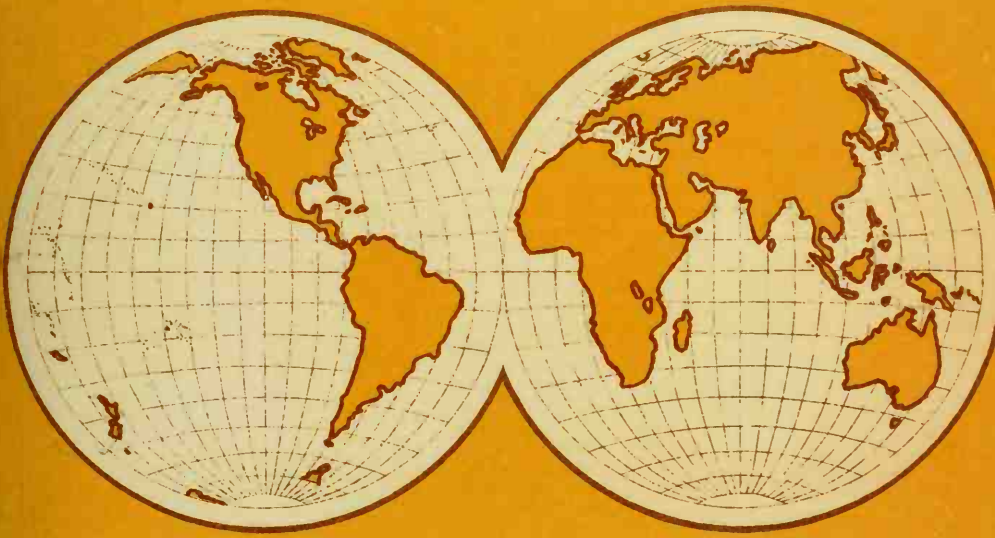
J.G. STARKE

INTRODUCTION TO INTERNATIONAL LAW

Seventh Edition



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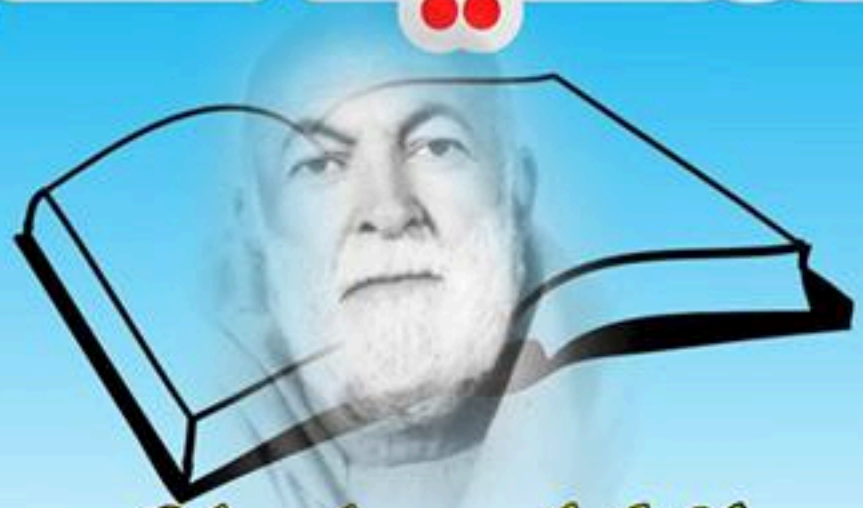

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AN INTRODUCTION TO
INTERNATIONAL LAW

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BY

J. G. STARKE, Q.C.

SEVENTH EDITION

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TO G. S.

PREFACE

THE present seventh edition takes into account the changes and developments that have occurred since the date (January 1967) when the manuscript of the sixth edition was completed. The object remains, as before, to present an introduction to international law, not full or complete or exhaustive, but one containing the fundamentals needed by those

(*a*) who are preparing to deal with the subject in actual practice; or

(*b*) who, for some purpose or other, require a working knowledge of it.

At the same time, within the limitations of these purposes, every endeavour has been made to ensure that the treatment is up to date.

The new multilateral Treaties and Conventions, calling for treatment in the present edition, include such important law-making instruments as the Vienna Convention of 1969 on the Law of Treaties, the Convention of 1969 on Special Missions, the Nuclear Weapons Non-Proliferation Treaty of 1968, the Treaty of 1971 on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, the two Brussels Conventions of 1969 relating respectively to Intervention on the High Seas in cases of Oil Pollution Casualties, and Civil Liability for Oil Pollution Damage, the Hague Convention of 1970 on the Suppression of the Unlawful Seizure of Aircraft (Hijacking), the Agreement of 1968 on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, and the Draft Convention on International Liability for Damage Caused by Space Objects, adopted in June, 1971, by the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space. Additions of such magnitude to the *corpus* of international law in so short a period are without parallel in its previous history. It is paradoxical that this has occurred at a

time when violence and instability appear to prevail to an equally unprecedented degree throughout the world.

Apart from Treaties and Conventions, there have been a number of important decisions, including those of the International Court of Justice in the *North Sea Continental Shelf Cases* (1969), the *Barcelona Traction Case* (1970), and the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) (1971).

Also, the law of the sea, seabed, and ocean floor stands on the threshold of a complete recasting of its principles. A Conference has been convened for the year 1973, and it is apparent that the four Geneva Conventions of 1958 on the Law of the Sea are no longer necessarily sacrosanct. Accordingly, the subject has had to be treated in the context of this trend towards basic revision.

A number of new matters receive attention in the present edition. A short chapter, Chapter 13, has been added to deal with the subject of Development and the Environment; the concept of opposability in international law is treated for the first time; and the status of "micro-States" is discussed. Some opinions previously expressed have also been revised or reformulated.

International law is now facing what, to employ current jargon, is best described as a crisis of identity. As Dr. Edvard Hambro, President of the Twenty-fifth Session of the United Nations General Assembly in 1970, said in his address at the opening of the Session:—

> "The fragmentary international society of yesterday is obsolete. We are now in a stage of transition, and we look forward to the integrated community of tomorrow.
>
> "The future organisation of international society must be based on agreed and accepted procedures for dealing with international disputes, under more effective rules of international law. Only thus can we protect the rights and the human dignity of every person, regulate international commerce and communications, ensure economic development and improve social conditions in all countries."

J. G. STARKE

November 1971

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PART 1

INTERNATIONAL LAW IN GENERAL

CHAPTER 1

NATURE, ORIGINS AND BASIS OF INTERNATIONAL LAW

1.—NATURE AND ORIGINS

Definition

International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other,[1] and which includes also:—

(*a*) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; and

(*b*) certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-State entities are the concern of the international community.

This definition goes beyond the traditional definition of international law as a system composed solely of rules governing the relations between States only. Such traditional definition of the subject, with its restriction to the conduct of States *inter se,* will be found set out in the majority of the older standard works of international law, but in view of developments during the last three decades, it cannot stand as a comprehensive description of all the rules now acknowledged to form part of the subject.

[1] The above definition is an adaptation of the definition of international law by the American authority, Professor Charles Cheney Hyde; see Hyde, *International Law* (2nd edition, 1947), Vol. I, §1.

These developments are principally:—(i) the establishment of a large number of permanent international institutions or organisations such as, for example the United Nations and the World Health Organisation, regarded as possessing international legal personality, and entering into relations with each other and with States; and (ii) the present movement (sponsored by the United Nations and the Council of Europe) to protect human rights and fundamental freedoms of individuals,[1] the creation of new rules for the punishment of persons committing the international crime of genocide or race destruction,[2] and the imposition of duties on individuals under the historic judgment in 1946 of the International Military Tribunal of Nuremberg, by which certain acts were declared to be international crimes, namely, crimes against peace, crimes against humanity, and conspiracy to commit these crimes.[3] Both categories of developments have given rise to new rules of international law, and may be expected to influence the growth of new rules in the future. The definition given above is intended to cover such new rules under heads (*a*)[4] and (*b*).

Nevertheless, from the practical point of view, it is well to remember that international law is primarily a system regulating the rights and duties of States *inter se*. So much is hinted at in the very title " international law ", or in another title frequently given to the subject—" the law of nations ", although strictly speaking the word " nation " is only in a crude way a

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[1] See below, pp. 347–364.

[2] Under the Genocide Convention adopted by the United Nations General Assembly on December 9, 1948, and which entered into force on January 12, 1951.

[3] The principles implicit in the judgment of the International Military Tribunal were formulated by the International Law Commission of the United Nations as a Draft Code of Offences Against the Peace and Security of Mankind in a Report presented in 1950; note Principle I, formulated in this Report:—" Any *person* who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

[4] There is a division of opinion among writers whether international law includes the " internal " law of international institutions, such as the rules governing the rights and duties of officials of these institutions. For the view that the expression " international law " in Article 38 of the Statute of the International Court of Justice does not cover this " internal " law, see per Judge Córdova I.C.J. Reports, 1956, at pp. 165–166.

synonym for the word " State ".[1] Indeed, it is a very good practical working rule to regard international law as mainly composed of principles whereby certain rights belong to, or certain duties are imposed upon States.

Nevertheless, although the principal component of the system is represented by binding rules, imposing duties and conferring rights upon States, international lawyers have now increasingly to concern themselves with *desiderata,* guidelines, and recommended standards expressed in a non-binding form (e.g., as in the Declarations adopted by the United Nations General Assembly, the Recommendations of the International Labour Conference, and the Recommendations of the periodical Consultative Meetings held under the Antarctic Treaty of 1959), but which many States concerned feel constrained to observe. These may indeed eventually evolve into binding legal rules, e.g., by general acceptance or approval (cf. Article IX, paragraph 4 of the Treaty on Antarctica of 1959, under which recommended measures may become " effective " upon approval by the parties concerned).

The main object of international law has been to produce an ordered rather than a just system of international relations, yet in later developments (for example, in the rules as to State responsibility concerning denial of justice,[2] and in the rules and practice as to international arbitration) there has been evidence of some striving to ensure that, objectively, justice be done between States. Moreover, apart from seeing that States receive just treatment, the modern law of nations aims at securing justice for human beings. It is significant further that the word " Justice " appears in the titles respectively of the Permanent Court of International Justice and its successor

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[1] " International law " is the title most frequently adopted by English and American jurists (cf. the treatises of Hall, Westlake, Oppenheim, Kent, Wheaton, Hyde, and Fenwick). Twiss, and Lorimer elected to use the title " law of nations ", while Hannis Taylor and A. S. Hershey preferred " international public law ". Other suggested titles have been " the law between Powers " (e.g., by Taube), " inter-State law ", and " the law of the community of States " (e.g., by Verdross). Judge Jessup in his *Transitional Law* (1956), adopted this latter title to denote " all law which regulates actions or events that transcend national boundaries ".

[2] See below, pp. 307–309.

the International Court of Justice, both being judicial tribunals set up to decide disputes between States and to give advisory opinions according to international law.[1] That justice is a primary purpose of the law of nations emphasises its kinship to State law.

General and Regional Rules of International Law; Community Law

There is a recognised distinction between *general* and *regional* rules of international law, that is to say between, on the one hand, rules which, practically speaking, are of universal application,[2] and, on the other hand, rules which have developed in a particular region of the world as between the States there located, without becoming rules of a universal character. The best illustration of such regional rules are those which have been commonly followed by the group of Latin American States, for example, the special rules relating to diplomatic asylum. This so-called " Latin American international law " and the nature of regional rules were discussed by the International Court of Justice in the *Colombian-Peruvian Asylum Case* (1950);[3] according to the judgments in this case:—(*a*) regional rules are not necessarily subordinate to general rules of international law, but may be in a sense "complementary" or "correlated" thereto, and (*b*) an international tribunal must, as between States in the particular region concerned, give effect to such regional rules as are duly proved to the satisfaction of the tribunal.

In this connection, there may perhaps be noted also the modern tendency towards regionalism in international organisation, reflected in the fusion of States into regional " functional " groupings (for example the European Economic Community

[1] There are besides the several references to " justice " in the Charter of the United Nations signed at San Francisco on June 26, 1945; see e.g., the Preamble, Article 1, paragraph 1, Article 2, paragraph 3, and Article 76. Humanitarian considerations are not in themselves sufficient to generate international legal rights and obligations: *South West Africa Cases*, 2nd Phase, I.C.J. Reports, 1966, 6, at p. 34.

[2] McDougal and Lasswell in *Studies in World Public Order* (1960) p. 1 at pp. 5–6, rightly query the notion that international law is really and literally universal law.

[3] See I.C.J. Reports (1950), 266.

(Common Market) under the Treaty of Rome of March 25, 1957, establishing this Community), the conclusion of regional security treaties (for example, the North Atlantic Security Pact of April 4, 1949[1]), the creation of regional international organs (for example, the South Pacific Commission established in 1948), and the establishment of regional international tribunals (for example, the Court originally established by Articles 31–45 of the Treaty constituting the European Coal and Steel Community of April 18, 1951, and which is now the Court of Justice of this Community, of the European Economic Community (Common Market), and of the European Atomic Energy Community (EURATOM) under the Rome Convention of March 25, 1957, Relating to Certain Institutions common to the European Communities).

The common rules (including the judge-made law of the Court) applicable within the legal and administrative framework of the European Communities have developed to such an extent since 1957 as to merit the designation of " Community Law " (*droit communitaire*).[2] One of the distinctive characteristics of this Community Law may be its direct applicability, in certain cases and under certain conditions, in the sytems of national law of each member of the European Communities, with national Courts also ready to give effect to Community Law where its primacy ought to be recognised,[3] e.g., if the Community rule or norm is clear and precise, and unconditional, without the need for further implementary action.

Origins and Development of International Law

The modern system of international law is a product, roughly speaking, of only the last four hundred years. It grew to some extent out of the usages and practices of modern European

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[1] *Stricto sensu*, however, this Pact is not a " regional arrangement " within the meaning of that expression in Articles 52 and 53 of the United Nations Charter of June 26, 1945.

[2] See generally W. J. G. van der Meersch (ed.), *Droit des Communautés Européennes* (1969).

[3] See Axline, *European Community Law and Organisational Development* (1968), and Hay, " Supremacy of Community Law in National Courts ", *American Journal of Comparative Law*, Vol. 16 (1968), 524, at pp. 532–540.

States in their intercourse and communications, while it still bears witness to the influence of writers and jurists of the sixteenth, seventeenth, and eighteenth centuries, who first formulated some of its most fundamental tenets. Moreover, it remains tinged with concepts such as national and territorial sovereignty, and the perfect equality and independence of States, that owe their force to political theories underlying the modern European State system, although, curiously enough, some of these concepts have commanded the support of newly emerged non-European States.

But any historical account of the system must begin with earliest times, for even in the period of antiquity rules of conduct to regulate the relations between independent communities were felt necessary and emerged from the usages observed by these communities in their mutual relations. Treaties, the immunities of ambassadors, and certain laws and usages of war are to be found many centuries before the dawn of Christianity, for example in ancient Egypt and India,[1] while there were historical cases of recourse to arbitration and mediation in ancient China and in the early Islamic world, although it would be wrong to regard these early instances as representing any serious contribution towards the evolution of the modern system of international law.

We find, for example, in the period of the Greek City States, small but independent of one another, evidence of an embryonic, although regionally limited, form of international law which one authority—Professor Vinogradoff—aptly described as "intermunicipal".[2] This "intermunicipal" law was composed of customary rules which had crystallised into law from long-standing usages followed by these cities such as, for instance, the rules as to the inviolability of heralds in battle, the need for a prior declaration of war, and the enslavement of

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[1] See A. Nussbaum, *A Concise History of the Law of Nations* (revised edition, 1954), pp. 1 *et seq.*, S. Korff, *Hague Recueil* (1923), Vol. I, pp. 17–22 and H. Chatterjee, *International Law and Inter-State Relations in Ancient India* (1958).

[2] See Vinogradoff, *Bibliotheca Visseriana Dissertationum Jus Internationale Illustrantium* (1923), Vol. I, pp. 13 *et seq.*

prisoners of war. These rules were applied not only in the relations *inter se* of these sovereign Greek cities, but as between them and neighbouring States. Underlying the rules there were, however, deep religious influences, characteristic of an era in which the distinctions between law, morality, justice and religion were not sharply drawn.

In the period of Rome's dominance of the ancient world, here also emerged rules governing the relations between Rome and the various nations or peoples with which it had contact. One significant aspect of these rules was their legal character, thus contrasting with the religious nature of the customary rules observed by the Greek City States. But Rome's main contribution to the development of international law was less through these rules than through the indirect influence of Roman Law generally, inasmuch as when the study of Roman Law was revived at a later stage in Europe, it provided analogies and principles capable of ready adaptation to the regulation of relations between modern States.

Actually, the total direct contribution of the Greeks and Romans to the development of international law was relatively meagre. Conditions favourable to the growth of a modern law of nations did not really come into being until the fifteenth century, when in Europe there began to evolve a number of independent civilised States.[1] Before that time Europe had passed through various stages in which either conditions were so chaotic as to make impossible any ordered rules of conduct between nations, or the political circumstances were such that there was no necessity for a code of international law. Thus in the later period of Roman history with the authority of the Roman Empire extending over the whole civilised world, there were no independent States in any sense, and therefore a law of nations was not called for. During the early mediaeval era, there were two matters particularly which militated against the evolution of a system of international law:—(*a*) the temporal

[1] Nevertheless there is evidence of some development of international law in the thirteenth and fourteenth centuries in the Eastern Empire and in Italy, while the Sovereigns of mediaeval England observed certain rules and usages in their relations with foreign Sovereigns.

and spiritual unity of the greater part of Europe under the Holy Roman Empire, although to some extent this unity was notional and belied by numerous instances of conflict and disharmony; and (*b*) the feudal structure of Western Europe, hinging on a hierarchy of authority which not only clogged the emergence of independent States but also prevented the Powers of the time from acquiring the unitary character and authority of modern sovereign States.

Profound alterations occurred in the fifteenth and sixteenth centuries. The discovery of the New World, the Renaissance of learning, and the Reformation as a religious revolution disrupted the façade of the political and spiritual unity of Europe, and shook the foundations of mediaeval Christendom. Theories were evolved to meet the new conditions; intellectually, the secular conceptions of a modern sovereign State and of a modern independent Sovereign found expression in the works of Bodin (1530–1596), a Frenchman, Machiavelli (1469–1527), an Italian, and later in the seventeenth century, Hobbes (1588–1679), an Englishman.

With the growth of a number of independent States there was initiated, as in early Greece, the process of formation of customary rules of international law from the usages and practices followed by such States in their mutual relations. So in Italy with its multitude of small independent States, maintaining diplomatic relations with each other and with the outside world, there developed a number of customary rules relating to diplomatic envoys, for example, their appointment, reception and inviolability.[1]

An important fact also was that by the fifteenth and sixteenth centuries jurists had begun to take into account the evolution of a community of independent sovereign States and to think and write about different problems of the law of nations, realising the necessity for some body of rules to regulate

[1] Cf. also the influence of the early codes of mercantile and maritime usage, e.g., the Rhodian Laws formulated between the seventh and the ninth centuries, the Laws or Rolls of Oléron collected in France during the twelfth century, and the *Consolato del Mare* as to the customs of the sea followed by Mediterranean countries and apparently collected in Spain in the fourteenth century.

certain aspects of the relations between such States. Where there were no established customary rules, these jurists were obliged to devise and fashion working principles by reasoning or analogy. Not only did they draw on the principles of Roman Law which had become the subject of revived study in Europe as from the end of the eleventh century onwards, but they had recourse also to the precedents of ancient history, to theology, to the canon law, and to the semi-theological concept of the "law of nature"—a concept which for centuries exercised a profound influence on the development of international law.[1] Among the early writers who made important contributions to the infant science of the law of nations were Vittoria (1480–1546), who was Professor of Theology in the University of Salamanca, Belli (1502–1575), an Italian, Brunus (1491–1563), a German, Fernando Vasquez de Menchaca (1512–1569), a Spaniard, Ayala (1548–1584), a jurist of Spanish extraction, Suarez (1548–1617), a great Spanish Jesuit, and Gentilis (1552–1608), an Italian who became Professor of Civil Law at Oxford, and who is frequently regarded as the founder of a systematic law of nations.[2] The writings of these early jurists reveal significantly that one major preoccupation of sixteenth century international law was the law of warfare between States, and in this connection it may be noted that by the fifteenth century the European Powers had begun to maintain standing armies, a practice which naturally caused uniform usages and practices of war to evolve.

By general acknowledgment the greatest of the early writers on international law was the Dutch scholar, jurist, and diplomat, Grotius (1583–1645), whose systematic treatise on the subject *De Jure Belli ac Pacis* (The Law of War and Peace) first appeared in 1625. On account of this treatise, Grotius

[1] See below, pp. 22–34.

[2] Of particular importance was the contribution of the so-called "school" of Spanish writers, including Suarez and Ayala, mentioned above. In their works one finds powerfully expressed the concepts of the universal validity of a law of nations, and of the subjection of all States to a higher law, which influenced jurists in succeeding centuries. The influence of scholars and writers in Eastern Europe such as Paulus Vladimiri (1371–1435) of the University of Cracow, should also not be overlooked. For discussion of the writings of Vittoria and Suarez, see Bernice Hamilton, *Political Thought in Sixteenth Century Spain* (1963).

has sometimes been described as the "father of the law of nations", although it is maintained by some that such a description is incorrect on the grounds that his debt to the writings of Gentilis is all too evident[1] and that in point of time he followed writers such as Belli, Ayala and others mentioned above. Indeed both Gentilis and Grotius owed much to their precursors.

Nor is it exact to affirm that in *De Jure Belli ac Pacis* will be found all the international law that existed in 1625. It cannot, for example, be maintained that Grotius dealt fully with the law and practice of his day as to treaties, or that his coverage of the rules and usages of warfare was entirely comprehensive.[2] Besides, *De Jure Belli ac Pacis* was not primarily or exclusively a treatise on international law, as it embraced numerous topics of legal science, and touched on problems of philosophic interest. Grotius's historical pre-eminence rests rather on his continued inspirational appeal as the creator of the first adequate comprehensive framework of the modern science of international law.

In his book, as befitted a diplomat of practical experience, and a lawyer who had practised, Grotius dealt repeatedly with the actual customs followed by the States of his day. At the same time Grotius was a theorist who espoused certain doctrines. One central doctrine in his treatise was the acceptance of the "law of nature" as an independent source of rules of the law of nations, apart from custom and treaties. The Grotian "law of nature" was to some extent a secularised version, being founded primarily on the dictates of reason, on the rational nature of men as social human beings, and in that form it was to become a potent source of inspiration to later jurists.

Grotius has had an abiding influence upon international law and international lawyers, although the extent of this influence has fluctuated at different periods, and his actual impact upon

[1] As to the influence of Gentilis on Grotius, see Fujio Ito, *Rivista Internationale di Filosofia del Diritto*, July–October 1964, pp. 621–627.

[2] For a modern treatment of the laws and usages of war in the later Middle Ages, see M. H. Keen, *The Laws of War in the Late Middle Ages* (1965); this may be usefully read in the light of what Grotius wrote.

the practice of States was never so considerable as is traditionally represented. While it would be wrong to say that his views were always treated as being of compelling authority—frequently they were the object of criticism—nevertheless his principal work, *De Jure Belli ac Pacis,* was continually relied upon as a work of reference and authority in the decisions of Courts, and in the text-books of later writers of standing. Also several Grotian doctrines have left their mark on, and are implicit in the character of modern international law, namely, the distinction between just and unjust war,[1] the recognition of the rights and freedoms of the individual, the doctrine of qualified neutrality, the idea of peace, and the value of periodic conferences between the rulers of States.

The history of the law of nations during the two centuries after Grotius was marked by the final evolution of the modern State-system in Europe, a process greatly influenced by the Treaty of Westphalia of 1648 marking the end of the Thirty Years' War, and by the development from usage and practice of a substantial body of new customary rules. Even relations and intercourse by treaty or otherwise between European and Asian governments or communities contributed to the formation of these rules. Moreover the science of international law was further enriched by the writings and studies of a number of great jurists. Side by side there proceeded naturally a kind of action and reaction between the customary rules and the works of these great writers; not only did their systematic treatment of the subject provide the best evidence of the rules, but they suggested new rules or principles where none had yet emerged from the practice of States. The influence of these great jurists on the development of international law was considerable, as can be seen from their frequent citation by national courts during the nineteenth century and even up to the present time.

The most outstanding writers of the seventeenth and eighteenth centuries following the appearance of Grotius's treatise were Zouche (1590–1660), Professor of Civil Law at

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[1] Cf. Joan D. Tooke, *The Just War in Aquinas and Grotius* (1965).

Oxford and an Admiralty Judge, Pufendorf (1632–1694), Professor at the University of Heidelberg, Bynkershoek (1673–1743), a Dutch jurist, Wolff (1679–1754), a German jurist and philosopher, who constructed an original, systematic methodology of international law and the law of nature, Moser (1701–1795), a German Professor of Law, von Martens (1756–1821), also a German Professor of Law, and Vattel (1714–1767), a Swiss jurist and diplomat, who was greatly influenced by the writings of Wolff, and who perhaps of these seven men proved to have the greatest influence. In the eighteenth century, there was a growing tendency among jurists to seek the rules of international law mainly in custom and treaties, and to relegate to a minor position the " law of nature ", or reason, as a source of principles. This tendency was extremely marked, for instance, in the case of Bynkershoek's writings and found expression particularly also in the works of Moser, and von Martens. There were, however, jurists who at the same time clung to the traditions of the law of nature, either almost wholly, or coupled with a lesser degree of emphasis upon custom and treaties as components of international law. As contrasted with these adherents to the law of nature, writers such as Bynkershoek who attached primary or major weight to customary and treaty rules were known as " positivists ".

In the nineteenth century international law further expanded. This was due to a number of factors which fall more properly within the scope of historical studies, for instance, the further rise of powerful new States both within and outside Europe, the expansion of European civilisation overseas, the modernisation of world transport, the greater destructiveness of modern warfare, and the influence of new inventions. All these made it urgent for the international society of States to acquire a system of rules which would regulate in an ordered manner the conduct of international affairs. There was a remarkable development during the century in the law of war and neutrality, and the great increase in adjudications by international arbitral tribunals following the *Alabama Claims Award* of 1872 provided an important new source of rules and principles. Besides,

States commenced to acquire the habit of negotiating general treaties in order to regulate affairs of mutual concern. Nor was the nineteenth century without its great writers on international law. The works of jurists belonging to a number of different nations contributed significantly to the scientific treatment of the subject; among them were Kent (American), Wheaton (American), De Martens (Russian), Klüber (German), Phillimore (British), Calvo (Argentinian), Fiore (Italian), Pradier-Fodéré (French), Bluntschli (German), and Hall (British). The general tendency of these writers was to concentrate on existing practice, and to discard the concept of the " law of nature ", although not abandoning recourse to reason and justice where, in the absence of custom or treaty rules, they were called upon to speculate as to what should be the law.

Other important developments have taken place in the twentieth century. The Permanent Court of Arbitration was established by the Hague Conferences of 1899 and 1907. The Permanent Court of International Justice was set up in 1921 as an authoritative international judicial tribunal, and was succeeded in 1946 by the present International Court of Justice. Then there has been the creation of permanent international organisations whose functions are in effect those of world government in the interests of peace and human welfare, such as the League of Nations and its present successor —the United Nations, the International Labour Organisation, the International Civil Aviation Organisation, and others referred to in Chapter 19 of this book. And perhaps most remarkable of all has been the widening scope of international law to cover not only every kind of economic or social interest affecting States, but also the fundamental rights and freedoms of individual human beings.

It is characteristic of the latter-day evolution of international law that the influence of writers has tended to decline, and that modern international lawyers have come to pay far more regard to practice and to decisions of tribunals. Yet the spelling out of rules of international law from assumed trends of past and current practice cannot be carried too far. This was

shown at the Geneva Conference of 1958 on the Law of the Sea, and at the Vienna Conferences of 1961, 1963, and 1968–1969 on, respectively, Diplomatic Relations, Consular Relations, and the Law of Treaties, when in a number of instances an apparent weight of practice in favour of a proposed rule of international law did not necessarily result in its general acceptance by the States represented at the Conferences. Nevertheless, " natural law " writers have ceased to command the same degree of influence as formerly, perhaps because of the emergence of a number of States outside Europe and which did not inherit doctrines of Christian civilisation such as that of " natural law ". These new States (in particular the Afro-Asian group) have challenged certain of the basic principles of international law, stemming from its early European evolution in the seventeenth and eighteenth centuries.[1] Moreover, many long-standing rules and concepts of international law have been subjected to severe strains and stresses under the impact of modern developments in technology, of modern economic exigencies, and—not least—the more enlightened sociological views and attitudes which prevail today. Above all, there is the present unprecedented political state of affairs, for which the traditional system of international law was not devised, namely, the division of the world into global and regional blocs, the existence of a " third world " of numerous newly-emerged States, undeveloped economically and technologically (and sometimes possessing unstable governments), and the numerous groupings and associations into which States have formed themselves. Apart from this, international law is now called upon to find new rules to govern the fields of nuclear and thermonuclear energy, and scientific research generally, to regulate state activities in the upper atmosphere and in the

[1] Reference should be made in this connection to the important activities in the field of study of international law, of the Asian-African Legal Consultative Committee, representing the Afro-Asian group of States. Certain sessions of this Committee have been attended by an observer from the International Law Commission, which has a standing invitation to send an observer. For the impact upon international law of the new Asian and other States, see Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961), and S. P. Sinha, *New Nations and the Law of Nations* (1967).

cosmos, to protect and control the environment of man, and to establish a new legal régime for the exploration and exploitation of the resources of the seabed beyond the limits of national sovereignty.

Present-Day Status of International Law

International law, as we know it today, is that indispensable body of rules regulating for the most part the relations between States, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of international law, the international society of States could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication.

The last half-century witnessed a greater impetus to the development of international law than at any previous stage of its history. This was a natural result of the growing interdependence of States, and of the vastly increased intercourse between them due to all kinds of inventions that overcame the difficulties of time, space, and intellectual communication. New rules had to be found or devised to meet innumerable new situations. Whereas previously the international society of States could rely on the relatively slow process of custom[1] for the formation of rules of international law, modern exigencies called for a speedier method of law-making. As a result, there came into being the great number of multilateral treaties of the last seventy years laying down rules to be observed by the majority of States — " law-making treaties " or " international legislation ", as they have been called. Apart from these " law-making treaties " there was a remarkable development in the use of arbitration to settle international disputes, and at the same time the Permanent Court of International Justice came by its decisions to make an important contribution to the growth of international law. The mantle

[1] Although treaties had nevertheless played an important role in the mediaeval law of nations; cf. Schwarzenberger, *A Manual of International Law* (5th Edition, 1967), pp. 6–7.

of the Permanent Court has now descended upon its successor, the International Court of Justice. Nor should there be forgotten the work of codifying and progressively developing international law at present being sponsored by the United Nations with the expert aid of a body known as the International Law Commission, created in 1947.[1]

It is true that in some quarters there is a tendency to disparage international law, even to the extent of questioning its existence and value. There are two main reasons for this:—

(*a*) the generally held view that the rules of international law are designed only to maintain peace; and

(*b*) ignorance of the vast number of rules which, unlike the rules dealing with " high policy ", that is, issues of peace or war, receive little publicity.

Actually, however, a considerable part of international law is not concerned at all with issues of peace or war. In practice, legal advisers to Foreign Offices and practising international lawyers daily apply and consider *settled* rules of international law dealing with an immense variety of matters. Some of these important matters which arise over and over again in practice are claims for injuries to citizens abroad, the reception or deportation of aliens, extradition, questions of nationality, and the interpretation of the numerous complicated treaties or arrangements now entered into by most States with reference to commerce, finance, transport, civil aviation, nuclear energy, and many other subjects.

Breaches of international law resulting in wars or conflicts

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[1] The Statute of the Commission was adopted by the United Nations General Assembly on November 21, 1947; for text of Statute, see *U.N. Year Book*, 1947–1948, 211, or the handbook, *The Work of the International Law Commission* (1967), pp. 55–60. The Commission, consisting originally of fifteen members, appointed in their individual capacity as experts, first met in 1949. Subjects dealt with by the Commission since 1949 have included the basic rights and duties of States, offences against the peace and security of mankind (the Nuremberg principles), reservations to treaties, the regime of the high seas, the law of treaties, arbitral procedure, nationality, statelessness, international criminal jurisdiction, the definition of aggression, State responsibility, diplomatic and consular practice, succession of States and Governments, and relations between States and inter-governmental organisations. The Commission now consists of twenty-five members.

of aggression tend to receive adverse attention, and from them the public incorrectly deduces the complete breakdown of international law. The answer to this criticism is that even in wartime there is no absolute breakdown of international law, as many rules affecting the relations of belligerents *inter se* or with neutrals are of vital importance and to a large extent are strictly observed. Another consideration is worth mentioning. Even in the case of war or armed conflict, the States involved seek to justify their position by reference to international law. This applies also in " crisis " situations, short of war; for example, during the Cuban missile crisis of 1962, the United States relied to some extent on the Inter-American Treaty of Reciprocal Assistance of 1947 as a legal basis for its " selective " blockade of Cuba.

It is possible to argue further that in municipal law (that is, State law), breaches, disturbances and crimes take place, but no one denies the existence of law to which all citizens are subject. Similarly, the recurrence of war and armed conflicts between States does not necessarily involve the conclusion that international law is non-existent.

Finally, it is incorrect to regard the maintenance of peace as the entire purpose of international law. As one authority well said,[1] its *raison d'être* is rather to

> " form a framework within which international relations can be conducted and to provide a system of rules facilitating international intercourse; and as a matter of practical necessity it has, and will, operate as a legal system even when wars are frequent ".

The same authority goes on to say:—

> " It is, of course, true that the ideal of international law must be a perfect legal system in which war will be entirely eliminated, just as the ideal of municipal law is a Constitution and legal system so perfect, that revolution, revolt, strikes, etc., can never take place and every man's rights are speedily, cheaply, and infallibly enforced ".

Lapses from such ideals are as inevitable as the existence of law itself.

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[1] W. E. (Sir Eric) Beckett in *Law Quarterly Review* (1939), Vol. 55, at p. 265.

2.—Theories as to Basis of International Law

Much theoretical controversy has been waged over the nature and basis of international law.

Some discussion of the theories should help to throw light on many important aspects of the subject.

Is International Law True Law?

One theory which has enjoyed wide acceptance is that international law is not true law, but a code of rules of conduct of moral force only.[1] The English writer on jurisprudence, Austin, must be regarded as foremost among the protagonists of this theory. Others who have questioned the true legal character of international law have been Hobbes, Pufendorf, and Bentham.

Austin's attitude towards international law was coloured by his theory of law in general. According to the Austinian theory, law was the result of edicts issuing from a determinate sovereign legislative authority. Logically, if the rules concerned did not in ultimate analysis issue from a sovereign authority, which was politically superior, or if there were no sovereign authority, then the rules could not be legal rules, but rules of moral or ethical validity only. Applying this general theory to international law, as there was no visible authority with legislative power or indeed with any determinate power over the society of States, and as in his time the rules of international law were almost exclusively customary, Austin concluded that international law was not true law but " positive international morality " only, analogous to the rules binding a club or society. He further described it as consisting of " opinions or sentiments current among nations generally ".[2]

The reply to Austin's view is as follows:—

(*a*) Modern historical jurisprudence has discounted the force of his general theory of law. It has been shown that in many communities without a formal legislative authority, a system

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[1] For an excellent authoritative treatment of the problems concerning the legality of international law, see Dennis Lloyd, *The Idea of Law* (Penguin revised Edition, 1970), pp. 37–40, 186–90, 224–5, and 238–9.

[2] See *Lectures on Jurisprudence* (4th Edition, revised and edited by R. Campbell, 1873), Vol. I, at pp. 187–188, 222.

of law was in force and being observed, and that such law did not differ in its binding operation from the law of any State with a true legislative authority.

(*b*) Austin's views, however right for his time, are not true of present-day international law. In the last half-century, a great mass of "international legislation" has come into existence as a result of law-making treaties and Conventions, and the proportion of customary rules of international law has correspondingly diminished.[1] Even if it be true that there is no determinate sovereign legislative authority in the international field, the procedure for formulating these rules of "international legislation" by means of international conferences or through existing international organs is practically as settled, if not as efficient, as any State legislative procedure.

(*c*) Questions of international law are always treated as legal questions by those who conduct international business in the various Foreign Offices, or through the various existing international administrative bodies. In other words, the authoritative agencies responsible for the maintenance of international intercourse do not consider international law as merely a moral code. As Sir Frederick Pollock has well said:—

> "If international law were only a kind of morality, the framers of State papers concerning foreign policy would throw all their strength on moral argument. But, as a matter of fact, this is not what they do. They appeal not to the general feeling of moral rightness, *but to precedents, to treaties, and to opinions of specialists.* They assume the existence among statesmen and publicists of a series of legal as distinguished from moral obligations in the affairs of nations".[2]

Certain countries indeed in practice expressly treat international law as possessing the same force as the ordinary law

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[1] Indeed a significant number of customary rules of international law have now been formulated as rules in multilateral Conventions; as, e.g., in the case of the four Geneva Conventions of April 28–29, 1958, on the Law of the Sea, and the three Vienna Conventions of April 18, 1961, on Diplomatic Relations, of April 24, 1963, on Consular Relations, and of May 22, 1969, on the Law of Treaties, codifying the customary rules as to diplomatic and consular privileges and immunities, and as to the law and practice of treaties.

[2] Pollock, *Oxford Lectures* (1890), p. 18.

binding their citizens. Under the Constitution of the United States of America, for example, treaties are " the supreme law of the land " (Article VI, §2). Judges of the United States Supreme Court—the highest Court of the land—have repeatedly recognised the constitutional validity of international law. In one case,[1] Marshall, C.J., declared that an Act of Congress " ought never to be construed to violate the law of nations if any other possible construction remains ". In another case,[2] Gray, J., made the following remarks:—

> " *International law is part of our law*, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination ".

Moreover, the legally binding force of international law has been asserted again and again by the nations of the world in international conference. To take one illustration, the Charter creating the United Nations Organisation, drawn up at San Francisco in 1945, is both explicitly and implicitly based on the true legality of international law. This is also clearly expressed in the terms of the Statute of the International Court of Justice, annexed to the Charter, where the Court's function is stated as being " to decide *in accordance with international law* such disputes as are submitted to it " (see Article 38).

In connection with the Austinian theory, it is useful to bear in mind the difference between rules of international law proper, and the rules of " international comity ". The former are legally binding, while the latter are rules of goodwill and civility, founded on the moral right of each State to receive courtesy from others. The essence of these usages of " comity " is thus precisely what Austin attributed to international law proper, namely a purely moral quality.[3] Non-observance of a rule of international law may give rise to a claim by one State

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[1] *The Charming Betsy* (1804), 2 Cranch 64, at p. 118.

[2] *The Paquete Habana* (1900), 175 U.S. 677, at p. 700.

[3] An illustration of such a usage of courtesy was the privilege accorded, within certain limits, to diplomatic envoys to import, free of customs dues, goods intended for their own private use. This courtesy privilege has now become a matter of legal duty upon the State of accreditation under Article 36 (1) (b) of the Vienna Convention on Diplomatic Relations of April 18, 1961.

against another for some kind of satisfaction, whether it be diplomatic in character or whether it take the concrete form of indemnity or reparation. Non-observance of a usage of "comity" on the other hand produces no strict legal consequences as regards the State withholding the courtesy; the State affected by the withdrawal of the concession may reply in the same kind and retract its own courtesy practices, but beyond this narrow reciprocity, there is no other legal action open to it.[1]

This cumulative evidence against the position taken by Austin and his followers should not blind us to the fact that necessarily international law is *weak law*. Existing international legislative machinery, operating mainly through law-making Conventions, is not comparable in efficiency to State legislative machinery. Frequently the rules expressed in such Conventions are formulated in such a way as to give wide options or areas of choice to the States parties (see, e.g., the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965). In spite of the achievement of the United Nations in re-establishing a World Court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between States. Finally, many of the rules of international law can only be formulated with difficulty, and, to say the least, are quite uncertain, being often incapable of presentation except as a collection of inconsistent State practices, while there are, in different areas of the subject, fundamental disagreements as to what the rules should be. In 1960, the second Geneva Conference on the Law of the Sea, with eighty-seven States participating, failed to agree on a general rule fixing the width of the territorial sea, thus repeating the experience of the Hague Conference of 1930, while the

[1] In this connection, reference should be made to judicial "comity". For example, British Courts apply "comity" when giving recognition to the legislative, executive, and judicial acts of other States. See *Foster* v. *Driscoll*, [1929] 1 K.B. 470. "Comity", in its general sense, cannot be invoked to prevent Great Britain, as a sovereign State, from taking steps to protect its own revenue laws from gross abuse; see decision of House of Lords in *Collco Dealings, Ltd.* v. *Inland Revenue Commissioners*, [1962] A.C. 1 at 19; [1961] 1 All E.R. 762 at 765.

Vienna Conference on the Law of Treaties of 1968-1969 revealed basic differences over the rules as to invalidity of treaties, and over the doctrine of *jus cogens*[1] (superior principles or norms governing the legality of treaty provisions).

Theories as to " Law of Nature "

From earliest times,[2] as we have seen, the concept of the " law of nature " exercised a signal influence on international law. Several theories of the character and binding force of international law were founded upon it.

At first the " law of nature " had semi-theological associations, but Grotius to some extent secularised the concept, and as his followers later applied it, it denoted the ideal law founded on the nature of man as a reasonable being, the body of rules which Nature dictates to human reason. On this basic conception, theorists erected various structures, some writers adopting the view that international law derived its binding force from the fact that it was a mere application to particular circumstances of the " law of nature ". In other words, States submitted to international law because their relations were regulated by the higher law—the " law of nature ", of which international law was but a part. The concept of the " law of nature " underwent further specialisation in the eighteenth century. The later refinements can be seen in the following passage from Vattel's *Droit des Gens* (1758)[3]:—

> " We use the term necessary Law of Nations for that law which results from applying the natural law to nations. It is necessary, because nations are absolutely bound to observe it. It contains those precepts which the natural law dictates to States, and it is no less binding upon them than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the

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[1] See pp. 59–61, *post*.

[2] The concept of a " law of nature " goes back to the Greeks, and its history can be traced through the Roman jurists up to mediaeval times when it found expression in the philosophy of St. Thomas Aquinas (1226–1274). See Barker, Introduction to Gierke, *Natural Law and the Theory of Society* (transl. 1934), Vol. I, xxxiv–xliii.

[3] Preliminaries. §7.

> natural law under whatever capacity they act. This same law is called by Grotius and his followers the internal Law of Nations, inasmuch as it is binding upon the conscience of nations. Several writers call it the natural Law of Nations ".

Vattel's views in this connection led him to hold that the assumption that one or more States could overview and control the conduct of another State would be contrary to the law of nature.

The general objection to theories based on the " law of nature " is that each theorist uses it as a metaphor for some more concrete conception such as reason, justice, utility, the general interests of the international community, necessity, or religious dictates. This leads to a great deal of confusion, particularly as these interpretations of the " law of nature " may differ so widely.

Traces of the " natural law " theories survive today, albeit in a much less dogmatic form. An approach kindred to that of " natural law " colours the current movement to bind States by international Covenants to observe human rights and fundamental freedoms,[1] while to some extent a " natural law " philosophy underlies the Draft Declaration on the Rights and Duties of States of 1949 prepared by the International Law Commission of the United Nations.[2] " Natural law " has been invoked also in order to justify the punishment of offenders, guilty of the grosser and more brutal kind of war crimes. Besides, there are the writers who adopt an international sociological standpoint, who treat the conception of " natural law " as identical with reason and justice applied to the international community, and who look upon it as thereby elucidating the lines of the future development of international law.[3]

Because of its rational and idealistic character, the conception of the " law of nature " has had a tremendous influence—a

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[1] The United Nations General Assembly, on December 17, 1966, unanimously approved a Covenant on Economic, Social and Cultural Rights, and a Covenant on Civil and Political Rights. The two Covenants were opened for signature on December 19, 1966.

[2] See below, pp. 105–106.

[3] Cf. Le Fur, *Hague Recueil* (1927), Vol. 18, pp. 263–442.

beneficent influence—on the development of international law. If it has lacked precision, if it has tended to be a subjective rather than an objective doctrine, it has at least generated respect for international law, and provided, and still provides, moral and ethical foundations that are not to be despised. As against this, its main defect has been its aloofness from the realities of international intercourse shown in the lack of emphasis on the actual practice followed by States in their mutual relations, although the majority of rules of international law originally sprang from this practice.

Positivism

The theory known as " positivism " commands a wide support, and has been adopted by a number of influential writers. We have already seen that Bynkershoek was an eighteenth-century " positivist ", but the modern " positivist " theories have refinements and are expressed in generalisations not to be found in Bynkershoek's writings.

The " positivists " hold that the rules of international law are in final analysis of the same character as " positive " municipal law (i.e., State law) inasmuch as they also issue from the will of the State. They believe that international law can *in logic* be reduced to a system of rules depending for their validity only on the fact that States have consented to them.[1]

Positivism begins from certain premises, that the State is a metaphysical reality with a value and significance of its own, and that endowed with such reality the State may also be regarded as having a will. This psychological notion of a State-will is derived from the great German philosopher, Hegel. To the State-will, the positivists attribute complete sovereignty and authority.

[1] This is the more specialised meaning of the term " positivist ". In its broader sense, the term " positivist " denotes a writer, such as Bynkershoek and others, who maintains that the practice of States (custom and treaties) constitutes the primary source of international law. Also, some " positivists " held that the only true law, " positive " law, must be the result of some externally recognisable procedure; see Ago, " Positive Law and International Law ", *American Journal of International Law* (1957), Vol. 51, pp. 691–733.

Pursuant to their initial assumptions, the positivists regard international law as consisting of those rules which the various State-wills have accepted by a process of voluntary self-restriction, or as they have termed it, "*auto-limitation*".[1] Without such manifestation of consent, international law would not be binding on the society of States. Zorn, one of the most characteristic of the positivists, indeed regarded international law as a branch of State law, as external public law (*äusseres Staatsrecht*), and only for that reason binding on the State.[2]

The positivists concede that the difficulty in the application of their theory relates to customary international law. They admit that sometimes it is impossible to find an express consent in treaties, State papers, public documents, diplomatic notes, or the like, to being bound by particular customary rules. They therefore, consistently with their consensual theory, argue that in such exceptional cases the consent must be regarded as "tacit" or "implied".[3] This reasoning is often carried a stage further by arguing that membership of the society of States involves an implied consent to the binding operation of established customary rules of international law. On the face of it, this is begging the question, as such a general implied consent could only be conditioned by some fundamental rule of international law itself, and it would still be necessary to explain the source and origin of this fundamental rule.

The outstanding positivist has been the Italian jurist Anzilotti, later Judge of the Permanent Court of International Justice. In Anzilotti's view, the binding force of international law can be traced back to one supreme, fundamental principle or norm, the principle that agreements between States are to be respected, or as the principle is better known, *pacta sunt*

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[1] The "auto-limitation" theory was adopted by Jellinek in his work, *Die rechtliche Natur der Staatenverträge* (1880).

[2] Another refinement of positivist theory is Triepel's view that the obligatory force of international law stems from the *Vereinbarung*, or agreement of States to become bound by common consent; this agreement is an expression of a "common will" of States, and States cannot unilaterally withdraw consent.

[3] This view has also been adopted by Soviet Russian jurists; see Professor G. I. Tunkin's, *Droit International Public: Problèmes Théoriques* (Paris, 1965 tr. from Russian), p. 80.

servanda. This norm *pacta sunt servanda* is an absolute postulate of the international legal system, and manifests itself in one way or another in all the rules belonging to international law. Consistently with this theory, Anzilotti holds that just as in the case of treaties, customary rules are based on the consent of States, and there is here an implied agreement. The following passage from his treatise[1] illustrates his views:—

> " Every legal order consists of a complex of norms which derive their obligatory character from a fundamental norm to which they all relate, directly or indirectly. The fundamental norm determines, in this way, which norms compose a given legal order and gives unity to the whole. The international legal order is distinguished by the fact that, in this order, the principle *pacta sunt servanda* does not depend, as in international law, upon a superior norm; it is itself the supreme norm. The rule according to which ' States must respect the agreements concluded between them ', thus constitutes the formal criterion which distinguishes the norms of which we speak from other norms and gives unity to the whole; all norms, and only the norms, which depend upon this principle *as the necessary and exclusive source of their obligatory character*, belong to the category of those with which we are concerned here ".

The main defect in this analysis is that the norm *pacta sunt servanda* is only partially an explanation of the binding force of international law. Anzilotti's view that customary rules are binding on States by virtue of an implied *pactum* (or treaty) is no more convincing than the " tacit " consent arguments of other positivists.

The principal objections to positivism as a whole may be formulated as follows:—

(1) The notion of the State-will is purely metaphorical, and is used to express the fact that international law is binding on the State. It does not explain the fact. For example, when a treaty has been ratified by, say, Great Britain, we can if we like say that the ratification is an expression of Great Britain's will to become bound by the treaty. This language, however alluring and figurative, merely describes a situation of fact,

[1] *Corso di Diritto Internazionale*, Vol. I (3rd Edition, 1928), at p. 43.

that the competent British executive organ has ratified a treaty, and that the British people through their representatives have become responsible for the fulfilment of treaty obligations. The State-will is thus a mere *façon de parler*, as the only will or wills which operate are those of the individuals who govern Great Britain.

(2) It is difficult to reconcile the facts with a consensual theory of international law. In the case of customary rules, there are many instances where it is quite impossible to find any consent by States to the binding effect of these rules. Moreover, the consensual theory breaks down in the crucial case of a new State admitted into the family of nations, as, for example, those African States, emerged since 1957 by way of " decolonisation ". Such a new State is bound by international law from the date of its emancipation without an express act of consent. The idea that in such an instance there is a " tacit " or " implied " consent, merely strains the facts. The reality is that other States look to the new State to comply with the whole body of established international law. This has consistently been the attitude of two influential Great Powers—the United States of America and Great Britain. As to the United States, the authoritative Moore's *Digest of International Law*[1] says:—

> " The Government of the United States has on various occasions announced the principle that international law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilised States ".

Professor H. A. Smith on an examination of British official legal opinions and State papers relative to questions of international law declared that therein[2] :—

> ". . . It is clearly emphasised that international law as a whole is binding upon all civilised States irrespective of their individual consent, and that no State can by its own act release

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[1] Vol. I (1906), at p. 2.
[2] *Great Britain and the Law of Nations*, Vol. I (1932), at pp. 12–13.

itself from the obligation either of the general law or of any well established rule ".

(3) It is never necessary in practice when invoking a particular rule of international law against a particular State to show that that State has assented to it diplomatically. The test applied is whether the rule is one generally recognised by the society of States. As Westlake[1] has put it:—

> " It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule ".

(4) There are concrete examples today of treaty rules, particularly those laid down by " law-making " treaties, having an incidence upon States without any form of consent expressed by or attributable to them. A striking example is paragraph 6 of Article 2 of the United Nations Charter, which provides that the United Nations is to ensure that non-Member States shall act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security.

These objections to positivism are by no means exhaustive, but they sufficiently illustrate the main defect of the theory—the fallacy of the premise that some consensual manifestation is necessary before international law can operate.

In spite of its many weaknesses, positivist theory has had one valuable influence on the science of international law. It has concentrated attention on the actual practice of States by emphasising, perhaps unduly, that only those rules which States do in fact observe can be rules of international law. This has led to a more realistic outlook in works on international law, and to the elimination of much that was academic, sterile, and doctrinal.

Sanctions of Observance of International Law

A controversial question is the extent to which sanctions, including sanctions by way of external force, are available under international law, to secure observance of its rules.

[1] *International Law*, Vol. I (1904), at p. 16. Cf. *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K.B. 391, at p. 407.

At one extreme there is the view that international law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a State to comply with international law. The United Nations Security Council may, pursuant to Chapter VII of the United Nations Charter of June 26, 1945, in the event of a threat to the peace, breach of the peace, or act of aggression, institute enforcement action against a particular State to maintain or restore international peace and security, and to the extent that the State concerned is in breach of international law, this is in effect a form of collective sanction to enforce international law. Also, under Article 94 paragraph 2 of the Charter, if any State, party to a case before the International Court of Justice, fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council may upon application by the other State, party to the same case, make recommendations or decide upon measures to be taken to give effect to the judgment. It must be acknowledged, however, that the United Nations Charter does not otherwise allow the use of force, collectively or individually, for the enforcement of international law in general.[1] Under Article 2 paragraph 4 of the Charter, Member States are to refrain 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 right of self-defence permitted to Member States by Article 51 of the Charter is only against an actual armed attack. These provisions have restricted the liberty formerly enjoyed by States to use forcible measures, short of war, such as retorsion and reprisals (see Chapter 16, *post*), or to go further and resort to war in order to induce other States to fulfil their international obligations. Historically, war used to be, in a sense, the

[1] See Kunz, " Sanctions in International Law ", *American Journal of International Law* (1960), Vol. 54, pp. 324–347. United Nations " peacekeeping " operations cannot, strictly speaking, be regarded as a category of sanctions for the observance of international law, although sometimes serving to prevent the occurrence of breaches of international law. The primary purpose of United Nations peacekeeping forces or peacekeeping missions is to restore or maintain peace, or to mitigate deteriorating situations; see pp. 620–621, *post*.

ultimate sanction by which international law was enforced, but upon its strict interpretation the Charter prohibits the unilateral application, without the authority or licence of the Security Council, of sanctions to enforce international law, and permits only sanctions, of the nature of enforcement or preventative action, duly authorised by the Security Council, in order to maintain or restore international peace and security. These may include, not only the actual use of force, but also economic sanctions (e.g., the imposition of a collective embargo upon trade with a particular State or entity), as has already occurred in the case of South Africa[1] and of Rhodesia.[2] Moreover, since the critical point is the need for the Security Council's authority, it is *semble* not required that force be applied collectively by a number of States, for a single individual member of the United Nations may be authorised to take unilateral forcible action, as occurred in 1966 when the United Kingdom was so authorised, for the purpose of preventing the transport of oil to Rhodesia.[3]

If the word " sanctions " be taken in the larger sense of measures, procedures, and expedients for exerting pressure upon a State to comply with its international legal obligations, then the above-mentioned provisions of the United Nations Charter are not exhaustive of the sanctions which may become operative in different areas of international law. By way of illustration, reference may be made to the following instances:—(*a*) Under the Constitution of the International Labour Organisation (see Articles 24–34), a procedure is laid down for dealing with complaints regarding a failure by a Member State to secure the effective observance of an International Labour Convention binding it; this can lead to a reference to a Com-

[1] See the Resolutions of the Security Council of August 7, 1963, and June 18, 1964, calling upon all States to cease the sale and shipment to South Africa of arms, ammunition of all types, and military vehicles.

[2] See the Resolution of the Security Council of November 20, 1965, calling upon all States to do their utmost in order to cease all economic relations with Rhodesia, such cessation to include an embargo on oil and petroleum products.

[3] See the Resolution of the Security Council of April 9, 1966, empowering the United Kingdom to take steps, by the use of force if necessary, to prevent ships taking oil to ports from which it could be supplied or distributed to Rhodesia.

mission of Enquiry, or if necessary to the International Court of Justice, and in the event of a Member State failing to carry out the recommendations in the Commission's report or in the decision of the International Court of Justice, the Governing Body of the Organisation may recommend "*action*" to the International Labour Conference in order to secure compliance with the recommendations.[1] (*b*) Under the Single Convention on Narcotic Drugs of March 30, 1961 (see Article 14), if any country or territory fails to carry out the provisions of the Convention, the aim of which is to limit the quantity of narcotic drugs in use to the amount needed for legitimate purposes, a body known as the International Narcotics Control Board is entitled to call for explanations from the country or territory; should the explanations be unsatisfactory, the Board may call the attention of other competent United Nations organs to the position, and may go to the length of recommending a stoppage of drug imports or exports or both to and from the country or territory in default. (*c*) The constituent instruments of certain international organisations provide that Member States not complying with the basic principles laid down in these instruments may be suspended or expelled (see, e.g., Article 6 of the United Nations Charter). (*d*) An international legal obligation is sometimes enforceable through the procedures of domestic legal systems, subject to the appropriate sanctions applying under these systems; for example, under Articles 54–55 of the Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, each contracting State is to recognise an arbitral award made pursuant to the Convention as binding, and is to enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in that State. (*e*) Acts by a particular State, in breach of international law, may sometimes be treated by other States as invalid and inoperative. In its Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), the International Court of Justice ruled

[1] *Quaere* whether "action" could include economic sanctions; see Landy, *The Effectiveness of International Supervision* (1966), p. 178.

that South Africa's continued presence in Namibia (South West Africa) was illegal, and that Member States of the United Nations were obliged to recognise the invalidity of South Africa's acts as to Namibia, and to refrain from acts and dealings with South Africa implying acceptance of the legality of its presence in, and administration of Namibia, or lending support or assistance to these.[1]

Notwithstanding the sanctions possible under the United Nations Charter, together with the range of pressures which may be applied to compel a State to comply with international law, it still remains true that the international community does not have available to it a permanent organised force for securing obedience to the law, similar to that which exists in a modern State. The question then is whether this complete absence of an organised external force necessarily derogates from the legal character of international law. In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the " law of nature ". The canon law is like international law unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter, the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force.

Nor should it be forgotten that there are tangible sanctions for those rules of international law, at least, which impose duties upon individuals. For example, persons who, contrary to international law, commit war crimes, are no less subject to punishment than those who are guilty of criminal offences under municipal law. Another illustration is that of the international law crime of piracy *jure gentium*; every State is entitled to apprehend, try, and punish (if convicted) persons guilty of this

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[1] I.C.J. Reports (1971), 16, at pp. 54, 56.

crime (see Geneva Convention on the High Seas of April 29, 1958, Articles 19 and 21, and Chapter 8, *post*). Similarly, under the Hague Convention of December 16, 1970 for the Suppression of Unlawful Seizure of Aircraft, hijacking and like acts endangering the safety of aircraft, and persons and property on aircraft, are made punishable by contracting States who are entitled to place offenders in custody and take other appropriate measures.[1]

It is clear from the above analysis of theories as to the basis of international law, that a complete explanation of its binding force, embracing all cases and conditions, is hardly practicable. Indeed, there is something pedantic in the very notion that such a comprehensive explanation is necessary or desirable.

Apart from the sanctions and pressures mentioned above, one of the main elements reinforcing the obligatory character of the rules of international law is the empirical fact that States will insist on their rights under such rules against States which they consider should observe them. Obviously, if States did not insist on respect for these rules, international law would not exist. The ultimate reasons that impel States to uphold the observance of international law belong to the domain of political science, and cannot be explained by a strictly legal analysis. In other words, to some extent at least, the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general.

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[1] See below, pp. 290–292.

Chapter 2

THE MATERIAL " SOURCES " OF INTERNATIONAL LAW

The material " sources "[1] of international law may be defined as the actual materials from which an international lawyer determines the rule applicable to a given situation. These materials fall into five principal categories or forms:—

(1) Custom.
(2) Treaties.
(3) Decisions of judicial or arbitral tribunals.
(4) Juristic works.
(5) Decisions or determinations of the organs of international institutions.

From a practical standpoint, we may imagine the legal adviser to a particular Foreign Office called upon for an opinion on international law in regard to some special matter. His task is by no means as straightforward as that of a practising lawyer concerned only with State law. He has no codes, no statute books, and often he is in the realm of uncertainty either because it is not clear whether a customary rule of international law has been established or because there is neither usage nor practice nor opinion to guide him as to the correct solution. At all events, he must quarry for the law among these material " sources ", assisted by his own faculties of logic and reasoning, and his sense of justice.

It will be found that the same practical approach has been adopted by Courts which have decided questions of international law. Under article 38 paragraph 1 of its present Statute,[2] the

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[1] The term " sources " has been placed in inverted commas in order to mark the fact that, although frequently used as above, it is liable to misconstruction.

[2] This provision is similar to the corresponding provision in Article 38 of the Statute of the Permanent Court of International Justice, except that it is expressly said in the new provision that the Court's function is " to decide in accordance with international law such disputes as are submitted to it ".

International Court of Justice is directed to apply the following:

(1) International treaties.[1]
(2) International custom, as evidence of a general practice accepted as law.
(3) The general principles of law recognised by civilised nations.
(4) Judicial decisions and the teachings of the most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law.

The order of the materials in this Article is not the same as set out above, nor does it embrace the decisions of arbitral tribunals bearing on legal matters, or the decisions or determinations of the organs of international institutions, while it includes one material, " the general principles of law recognised by civilised nations ", which is not given above as a material " source ". This latter was inserted in the Court's Statute in order to provide an additional basis for a decision in case the other materials should give no assistance to the Court. These " general principles " were to be applied by analogy, and would be derived by selecting concepts recognised by all systems of municipal law. Such was clearly the intention originally of the draftsmen of the Statute,[2] confirmed in the context of Article 9, under which electors of the judges are to bear in mind that the Court should be representative of " the

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[1] These are described as " international Conventions, whether general or particular, establishing rules expressly recognised by the contesting States ".

[2] In the Advisory Committee of Jurists which in 1920 drafted the corresponding article of the Statute of the Court's predecessor, the Permanent Court of International Justice, Lord Phillimore pointed out that the " general principles " referred to were those accepted by all nations in the municipal sphere, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*; Proceedings of the Committee, p. 335. In the *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, p. 3, the International Court of Justice had regard to the general rule under municipal legal systems (see paragraph 50 of the Court's judgment) which indicated that an infringement of a company's rights by outsiders did not involve liability towards the shareholders individually; from this the Court reached the conclusion that the national State of the shareholders was not normally entitled to espouse the claim of the shareholders for loss suffered through an international wrong done to the company itself.

main forms of civilisation and of the principal legal systems of the world ", and the attempt by certain writers to give some other interpretation to these words is both artificial and unconvincing.[1] Widely quoted or popularised maxims of law are not of themselves " general principles ", in this sense.

On several occasions the former Permanent Court of International Justice found it necessary to apply or refer to such " general principles ". Thus in the *Chorzów Factory* (*Indemnity*) *Case*, it applied the principle of *res judicata* and it referred to the " general conception of law ", that " any breach of an engagement involves an obligation to make reparation ".[2] In the *Mavrommatis Palestine Concessions Case*, the Court referred to the " general principle of subrogation ",[3] and in the *Case of the Diversion of Water from the Meuse*, Judge Manly O. Hudson expressed the view that the Court might apply Anglo-American equitable doctrines as being " general principles ".[4] But on at least one occasion, the Court refused to apply an alleged " general principle "—in the *Serbian Loans Case* where it held that the principle in English law known as " estoppel " was inapplicable.[5] On the other hand, the private law doctrine

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[1] Among the various interpretations given to the words " general principles of law recognised by civilised nations " there have been the following:— (*a*) General principles of justice. (*b*) Natural law. (*c*) Analogies derived from private law. (*d*) General principles of comparative law. (*e*) General principles of international law (the view adopted by certain Soviet writers). (*f*) General theories of law. (*g*) General legal concepts. See also Rousseau, *Principes Généraux du Droit International Public* (1944), Vol. 1, pp. 889 *et seq.* According to Professor G. I. Tunkin the "general principles" are to be derived only from two sources, treaty and custom; see his *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr. from Russian), p. 127.

[2] Pub. P.C.I.J. (1928), Series A, No. 17, p. 29.

[3] Pub. P.C.I.J. (1924), Series A, No. 2, p. 28.

[4] Pub. P.C.I.J. (1937), Series A/B, Fasc. No. 70, pp. 76 *et seq.*

[5] Pub. P.C.I.J. (1929), Series A, Nos. 20–21, pp. 38–9. Yet the International Court of Justice applied the principle of estoppel or preclusion in the *Case concerning the Temple of Preah Vihear*, I.C.J. Reports, 1962, 6, and also dealt with that principle in the *Barcelona Traction Case*, *Preliminary Objections*, I.C.J. Reports, 1964, 6, where however the principle was held not to debar Belgium from proceeding. Note also the references to estoppel:— (*a*) in the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, 3, at p. 26, in respect to the question whether a non-party had accepted a treaty provision; and (*b*) in the *Argentina-Chile Boundary Arbitration Award* (H.M.S.O., 1966), pp. 66–68, as to alleged estoppels by reason of representations regarding the course of boundary lines.

of trusts was considered as helpful in order to deal with certain questions relating to the Mandates and Trusteeship systems.[1] "General principles" include procedural[2] and evidentiary principles, as well as principles of substantive law, provided that these do possess some character of generality over and above the context of each particular legal system to which they belong in common. However, these "general principles" are less a material "source" of international law than a particular instance of judicial reason and logic which the most authoritative international tribunal of the day is specially enjoined to employ.[3]

From the theoretical standpoint, the provision for applying the "general principles" has been regarded as "sounding the death-knell" of positivism, inasmuch as it explicitly rejects the broad positivist view that custom and treaties are to be considered the exclusive sources of international law. It has also been said to resolve the problem of *non liquet*, i.e., the powerlessness of an international court to decide a case legally because of inability to find any rules of law that are applicable.[4] Finally, the provision may fairly be considered as not laying down a new rule, but as being merely declaratory of the long-established practice of international courts.[5]

Each of the material "sources" will now be discussed in turn.

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[1] See Advisory Opinion on *the Status of South-West Africa*, I.C.J. Reports, 1950, pp. 146–150.

[2] In the *South West Africa Cases*, *2nd Phase*, I.C.J. Reports, 1966, 6 at pp. 39, 47, the International Court of Justice applied the "universal and necessary" principle of procedural law that there was a distinction between: (*a*) a plaintiff's legal right appertaining to the subject-matter of his claim; and (*b*) his right to activate a Court and the Court's right to examine the merits; and at the same time, it refused to allow anything like an *actio popularis*, i.e., a right in a member of a community to vindicate a point of public interest, albeit such *actio* was known to certain domestic legal systems.

[3] For a discussion of the whole subject of "general principles", see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), and Schlesinger, *American Journal of International Law* (1957) Vol. 51, pp. 734–753.

[4] Article 11 of the model Draft Articles on Arbitral Procedure drawn up by the International Law Commission of the United Nations in 1958 provides that an arbitral tribunal is not to bring in a finding of *non liquet* "on the ground of the silence or obscurity of the law to be applied".

[5] Cf. Guggenheim, *Traité de Droit International Public*, Vol I (2nd Edition, 1967), pp. 299–301. In which connection, note also the *Aramco Concession Award* (1958).

1.—Custom

Until recent times, international law consisted for the most part of customary rules. These rules had generally evolved after a long historical process culminating in their recognition by the international community. The preponderance of customary rules was diminished as a result of the large number of " law-making " treaties concluded since the middle of the last century, and must progressively decline to negligible proportions in measure as the work of the International Law Commission in codifying and restating customary rules produces results in treaties such as the Geneva Convention of April 29, 1958, on the High Seas, and the Vienna Conventions of April 18, 1961, of April 24, 1963, and of May 22, 1969, on Diplomatic Relations, Consular Relations, and the Law of Treaties respectively.

The terms " custom " and " usage " are often used interchangeably. Strictly speaking, there is a clear technical distinction between the two. Usage represents the twilight stage of custom. Custom begins where usage ends. Usage is an international habit of action that has not yet received full legal attestation. Usages may be conflicting, custom must be unified and self-consistent. *Viner's Abridgement*, referring to custom in English law, has the matter in a nutshell.[1]

> " A custom, in the intendment of law, is such a usage as hath obtained the force of a law ".

A customary element has, as we have seen, been a feature of the rules of international law from antiquity to modern times. In ancient Greece, the rules of war and peace sprang from the common usages observed by the Greek City States. These customary rules crystallised by a process of generalisation and unification of the various usages separately observed by each city republic. A similar process was observable among the small Italian States of the Middle Ages. When in the sixteenth and seventeenth centuries Europe became a complex of highly nationalised, independent territorial States, the process was translated to a higher and more extensive plane. From the

[1] Viner, *Abridgement*, vii, 164, citing *Tanistry Case* (1608), Dav. Ir. 28.

usages developed in the intercourse of modern European States there emerged the earliest rules of international law.

Customary rules crystallise from usages or practices which have evolved in approximately three sets of circumstances:—

(*a*) *Diplomatic relations between States.*—Thus acts or declarations by statesmen, opinions of legal advisers to State Governments, bilateral treaties, and now Press releases or official statements by Government spokesmen may all constitute evidence of usages followed by States.

(*b*) *Practice of international organs.*—The practice of international organs may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities. Thus in its Advisory Opinion holding that the International Labour Organisation had power to regulate internationally the conditions of labour of persons employed in agriculture, the Permanent Court of International Justice founded its views to a certain extent on the practice of the Organisation.[1] In a noted Advisory Opinion, the International Court of Justice based its opinion that the United Nations had international legal personality, partly on the practice of the United Nations in concluding Conventions.[2]

(*c*) *State laws, decisions of State Courts, and State military or administrative practices.*—A concurrence, although not a mere parallelism, of State laws or of judicial decisions of State Courts or of State practices may indicate so wide an adoption of similar rules as to suggest the general recognition of a broad principle of law. This is particularly well illustrated by a decision of the United States Supreme Court, *The Scotia.*[3] The facts were as follows:—In 1863, the British Government adopted a series of regulations for preventing collisions at sea. In 1864, the American Congress adopted practically the same regulations, as did within a short time after, the Governments of nearly all the maritime countries. Under these circumstances the *Scotia* (British) collided in mid-ocean with the *Berkshire* (American), which was not carrying the lights

[1] Pub. P.C.I.J. (1922), Series B, No. 2, especially at pp. 40–41.

[2] Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), I.C.J. Reports, pp. 174 *et seq.*

[3] (1871), 14 Wallace 170, at p. 188.

required by the new regulations. As a result, the *Berkshire* sank. The question was whether the respective rights and duties of the two vessels were determined by the general maritime law before the British regulations of 1863. It was held that these rights and duties must be determined by the new customary rules of international law that had evolved through the widespread adoption of the British regulations, and that therefore the fault lay with the *Berkshire*.

> "This is not giving to the Statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations".

For evidence of State practices, it may be necessary to refer to official books or documents, such as military, naval, and Air Force manuals, or the internal regulations of each State's diplomatic and consular services. Comparison of these may indicate the existence of a practice uniformly followed by all States.

A general, although not inflexible, working guide is that before a usage may be considered as amounting to a customary rule of international law, two tests must be satisfied. These tests relate to:—(i) the material, and (ii) the psychological aspects involved in the formation of the customary rule.

As regards the material aspect, there must in general be a recurrence or repetition of the acts which give birth to the customary rule. A German Court held in the case of *Lübeck* v. *Mecklenburg-Schwerin*[1] that a single act of a State agency or authority could not create any rights of custom in favour of another State which had benefited by the act; conduct to be creative of customary law must be regular and repeated.[2]

[1] See Annual Digest of Public International Law Cases, 1927–8, No. 3.

[2] There are none the less certain instances of a single act creating a custom; e.g., in the practice of international organisations, when a Resolution or decision may suffice to create a precedent for future action. In the *Asylum Case*, I.C.J. Reports (1950) at 276–277, the International Court of Justice stressed the necessity for constancy and uniformity of usages or practices, before they can be recognised as custom. See also Kunz in *American Journal of International Law* (1953) vol. 47 at pp. 662 *et seq.*

Material departures from a practice may negative the existence of a customary rule. Apart from recurrence, the antiquity of the acts may be also a pertinent consideration.

The psychological aspect is better known as the *opinio juris sive necessitatis*, or as one authority[1] has termed it " the mutual conviction that the recurrence . . . is the result of a compulsory rule ". This needs further explanation. Recurrence of the usage or practice tends to develop an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated. When this expectation evolves further into a general acknowledgment by States that the conduct or the abstention therefrom is a matter both of right and of obligation,[2] the transition from usage to custom may be regarded as consummated. In this process, there is involved, to some extent, an element of acceptance or assent on the part of States generally. This conviction, this *opinio juris*, is a convenient if not invariable test that a usage or practice has crystallised into custom; there is, for example, an absence of *opinio juris* when States conform to a usage for motives of comity or courtesy only.[3] At the same time, the *opinio juris* is not an essential element of custom, but if it is present, it is helpful as distinguishing custom from a course of action followed as a matter of arbitrary choice or for other reasons.[4]

It would follow from the judgments of the Permanent Court of International Justice in the *Lotus Case*[5] that the *opinio*

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[1] Judge Negulesco of the Permanent Court of International Justice, Pub. P.C.I.J. (1927), Series B, No. 14, at p. 105. Cf. Briggs, *American Journal of International Law* (1951), Vol. 45, pp. 728–731

[2] The necessity for customary rules to have binding quality was stressed by the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports (1952), at pp. 199–200. See also *dicta* of the Court in the *Asylum Case*, I.C.J. Reports, 1950, at 276–277. In the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, at p. 44, the Court stressed that *opinio juris* involved a feeling by States that they were conforming to what amounted to a legal obligation; habitual action in itself was not enough.

[3] See pp. 20–21, *ante*. In this connection, it is relevant to consider the acquiescence of other States, and the matter of protest or absence of protest by such States; cf. Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 874–875.

[4] See Kelsen, *General Theory of Law and State* (1961 Edition), p. 114.

[5] Pub. P.C.I.J. (1927), Series A, No. 10.

juris is a matter of inference from all the circumstances, not merely the detailed acts which constitute the material element of the alleged customary rule. One test for the existence of *opinio juris* is that set out in *West Rand Central Gold Mining Co.* v. *R.*[1] There the Court laid down that it must be proved by satisfactory evidence that the alleged rule " is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it ". This amounts to a test of " general recognition " by the international society of States.

Such test of " general recognition " underlies the provision[2] in the Statute of the International Court of Justice, under which the Court is directed to apply international custom " as evidence of a general practice accepted as law ", and is to be found also in Article 53 of the Vienna Convention of 1969 on the Law of Treaties providing that a norm of *jus cogens* must be one " accepted and recognised by the international community of States as a whole ".

The International Court of Justice has held, however, in the *Right of Passage over Indian Territory Case* (Portugal-India),[3] that a *particular* practice between two States only, which is accepted by them as law, may give rise to a binding customary rule *inter partes*.

Judicial Application of Custom

Both national and international Courts play an important role in the application of custom. Often it is claimed by one of the parties before the Court that a certain rule of customary international law exists. The Court must then investigate whether or not the rule invoked before it is a validly established rule of international custom, and in the course of this inquiry it examines all possible materials, such as treaties, the practice of States, diplomatic correspondence,

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[1] [1905] 2 K.B. 391, at p. 407.
[2] See Article 38 of the Statute.
[3] I.C.J. Reports (1960), 6.

decisions of State Courts, and juristic writings. In certain cases, the Court's function may be more than purely declaratory; while not actually creating new customary rules, the Court may feel constrained to carry to a final stage the process of evolution of usages so generally recognised as to suggest that by an inevitable course of development they will crystallise into custom. To use Mr. Justice Cardozo's words, by its *imprimatur* the Court will attest the "jural quality" of the custom.[1]

Two instructive cases illustrating the judicial methods in the application of custom are *The Paquete Habana*,[2] a decision of the United States Supreme Court, and the *Lotus Case*,[3] a decision of the Permanent Court of International Justice.[4] In the former case, the Supreme Court, after a detailed investigation of the materials mentioned above, namely State laws and practices, treaties, writings of publicists evidencing usage, and decisions of Courts, found that they uniformly proved the existence of a valid customary rule giving immunity to small fishing vessels from belligerent action in time of war; in the latter case, the Permanent Court, following the same method, decided that there was no customary rule conferring exclusive penal jurisdiction in maritime collision cases (on the high seas) on the country of the ship's flag, as regards all incidents on the ship, because, of the relevant materials considered, State laws

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[1] See *New Jersey* v. *Delaware* (1934), 291 U.S. 361, at pp. 383–384.

[2] (1900), 175 U.S. 677.

[3] Pub. P.C.I.J. (1927), Series A, No. 10.

[4] These two cases should, however, be used with caution, as the customary rule found to exist according to *The Paquete Habana*, viz., the immunity of small fishing vessels from belligerent action in time of war is, *semble*, now obsolete, while the alleged customary rule of exclusive penal jurisdiction of the flag State in maritime collision cases (on the high seas) negatived in the *Lotus Case*, was adopted by the Geneva Conference of 1958 on the Law of the Sea, and formulated as Article 11 paragraph 1 of the Convention on the High Seas of April 29, 1958 (subject to the concurrent jurisdiction of the State of nationality over the persons responsible for the collision, etc). A more recent illustration of judicial investigation of the problem whether a practice of States conclusively reflects the existence of a customary rule of international law is the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, 3, where the International Court of Justice ruled against the existence of a customary rule that the division of a common continental shelf of adjacent countries must be effected according to the equidistance principle.

were not consistent, decisions of State Courts conflicted, no uniform trend could be deduced from treaties, and publicists were divided in their views. Although the same method of detailed consideration of all materials was followed in both cases, weightier proof of the customary rule was required by the Permanent Court than by the Supreme Court, and owing to the absence of such proof the Permanent Court decided against the existence of the rule.

The difficulties involved in extracting a customary rule or principle of international law from the mass of heterogeneous documentation of State practice, State judicial decisions, diplomatic history, etc., are not to be minimised, as the two cases just mentioned, *The Paquete Habana* and *The Lotus*, amply illustrate. Not only, also, is the documentation itself frequently defective or incomplete, but the practice of some States is documented less adequately than that of other States. Moreover, the experience of the International Law Commission, and of the conferences called in 1958–1969 to consider the Commission's drafts, revealing as it did so much disagreement in areas where there were customary rules assumed to be generally recognised, should induce the utmost caution in drawing inferences as to the existence of such general recognition.

By Article 24 of its Statute of November 21, 1947, the International Law Commission of the United Nations was specifically directed to " consider ways and means for making the evidence of customary international law more readily available ",[1] and the Commission subsequently reported to the General Assembly of the United Nations on the matter.[2]

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[1] See Memorandum submitted by the Secretary-General of the United Nations, 1949, " Ways and Means of Making the Evidence of Customary International Law more readily Available ".

[2] Among the Commission's recommendations was one that the General Assembly should call the attention of Governments to the desirability of their publishing Digests of their diplomatic correspondence. The matter has also occupied the General Assembly at its sessions in 1950 and subsequent years. For the Commission's recommendations, see *Report* on the work of its second session (1950).

2.—Treaties

Treaties represent a second important material source of international law.[1] That importance is increasing.

The effect of any treaty in leading to the formation of rules of international law depends on the nature of the treaty concerned. In this connection there is a useful, although not rigid, distinction between:—(*a*) " law-making " treaties, which lay down rules of universal or general application; (*b*) " treaty-contracts ", for example, a treaty between two or only a few States,[2] dealing with a special matter concerning these States exclusively. This corresponds to some extent to the distinction made by Continental jurists between *Vereinbarungen* and *Verträge*.

(a) " Law-Making " Treaties

The provisions of a " law-making " treaty are directly a source of international law. This is not so with the " treaty-contracts ", which simply purport to lay down special obligations between the parties only.

There has been an astonishing development of " law-making " treaties since the middle of the nineteenth century. One authority[3] enumerated 257 such instruments concluded in the period 1864–1914. This rapid expansion of what has been called " international legislation " was due to the inadequacy of custom in meeting the urgent demands of the international society of States for the regulation of its common interests. The urgency of these demands arose from the deep-rooted changes which were transforming the whole structure of international life. Industrial and economic changes were

[1] There is a fairly consistent trend in Soviet Russian theoretical writings on international law to regard treaties as the primary or fundamental source of international law; see article by Triska and Slusser in *American Journal of International Law* (1958) Vol. 52, pp. 699–726, same Journal, Vol. 51 (1957), at pp. 135–136, and Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr. from Russian), p. 92 (see *ibid.*, pp. 63–75 as to the extent to which treaties play a role in the formation of international law).

[2] In certain cases, a bilateral treaty may have a " law-making " effect; e.g., the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain, providing that the Panama Canal should be free and open to the vessels of all nations on terms of entire equality.

[3] Hudson, *International Legislation* (1931), Vol. I, pp. xix *et seq.*

bringing States into closer intercourse with each other, and as international communications thus became more intimate, the range of interests springing from the relationships between States grew in size and complexity. In some regulation of these complex international activities every State had a direct interest which rose superior to considerations of national autonomy and independence.

A rapid glance at the principal " law-making " treaties and Conventions concluded before and after the Second World War amply confirms this trend. These instruments deal, for example, with Red Cross work, weights and measures, the protection of industrial property, the protection of submarine cables, the suppression of the slave trade, aerial navigation, international waterways, the pacific settlement of international disputes, international economic and monetary questions, control of narcotics, and nationality and statelessness, all subjects which called urgently for international statute law, and where to rely on the growth over several years of customary rules would have been impolitic.

A " law-making " treaty cannot in the nature of things be one containing rules of international law always of universal application. We are forced to admit that " law-making " treaties may be of two kinds: (*a*) enunciating rules of universal international law, e.g., the United Nations Charter; (*b*) laying down general or fairly general rules.[1] Then, even to the extent that a "law-making " treaty is universal or general, it may be really a " framework Convention ", imposing duties to enact legislation, or offering areas of choice, within the ambit of which States are to apply the principles laid down therein; see, e.g., articles 35–37 (provisions for co-operation in the penal repression of the illicit drug traffic) of the Single Narcotic Drugs Convention signed at New York, March 30, 1961. Besides, some multilateral treaties are to a large extent either confirmatory of, or represent a codification of customary

[1] Cf. distinction made by Quintana, *Tratado de Derecho Internacional*, Vol. I (1963), p. 78. Cf. also E. Vitta, " Le Traité Multilatéral, Peut-Il Être Considéré comme un Acte Législatif ", *Annuaire Français de Droit International*, 1960, pp. 225–238.

rules, as for example the Vienna Convention on Diplomatic Relations of April 18, 1961.

The use of the term " law-making " applied to treaties has been criticised by some writers on the ground that these treaties do not so much lay down rules of law as set out the contractual obligations which the States parties are to respect. In making such a criticism these writers overlook the number of Conventions and international legislative instruments that are now *adopted* by the organs of international institutions, such as the General Assembly of the United Nations and the Conference of the International Labour Organisation, instead as before of being signed by the plenipotentiaries at diplomatic Conferences. True it is that some of these Conventions and instruments need to be ratified or accepted by States in order to come into force, but certain of them are not even expressed in the consensual form.

It may be that the designation " normative treaties " is the more appropriate one. This would be capable of embracing: (1) Treaties operating as general standard-setting instruments, or which States apply either on a *de facto* or on a provisional basis; e.g., the General Agreement on Tariffs and Trade of October 30, 1947, which conditions the trading relations of so many non-party States; (2) Unratified Conventions, significant as agreed statements of principles to which a large number of States have subscribed; (3) " Closed " or " limited participation " treaties opened for signature by a restricted number of countries; (4) Treaties formulating regional or community rules; (5) Treaties creating an internationally recognised status or regime, operative, to some extent, *erga omnes*; e.g., the Twelve-Power Treaty on Antarctica signed at Washington, December 1, 1959; (6) Instruments such as Final Acts, to which are annexed International Regulations intended to be applied by States parties as general rules *inter se;* e.g., the International Regulations of 1960 for preventing collisions at sea, formulated by the London Conference of the same year on the Safety of Life at Sea, and being an annex to the Conference's Final Act.

Inter-agency agreements, i.e., those between international

organisations, and in addition, even agreements between an international organisation and a State, can also be "normative" in the sense that they may lay down norms of general application.

The mere fact that there are a large number of parties to a multilateral Convention does not mean that its provisions are of the nature of international law, binding non-parties. Generally speaking, non-parties must by their conduct distinctly evidence an intention to accept such provisions as general rules of international law. This is shown by the decision of the International Court of Justice in 1969 in the *North Sea Continental Shelf Cases*,[1] holding on the facts that Article 6 of the Geneva Convention of 1958 on the Continental Shelf, laying down the equidistance rule for apportionment of a common continental shelf, had not been subsequently accepted by the German Federal Republic—a non-party—in the necessary manifest manner.

(b) Treaty-Contracts

In contrast to "law-making" treaties, treaty-contracts are not directly a "source" of international law. They may, however, as between the parties or signatories thereto, constitute particular law; hence the use of the expression "particular" Conventions in Article 38, paragraph 1, a, of the Statute of the International Court of Justice.[2] Such treaties lead also to the formation of international law through the operation of the principles governing the development of customary rules.

There are three cases to be considered:—

(i) A series or a recurrence of treaties laying down a similar rule may produce a principle of customary international law to the same effect. Such treaties are thus a step in the process whereby a rule of international custom emerges.

[1] I.C.J. Reports, 1969, 3, at pp. 25–26.

[2] "*Bilateralisation*" *of multilateral Conventions:* There is also the case of the novel technique of laying down general rules in a multilateral Convention, with provision for States parties to enter into bilateral agreements confirming *inter se* and/or amplifying the rules in the Convention; cf. articles 21–23 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, adopted April 26, 1966, by the Hague Conference on Private International Law.

This function treaties share with, for example, diplomatic acts, State laws, State judicial decisions, and the practice of international organs. An illustration is the series of bilateral extradition treaties concluded during the nineteenth century from which such general rules as those that the nationals of the State demanding extradition and nationals of third States are extraditable, were deduced and became established. A further illustration is the number of identical provisions concerning consular privileges and immunities to be found in the numerous recent bilateral Consular Conventions and treaties, and which were used by the International Law Commission in 1960–1961 in drawing up its Draft Articles on Consular Relations,[1] which formed the basis of the later concluded Convention of April 24, 1963.

(ii) It may happen with a treaty originally concluded between a limited number of parties only that a rule in it be generalised by subsequent independent acceptance or imitation. In this case, the treaty represents the initial stage in the process of recurrence of usage by which customary rules of international law have evolved. Thus, for instance, the rule " free ships, free goods ", i.e., that enemy goods carried on a neutral vessel are in general immune from belligerent action, first appeared in a treaty of 1650 between Spain and the United Provinces, and became established only at a much later period after a long process of generalisation and recognition.[2] In the *North Sea Continental Shelf Cases,*[3] the International Court of Justice expressed the view that before a treaty provision could generate such a process of evolution into custom, it should potentially be of a norm-creating character so as to be capable of maturing into a general rule of law. Apart from this, a widespread and representative participation in a treaty rule, inclusive of the States whose interests were specially affected, might be sufficient to mark completion of the process.

(iii) A treaty may be of considerable *evidentiary* value

[1] See *Report* on the work of the Commission's thirteenth session (1961), Chapter II.

[2] See Hall, *International Law* (8th Edition, 1924), at pp. 837 *et seq.*, for an account of the development of the rule.

[3] I.C.J. Reports, 1969, 3, at p. 42.

as to the existence of a rule which has crystallised into law by an independent process of development. Such effect is due to the special authority and solemnity possessed by this type of instrument. One authority[1] has pointed out that it is " a sound maxim that a principle of international law acquires additional force from having been solemnly acknowledged as such in the provisions of a Public Treaty ".

3.—Decisions of Judicial or Arbitral Tribunals

International Judicial Decisions

The only existing permanent international judicial tribunal with a general jurisdiction is the International Court of Justice, which in 1946 succeeded the former Permanent Court of International Justice, itself first created in 1921. The International Court of Justice functions under a Statute containing virtually the same organic regulations as the Statute of the former Permanent Court. During the period 1921–1940, the Permanent Court gave a large number of judgments and advisory opinions on matters of international import, thereby contributing, as was intended by the founders of the Court, to the development of international jurisprudence. The work of its successor has been of equal importance.

It would be misleading to say that any decision of the former Permanent Court created a binding rule of international law. Under Article 59 of its Statute (now Article 59 of the Statute of the new International Court of Justice) the Court's decisions were to have " no binding force except between the parties and in respect of that particular case ". Pursuant to its Statute, the Permanent Court did not treat its own prior decisions as *per se* binding, and such decisions could therefore hardly be regarded by the international society of States as binding legal precedents. The Court, however, did use its prior decisions for guidance as to the law, for example, for purposes of illustrating or distinguishing the application of particular rules; also, it had regard to the principles of international law and to the reasoning on which previous decisions

[1] Phillimore, *Commentaries upon International Law* (2nd Edition, 1871), Vol. I, at p. 52.

were based, since the expression " decision " in Article 59 connoted only the operative portion of the Court's judgment, as distinct from the grounds given for such judgment; and as a general practice it followed a line or series of its prior decisions and opinions which were consistently of a similar trend, although it did not at any time purport to bind itself by any expressed doctrine of judicial precedent. The present International Court of Justice has in its turn followed a practice consistent with that of its predecessor.[1] Moreover, the International Court has shown that it regards itself as free to " develop " international law, without being tied by the weight of prior practice and authority, as witness its judgment in 1951 in the *Fisheries Case* (United Kingdom-Norway)[2] upholding the legitimacy of the baselines method for delimiting the territorial sea in certain coastal waters. Clearly, to the extent that a decision by the Court, or a particular principle laid down by it becomes accepted by States generally, as occurred with this baselines method (see now Article 4 of the Geneva Convention of April 28, 1958, on the Territorial Sea and Contiguous Zone), the Court would be justified in regarding itself as bound by its former pronouncements.

Quite apart from the attitude of both Courts towards their own prior decisions, the judgments and advisory opinions delivered by them are considered by international lawyers generally as elucidating the law, as being the expression of what the most authoritative international judicial body holds to be the international law on a given point, having regard to a given set of circumstances.

An example of a temporary—as distinct from a permanent—international judicial body contributing substantially towards the development of international law is that of the judgment of the International Military Tribunal at Nuremberg in 1946 which laid down important principles relating to crimes against the peace and security of mankind.[3]

[1] In the *South West Africa Cases, 2nd Phase,* I.C.J. Reports, 1966, 6, at pp. 36–37, the Court ruled that an earlier decision by it upon a preliminary objection could not conclusively bind the Court in deciding a matter appertaining to the merits of the case.

[2] See I.C.J. Reports, 1951, 116, and below, pp. 216–217.

[3] See below, pp. 66–67.

State Judicial Decisions

There are two ways in which the decisions of State Courts may lead to the formation of rules of international law:—

(*a*) The decisions may be treated as weighty precedents, or even as binding authorities. According to Marshall, C.J., of the United States Supreme Court[1]:—

> " The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this ".

A notable example is furnished by the decisions of the great British Prize Court Judge—Lord Stowell, who presided over the Court during the Napoleonic Wars. Lord Stowell's judgments received universal acknowledgment as authoritative declarations of the law, and he became peculiarly identified with the establishment of important doctrines, such as : that blockade to be binding must be effective, that contraband of war is to be determined by probable destination, and the doctrine of continuous voyage. Similarly, both as exponent and as agent for the development of international law, the Supreme Court of the United States has played an important role; for example, its judgments in the *Paquete Habana*[2] and the *Scotia*[3] did much to clarify the nature of international custom.

(*b*) The decisions of State Courts may, under the same principles as dictate the formation of custom, lead directly to the growth of customary rules of international law. Thus, for example, certain rules of extradition law and of State recognition were in the first instance derived from the uniform decisions of State Courts. A concurrence of such decisions is usually necessary for this purpose, for if there be no uniformity, a customary rule of international law will not be inferred. Thus, in the *Lotus Case* (*ante,* p. 43), the Permanent Court of International Justice refused to deduce a customary

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[1] *Thirty Hogsheads of Sugar, Bentzon* v. *Boyle* (1815), 9 Cranch 191, at p. 198.

[2] See above, p. 43.

[3] See above, p. 39.

rule where, to use the Court's expression, State judicial decisions on the point were " divided ".

Decisions of International Arbitral Tribunals

Decisions of international arbitral tribunals such as the Permanent Court of Arbitration, the British-American Mixed Claims Tribunal, and others, have contributed to the development of international law. In the following branches, arbitral decision has either added to or clarified the law:—Territorial sovereignty, neutrality, State jurisdiction, State servitudes, and State responsibility. Many notable arbitrations, for example, the *Alabama Claims Arbitration* (1872), the *Behring Sea Fisheries Arbitration* (1893), the *Pious Fund Case* (1902), and the *North Atlantic Fisheries Case* (1910) are regarded as landmarks in the history of international law.

Some writers have refused to acknowledge this contribution on the ground of an alleged fundamental distinction between arbitral and judicial decision. According to these writers, arbitrators have as a general practice tended to act as negotiators or diplomatic agents rather than as judges on questions of fact and law. They insist that arbitrators have been influenced to an unreasonable extent by the necessity of reaching a compromise. There is naturally an element of truth in this conception of arbitral decision, and arbitrators are less strictly bound by necessary technicalities than judges working within the ambit of established rules of procedure, but the distinction from judicial decision is by no means so fundamental as pictured. In the great majority of cases arbitrators have regarded themselves as acting to some extent judicially, rather than as *amiables compositeurs*. Moreover, if arbitral awards were merely quasi-diplomatic compromises, it would be difficult to explain how notable awards like *The Alabama Claims*, the *Behring Sea Fisheries*, and so on, have contributed to the growth of international law.

The " compromise " element in arbitral adjudications has been unduly exaggerated because under so many treaties arbitrators were authorised to act " *ex æquo et bono* ", but even in such cases arbitrators commonly acted according to

judicial principles. By far the greater majority of arbitral awards have been based on strictly legal considerations in form and substance. Judge J. B. Moore, with unrivalled knowledge of arbitral adjudications, declared[1]:—

> " I have failed to discover support for the supposition that international arbitrators have shown a special tendency to compromise, or that they have failed to apply legal principles or to give weight to legal precedents. Indeed, even in the abridged form in which many of the decisions cited in my History and Digest of International Arbitrations, published in 1898, were necessarily given in that work, nothing is more striking than the consistent effort to ascertain and apply principles of law approved by the best authorities, and to follow pertinent prior adjudications where any existed ".

The main distinction between arbitration and judicial decision lies not in the principles which they respectively apply, but in the manner of selection of the judges, their security of tenure, their independence of the parties, and the fact that the judicial tribunal is governed by a fixed body of rules of procedure instead of by *ad hoc* rules for each case.

4.—Juristic Works

It is perhaps needless to insist on the important role played by jurists in the development of international law.

Juristic works are not an independent " source " of law, although sometimes juristic opinion does lead to the formation of international law. According to the report of one expert body to the League of Nations,[2] juristic opinion is only important as a means of throwing light on the rules of international law and rendering their formation easier. It is of no authority in itself, although it may become so if subsequently embodied in customary rules of international law; this is due to the action of States or other agencies for the formation of custom, and not to any force which juristic opinion possesses.

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[1] Moore, *International Adjudications Ancient and Modern* (1929–1936), Vol. I. at pp. xxxix–xc.

[2] The Sub-Committee on State responsibility of the Committee of Experts for the Progressive Codification of International Law, League of Nations Document, C.196. M.70. 1927. V, p. 94.

Article 38 of the Statute of the International Court of Justice directs the Court to apply " the teachings of the most highly qualified publicists of the various nations, as *subsidiary* means for the determination of rules of law ". This provision emphasises the evidentiary value of juristic works. No doubt the principal function of juristic works is to furnish reliable evidence of the law. Jurists have been largely responsible for deducing customary rules from a coincidence or cumulation of similar usages or practices, and to this extent, they perform an indispensable service. The evidentiary function of juristic works has been well described by Gray, J.,[1] of the United States Supreme Court:—

> ". . . Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and as evidence of these, to the works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is ".

Although there are several authorities which deny that the opinions or speculations of jurists whether a certain rule ought to be recognised are of any force,[2] it is an undoubted fact that juristic opinion may be evidence not merely of established customary rules, but of customary rules which are bound in course of time to become established. The reaction of juristic opinion may be of great importance in assisting the transition from usage to custom.

In view of this evidentiary function, the passage of time will add weight to the authority of juristic opinion, particularly if generally relied upon, or if no principles contrary to such opinion become established.[3] To this extent, juristic works may acquire a kind of prescriptive authority. However, the labours of the International Law Commission since its inception

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[1] *The Paquete Habana* (1900), 175 U.S. 677, at p. 700.
[2] *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K.B. 391, at p. 407.
[3] Cf. Wheaton, *International Law* (Dana Edition, 1866), pp. 23–24.

have shown how cautious one must be in accepting as conclusive evidence of a generally recognised customary rule, even an established *consensus omnium* among jurists.

In one exceptional case, juristic opinion does assume importance. Where there are no established customary or treaty rules in regard to a particular matter, recourse may be had to juristic opinion as an independent " source ", in addition to the views expressed in decided cases or in diplomatic exchanges. Thus in the Privy Council case of *Re Piracy Jure Gentium*,[1] the question arose whether actual robbery was an essential element in the crime of piracy at international law.[2] On this point, the Privy Council found itself mainly dependent on juristic opinion, and ruled that it could not only seek a *consensus* of views, but select what appeared to be the better views. It finally decided that robbery was not an essential element in piracy *jure gentium*, and that a frustrated attempt to commit piratical robbery was equally piracy *jure gentium*.

5.—Decisions or Determinations of the Organs of International Institutions

Decisions or determinations of the organs of international institutions may lead to the formation of rules of international law in a number of different ways:—

(1) They may represent intermediate or final steps in the evolution of customary rules, particularly those governing the constitutional functioning of these institutions. The decisive criterion is the extent to which the decision, determination or recommendation has been adhered to in practice;[3] of itself it is not of normative effect. Thus from the practice of the United Nations Security Council (cf. similarly the League of Nations Council), there has developed the rule that an abstention by a Member State from voting is not to be deemed a non-concurring vote for the purpose of determining whether a decision on a non-procedural question has been validly taken by the Security Council according to the voting requirements

[1] [1934] A.C 586, at pp. 588–9.

[2] See also below, pp. 285–288.

[3] Cf. also Professor G. I. Tunkin's, *Droit International Public: Problèmes Théoriques* (Paris, 1965, tr. from Russian), pp. 109–110.

of Article 27 of the United Nations Charter.[1] As regards international law in general, the Resolutions since 1952 of the United Nations General Assembly have gone far towards confirming a rule that dependent peoples are entitled to self-determination.[2]

(2) A Resolution of the organ of an international institution which validly formulates principles or regulations for the internal working of the institution may have full legal effect as laying down rules which are binding on the members and organs of the institution.

(3) Inasmuch as an organ of an international institution has inherent power, in doubtful cases not precisely covered by its Constitution, to determine the limits of its own competence, such decisions by it on questions of its jurisdiction may have a law-making effect.

(4) Sometimes, organs of international institutions are authorised to give binding determinations concerning the interpretation of their constituent instruments (for example, the Executive Directors and the Board of Governors of the International Monetary Fund have such power under Article XVIII of the Articles of Agreement of the Fund, of July 22, 1944).[3] These interpretative decisions will form part of the law of the international institution in question.

(5) Some organs of international institutions are empowered to give general decisions of quasi-legislative effect, binding on all the members to whom they are addressed; for example, as are the Council and Commission of the European Economic Community (Common Market) under Article 189 of the Treaty of Rome of March 25, 1957, establishing the Community.

(6) A special case is that of the determinations or opinions of Committees of Jurists, specifically instructed by the organ of an

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[1] See below pp. 607–609.

[2] As to Resolutions of the United Nations General Assembly, see Professor D. Goedhuis in *Netherlands International Law Review*, Vol. XIII (1966), at pp. 117 and 119, and Asamoah, *The Legal Significance of the Declaration of the General Assembly of the United Nations* (1966), p. v, and *passim*.

[3] See Hexner, "Interpretation by Public International Organisations of their Basic Instruments", *American Journal of International Law* (1959) Vol. 53, pp. 341–370.

international institution to investigate a legal problem.[1] These necessarily bear some weight and authority.

Reference should also be made to the discussion in Chapter 19, below, of the legislative and regulatory powers of international institutions.[2]

Order of Use of Material "Sources"

The final question is in what *order* should these material "sources"—custom, treaties, arbitral and judicial decisions bearing on legal matters, juristic works, and decisions or determinations of the organs of international institutions—be used for ascertaining the law on a given matter. It will be remembered that the order in which the material "sources" were set out in paragraph 1 of Article 38 of the Statute of the International Court of Justice was:—

(1) Treaties and Conventions.
(2) Custom.
(3) "General principles of law recognised by civilised nations".
(4) Judicial decisions and juristic opinion, "as subsidiary means for the determination of rules of law".

This order is generally followed in practice. Treaties and Conventions, custom, and general principles of law recognised by civilised nations are deemed to prevail over judicial decisions and juristic opinion, which are expressly declared by paragraph 1 of Article 38 of the Statute of the International Court of Justice to be "subsidiary means for the determination of rules of law". So far as the first three categories are concerned, priority would normally be attributed to treaties and Conventions expressly recognised by the States concerned; if there were no treaties or Conventions applicable, preference would be accorded to established customary rules, while if there

[1] See, e.g. the opinion of the Committee of Jurists appointed in 1920 by the League of Nations Council to advise on the question of the Aaland Islands. The Committee's view that a Convention of 1856, whereby Russia agreed not to fortify the Aaland Islands, created a special military status, conferring rights on interested adjoining States although not parties to the Convention, has been cited with express or implied approval in leading text-books.

[2] See below pp. 586–587.

were no such rules, recourse could be had to general principles of law recognised by civilised nations. If none of these three categories furnished clear rules applicable to the matter, judicial and arbitral decisions, and juristic opinion could be resorted to, with more weight being given usually to decisions of Courts than to expressions of opinion by jurists and text-book writers. The weight to be given to a decision or determination of an international institution would depend upon its nature and content, and upon the provisions of the constituent instrument of the organisation. There may also be duplication of applicability, as for example when a Convention contains a provision declaratory of customary international law, or when a general principle of law recognised by civilised nations is at the same time confirmatory of a treaty or customary rule.

It is to be observed that the enumeration in paragraph 1 of Article 38 of the Court's Statute makes no reference to such principles as those of equity and justice, or to the processes of legal reasoning to which a judge or practising lawyer is always entitled to have recourse. When such principles or processes are availed of, it may indeed be found that one category of material " sources ", for example a Convention, has actually no application to the particular matter concerned, which is governed by some category of a lower order, for example a rule of custom.

Peremptory Principles or Norms of International Law; *jus cogens*

Lastly, mention should be made of the concept of *jus cogens*,[1] that is to say the body of peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any of such principles or norms.[2] According to Article 53 of the Vienna Convention

[1] See generally on the subject, E. Suy and Others, *The Concept of Jus Cogens in International Law* (1967).

[2] It may be, of course, that the treaty as a whole must be treated as void, because of the inseverability of its content, or because the treaty's operation is dependent upon a condition precedent which offends against a norm of *jus cogens*.

on the Law of Treaties of May 22, 1969, it is an additional characteristic of a norm of *jus cogens* that it " can be modified only by a subsequent norm or general international law having the same character ", although in this article *jus cogens* is defined merely " for the purposes " of the Convention. There is undoubtedly some analogy between *jus cogens* and the principles of public policy which at common law render a contract void if it offends against these, such as the principle that parties cannot by agreement between themselves oust the ordinary courts from their jurisdiction.[1] Assuming that this analogy holds good, one must correspondingly bear in mind some of the metaphors used by harassed common law judges to describe the doctrine of public policy, such as " a very unruly horse ", " treacherous ground ", and " slippery ground ".[2] Critics of the concept of *jus cogens* in international law have also urged that it may be resorted to as a means of avoiding onerous treaty obligations, or even to justify interference in matters otherwise falling within the domestic jurisdiction of States.

One major difficulty is related to the identification of norms of *jus cogens*. First, should this function of identification be performed solely by multilateral law-making Conventions, or may a norm of *jus cogens* evolve through the same process as in the case of customary rules of international law? Article 64 of the Vienna Convention on the Law of Treaties provides that " if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates ". The word " emerges " shows that it was contemplated that a norm of *jus cogens* could be one of customary international law. Second, there is a lack of consensus as to what, at the present time, are norms of *jus cogens*. Two such generally acceptable norms seem to be the prohibition against the threat or use of force in the terms laid down in Article 2 paragraph 4 of the United

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[1] See *Lee* v. *Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329, at p. 342.
[2] For the various metaphors used, see *Newcastle Diocese Trustees* v. *Ebbeck* (1961), A.L.R. 339, at pp. 350–351.

Nations Charter, and the principle of *pacta sunt servanda,* as defined in Article 26 of the Vienna Convention on the Law of Treaties. Other suggested norms, for example the principle of sovereign equality of States, and the principle of peaceful settlement of disputes, while acceptable as propositions of law, have not found general favour as being of the nature of *jus cogens.*

A general provision as to *jus cogens* is contained in Article 53 (mentioned above) of the Vienna Convention on the Law of Treaties;[1] this reads:—

> " A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The article reflects the underlying notion in *jus cogens* that its component norms are conditioned by the interests of the international community as whole. The drafting of the first sentence is open to objection. If it means that the whole of a treaty is void when a single provision offends against *jus cogens,* this is an untenable proposition, for in many cases the provision may be severable. The sentence would be more acceptable if the word " provision " were added after the word " treaty ".

It remains to say that the concept of *jus cogens,* if applicable to treaties, must also render inoperative usages or practices conflicting with peremptory norms.

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[1] As to its drafting history at the Vienna Conference, see R. D. Kearney and R. E. Dalton, *American Journal of International Law,* Vol. 64 (1970), at pp. 535–538.

Chapter 3

THE SUBJECTS OF INTERNATIONAL LAW

International law is primarily concerned with the rights, duties, and interests of *States*. Normally the rules of conduct that it prescribes are rules which States are to observe, and in the same way treaties may impose obligations which the signatory States alone agree to perform. But this does not necessarily imply that no other entities or persons, whether natural or legal, can come within the dominion or bounty of international law.[1]

However, certain authorities assert that States are the only subjects[2] with which international law is concerned. A natural stumbling block for so wide a theory has always been the case of slaves and pirates. As a result of general treaties,[3] certain rights of protection, etc., have been bestowed on slaves by the society of States. Also under customary rules of international law, individuals who commit the offence of piracy *jure gentium* on the high seas are liable as enemies of mankind to punishment by any apprehending State.[4] These two apparent exceptions to the general rule have been reconciled by treating slaves and pirates *jure gentium* as *objects*, and in no sense as subjects of international law. Moreover it has been said by the same authorities that on a proper analysis, it would be found that the so-called rights or duties of slaves and pirates *jure gentium* are technically those of States and States only.

[1] See Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 19–22; W. Paul Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (1966); Nørgaard, *The Position of the Individual in International Law* (1962).

[2] The term "subject of international law" is capable of meaning:—(*a*) an incumbent of rights and duties under international law; (*b*) the holder of a procedural privilege of prosecuting a claim before an international tribunal; and (*c*) the possessor of interests for which provision is made by international law. These three meanings are not always kept distinct in the literature on the question whether individuals and non-State entities may be subjects of international law.

[3] See, e.g. Article 13 of the Geneva Convention on the High Seas of April 29, 1958, providing that any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free. See also below at p. 284, n. 2, p. 363.

[4] See below, pp. 285–288.

Thus, in the case of slaves, it is argued, the international Conventions under which slaves enjoy protection really cast duties on the States parties; without such duties on the States to recognise and protect their interests, slaves would not possess any rights at international law.

As against this theory that individuals are only incumbents of rights and duties at international law insofar as they are objects and not subjects, there is a theory which goes to the limit in the opposite direction. This theory which is held by the noted jurist Kelsen and his followers maintains that in the ultimate analysis, individuals alone are the subjects of international law. A faint version of this theory had already appeared in the following passage in Westlake[1]:—

> " The duties and rights of States are only the duties and rights of the men who compose them ".

Kelsen analyses the notion of a State, and affirms that it is purely a technical legal concept serving to embrace the totality of legal rules applying to a group of persons within a defined territorial area; the State and the law may almost be described as synonymous. The concept of the State is used to express in technical language legal situations in which individuals alone are bound to do certain acts or receive certain benefits in the name of the collectivity of human beings to which they belong.[2] For instance, when we say that Great Britain is responsible at international law for some wrong committed against another State by one of its officials or a member of its armed forces, this is only a technical method of expressing the fact that the British people as a whole, i.e., the individuals subject to British law, are bound through the persons who constitute its Government to give redress for the wrong imputed to Great Britain as a State. The duties resting on a State at international law are thus ultimately duties binding on individuals.

In this respect, according to Kelsen, there is no real distinction between State law and international law. Both systems bind individuals, although international law as a

[1] *Collected Papers* (1914), Vol. I, p. 78. To much the same effect is a passage in Professor Scelle's study in Lipsky (ed.), *Law and Politics in the World Community* (1953), at p. 56.

[2] See Kelsen, *Hague Recueil* (1926), Vol. 14. 231, at pp. 239 *et seq.*

matter of technique does so only *mediately* and through the concept of the State.

From the purely theoretical standpoint, and in logic, Kelsen's views are undoubtedly correct. But as a matter of practice, international lawyers and the statesmen they advise, work on the realistic basis that their primary concern is with the rights and duties of States. It is true that from time to time treaties do provide that individuals may have rights, a remarkable recent illustration being the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, enabling private foreign investors to have access to international machinery for the settlement of their disputes with investment-receiving States.[1] But otherwise it will generally be found that treaty provisions are couched in the form of rules of conduct binding upon, or conferring rights on States. This is also consistent with the long-standing British practice of treaty negotiation. The Crown when negotiating treaties does not do so as trustee or agent for private citizens. As Lord Atkin said in an important judgment[2]:—

> " When the Crown is negotiating with another sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign State, unless indeed the Crown chooses expressly to declare that it is acting as agent ".

At the same time, it serves no purpose to gloss over the exceptions to the general working rule. There are cases where international law binds individuals *immediately* and not merely mediately in Kelsen's sense. It is a pure play on words to say that slaves and pirates *jure gentium* are not subjects, but objects of international law. For example, the rule of international law by which States are authorised to attack, seize, and punish pirates *jure gentium*, is a rule " imposing a legal duty directly upon individuals and establishing individual respon-

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[1] Note also that Article 7 of the Geneva Prisoners of War Convention of 1949 provides that prisoners of war may in no circumstances renounce " the rights " secured to them by the Convention.

[2] *Civilian War Claimants Association, Ltd.* v. *R.*, [1932] A.C. 14, at pp. 26–27.

sibility ".[1] It would be straining the facts to interpret the rule as casting a duty not on individuals but on States, for no State is bound to punish pirates if it chooses to abstain from doing so, while the power to apprehend pirates is scarcely a right in its proper connotation.

It is maintained by the protagonists of the traditional theory that, in any event, such alleged exceptional cases are only in fact apparent exceptions, for in essence the liability to punishment of pirates *jure gentium* and the right of slaves to their freedom derives from municipal law, and not from international law. They claim that generally no rule of international law can operate directly or indirectly upon individuals without some municipal legislative implementation of the rule.[2] However, as to pirates *jure gentium* Kelsen cogently says[3]:—

> " The fact that the specification of the punishment is left to national law, and the trial of the pirate to national Courts, does not deprive the delict and the sanction of their international character ".

That is a consideration applicable to all the exceptional cases.

Irrespective of municipal legislative implementation of the rules therein contained, there is no question that, however exceptionally, many modern treaties do bestow rights or impose duties upon individuals. It was authoritatively decided by the Permanent Court of International Justice in the *Danzig Railway Officials' Case* that if by a particular treaty the parties intended to confer rights on individuals, then these rights should receive recognition and effect at international law, that is to say from an international Court.[4] In that case, Poland contended that the agreement between herself and Danzig fixing the conditions of employment of Danzig railway officials, whom she had taken over, conferred no right of action on these officials. She maintained that the agreement being an international treaty, and not having been incorporated into Polish law, created rights and obligations only between the con-

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[1] Kelsen, *Peace Through Law* (1944), at p. 76.
[2] See, generally, as to this question, below, pp. 82–96.
[3] Kelsen, *ibid.*, 76.
[4] See *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, Pub. P.C.I.J. (1928), Series B, No. 15.

tracting parties, and that failure to carry out such obligations would involve her in responsibility only to Danzig and not to private individuals. While the Permanent Court was ready to admit this as a general rule, it declared that in the particular case the intention of the parties was to create rights enforceable by private citizens, and therefore the Danzig officials had their cause of action against the Polish administration as under the agreement. It may well be said that insofar as it purports to confer rights upon individuals, the Geneva Prisoners of War Convention of 1949 is such a treaty, within the meaning of the Permanent Court's decision.

This controversy as to whether international law binds individuals is by no means of theoretical significance only. Towards the end of the Second World War when the Allies were concerting measures to prosecute war criminals, there was some hesitation whether international law could indeed reach out to punish Heads of State, Ministers, and high military and administrative functionaries responsible for initiating the war and authorising the perpetration of atrocities. In the event, the theoretical objections to such a course were disregarded, and pursuant to agreements to this effect which were without precedent in international law,[1] international trial tribunals were set up at Nuremberg and Tokyo. Among the offences for which charges were laid were crimes against peace (for example, beginning a war of aggression or in violation of treaties), crimes against humanity (for example, murder or persecution of racial or religious groups), crimes under the laws of war, and the conspiracy to commit these crimes. The judgment of the Nuremberg International Tribunal in 1946 (followed later by the judgment in 1948 of the Tokyo International Tribunal) establishing the guilt of certain of the defendants in respect of these charges, and affirming their

[1] The Agreement for setting up the Nuremberg Tribunal, dated August 8, 1945, between Great Britain, the United States, France, and Russia provided in Article 7 of the Charter annexed thereto that:—

> ". . . The official position of the defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment ".

Cf. the Charter of January 19, 1946, concerning the constitution of the Tokyo Tribunal.

individual responsibility under international law, is of historic significance. The principles of international law recognised in the Agreement or Charter setting up the Tribunal of August 8, 1945,[1] and in the Tribunal's Judgment were subsequently formulated by the International Law Commission of the United Nations as a Draft Code on Offences against the Peace and Security of Mankind (see *Report* concerning the work of its second session presented to the General Assembly in 1950). In these principles, as formulated, the references are to " persons " as being guilty of crimes against the peace and security of mankind. In the light of these principles, too, one point has been clarified, namely that international law can reach over and beyond traditional technicalities, and prevent guilty individuals sheltering behind the abstract concept of the State.[2] According to the Nuremberg Tribunal[3]:—

> " Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ".

This trend of international law towards attaching direct responsibility to individuals was reaffirmed in the Genocide Convention adopted by the United Nations General Assembly on December 9, 1948, which is somewhat in advance of the

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[1] Some writers questioned the validity and propriety of the Tribunal, as well as the legality of conferring upon it, by Agreement of the Four Powers (i.e., Great Britain, the United States, France, and Russia), jurisdiction to deal with certain offences against the law of nations, formulated for the first time in such Agreement, e.g., crimes against the peace, and crimes against humanity. Cf. Kelsen, *International Law Quarterly* (1947), Vol. I, pp. 153 *et seq.*

[2] The Nuremberg Tribunal rejected the argument urged on behalf of the defendants that they were being prosecuted for international crimes under rules of law *ex post facto* inasmuch as prior to 1939–1940, such crimes as crimes against the peace had not been defined or made punishable under existing international law. It pointed out that the defendants must have known that their actions were illegal and wrong, and in defiance of international law (see Official Record of Trials, Vol. I, *Official Documents*, at p. 219). This ruling has been widely criticised; for typical criticism and discussion, see Finch, *American Journal of International Law* (1947), Vol. 41, at pp. 33 *et seq.*

[3] See Official Record, Vol. I, *Official Documents*, at p. 223. The Tribunal also pointed out that it had long been recognised that " international law imposes duties and liabilities upon individuals as well as upon States ".

Nuremberg principles.[1] Under the Convention, the States Parties agreed that genocide (i.e., acts committed with intent to destroy in whole or in part national, ethnical, racial, or religious groups) and the conspiracy or incitement to commit genocide, attempts, and complicity therein, should be punishable on trial by national courts or by an international criminal tribunal. Article IV of the Convention emphasised the aspect of individual responsibility by providing that *persons* committing the Acts should be punished " whether they are constitutionally responsible rulers, public officials or private individuals ".

These developments lay in the direction of imposing duties on individuals under international law.

But parallel thereto, there has been also a movement for conferring rights on individuals, even as against States of which such individuals are nationals or citizens. This is implicit in the Nuremberg judgment of 1946, inasmuch as it recognises that the victims of crimes against humanity committed even by their own Governments, are entitled to the protection of international criminal law. So also does the Genocide Convention of 1948 purport to protect the very right of human groups to exist as groups. In this connection reference must be made to the movement to protect human rights and fundamental freedoms sponsored by the United Nations under the powers given in Article 1 and other provisions of the United Nations Charter, a subject which is discussed in a later Chapter.[2] In Europe the human rights movement has been advanced as a result of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on November 4, 1950.[3] Under the Convention, there were established a European Commission of Human Rights with administrative power to investigate and report on violations of human rights, and a European Court of Human Rights, which commenced

[1] Note that in respect of the crimes against humanity as charged before the Nuremberg Tribunal, the Tribunal limited its jurisdiction over these to such as were committed in connection with or in execution of crimes against peace, or war crimes proper.

[2] See below, pp. 357–364.

[3] See below, pp. 359–362.

to function in 1959, and in several cases already,[1] both the Commission and the Court have inquired into a violation of human rights alleged by an individual against his own Government.

In regard to individuals in general, it should be noted that there is a widely recognised rule of international practice that before an international tribunal, the rights of, or the obligations binding individuals at international law, are respectively enforceable at the instance of or against those States only whose nationality such individuals possess.[2] In other words an individual cannot generally assert his own rights against a State before an international tribunal or be answerable to a State in the same jurisdiction for failing in his obligations, but only through the State of which he is a national.

The European Court of Human Rights does not represent an exception to the rule, as the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Commission of Human Rights have alone the right to bring a case before the court. Individuals cannot of their own motion invoke the Court's jurisdiction.

Certain points require emphasis in this connection. In the first place, the rule precluding an individual from approaching an international tribunal is one of a general nature only, and already certain exceptions to it have appeared. Thus, by treaties concluded after the First World War (see Articles 297 and 304 of the Treaty of Versailles, 1919, and the Polish-German Convention of May 15, 1922, relating to Upper Silesia[3]) individual claimants were allowed access to the various Mixed Arbitral Tribunals set up pursuant to the provisions of these instruments, although as it turned out Governments intervened in some of the more important cases in support of their nationals.

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[1] See pp. 360 *et seq.*, *post*.

[2] See per Judge Hackworth in I.C.J. Reports, 1949, at pp. 202 *et seq.* Note also Article 34 of the Statute of the International Court of Justice, providing that " only States may be parties in cases before the Court ".

[3] Under this Convention, the independent procedural capacity of individuals as claimants before an international tribunal was recognised even as against the State of which they were nationals; see *Steiner and Gross* v. *Polish State* (1928), Annual Digest of Public International Law Cases, 1927–1928, Case No. 188.

Again, under the Treaty creating the European Coal and Steel Community of April 18, 1951, under the Treaty establishing the European Economic Community (Common Market) of March 25, 1957, and under the Treaty establishing the European Atomic Energy Community (EURATOM) of March 25, 1957, individuals, private enterprises, and corporate entities have been given certain rights of direct appeal to the Court of Justice of the Communities against decisions of organs of the Communities. Mention may also be made of the right of United Nations Officials to take proceedings before the United Nations Administrative Tribunal for alleged non-observance of their contracts of employment or the terms of their appointment. Moreover, the opinion of many international lawyers is that, in certain limited cases, access by individuals or corporations to international tribunals is necessary and should be allowed, and it may be expected that in the future changes in this direction will come about.[1] Second, the fact that individuals have such procedural incapacities before international tribunals is not necessarily inconsistent with their status as subjects of international law. There are similar instances of persons with procedural incapacities before municipal Courts (for example, infants, who under English law can only bring an action by a next friend or defend it by a guardian *ad litem*), who are nevertheless regarded as subjects of municipal law. Third, the International Court of Justice has held[2] that an international institution, as distinct from a State, is entitled to espouse the claim of one of its officials against a State for damage or injury suffered, thus recognising that, at all events, this function of protection does not belong exclusively to States.

International practice has in recent years extended the range of subjects far beyond that of States only:—

(*a*) International institutions and organs, such as the United Nations and the International Labour Organisation (ILO)

[1] An early precedent also is that of the Central American Court of Justice (1908–1918), which did have jurisdiction to deal with disputes between States and private individuals, although no significant conclusions can be drawn from its meagre record of activity over a period of ten years.

[2] See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports, 1949, pp. 182 *et seq.*

were established under international Conventions containing constitutional provisions regulating their duties and functions, for example, the United Nations Charter, 1945, and the Constitution of the International Labour Organisation.

In its Advisory Opinion just mentioned the International Court of Justice expressly held, in terms which are applicable to other international organisations, that the United Nations is, under international law, an international person. According to the Court[1]:—

> " That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . What it does mean is that it is *a subject of international law* and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims ".

Moreover within the United Nations and the International Labour Organisation, for example, are other organs, and even individuals,[2] whose activities are regulated by rules set out in these constitutional intruments.

Even regional international organisations and Communities (e.g., the European Economic Community) may by the terms of their constituent instruments be endowed with international personality, as, for example, the North Atlantic Treaty Organisation (NATO), which possesses " juridical personality " under Article 4 of the Agreement of September 20, 1951 on the Status of the North Atlantic Treaty Organisation, National Representatives, and International Staff.

It should be mentioned, however, that some positivist writers oppose the attribution of international personality to international institutions, and maintain what is known as a theory of " common organs ". Under this theory international organisations are regarded as domestic institutions common to the participating States, and whose activities are in essence the activities of these States, and not as true international agencies.

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[1] See *Advisory Opinion, op. cit.*, at p. 179.

[2] E.g., the Secretary-General of the United Nations. See generally, Schwebel, *The Secretary-General of the United Nations: His Political Powers and Practice* (1952).

It is difficult to reconcile such a conception of the status of international institutions with all the facts, and in the *South West Africa Cases*, *2nd Phase* (1966),[1] the International Court of Justice, dealing with the League of Nations, ruled that individual member States had, with reference to mandates, no separate, self-contained right they could assert before a Court, over and above the League's collective, institutional activity.

(*b*) Several "law-making" Conventions have been concluded in regard to matters of international criminal law, for example, the Geneva Conventions dealing with the Suppression of Counterfeiting Currency (1929), and with the Suppression of the International Drug Traffic (1936), the Single Narcotic Drugs Convention adopted at New York in 1961, the Tokyo Convention on Offences and Other Acts Committed on board Aircraft (1963), and the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft (1970). Under these Conventions, States have concerted or may concert their action for the punishment of certain international offences or crimes in which individuals alone were concerned. Thereby, delinquents such as international drug traffickers and counterfeiters, and persons "hijacking" an aircraft, have become subjects of conventional rules of international criminal law in much the same way as pirates *jure gentium* under customary rules.

(*c*) Under treaties concerning national minorities, individuals, as already mentioned, were given the right of securing redress by application to an international Court (see, for example, Articles 297 and 304 of the Treaty of Versailles, 1919).

(*d*) Subdivisions of States,[2] dependencies, protectorates, and territories were brought within the scope of several "law-making" Conventions, in order better to secure the working of the provisions of these Conventions which required application by all administrative units throughout the world, whether

[1] I.C.J. Reports, 1966, 6, at pp. 29, 63.

[2] Under the Convention of March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of other States, a constituent subdivision of a State party (e.g. a province or State of a Federation) may, with the approval of that State, go to arbitration or conciliation with an investor of another State party (see article 8).

States, colonies, protectorates, or territories. An appropriate example is the provision in Article 8 of the Constitution of the World Health Organisation of 1946 that territories or groups of territories " not responsible for the conduct of their international relations " may be admitted as Associate Members of that Organisation.

(*e*) Insurgents as a group may be granted belligerent rights in a contest with the legitimate Government, although not in any sense organised as a State.[1]

A further significant point, often lost sight of, is the fact that international law is not solely concerned with advancing the political interests of States, but to a large extent also with the interests and needs of individuals and non-State entities. So it is that a primary aim of many notable " law-making " Conventions of the past seventy years, including such instruments as the Geneva Prisoners of War Convention of 1949 and the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War, and the large number of Conventions adopted by the Conferences of the International Labour Organisation, has been the welfare and health of the individual. Moreover, a number of international organisations are specifically devoted to advancing and ensuring respect for the rights and interests of individuals, in effect taking over, to some extent, internationally, the functions of diplomatic protection formerly performed by States. It would not therefore be a very revolutionary step if one further step were to be taken, and international law were to confer rights on individuals directly and *ex proprio vigore* without necessarily operating for this purpose

[1] Another instance is the status of the Holy See as a subject of international law from 1871 to 1929, before the Lateran Treaties; as to which see Kunz, " The Status of the Holy See in International Law ", *American Journal of International Law* (1952), Vol. 46, pp. 308–314. For the special case of Governments in exile, as during the Second World War, see F. E. Oppenheim, " Governments and Authorities in Exile ", *American Journal of International Law* (1942), Vol. 36, pp. 568 *et seq.* Note also the decision of the Rome Tribunal that the Sovereign Order of Malta is a subject of international law; see *Cartolari* v. *Sovereign Order of Malta, Annali di Diritto Internazionale* (1951), Vol. IX, p. 153. A further case of a non-State entity, which is possibly a subject of international law, is that of the International Committee of the Red Cross (ICRC); see Kunz, *American Journal of International Law* (1959), Vol. 53 at no. 132.

through the medium and under the cover of the State. So far, it is only in exceptional cases that such an advance has been made.

Then, as a final point, there is the fact that a considerable weight of contemporary opinion, represented particularly by the newly emerged States, favours the view that *peoples as such* have certain inalienable rights under international law, among which are the right to self-determination, the right freely to choose their political, economic and social systems, and the right to dispose of the natural wealth and resources of the territory occupied by them. Obviously this conception of the inalienable rights of peoples as such conflicts with the traditional doctrine that States are the exclusive subjects of international law. These rights of peoples as such were recognised in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, where the Declaration elaborates in detail the principle of equal rights and self-determination of peoples. In its Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa* (*Namibia*), the International Court of Justice treated the people of the Mandated Territory of South West Africa as having, in effect, rights at international law, including a right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligations to submit to the supervision of United Nations organs (see I.C.J. Reports, 1971, 16, at p. 56, where the Court referred to the people of the Territory as a " jural entity " and as an " injured entity ").

To sum up, it may be said:—(*a*) That under modern practice, the number of exceptional instances of individuals or non-State entities enjoying rights or becoming subject to duties directly under international law, has grown. (*b*) That the doctrinaire rigidity of the procedural convention precluding an individual from prosecuting a claim under international law except through the State of which he is a national, has been to some extent tempered. (*c*) That the interests of individuals, their

fundamental rights and freedoms, etc., have become a primary concern of international law.

These and other developments of recent years[1] appear to show that the theory that States are the exclusive subjects of international law cannot be accepted today as accurate in all respects, although it may be a good working generalisation for the practical international lawyer. The use of the State as a medium and screen for the application of international law cannot now do justice to all the far-reaching aims of the modern system.

Yet it is as wrong to minimise this traditional theory as artificially to explain away the developments that have subjected the theory to such strain. The bulk of international law consists of rules which bind States, and it is only in the minority of cases, although it is a substantial minority, that lawyers have to concern themselves with individuals and non-State entities as subjects of international law.

[1] One interesting development was the conclusion in February and November, 1965 of educational and cultural agreements between France and the Canadian province of Quebec, with provision for a supervisory France-Quebec Co-operation Commission. True, this was with the concurrence of the Canadian Government, but in the result a component of a Federation was brought within the range of international law. See Fitzgerald, *American Journal of International Law*, Vol. 60 (1966), pp. 529–531. A later development was the conclusion in September, 1969, of a Quebec-Louisiana Cultural Co-operation Agreement, i.e., between subdivisions of different Federations. As to the extent to which the Soviet Union Republics are subjects of international law, see *Soviet Year Book of International Law*, 1963, pp. 105 *et seq.*

Chapter 4

THE RELATION BETWEEN INTERNATIONAL LAW AND STATE LAW

1.—General

Nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to State law. A thorough acquaintance with this topic is of the utmost practical importance. Particularly is it of value in clarifying the law of treaties—perhaps the most important branch of international law, and one which impinges so frequently on the domain of State law.

Although this book aims only at stating the fundamentals of modern international law, it is desirable to give more than a merely elementary account of the relation between international law and State law. For this purpose, it is necessary to include some treatment of the theoretical aspects before dealing briefly with the practice observed by States at the present time. The importance of such theoretical analysis cannot be overrated, for numerous are the questions which come for opinion before an international lawyer, involving a nice consideration of the limits between international law and State law. Apart from the aspect of theory, there is the important practical problem of more immediate concern to municipal Courts, namely, to what extent may such Courts give effect within the municipal sphere to rules of international law, both where such rules are, and where they are not in conflict with municipal law. It is this problem which requires a consideration of the practice of States. Besides, in the international sphere, international tribunals may be called upon to determine the precise status and effect of a rule of municipal law, which is relied upon by one party to a case.

2.—Theories as to the Relation between International Law and State Law[1]

The two principal theories are known as *monism* and *dualism*. According to monism, international law and State law are concomitant aspects of the one system—law in general; according to dualism, they represent two entirely distinct legal systems, international law having an *intrinsically* different character from that of State law. Because a large number of domestic legal systems are involved, the dualist theory is sometimes known as the " pluralistic " theory, but it is believed that the term " dualism " is more exact and less confusing.

Dualism

Probably it is true to say that it would not have occurred to the earliest writers on international law (for example, Suarez) to doubt that a monistic construction of the two legal systems was alone correct, believing as they did that natural law conditioned the law of nations and the very existence of States. But in the nineteenth and twentieth centuries, partly as a result of philosophic doctrines (for example, of Hegel) emphasising the sovereignty of the State-will, and partly as a result of the rise in modern States of legislatures with complete internal legal sovereignty, there developed a strong trend towards the dualist view.

The chief exponents of dualism have been the modern positivist writers, Triepel[2] and Anzilotti.[3] For the positivists, with their consensual conception of international law, it was natural to regard State law as a distinct system. Thus, according to Triepel, there were two fundamental differences between the two systems:—(*a*) The subjects of State law are individuals, while the subjects of international law are States solely and exclusively. (*b*) Their juridical origins are different; the source of State law is the will of the State itself, the source of international law is the common will (*Gemeinwille*) *of States.*

[1] See generally on the subject, Kelsen, *Principles of International Law* (2nd edn., 1966), revised and edited by R. W. Tucker, pp. 553–588.

[2] See his *Völkerrecht und Landesrecht* (1899).

[3] See his *Corso di Diritto Internazionale*, Vol. I (3rd edition, 1928), pp. 43 *et seq.* See also above, pp. 25–26.

As to point (*a*), we have already shown in Chapter 3 above that it is far from correct, and that international law binds individuals and entities other than States. As to (*b*), the statement is somehow misleading; it begs the question to say that the alleged *Gemeinwille* is a source of international law, because the really important question is under what circumstances an expression of the *Gemeinwille* can become decisive. The natural inference is that over and above the *Gemeinwille* there are fundamental principles of international law, superior to it and indeed regulating its exercise or expression.

Anzilotti adopted a different approach; he distinguished international law and State law according to the fundamental principles by which each system is conditioned. In his view, State law is conditioned by the fundamental principle or norm that State legislation is to be obeyed, while international law is conditioned by the principle *pacta sunt servanda*, i.e., agreements between States are to be respected. Thus the two systems are entirely separate, and Anzilotti maintained further that they are so distinct that no conflicts between them are possible; there may be references (*renvois*) from one to the other, but nothing more. As to Anzilotti's theory, it is enough to say that for reasons already given,[1] it is incorrect to regard *pacta sunt servanda* as the underlying norm of international law; it is a partial illustration of a much wider principle lying at the root of international law.

Apart from the positivist writers, the theory of dualism has received support from certain non-positivist writers and jurists, and implicitly too from a number of Judges of municipal Courts.[2] The reasoning of this class of dualists differs from that of the positivist writers, since they look primarily to the empirical differences in the formal sources of the two systems, namely, that on the one hand, international law consists for the most part of customary and treaty rules, whereas municipal law, on the other hand, consists mainly of judge-made law and of Statutes passed by municipal legislatures.

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[1] See above, pp. 25–28.

[2] See, e.g., the passage in *Commercial and Estates Co. of Egypt* v. *Board of Trade* [1925] 1 K.B. 271, at 295.

Monism

Modern writers who favour the monistic construction endeavour for the most part to found their views upon a strictly scientific analysis of the internal structure of legal systems as such.

By contrast with the writers adopting dualism, such followers of monism regard all law as a single unity composed of binding legal rules, whether those rules are obligatory on States, on individuals, or on entities other than States. In their view, the science of law is a unified field of knowledge, and the decisive point is therefore whether or not international law is true law. Once it be accepted as a hypothesis that international law is a system of rules of a truly legal character, it is impossible according to Kelsen[1] and other monist writers to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Thus any construction other than monism, and in particular dualism, is bound to amount to a denial of the true legal character of international law. There cannot in the view of the monist writers be any escape from the position that the two systems, because they are both systems of legal rules, are interrelated parts of the one legal structure.

There are, however, other writers who favour monism for less abstract reasons, and who maintain, as a matter purely of practical appraisal, that international law and State law are both part of a universal body of legal rules binding all human beings collectively or singly. In other words, it is the individual who really lies at the root of the unity of all law.

Question of Primacy

Where does primacy reside, in international law or in State law? It is apparent from the attachment of dualistic theory to the sovereignty of the State-will that it ascribes primacy to State law.

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[1] Kelsen's monistic theory is founded on a philosophic approach towards knowledge in general. According to Kelsen, the unity of the science of law is a necessary deduction from human cognition and its unity.

On this point, the protagonists of monism are somewhat divided. Kelsen's answer, for instance, is to make a structural analysis of international law and State law. Here he applies his well-known " hierarchical " doctrine according to which legal rules are conditioned by other rules or principles from which they derive their validity and binding force; thus the rule laid down in regulations or statutory orders is conditioned by the superior rule laid down in a Statute, and it in its turn by the rule laid down in the Constitution, and so on.

> " Law has the peculiarity of governing its own creation; a rule of law determines how another rule will be laid down; in this sense the latter depends on the former; it is this bond of dependence which links together the different elements of the legal order, which constitutes its principle of unity ".

From principle to principle, and from rule to rule, legal analysis eventually reaches one supreme fundamental norm[1] which is the source and foundation of all law. Beyond this fundamental postulate, one which may be taken as conditioning both the validity and content of norms of lower degree in the hierarchy, the analytical jurist cannot venture, as the ultimate origins of law are determined by non-legal considerations.

Peculiarly enough, Kelsen takes the view that this fundamental postulate may belong either to international law or to State law. According to him, the thesis of the primacy of State law is perfectly legitimate, and he adopts this attitude for the reason that in his opinion the choice between either system cannot be decided, as in the natural sciences, in a strictly scientific way. In his own words[2]:—

> " It cannot be asserted, as in the natural sciences, that the preferable hypothesis is the one which embraces the greatest number of given facts. For, here, we are not dealing with materials, with perceptible realities, but with rules of law—data uncertain by their very nature ".

It has been objected against Kelsen's view of such an option

[1] As to which, see Kelsen, *Principles of International Law*, *op. cit.*, pp. 557–559, and his *Reine Rechtslehre* (1960), pp. 9 *et seq.*, and 80 *et seq.*

[2] Kelsen in *Hague Recueil* (1926), Vol. 14, pp. 313–4. Kelsen reaffirmed his position on this point in *The Principles of International Law* (1952) at pp. 446–447, and as recently as 1958, in *Makarov Festgabe. Abhandlungen zum Völkerrecht* (1958), at pp. 234–248. Cf. also his *Reine Rechtslehre* (1960) at pp. 328–343.

between international law and State law that his attitude is rooted in too sceptical a philosophic approach,[1] and that there are also fundamental difficulties which this view fails to resolve. For instance, there is the point that if international law were not the higher legal order, primacy would have to be attributed to over one hundred and more different and separate systems of State law, which would virtually amount to an affirmation of international anarchy. Moreover, the thesis of the ultimate primacy of State law breaks down in two crucial cases:—(*a*) If international law drew its validity only from a State Constitution, it would necessarily cease to be in force once the Constitution on which its authority rested, disappeared. But nothing is more certain than that the valid operation of international law is independent of change or abolition of Constitutions, or of revolutions. This was so declared by the London Conference of 1831 which decided that Belgium should be an independent and neutralised State. The Conference expressly upheld the fundamental principle that " treaties do not lose their force despite internal constitutional changes ". (*b*) The entry of new States into the international Society. It is well established that international law binds the new State without its consent, and such consent if expressed is merely declaratory of the true legal position.[2] Besides, there is a duty on every State to bring not only its laws, but also its Constitution, into harmony with international law.

It may be argued in favour of State primacy that States have the very widest liberties and exercise almost complete sovereignty. The answer to this argument is that State sovereignty represents no more than the competence, however wide, which States enjoy within the limits of international law. Here the analogy of a Federal State is useful. The individual member States of a Federation may enjoy a very wide measure of independence, but legal primacy none the less resides in the Federal Constitution.

This analogy of Federal States is important for one further

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[1] See Kunz, *Transactions of the Grotius Society* (1924), Vol. 10, pp. 115 *et seq.*

[2] See also above, pp. 27–28.

reason. Accepting the view that primacy belongs to international law, the question arises:—does this reside in international law as a whole, or only in a particular group of its rules and principles? The latter is the better view, and on the analogy of Federal Constitutions we are entitled to deduce that there is in a sense an international constitutional law which conditions both State law, and the remaining body of international law much in the same way as a constitutional instrument in a Federal State conditions both provincial law and the law under Federal Statutes and regulations made pursuant to the constitutional powers.

"Transformation" and "Specific Adoption" Theories

The above discussion would be incomplete without briefly referring to certain theories concerning the application of international law within the municipal sphere.

On the one hand, the positivists have put forward the view that the rules of international law cannot directly and *ex proprio vigore* be applied within the municipal sphere by State Courts or otherwise; in order to be so applied such rules must undergo a process of *specific adoption* by, or specific incorporation into, municipal law. Since, according to positivist theory, international law and State law constitute two strictly separate and structurally different systems, the former cannot impinge upon State law unless the latter, a logically complete system, allows its constitutional machinery to be used for that purpose. In the case of treaty rules, it is claimed that there must be a *transformation* of the treaty, and this transformation of the treaty into State law,[1] which is not merely a formal but a *substantive* requirement, *alone* validates the extension to individuals of the rules laid down in treaties.

These theories rest on the supposed consensual character of international law as contrasted with the non-consensual nature of State law. In particular, the *transformation* theory is based on an alleged difference between treaties on the one hand, and State laws or regulations on the other; according to the theory,

[1] E.g., by legislation approving the treaty, or implementing its provisions.

there is a difference between treaties which are of the nature of *promises*, and municipal Statutes which are of the nature of *commands*. It follows from this basic difference that a transformation from one type to the other is *formally* and *substantively* indispensable. Critics of the transformation theory have objected that this point is somewhat artificial. They maintain that if due regard be paid to the real function of provisions in treaties or in Statutes it will be seen that the one no more " promises " than the other " commands ". The real object of treaties and of Statutes—indeed their common ground—is to stipulate that certain situations of fact will involve certain determinate legal consequences. The distinction between promise and command is relevant to *form* and *procedure* but not to the true legal character of these instruments. It is therefore incorrect to consider that the transformation from one to the other is *materially* essential.

In answer to the transformation theory, the critics have put forward a theory of their own—*the delegation theory*. According to this theory there is *delegated* to each State Constitution by constitutional rules of international law, the right to determine when the provisions of a treaty or Convention are to come into force and the manner in which they are to be embodied in State law. The procedure and methods to be adopted for this purpose by the State are a continuation of the process begun with the conclusion of the treaty or Convention. There is no transformation, there is no fresh creation of rules or municipal law, but merely a prolongation of one single act of creation. The constitutional requirements of State law are thus merely part of a unitary mechanism for the creation of law.

Whatever be the ultimate merits of this theoretical controversy over the alleged necessity for a transformation or specific adoption of international law by municipal law, the actual practice of States concerning the application of international law within the municipal sphere must remain of critical importance. It is therefore proposed to pass to a consideration of such State practice, and then to derive therefrom any necessary conclusions relative to the matter.

3.—State Practice as to Operation of International Law within Municipal Sphere

The object of the present discussion is to ascertain in what manner and to what extent municipal Courts do apply a rule of international law. How far do they give effect to it automatically, and how far is some specific municipal measure of statutory or judicial incorporation required before that rule can be recognised as binding within the municipal sphere? A further question is, how far a rule of international law will be applied by a municipal Court if it actually conflicts with a rule of municipal law judge-made or statutory rule. The answers to these questions will be found to require distinctions to be made, on the one hand, between customary and treaty rules of international law; and on the other between statutory and judge-made municipal law.

British Practice

British practice draws a distinction between:—(i) customary rules of international law; (ii) rules laid down by treaties.

(i).—The rule as to customary international law according to the current of modern judicial authority is that customary rules of international law are deemed to be part of the law of the land, and will be applied as such by British municipal Courts, subject to two important qualifications:—

(*a*) That such rules are not inconsistent with British Statutes,[1] whether the Statute be earlier or later in date than the particular customary rule concerned.

(*b*) That once the scope of such customary rules has been determined by British Courts of final authority, all British Courts are thereafter bound by that determination, even though a divergent customary rule of international law later develops.[2]

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[1] See *Mortensen* v. *Peters* (1906), decision of the High Court of Justiciary of Scotland, 8 F. (Ct. of Sess.) 93, and *Polites* v. *The Commonwealth* (1945), decision of the High Court of Australia, 70 C.L.R. 60.

[2] See *Chung Chi Cheung* v. *R.*, [1939] A.C. 160, at p. 168, noting, however, *The Berlin*, [1914] P. 265, at p. 272.

These qualifications must be respected by British municipal Courts, notwithstanding that the result may be to override a rule of international law; the breach of such a rule is not a matter for the Courts, but concerns the Executive in the domain of its relations with foreign Powers.[1]

The rule as stated above is somewhat narrower than that which was formerly applicable. In the eighteenth century, by a doctrine known sometimes as the " Blackstonian " doctrine (because so affirmed by Blackstone) but more generally as the " incorporation " doctrine, customary international law was deemed automatically to be part of the common law and the two above-mentioned qualifications were not expressly formulated.[2] Thus Blackstone's statement of the doctrine was in these terms[3]:—

> " The law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, *and it is held to be a part of the law of the land* ".

This doctrine was favoured not only by Blackstone but also by Lord Mansfield and other Judges in the eighteenth century.[4]

During the nineteenth century it was reaffirmed in a succession of decisions by distinguished common law and equity Judges; in *Dolder* v. *Huntingfield* (1805) by Lord Eldon,[5] in *Wolff* v. *Oxholm* (1817) by Lord Ellenborough,[6] in *Novello* v. *Toogood* (1823) by Abbott, C.J.,[7] in *De Wutz* v. *Hendricks* (1824) by Best, C.J.,[8] and in *Emperor of Austria* v. *Day* (1861) by Stuart, V.-C.[9] In terms the Courts of law and equity stated that they would give effect to settled rules of international

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[1] See *Polites* v. *The Commonwealth*, *loc. cit.*

[2] These qualifications emerged presumably because of two nineteenth century developments:—(*a*) The crystallisation after 1830 of a rigid doctrine of the binding character of British judicial precedents. (*b*) The growth of the modern doctrine of parliamentary sovereignty in Great Britain.

[3] *Commentaries*, Vol. IV, at p. 55.

[4] For eighteenth century cases supporting the doctrine, see *Barbuit's Case* (1737), Cas. *temp.* Talb. 281; *Triquet* v. *Bath* (1764), 3 Burr. 1478, and *Heathfield* v. *Chilton* (1767), 4 Burr. 2015.

[5] 11 Ves. 283.

[6] 6 M. & S. 92, at pp. 100–6.

[7] 1 B. & C. 554.

[8] 2 Bing. 314.

[9] 30 L.J. Ch. 690, at p. 700.

law as part of English law. This did not mean, however, that they would enforce international law if it conflicted with an English Statute or judicial decision.

In 1876, in *R.* v. *Keyn* (*The Franconia*),[1] the Court for Crown Cases Reserved held by a majority that English Courts had no jurisdiction over crimes committed by foreigners within the maritime belt extending to three miles from the English coast, although it was claimed that such jurisdiction belonged to them under international law. This decision was nullified by Parliament passing the Territorial Waters Jurisdiction Act of 1878 to give English Courts jurisdiction in such circumstances, but the judicial opinions expressed in the case seemed to throw doubts on the scope of the incorporation doctrine. According to these, an English Court could not give any effect to rules of international law unless such rules were proved to have been adopted by Great Britain, in common with other nations, in a positive manner. Moreover if such rules conflicted with established principles of the English common law, an English Court was bound not to apply them. But in 1905, in the decision of *West Rand Gold Mining Co.* v. *R.*,[2] there was a partial return to the traditional "incorporation" doctrine, albeit the Court of Appeal in that case reaffirmed it in none too positive terms.

In a number of later pronouncements, the doctrine again received recognition, though in somewhat hesitant language, and with certain qualifications. Thus Lord Atkin declared in *Chung Chi Cheung* v. *R.*:—[3]

> "The Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, *so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunals*".

In addition to the qualifications stated by Lord Atkin, that a

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[1] 2 Ex. D. 63, at pp. 202 *et seq.*, and 270.

[2] [1905] 2 K.B. 391.

[3] [1939] A.C. 160, at p. 168. See also on the binding operation of Statutes, even if in contravention of international law, *Croft* v. *Dunphy*, [1933] A.C. 156, at pp. 163–4.

customary rule must not be inconsistent with Statutes or prior judicial decisions of final authority, it is also a condition precedent that the rule is one generally accepted by the international community.

> " It is a recognised prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilised nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice, and judicial decisions ".[1]

Moreover it is now clear that, contrary to certain dicta in *R.* v. *Keyn* (*The Franconia*), p. 86, *ante*, an English Court can in a proper case, if there are no established rules on a particular point, apply the unanimous opinion of jurists.[2] At the same time, many other judicial utterances still reflect an attitude rather hostile to the incorporation doctrine.

On one extreme view, which is reflected in certain judicial utterances in *R.* v. *Keyn* (*The Franconia*), *supra*, customary rules of international law could never be applied by British municipal Courts unless they had been embodied in a British Statute, but so far-reaching an opinion is contradicted by the whole current of recent authority. A more moderate view is that international law is not a part of British domestic law, but may be a " source " of rules applied by a British Court[3]; if, however, this meant that a British Judge were free to reject a generally recognised customary rule of international law, it would be contrary to authority.

Apart from the two qualifications to the rule as stated above, there are two important exceptions to the automatic applicability of customary international law by British municipal Courts:—

(1) Acts of State by the Executive, for example a declaration of war, or an annexation of territory, may not be questioned

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[1] *Per* Lord MacMillan, in *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at p. 497.

[2] *Re Piracy Jure Gentium*, [1934] A.C. 586.

[3] See *per* Dixon, J., in *Chow Hung Ching* v. *R.* (1949), 77 C.L.R. 449 at p. 477.

by British municipal Courts, notwithstanding that a breach of international law may have been involved.[1]

(2) British municipal Courts regard themselves as bound by a certificate or authoritative statement on behalf of the Executive (that is to say, the Crown) in regard to certain matters falling peculiarly within the Crown's prerogative powers, such as the *de jure* or *de facto* recognition of States and Governments, the sovereign nature of Governments, and the diplomatic status of persons claiming jurisdictional immunity on the grounds of diplomatic privilege, although such certificate or statement may be difficult to reconcile with existing rules of international law.[2]

Notwithstanding judicial doubts as to its scope, the incorporation doctrine has left its definite mark in two established rules recognised by British Courts:—

(*a*) A rule of construction. Acts of Parliament are to be interpreted so as not to conflict with international law. There is indeed a presumption that Parliament did not intend to commit a breach of international law.[3] But this rule of construction does not apply if the Statute is otherwise clear and unambiguous,[4] in which case it must be applied, although there is nothing to debar the Court from expressly ruling that the Statute is in breach of customary rules of international law.[5]

(*b*) A rule of evidence. International law need not, like foreign law, be proved as a fact by expert evidence or otherwise. The British Courts will take judicial notice of its rules, and may of their own volition refer to text-books and other sources for evidence thereof.[6]

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[1] See *Cook* v. *Sprigg*, [1899] A.C. 572, and W. Harrison Moore, *Act of State in English Law* (1906), pp. 78, 82, and pp. 132 *et seq.*

[2] See, e.g., *The Arantzazu Mendi*, [1939] A.C. 256, and *Engelke* v. *Musmann*, [1928] A.C. 433. See also pp. 161–163, *post*.

[3] *The Le Louis* (1817), 2 Dods. 210, at pp. 251 and 254; *Corocraft, Ltd.* v. *Pan American Airways*, [1969] 1 Q.B. 616; [1969] 1 All E.R. 82.

[4] See decision of House of Lords in *Collco Dealings Ltd.* v. *Inland Revenue Commissioners*, [1962] A.C. 1 at 19; [1961] 1 All E.R. 762 especially at 765, and decision of High Court of Australia in *Polites* v. *The Commonwealth* (1945), 70 C.L.R. 60. Cf. also *Mohammad Mohy-ud-Din* v. *King Emperor* (India) (1946), 8 F.C.R. 94, and *Theophile* v. *Solicitor-General*, [1950] A.C. 186 at p. 195.

[5] *Polites* v. *The Commonwealth*, *supra*.

[6] *Re Piracy Jure Gentium*, [1934] A.C. 586.

In the matter of giving effect to international law, the position of British Prize Courts is different from that of the Courts of common law and equity. Prize Courts are specifically appointed to apply international law, and according to the leading case of *The Zamora*[1] are not bound by an executive Order-in-Council which contravenes or purports to alter a rule of international law, although presumably they would be obliged to follow an Act of Parliament in breach of international law.

(ii).—The British practice as to treaties, as distinct from customary international law, is conditioned primarily by the constitutional principles governing the relations between the Executive (that is to say, the Crown) and Parliament. The negotiation, signature, and ratification of treaties are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval.

Hence it has become established that[2]:—

(*a*) Treaties which:—(1) affect the private rights of British subjects, or (2) involve any modification of the common or Statute law[3] by virtue of their provisions or otherwise,[4] or (3) require the vesting of additional powers in the Crown, or (4) impose additional financial obligations, direct or contingent, upon the Government of Great Britain, must receive

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[1] [1916] 2 A.C. 77, at pp. 91–94.

[2] Note the constitutional convention known as the "Ponsonby Rule", whereby treaties, subject to ratification, are tabled in both Houses of Parliament for a period of 21 days before the Government proceeds to ratification.

[3] An exception to (1) and (2) is the case of an agreement to admit a foreign armed force, conceding certain immunities from local jurisdiction to the members of the armed force; see *Chow Hung Ching* v. *R.* (1949), 77 C.L.R. 449, and below, pp. 269–273. A possible further exception is a treaty conceding immunities and privileges to the diplomatic and consular officers of a foreign State.

[4] E.g., a treaty or Convention signed by Great Britain binding it to pass certain legislation.

parliamentary assent through an enabling Act of Parliament, and, if necessary, any legislation to effect the requisite changes in the law must be passed.[1]

(*b*) Treaties made expressly subject to the approval of Parliament require its approval, which is usually given in the form of a Statute, though sometimes by Resolution.

(*c*) Treaties involving the cession of British territory require the approval of Parliament given by a Statute.

(*d*) No legislation is required for certain specific classes of treaties, namely, treaties modifying the belligerent rights of the Crown when engaged in maritime warfare[2] (presumably because such treaties involve no major intrusion on the legislative domain of Parliament), and administrative agreements of an informal character needing only signature, but not ratification, provided they do not involve any alteration of municipal law.

Where under the above-mentioned rules, a British treaty is required to be implemented by legislation, a mere general or vague allusion to the treaty in a Statute is not sufficient to constitute the necessary legislative implementation.[3]

It follows also that, where a Statute contains provisions which are unambiguously[4] inconsistent with those of an earlier treaty, a British municipal Court must apply the Statute in preference to the treaty. *Semble*, however, where the Statute is ambiguous, and its provisions have been conditioned by a previously concluded treaty, the Court may look at the treaty for the purpose of interpreting the ambiguous statutory language, notwithstanding that the Statute does not specifically incorporate or refer to the treaty.[5]

According to the decision of the House of Lords in

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[1] See *Walker* v. *Baird*, [1892] A.C. 491, at p. 497, *The Parlement Belge* (1879), 4 P.D. 129, and *A.-G. for Canada* v. *A.-G. for Ontario*, [1937] A.C. 326, at p. 347. Cf. *Francis* v. *R.* (1956), 3 D.L.R. (2d) 641.

[2] But not treaties increasing the rights of the Crown in that connection; cf. *The Zamora*, [1916] 2 A.C. 77.

[3] See *Republic of Italy* v. *Hambros Bank, Ltd.*, [1950] Ch. 314.

[4] See decision of House of Lords in *Collco Dealings, Ltd.* v. *Inland Revenue Commissioners*, [1962] A.C. 1; [1961] 1 All E.R. 762.

[5] *Salomon* v. *Customs and Excise Commissioners*, [1966] 2 All E.R. 340.

Ostime v. *Australian Mutual Provident Society*[1] where a treaty has been duly implemented by legislation, this enactment will prevail over conflicting earlier " unilateral " legislation.

American Practice

In the matter of customary rules of international law, the American practice is very similar to the British practice. Such rules are administered as part of the law of the land,[2] and Acts of the United States Congress are construed so as not to conflict therewith,[3] although a later clear Statute will prevail over earlier customary international law.[4] Also, an American Court is entitled to ascertain the rules of international law on a particular point by referring to text-books, State practice, and other sources.[5] Deference is, however, paid to the views of the Executive, as in the case of British Courts, to the extent that American municipal Courts regard themselves as bound by the certificates or " suggestions " of the Executive regarding such matters as the recognition of foreign States and Governments, and the territorial limits of a foreign country.

But so far as treaties are concerned, there is a radical difference from the British practice. The American practice does not depend like the British practice upon any reconciliation between the prerogative powers of the executive and the legislative domain of Parliament, but upon the provisions of the United States Constitution stipulating that treaties are " the supreme law of the land " (see Article VI, § 2), and upon a distinction drawn by American Courts between " self-executing " and " non-self-executing " treaties.[6] A self-

[1] [1960] A.C. 459 at 476; [1959] 3 All E.R. 245, at p. 248.

[2] *The Paquete Habana* (1900), 175 U.S. 677, at p. 700, and *U.S.* v. *Melekh* (1960), 190 F. Supp. 67. However, in *Pauling* v. *McElroy* (1958), 164 F. Supp. 390, a Federal Court refused to give effect to the principle of the freedom of the high seas in a suit brought by individuals to restrain the Government from detonating nuclear weapons in the Marshall Islands.

[3] *The Charming Betsy* (1804), 2 Cranch 64, at p. 118.

[4] *The Over the Top* (1925), 5 F. (2d) 838, at p. 842. *A fortiori*, the Courts will not give effect to a rule of international law which conflicts with the United States Constitution; see *Tag* v. *Rogers* (1959), 267 F. (2d) 664.

[5] *The Paquete Habana, loc. cit., supra.*

[6] See *Foster* v. *Neilson* (1829), 2 Peters 253, at p. 314.

executing treaty is one which does not in the view of American Courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.[1] If a treaty is within the terms of the Constitution, and it is self-executing within the meaning just referred to, then under the Constitution it is deemed to be operative as part of the law of the United States, and will prevail, also, over a customary rule of international law.[2] On the other hand, treaties which are not self-executing, but require legislation, are not binding upon American Courts until the necessary legislation is enacted.[3] This distinction involves some anomalies, and in 1952, Senator Bricker's proposed amendment to the Constitution included a provision to make all treaties, in effect, non-self-executing.

Generally recognised customary rules of international law, and self-executing treaties or Conventions ratified by the United States, are binding on American Courts, even if in conflict with previous American Statutes,[4] provided that there is no

[1] *Sei Fujii* v. *The State of California* (Supreme Court of California) (1952), 38 Cal. (2d) 718. In this case, the question was to what extent certain provisions of the United Nations Charter were self-executing. It was held that the human rights provisions of the Charter (Articles 55–56) were not self-executing, but that, *semble*, the provisions relative to the privileges and immunities of the United Nations (Articles 104–5) were. Note now *Pauling* v. *McElroy* (1958), 164 F. Supp. 390, where it was held that the Charter, and the Trusteeship Agreement for the Trust Territory of the Pacific Islands were not self-executing treaties.

[2] See *Tag* v. *Rogers* (1959), 267 F. (2d) 664, and Reiff, "The Enforcement of Multipartite Administrative Treaties in the United States", *American Journal of International Law* (1940), Vol. 34, pp. 661–679.

[3] Note also the constitutional distinction between "treaties" and "executive agreements" made by the President of the United States, the latter instruments not being subject to the requirement under Article II, § 2, of the Constitution, of concurrence of two-thirds of the Senate; see the United Nations publications, *Laws and Practices concerning the Conclusion of Treaties* (1953), at pp. 129–130.

[4] *Whitney* v. *Robertson* (1888), 124 U.S. 190, at p. 194. Cf. also *Iannone* v. *Radory Construction Corporation* (1955), 141 N.Y.S. (2d) 311. This rule does not apply to "executive agreements", which are invalid if they conflict with a substantive Federal enactment: see *Seery* v. *The United States* (1955), 127 F. Supp. 601. See, however, *Territory* v. *H.O.* (1957), 41 Hawaii Reports 565. As to the constitutional validity of legislation giving effect to an executive agreement, note *Kinsella* v. *Krueger* (1957), 354 U.S. 1. A treaty will prevail over an earlier Statute only if it contains a substantive inconsistency with the Statute; see *Bank Voor Handel en Scheepvaart N.V.* v. *Kennedy* (1961), 288 F. (2d) 375.

conflict with the United States Constitution.[1] But a Statute passed by Congress overrules previous treaties that have become the law of the land,[2] although there is a presumption that Congress did not intend to overrule such treaties, and unless the purpose of Congress to overrule international law has been clearly expressed, such abrogation or modification will not be deemed to have been carried out.[3]

Practice of States other than Great Britain and the United States

The practice of States other than Great Britain and the United States reveals wide variations both in the requirements of constitutional law, and in the attitudes of municipal Courts concerning the application therein of customary international law and of treaties.

So far as one can sum up this practice, and despite the hazard of generalisation on so complex a matter, the following propositions may be ventured:—

(1) In a large number of States, customary rules of international law are applied as part of internal law by municipal Courts, without the necessity for any specific act of incorporation, provided that there is no conflict with existing municipal law.

(2) Only a minority[4] of States follow a practice whereby, without the necessity for any specific act of incorporation, their municipal Courts apply customary rules of international law to the extent of allowing these to prevail in case of conflict with a municipal Statute or municipal judge-made law.

(3) There is no uniform practice concerning the application of treaties within the municipal sphere. Each country has its own particularities as regards promulgation or publication of treaties, legislative approval of treaty provisions, and so on.[5]

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[1] *Cherokee Tobacco Co.* v. *The United States* (1870), 11 Wall 616.

[2] See *Tag* v. *Rogers* (1959), 267 F. (2d) 664, and *Mercado* v. *Feliciano* (1958), 260 F. (2d) 500.

[3] *Cook* v. *The United States* (1933), 288 U.S. 102.

[4] Albeit, the minority is steadily growing.

[5] Note the curious case of Austria; treaties automatically bind the Administration without publication, but need to be gazetted in order to affect rights of the public in general. At the same time, purely departmental and administrative agreements are not usually published.

Moreover, certain treaties, such as informal administrative arrangements, are never submitted to the legislature. Also the Courts in some countries, for example the German Federal Republic, will, like American Courts, give effect to self-executing treaties, that is to say, those capable of application without the necessity of legislative implementation. In other countries, for example, Belgium, legislative enactment or legislative approval is necessary for almost all treaties, particularly those which affect the status of private citizens.[1] As to conflicts between the provisions of treaties and earlier or later Statutes, it is only in relatively few countries that the superiority of the treaty in this regard is established. France is a case in point, for if a treaty has been duly ratified in accordance with law, French tribunals, both judicial and administrative, will give effect to it, notwithstanding a conflict with internal legislation. But in most countries, for example, Norway, treaties do not *per se* operate to supersede State legislation or judge-made law. Exceptionally, however, there are some countries the Courts of which go so far as to give full force to treaties, even conflicting with the provisions of the Constitution of the country concerned.

(4) In general, there is discernible a considerable weight of State practice requiring that in a municipal Court, primary regard be paid to municipal law, irrespective of the applicability of rules of international law, and hence relegating the question of any breach of international law to the diplomatic domain.

Reference should be made in this connection to certain modern Constitutions, containing far-reaching provisions to the effect that international law shall be treated as an integral part of municipal law. A current example is Article 25 of the Basic Law for the Federal Republic of Germany (the West German Republic) which lays down that the general rules of international law shall form part of Federal law, and shall take precedence over the laws of and create rights and duties directly for the inhabitants of the Federal territory.[2] It has been

[1] See as to India, decision in *Biswambhar* v. *State of Orissa*, A. 1957, Orissa 247, and Basu *Commentaries on the Constitution of India* (1962), Vol. II, at p. 323.

[2] Cf. Article 4 of the German Republican Constitution of 1919, which provided that " the universally recognised rules of international law are valid as binding constituent parts of German Federal law ".

claimed that this and similar constitutional provisions reflect a growing tendency among States to acknowledge the supremacy of international law within the municipal sphere. Be that as it may, it is none the less curious that these constitutional provisions appear to support the positivist thesis that before international law can be applicable by municipal Courts some specific adoption by municipal law is required, since it is only in virtue of these provisions of municipal constitutional law that the rules of international law are valid and applicable within the municipal sphere. This reasoning may well be carried a stage further; even the Anglo-American judge-made doctrine that customary international law, subject to certain qualifications, forms part of the law of the land,[1] appears to be a doctrine of municipal law on the same plane as express municipal constitutional provisions of similar effect and to support the view that a specific municipal adoption of international law is required. Yet, admitting this, it must still be added that it is unlikely that when the British " incorporation " doctrine was first enunciated by British Courts in the eighteenth century, such Courts were purporting to declare a principle of municipal constitutional law rather than to acknowledge the validity as such of the law of nations.

In regard, however, to the application of treaties within the municipal sphere, the above survey of State practice does not support the thesis that some municipal *transformation* is required in every case before treaties become operative in the municipal field. The necessity for some formal municipal change appears to depend upon two matters principally:—

(1) The nature and provisions of the particular treaty concerned. Thus some treaties are self-operating or self-executing, and do not require any legislative implementation, as appears from the State practice considered above.

(2) The constitutional or administrative practice of each particular State (see above). Also, it frequently happens that certain States (an outstanding illustration is Austria) allow the execution of a treaty to proceed by administrative practice

[1] See above, pp. 84, and 91 in this Chapter.

alone without enacting laws or issuing regulations. In such a case, there is no structural transformation of the rules laid down in the treaty.

4.—International Tribunals and the Operation of Municipal Law

The fact that municipal Courts must pay primary regard to municipal law in the event of a conflict with international law, in no way affects the obligations of the State concerned to perform its international obligations. A municipal Court which defers to municipal law, notwithstanding an inconsistent rule of international law, itself acts in breach of international law, and will, as an organ of the State, engage the international responsibility of that State. Hence, before an international tribunal, a respondent State cannot plead that its municipal law (not even its Constitution[1]) contains rules which conflict with international law, nor can it plead the *absence* of any legislative provision or of a rule of internal law as a defence to a charge that it has broken international law. This point was well put in the course of proceedings in the *Finnish Ships Arbitration*[2]:—

> " As to the manner in which its municipal law is framed, the State has under international law, a complete liberty of action, and its municipal law is a domestic matter in which no other State is entitled to concern itself, *provided that the municipal law is such as to give effect to all the international obligations of the State* ".

This may even import a duty upon a State, in an appropriate case, to pass the necessary legislation to fulfil its international obligations.[3] To this extent, the primacy of international law is preserved.

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[1] See *Advisory Opinion on the Treatment of Polish Nationals in Danzig*, Pub. P.C.I.J. (1932), Series A/B, No. 44, at p. 24. Article 7 of the Constitution of El Salvador of 1950, laying down that the territory of the Republic included the adjacent waters to a distance of two hundred sea-miles from low water-line, was alleged by the United States in 1950 to be in breach of international law.

[2] See *United Nations Reports of International Arbitral Awards*, Vol. 3, p. 1484.

[3] *Advisory Opinion on the Exchange of Greek and Turkish Populations*, Pub. P.C.I.J. (1925), Series B, No. 10, at p. 20.

The same rule applies with regard to treaties. A State cannot plead that its domestic law exonerated it from performing obligations imposed by an international treaty, unless in giving its consent to the treaty, a fundamental rule of municipal law concerning constitutional competence to conclude the treaty concerned was broken, and this breach of municipal constitutional law was manifest.[1]

This overriding regard for international law before international tribunals does not mean that the rules of municipal law are irrelevant in cases before international tribunals. Frequently, on the threshold of the determination of some international claim, it is necessary for an international tribunal to ascertain or interpret or apply municipal law, for example, where it is claimed that a denial of justice by a municipal tribunal has taken place, or where a treaty provision, calling for interpretation, refers to municipal law,[2] or sometimes merely for the purpose of elucidating the facts. Again, international tribunals are often constrained to consider the municipal laws of States generally, to ascertain whether cumulatively they lead to the inference that a customary rule of international law has evolved.[3] Or it may be that for the purpose of assisting in the determination of a difficult point of international law, an international tribunal will have regard to municipal law or to the special characteristics of municipal legal institutions,[4]

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[1] Vienna Convention of May 22, 1969, on the Law of Treaties, Articles 27 and 46; and cf. *Advisory Opinion on the Jurisdiction of the Courts of Danzig*, Pub. P.C.I.J., Series B, No. 15, at pp. 26–27.

[2] The so-called " reference without reception " to municipal law.

[3] As in the *Lotus Case* (1927), Pub. P.C.I.J., Series A, No. 10.

[4] See *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, p. 3, where the International Court of Justice, in reaching the conclusion that, as a general rule, the national State of shareholders of a company was not entitled to espouse their claim for loss suffered as a result of an international wrong done to the company itself, had regard to the general position at municipal law that an infringement of a company's rights by outsiders did not involve liability towards the shareholders. See paragraph 50 of the judgment, where the Court said:— " If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort."

or in an appropriate case may have recourse to analogies drawn from municipal law.

In this connection, a close study of the pleadings and arguments in the cases decided by the Permanent Court of International Justice and its present successor, the International Court of Justice, shows how important a role municipal law played in each instance. Indeed, few were the cases in which these Courts reached a solution without the most minute examination of the municipal law relevant to the questions calling for determination, while one of the most striking aspects of the process by which both Courts arrived at their decisions was the manner in which, almost spontaneously, the issues of international law emerged and became disengaged from the mass of municipal legal material relied upon by the parties in the pleadings and in the oral proceedings.

5.—Concept of Opposability

The concept of opposability (French, *opposabilité*), which has come into current use in the field of international law,[1] is of some value where the relationship between international law and municipal law is concerned.

In a dispute before an international tribunal between two States, A and B, where State A relies upon some ground in support of its claim, State B may seek to invoke as against, i.e., " oppose " to State A some rule, institution, or régime under State B's domestic law in order to defeat the ground of claim set up by State A. As a general principle, if the domestic rule, institution, or régime is in accordance with international law, this may be legitimately " opposed " to State A in order to negate its ground of claim,[2] but if not in accordance with inter-

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[1] See *North Sea Continental Shelf Cases, Pleadings, Oral Arguments, Documents,* I.C.J. Vol. I (1968), Counter-Memorial of Denmark, pp. 176–177, and judgment of the International Court of Justice in the same Cases, I.C.J. Reports, 1969, 3, at p. 41; and cf. Bin Cheng, *Year Book of World Affairs,* 1966, at p. 247.

[2] E.g., the baselines method of delimitation of the territorial sea was successfully opposed by Norway to the United Kingdom's claim of free fishery rights in the waters concerned, in the *Fisheries Case,* I.C.J. Reports, 1951, 116. See also pp. 216–217, *post.*

national law, the domestic rule, institution, or régime may not be so " opposed ".[1]

The convenience of the concept of opposability lies in the fact that if a rule of domestic law is held to be non-opposable, this does not necessarily mean that the rule ceases to be valid in the domestic domain; and, in any event, as Kelsen has pointed out,[2] international law provides no procedure of invalidation, within the domestic framework, of a rule of municipal law. If the position be that the rule of domestic law, held to be non-opposable, is itself invalid by reference to the provisions of domestic constitutional law, then the rule is not opposable also to States other than the claimant State, unless perhaps such other States have expressly waived the constitutional invalidity of the rule.

Of course, a treaty rule may be opposable by one State to another State, in respect to the latter's ground of claim, in the same way as with a rule of domestic law, and similarly if the treaty rule is deemed to be non-opposable, it may none the less be validly opposable to certain States other than the claimant State.[3]

According to the Advisory Opinion of June 21, 1971, of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa* (*Namibia*),[4] even a determination of the United Nations Security Council, which correctly declares that a certain situation is illegal, may be opposable to all States, whether Members

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[1] E.g., in the *Nottebohm Case* (*second phase*), I.C.J. Reports, 1955, 4, Liechtenstein's grant of nationality to one, Nottebohm, was in effect deemed non-opposable to Guatemala, where Guatemala claimed that Liechtenstein was not entitled to espouse Nottebohm's complaint.

[2] Kelsen, *Pure Theory of Law* (2nd Edition, translated by Max Knight, 1967), p. 331.

[3] E.g., in the *North Sea Continental Shelf Cases,* I.C.J. Reports, 1969, 3, Article 6 of the Geneva Convention on the Continental Shelf of April 29, 1958, containing the equidistance rule for the delimitation of a continental shelf common to adjacent countries, was held not opposable to the German Federal Republic (*ibid.,* p. 41), which had not ratified the Convention, but in the event of a subsequent case involving a State which had ratified the Convention without reservation as to Article 6, this article would be opposable to such a State.

[4] I.C.J. Reports, 1971, 16, at p. 56.

or non-Members, that may seek to rely upon the legality of the situation. Thus, in the Court's opinion, the termination of South Africa's mandate over South West Africa, by reason of its refusal to submit to the supervision of United Nations organs, and the consequence that its presence in the territory was illegal, according to the terms of a Security Council Resolution of 1970, were opposable to all States in the sense of barring *erga omnes* the legality of South Africa's continued administration of the mandate.

PART 2

STATES AS SUBJECTS OF INTERNATIONAL LAW

CHAPTER 5

STATES IN GENERAL

1.—NATURE OF A STATE AT INTERNATIONAL LAW

As we have seen, States are the principal subjects of international law. Of the term "State" no exact definition is possible, but so far as modern conditions go, the essential characteristics of a State are well settled.

Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States (signed by the United States and certain Latin American Countries) enumerates these characteristics:—

> "The State as a person of international law should possess the following qualifications:—(*a*) a permanent population; (*b*) a defined territory; (*c*) a Government[1]; and (*d*) a capacity to enter into relations with other States".

As to (*b*), a fixed territory is not essential to the existence of a State,[2] although in fact all modern States are contained within territorial limits. Accordingly, alterations, whether by increase or decrease, in the extent of a particular State's territory, do not of themselves change the identity of that State.[3] Nor need the territory possess geographical unity;

[1] I.e., a Government to which the population renders habitual obedience The temporary exile of the Government while an aggressor State is in military occupation does not result in the disappearance of the State; cf. the cases of Governments-in-exile (e.g., Norway) during the Second World War, 1939–45.

[2] Thus, Israel was admitted as a Member State of the United Nations in May, 1949, notwithstanding that its boundaries were not then defined with precision, pending negotiations regarding demarcation.

[3] A current continuing problem is whether:—(*a*) the former German State has disappeared as a result of the present condition of partition of Germany, with two separate Governments; (b) the German Federal Republic (West Germany) is identical with that former State. For a book on the subject of the identity and continuity of States in general, see K. Marek, *Identity and Continuity of States in Public International Law* (1954).

it may consist of territorial areas, lacking connection, or distant from each other (e.g., the territory of Pakistan).

So far as international law is concerned, the qualification (*d*) is the most important. A State must have recognised capacity to maintain external relations with other States. This distinguishes States proper from lesser units such as Members of a Federation, or Protectorates, which do not manage their own foreign affairs, and are not recognised by other States as fully-fledged members of the international community.

The State is by no means necessarily identical with a particular race or nation, although such identity may exist.

As we have already pointed out,[1] Kelsen's conception of the State emphasises that it is purely a technical notion expressing the fact that a certain body of legal rules binds a certain group of individuals living within a defined territorial area; in other words, the State and the law are synonymous terms.[2] On closer analysis, it will be seen that this theory is a condensation of the four characteristics of a State, set out above, and, in particular, the existence of a legal system is involved in the very requirement of a Government as a component of Statehood, for as Locke said:—

> " a government without laws is . . . a mystery in politics, inconceivable to human capacity and inconsistent with human society."[3]

In this connection, an important point is whether the statehood of an entity depends upon that entity being itself legal, and as well possessing a legal system which is juridically valid. Is an illegal State a contradiction in terms? In *Madzimbamuto* v. *Lardner-Burke*,[4] the Judicial Committee of the Privy Council ruled that the Rhodesian regime created as a result of the unilateral declaration of independence of November 11, 1965,

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[1] See above, p. 63.

[2] See Kelsen, *Harvard Law Review* (1942), Vol. 55, at p. 65, where he trenchantly criticises the traditional notion of the " dualism " of the State and the law.

[3] Quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at p. 954; [1966] 2 All E.R. 536, at p. 577.

[4] [1969] 1 A.C. 645, at pp. 722–728.

and of subsequent Rhodesian legislation, was illegal, and that, notwithstanding the *de facto* authority exercised by the regime, the laws of that regime were illegal and void by virtue of nullifying legislation in the United Kingdom.[1] This raises the question whether an entity, such as Rhodesia after the unilateral declaration of independence, whose legal system is deemed to be void and inoperative, fails in effect to fulfil the third requirement of statehood, specified above, of possession of an effective Government. In fact in a Resolution adopted on November 17, 1970, the United Nations Security Council expressly urged all States " not to grant any form of recognition to the illegal regime in Southern Rhodesia ".[2]

" Micro-States "

A " micro-State " was defined by the Secretary-General of the United Nations in his Introduction to his Annual Report of the work of the Organisation, 1966–1967,[3] as an entity, " exceptionally small in area, population and human and economic resources ", but which has emerged as an independent State.[4] The corresponding term in the pre-war days of the League of Nations was a " Lilliputian State ". As the Secretary-General pointed out, even the smallest territories are entitled through the exercise of the right of self-determination to attain independence. However, there is necessarily a difference between independence, on the one hand, and the

[1] See, however, the dissenting judgement of Lord Pearce at pp. 731–745. The Appellate Division of the High Court of Rhodesia also decided *contra* in *R.* v. *Ndhlovu,* 1968 (4) S.A. 515, at pp. 532–535, holding, *inter alia,* that the Government in Rhodesia was the only lawful Government, and that effect should be given to the laws and Constitution adopted in Rhodesia, pursuant to which that Government was functioning.

[2] Cf. also the Resolution adopted by the United Nations General Assembly on November 17, 1966, implicitly upholding a duty upon Member States to recognise the former status of Rhodesia, and not to recognise the regime which had come into being after the unilateral declaration of independence.

[3] See Report, at p. 20.

[4] An illustration is Nauru, which attained independence on January 31, 1968; the area of the island is 8·25 square miles, and the indigenous population about 3,000 persons. Professor S. A. de Smith, who is by far the most eminent authority on administrative law in the United Kingdom, has written a valuable, insightful book on micro-States, with particular reference to the Pacific area, under the title *Microstates and Micronesia* (1970). For a monograph on the subject, see Dieter Ehrhardt, *Der Begriff des Mikrostaats im Völkerrecht und in der Internationalen Ordnung* (Aalen, West Germany, 1970).

right of full membership of international organisations, such as the United Nations, on the other. The obligations of membership of the United Nations may be too onerous for micro-States with their limited resources and population, while this might also weaken the United Nations itself.

There can be forms of association with the United Nations, short of full membership, conferring certain benefits without the burdens, and in the interests both of micro-States and of full member States, such as:—(*a*) a right of access to the International Court of Justice; (*b*) participation in an appropriate United Nations regional economic commission; (*c*) participation in certain of the specialised agencies, and in diplomatic conferences summoned to adopt international Conventions. Nor is there any valid objection to a micro-State maintaining a permanent observer mission to the United Nations, as distinct from a permanent mission proper. This does not exhaust the possibilities of involvement in the work of the United Nations and its specialised agencies, open to micro-States.[1]

Apart from the relationship of micro-States to international organisations, it seems that they may legitimately join with other States in forming regional groupings or associations, or in the establishment of a " Community " of a functional nature.

Is a micro-State none the less a State within the meaning of the definition considered at the beginning of the present Chapter? In principle, minuteness of territory and population, imposing practical limitations upon capacity to conduct external relations, do not constitute a bar to statehood.[2] The non-participation of a micro-State in the United Nations as a full member is conditioned by the express terms of Article 4 of the Charter, under which one requirement of admission is ability to carry out the obligations contained in the Charter, and

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[1] As to these possibilities of participation, see S. A. de Smith, *op. cit.*, pp. 10–14. Note also the status accorded to Nauru in 1968 of " special member " of the Commonwealth, giving it a right of participation in functional activities, and attendance at ministerial or official meetings on educational, health, and technical questions, but not Heads of Government Conferences.

[2] See Alain Coret, " L'Indépendence de l'Ile Nauru ", *Annuaire Français de Droit International*, 1968, pp. 178–188.

inability for other reasons to meet this condition might be an obstacle to the admission of a State of normal magnitude.

Doctrine of Basic Rights and Duties of States

Numerous writers have purported to formulate lists of so-called " basic " or " fundamental " rights and duties of States. Such formulations have also been a persistent preoccupation of international Conferences or international bodies; among them may be mentioned those of the American Institute of International Law in 1916, the Montevideo Convention of 1933 on the Rights and Duties of States, and the Draft Declaration on the Rights and Duties of States drawn up by the International Law Commission of the United Nations in 1949.[1] This latter Draft Declaration still remains a draft under study by Governments, and has failed to command general adoption.

The doctrine of basic rights and duties was favoured by certain of the naturalist writers,[2] being derived by them from the notion of the State as a creature of natural law; twentieth century formulations of the doctrine, especially those made in the Latin-American States, appear on the other hand to be directed towards the establishment of universal standards of law and justice in international relations, and this indeed seems to be the object of the Draft Declaration of 1949 (*supra*).

The basic *rights* most frequently stressed have been those of the independence and equality of States, of territorial jurisdiction, and of self-defence or self-preservation. The basic *duties* emphasised have been, among others, those of not resorting to war, of carrying out in good faith treaty obligations, and of not intervening in the affairs of other States.[3]

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[1] The rights listed by the Commission in the Draft Declaration included the rights of States to independence, to territorial jurisdiction, to equality in law with other States, and to self-defence against armed attack. The duties included those of not intervening in the affairs of other States, of not fomenting civil strife in other States, of observing human rights, of settling disputes peacefully, of not resorting to war as an instrument of national policy, and of carrying out in good faith obligations under treaties.

[2] See above, pp. 12 and 22–23.

[3] For a treatment of the question of basic rights and duties by a distinguished Russian jurist, see V. M. Koretsky, *Soviet Year Book of International Law*, 1958, pp. 74–92.

There are grounds for scepticism as to the utility of the doctrine. Certain of the rights and duties declared to be " basic " seem no more fundamental than other rights and duties not so formulated, or to be no more than restatements of truisms or axioms of international law (for example, the alleged basic duty to observe international law itself), or to be too sweepingly general to be accurate. Also, although sometimes international tribunals have invoked a certain basic right or duty in determining the rules governing the case before them,[1] it may seriously be questioned whether this was necessary for the purpose of their reaching a decision.[2]

Sovereignty and Independence of States

Normally a State is deemed to possess independence and " sovereignty " over its subjects and its affairs, and within its territorial limits. " Sovereignty " has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised States, few limits on State autonomy were acknowledged. At the present time there is hardly a State which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most States are members of the United Nations and the International Labour Organisation (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the *residuum* of power which it possesses within the confines laid down by international law. It is of interest to note that this conception resembles the doctrine of early writers on international law, who treated the State as subordinate to the law of nations, then identified as part of the wider " law of nature ".

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[1] See, e.g., the *Advisory Opinion relating to the Status of Eastern Carelia*, Pub. P.C.I.J. (1923) Series B, No. 5, at p. 27, where the Permanent Court of International Justice relied on the basic rights of States to independence and equality.

[2] For general critical discussion of the Draft Declaration of 1949 (p. 105, *ante*), see Kelsen, *American Journal of International Law* (1950), Vol. 44, pp. 259–276. As to *jus cogens*, see above, p. 59.

In a practical sense, sovereignty is also largely a matter of degree. Some States enjoy more power and independence than other States. This leads to the familiar distinction between independent or sovereign States, and non-independent or non-sovereign States or entities, for example, Protectorates and colonies. Even here it is difficult to draw the line, for although a State may have accepted important restrictions on its liberty of action, in other respects it may enjoy the widest possible freedom. "Sovereignty" is therefore a term of art rather than a legal expression capable of precise definition.

When we say that a particular State is independent, in a concrete way we attribute to that State a number of rights, powers, and privileges at international law. Correlative to these rights, etc., there are duties and obligations binding other States who enter into relations with it. These rights, etc., and the correlative duties are the very substance of State independence.

Examples of the rights, etc., associated with a State's independence are:—(*a*) the power exclusively to control its own domestic affairs; (*b*) the power to admit and expel aliens; (*c*) the privileges of its diplomatic envoys in other countries; (*d*) the sole jurisdiction over crimes committed within its territory.

Examples of the correlative duties or obligations binding States are:—(i) the duty not to perform acts of sovereignty on the territory of another State; (ii) the duty to abstain and prevent agents and subjects from committing acts constituting a violation of another State's independence or territorial supremacy; (iii) the duty not to intervene in the affairs of another State.

As to (i) it is, for instance, a breach of international law for a State to send its agents to the territory of another State to apprehend there persons accused of criminal offences against its laws. The same principle has been considered to apply even if the person irregularly arrested is charged with crimes against international law, such as crimes against the peace or crimes against humanity. Thus in June, 1960, the United Nations Security Council adopted the view that the clandestine

abduction from Argentina to Israel of Adolf Eichmann, a Nazi war criminal, to be tried by Israeli Courts, was an infringement of Argentina's sovereignty, and requested Israel to proceed to adequate reparation.[1]

It is not clear whether international law goes so far as to impose a duty on States to refrain from exercising jurisdiction over persons apprehended in violation of the territorial sovereignty of another State, or in breach of international law. State practice is conflicting in this regard, but in the *Savarkar Case* (1911),[2] the Permanent Court of Arbitration held that a country irregularly receiving back a fugitive is under no obligation to return the prisoner to the country where he had been apprehended. In the *Eichmann Case* (1961), the Jerusalem District Court held, in a decision affirmed on appeal, that it had jurisdiction to try Eichmann (see above) for crimes against humanity and other crimes, notwithstanding his irregular abduction to Israel from Argentina.[3]

The principle of respect for a State's territorial sovereignty is illustrated by the decision of the International Court of Justice in the *Corfu Channel Case* (*Merits*) (1949).[4] There the Court held that the British protective minesweeping operations in Albanian territorial waters in the Corfu Channel in November, 1946, three weeks after the damage to British destroyers and loss of life through mines in the Channel, were a violation of Albanian sovereignty, notwithstanding Albania's negligence or dilatoriness subsequent to the explosions.

An illustration of (ii) is the duty on a State to prevent within its borders political terrorist activities directed against foreign States. Such a duty was expressed in Article 4 of the Draft Declaration on the Rights and Duties of States,

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[1] By a subsequent settlement, the two countries regarded the incident as closed.

[2] See Scott, *The Hague Court Reports* (1916), 275. For American decisions, see *U.S.* v. *Insull* (1934), 8 F. Supp. 310, and *U.S.* v. *Sobell* (1957), 244 F. (2d) 520.

[3] For a discussion of the decisions of the French Courts in the *Argoud Case* (1963–4), where an alleged irregular seizure was held not to preclude jurisdiction, see A. Cocatre-Zilgien, *L'Affaire Argoud: Considérations sur les Arrestations internationalement irrégulières* (1965).

[4] I C.J. Reports (1949), 4 *et seq.*

prepared by the International Law Commission in 1949, and in wider and more general terms in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. On February 2, 1971, the duty was affirmed in Article 8 of the Convention to Prevent and Punish Acts of Terrorism approved by the General Assembly of the Organisation of American States (OAS). The subject had been raised as long ago as the year 1934 in connection with the assassination at Marseilles by Macedonian terrorists of the Yugoslav monarch—King Alexander. Yugoslavia formally accused the Hungarian Government before the League of Nations of tacitly conniving in the assassination inasmuch as it had knowingly allowed the major preparations for the deed to be carried out on Hungarian territory. In the course of the settlement of this dispute between the two nations, the League of Nations Council affirmed that two duties rested on every State:—(1) neither to encourage nor to tolerate on its territory any terrorist activity with a political purpose; (2) to do all in its power to prevent and repress terrorist acts of a political character, and for this purpose to lend its assistance to Governments which request it.[1]

The duty not to intervene in the affairs[2] of another State (see

[1] Arising out of this dispute, the League ultimately promoted the conclusion in November, 1937, of a Convention for the Repression of International Terrorism. This Convention did not, however, come into force. Cf. also in a similar connection:—(*a*) The Convention adopted in July, 1936, under League auspices, concerning the Use of Broadcasting in the Cause of Peace, under which the parties undertook to prohibit radio transmissions calculated to provoke the commission of acts affecting public safety in the territory of other States parties. (*b*) The Draft Convention on Freedom of Information sponsored by the United Nations.

[2] The duty extends both to internal and external affairs. This is recognised in Articles 1 and 3 of the Draft Declaration on the Rights and Duties of States adopted in 1949 by the United Nations International Law Commission, and by the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the United Nations Charter, adopted by the United Nations General Assembly in 1970, which proclaims certain principles as to non-intervention. This Declaration also treats as intervention an interference with a State's " inalienable right to choose its political, economic, social and cultural systems ". Cf. the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, and the Protection of their Independence and Sovereignty, adopted by the U.N. General Assembly, December 21, 1965.

(iii), above) requires some comment. International law generally forbids such intervention, which in this particular connection means something more than mere interference and much stronger than mediation or diplomatic suggestion. To fall within the terms of the prohibition, it must generally speaking be in opposition to the will of the particular State affected, and almost always, as Hyde points out,[1] serving by design or implication to impair the political independence of that State. Anything which falls short of this is strictly speaking not intervention within the meaning of the prohibition under international law. A notable historical example of dictatorial intervention—for which there was ostensible justification—was the joint *démarche* in 1895 by Russia, France and Germany, to force Japan to return to China the territory of Liaotung which she had extorted from the Chinese by the Treaty of Shimonoseki. As a result of this intervention, Japan was obliged to retrocede Liaotung to China, a fateful step which led ultimately to the Russo-Japanese War of 1904–5.

The imperious type of diplomatic intervention just described differs fundamentally from other more active kinds of interference in the internal or external affairs of another State, which are commonly grouped under the expression " intervention ", and which may go so far as to include military measures. It is possible to distinguish[2] three kinds of active, material intervention, which unlike the type first mentioned, do not have the character of a diplomatic *démarche*:—

(1) " *Internal* " *Intervention.*—An example is State A interfering between the disputing sections of State B, in favour either of the legitimate Government or of the insurgents.

(2) " *External* " *Intervention.*—An example is State A interfering in the relations—generally the hostile relations—of other States, as when Italy entered the Second World War on the side of Germany, and against Great Britain.

[1] Hyde, *International Law* (2nd Edition, 1947), Vol. I, § 69. It follows logically that where a State consents by treaty to another State exercising a right to intervene, this is not inconsistent with international law, as a general rule.

[2] Winfield, *The Foundations and the Future of International Law* (1941), at pp. 32–33.

(3) " *Punitive* " *Intervention.*—This is the case of a reprisal, short of war, for an injury suffered at the hands of another State; for example, a pacific blockade instituted against this State in retaliation for a gross breach of treaty.

The term " intervention " has also been used by some writers in the expression " subversive intervention ", to denote propaganda or other activity by one State with the intention of fomenting, for its own purposes, revolt or civil strife in another State. International law prohibits such subversive intervention.[1]

The following are, broadly expressed, the principal exceptional cases in which a State has at international law a legitimate right of intervention:—

(*a*) collective intervention[2] pursuant to the Charter of the United Nations;

(*b*) to protect the rights and interests, and the personal safety of its citizens abroad;

(*c*) self-defence,[3] if intervention is necessary to meet a danger of an actual armed attack;

(*d*) in the affairs of a Protectorate under its dominion;

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[1] See the Resolutions of the United Nations General Assembly on this subject, of November 3, 1947, of December 1, 1949, and of November 17, 1950, and note Article 2 (5) of the International Law Commission's revised Draft Code of Offences against the Peace and Security of Mankind, condemning " organised activities calculated to foment Civil Strife in another State ". The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, proclaims that " no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State ".

[2] This would be by enforcement action under the authority of the United Nations Security Council, pursuant to Chapter VII of the Charter, or any action sanctioned by the General Assembly under the Uniting for Peace Resolution of November 3, 1950 (see below, p. 603). Otherwise, the United Nations is prevented by Article 2, paragraph 7, of the Charter from intervening in matters " essentially within the domestic jurisdiction " of any State. *Semble*, the mere discussion by a United Nations organ of a matter on its agenda affecting the internal jurisdiction of any State is not an " intervention " in breach of this Article.

[3] As to which, see below, pp. 503–504. This would include collective self-defence by the parties to a mutual security treaty such as the North Atlantic Pact of April 4, 1949.

(*e*) if the State subject of the intervention has been guilty of a gross breach of international law in regard to the intervening State, for example, if it has itself unlawfully intervened.

States must subordinate the exercise of any such exceptional rights of intervention to their primary obligations under the United Nations Charter, so that except where the Charter permits it, intervention must not go so far as the threat or use of force against the territorial integrity or political independence of any State (see Article 2 paragraph 4).

Before the Spanish Civil War of 1936–1938, the principle was generally approved that revolution or civil war or other grave emergency in another State might be cause for intervention if the safety of the State desiring to intervene were affected by the conflict, or emergency, or if there were serious interference with the exercise by it of some rights which should be respected.[1]

How far this principle remains valid today, particularly in the light of a State's obligations under the United Nations Charter, is open to question. In 1936, the European Great Powers departed from the principle by agreeing not to intervene in the Spanish Civil War under any circumstances (even by certain kinds of trading with the contestants). Twenty years later, when in October–November, 1956, Great Britain and France did jointly intervene by force against Egypt in the Suez Canal zone, ostensibly in the Israeli–Egyptian conflict, under claim of a threat to their vital interests, the preponderant reaction of the rest of the world, as expressed in the United Nations General Assembly, was to condemn this action as *inter alia* a breach of the United Nations Charter. It was maintained that, as Egypt had not been guilty of any actual armed attack within the meaning of Article 51 of the Charter, recourse to an alleged right of collective self-defence was not justified. For a similar reason, namely, the absence of any actual armed attack, it has been claimed that the United States action in landing forces in Beirut in July, 1958, on the invitation

[1] Hyde, *op. cit.*, §§ 69 *et seq.*

of the President of Lebanon, to assist that country against an alleged threat of insurrection stimulated and assisted from outside, and to protect American lives and property, was not *stricto sensu* a measure of self-defence authorised by Article 51.[1]

The Beirut landing was, however, justified not only as an act of self-defence, but also on the ground that the legitimate Government of Lebanon had consented to the intervention. The general rule in this connection is that, in the case of strife, which is primarily internal, and particularly where the outcome is uncertain, the mere invitation by either faction to an outside State to intervene does not legalise an otherwise improper intervention. Inasmuch as it is claimed that subsequent events showed that the strife in Lebanon was purely of an internal character, the legality of the American intervention in Lebanon has been doubted.[2] An issue of a like nature arose in connection with the extensive United States military assistance given to South Vietnam, on the basis that the latter requested it, the justification among others being that South Vietnam was confronted with an insurrection directed and assisted from outside. There is current controversy over this justification, and, besides, the Vietnam problem is clouded over with some contentious questions turning on the true interpretation and application of the Geneva Agreements of July 20, 1954, which terminated the hostilities in Indo-China between France and the Viet Minh, and on the applicability of the South-East Asia Collective Defence Treaty (SEATO), signed at Manila on September 8, 1954. Another point is whether the United States and other countries that were involved in assistance to South Vietnam were acting by way of collective self-defence under Article 51 of the United Nations Charter; there is difficulty in seeing how this article can apply.

The Vietnam conflict, and the closely related affair in April–May 1970 of the incursion of American forces into Cambodia

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[1] For reasons similar to those alleged in the case of Lebanon, British troops were landed in Jordan upon the invitation of the Government of that country, shortly after the Beirut landing.

[2] Moreover, the reports of the United Nations Observation Group in Lebanon did not support any theory of outside intervention on a large scale.

(Khmer Republic) for the proclaimed purpose of destroying North Vietnamese and Vietcong military sanctuaries, have served to bring into focus some of the uncertainties in the existing rules of international law as to intervention. A root difficulty lies in the word " intervention " itself which, irrespective of whether the case be one of a purely internal strife staked upon gaining control over a whole people, or be, on the other hand, an insurrection guided and supported from outside, is inapt to describe military collaboration between an external power and the legitimate Government at the express invitation of, or with the implied consent of that Government. The word " involvement " seems more appropriate for such collaboration, and ideally there should be revised rules, dispensing with the term " intervention " and setting the limits within which involvement is permissible, if at all. But in the absence of a revision of the relevant rules of the United Nations Charter, such a reformulation of the law of intervention is a remote possibility.

Monroe Doctrine

The history of the American Monroe Doctrine throws some light on the political, as distinct from the legal aspects of intervention. As originally announced by President Monroe in a Message to Congress in 1823, it contained three branches:— (1) a declaration that the American Continent would no longer be a subject for future colonisation by a European Power; (2) a declaration of absence of interest in European wars or European affairs; (3) a declaration that any attempt by the European Powers " to extend their system " to any portion of the American Continent would be regarded as " dangerous " to the " peace and safety " of the United States.[1] The third branch was the most important, and by a paradoxical development it came by the end of the nineteenth century to

[1] Branch (1) of the Monroe Doctrine arose out of the fact that Russia had obtained territory in the North-West of the American Continent and laid claims to the Pacific Coast. Branch (3) was directed against any intervention on the part of the principal European Powers (the Triple Alliance) to restore the authority of Spain over the rebellious colonies in Latin America which had secured independence and recognition by the United States.

attract a claim by the United States, enforced on several occasions, to intervene in any part of the American Continent subject to a threat of interference from a European Power, or wherever in such Continent vital interests of the United States were endangered. Thus a doctrine originally directed against intervention was converted into a theory justifying intervention by the State which had first sponsored the doctrine. After the First World War, however, America's " good neighbour " policy towards other American States brought the Monroe Doctrine closer to its former objectives of 1823. And now by reason of recent inter-American regional security arrangements, it might seem as if the Monroe Doctrine regarded as an affirmation of the solidarity of the American Continent, has been transformed from a unilateral declaration[1] into a collective understanding of the American Powers.[2] Possibly, to this extent, the League of Nations Covenant in Article 21 may now be regarded as correct in referring to the doctrine as a " regional understanding ". But the Monroe Doctrine has not been completely multilateralised. To some extent, it still retains its unilateral significance for the United States Government, as indicated by the American " quarantine " or " selective " blockade of Cuba in October, 1962, in order to forestall the further construction of, or reinforcement of missile bases on Cuban territory, and by the landing of United States units in the Dominican Republic in April, 1965, to protect American lives and to ensure that no Communist Government was established in the Republic.

Sometimes by treaty, a State expressly excludes itself from intervention; cf. Article 4 of the Treaty of 1929 between Italy and the Holy See:—

> " The sovereignty and exclusive jurisdiction over the Vatican City which Italy recognises as appertaining to the Holy See

[1] In 1923, Secretary of State Hughes referred to the Monroe Doctrine as being " distinctively the policy of the United States ", and of which the United States " reserves to itself its definition, interpretation, and application ".

[2] This development can be traced through the Act of Chapultepec, 1945, the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro, 1947, and the Bogotá Charter of the Organisation of American States, 1948, under which, *inter alia*, a threat to the independence and security of any one American State is regarded as a threat against all.

precludes any intervention therein on the part of the Italian Government . . ."

Doctrine of the Equality of States

The doctrine of the equality of States was espoused early in the modern history of international law by those writers who attached importance to a relationship between the law of nations and the law of nature. This is reflected in the following passage, for example, from Christian Wolff's major work[1]:—

> " By nature all nations are equal the one to the other. For nations are considered as individual free persons living in a state of nature. Therefore, since by nature all men are equal, all nations too are by nature equal the one to the other."

That the doctrine of equality subsists today with added strength, but with some change of emphasis is shown by its reaffirmation and definition under the heading, " The principle of sovereign equality of States ", in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. The Declaration proclaimed the following principle:— " All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature." In the Charter of the United Nations, drawn up at San Francisco in 1945, there is of course express recognition of the doctrine. Article 1 speaks of " respect for the principle of equal rights ", and Article 2 says that the Organisation " is based on the principle of the sovereign equality of all its Members ". From the doctrine of equality, stems the duty upon States, expressed in certain treaties[2], and found in the law concerning resident aliens, not to discriminate in favour of their own citizens as against the citizens of another State.

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[1] *Jus gentium methodo scientifica pertractatum* (1749), Prolegomena, § 16.

[2] See, e.g. Article 7 of the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, of April 29, 1958.

The doctrine imports not merely equality at law, but also the capacity for equal legal rights and equal legal duties. The results of the doctrine are seen particularly in the law and practice as to multilateral treaties where generally the rule has prevailed that unanimity is necessary for the adoption of these instruments by States in Conference. This necessity for unanimity rather hampered the progress of international legislation. Frequently small States were able to hold up important advances in international affairs by selfish obstruction under the shelter of the unanimity rule. To quote one authority[1]:—

> " The unanimity rule, conceived as the safeguard of the minority, has, through exaggerating the doctrine of equality, become an instrument of tyranny against the majority ".

But the recent trend is towards decisions and voting by a majority, instead of unanimously. This is particularly reflected in voting procedures in the United Nations, the International Labour Organisation, and other bodies.[2]

Another alleged consequence of the principle of equality is that, in the absence of a treaty, no State can claim jurisdiction over, or in respect of another sovereign State.[3] A more far-reaching proposition is that the Courts of one State cannot question the validity or legality of the acts of State of another sovereign country or of its agents, and that such questioning must be done, if at all, through the diplomatic channel; this is the so-called " Act of State " doctrine, but it cannot be said to be yet part of international law. The Courts of particular countries may apply an " Act of State " doctrine under their own municipal law system, or on grounds of domestic law or practice (e.g., the consideration that the executive should not be embarrassed in the diplomatic sphere) refrain from ruling that an act of State of a recognised foreign sovereign country is

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[1] Politis, *Les Nouvelles Tendances du Droit International* (1927), at p. 28.

[2] See below, at pp. 600, 607–609 and 624.

[3] *Semble*, this is rather an illustration of the sovereignty and autonomy of States than of the principle of equality; see Kelsen, *General Theory of Law and State* (1961 Edition), at p. 253.

invalid,[1] but this is not because of any mandatory principles of international law requiring them so to proceed. In any event, State Courts remain free in accordance with the rules of their own municipal legal system to hold or abstain from holding that a foreign act of State is invalid because in conflict with international law.

There is indeed no general principle of international law obliging States to give effect to the administrative acts of other States. This is clearly illustrated by the prevailing " nationalistic " system of patents, under which, subject to exceptions, patents are granted solely on a domestic national basis, without any general obligation to recognise a foreign grant.

Side by side with the principle of equality, there are however *de facto* inequalities which are perforce recognised. For example, the five great powers, the United States, the Soviet Union, the United Kingdom, France, and China are the sole permanent members of the United Nations Security Council, and may " veto " decisions of the Council on non-procedural questions (see article 27 of the United Nations Charter).[2] Moreover, there is the distinction between developed and less-developed countries, expressly recognised in the new Part IV of the General Agreement on Tariffs and Trade of October 30, 1947 (GATT), added by the Protocol of February 8, 1965 (see the new articles 37–38). Then, as mentioned in the early part of this Chapter,[3] micro-States, with their limited resources and small population have had to be treated as incapable of

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[1] See, e.g., decision of the U.S. Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino* (1964), 376 U.S. 398 (validity of Cuban sugar expropriation decrees, alleged to be in violation of international law, could not be questioned). The effect of the decision was restricted by the Hickenlooper Amendment (Foreign Assistance Act of 1965, re-enacting with amendments the Foreign Assistance Act of 1964). Subsequently, the amendment was construed narrowly as applying only to cases in which property was nationalised abroad, contrary to international law, and the property or its traceable proceeds came to the United States; see *Banco Nacional de Cuba* v. *First National City Bank of New York* (1970), 431 F. (2d) 394, following and applying *Sabbatino's Case*. Cf. to a similar effect, *French* v. *Banco Nacional de Cuba* (1968), 295 N.Y.S. (2d) 433 (although a stringent Cuban currency control order constituted an act of State, its effect was outside the Amendment).

[2] See below, pp. 607–609. There are other somewhat similar cases in the membership of the " executive " organs of other international organisations.

[3] See p. 104, *ante*.

coping with the full burdens of United Nations membership. An entity which cannot be received as a plenary Member State of the United Nations is not in a practical sense one which has equal rights with a State actually admitted as a Member.

The line between, on the one hand, equality of States, and, on the other hand, their independence, tends to become blurred. Thus it is maintained that the right of a State freely to choose and develop its political, social, economic, and cultural systems appertains to equality,[1] but *stricto sensu* this right is merely an expression of a State's independence.

Rules of Neighbourly Intercourse between States

There is one important qualification on the absolute independence and equality of States, which has found expression in the recent decisions of international Courts and to some extent in the resolutions of international institutions. It is the principle, corresponding possibly to the municipal law prohibition of " abuse of rights ", that a State should not permit the use of its territory for purposes injurious to the interests of other States. Thus in the United Nations deliberations on the situation in Greece (1946–1949), it was implicitly recognised that, whatever the true facts might be, Greece's neighbours, Albania, Yugoslavia and Bulgaria were under a duty to prevent their territory being used for hostile expeditions against the Greek Government.[2] Similarly, the *Trail Smelter Arbitration Case* of 1941[3] recognised the principle that a State is under a duty to prevent its territory from being a source

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[1] See the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, where this right is stated to be one of the elements of the sovereign equality of States. The Declaration also affirms that the duty to respect the personality of other States is an element of equality, although such duty seems to be more concerned with preserving the independence of States.

[2] Cf. Article 4 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission of the United Nations, providing for a duty upon every State " to refrain from fomenting civil strife in the territory of another State, and to prevent the organisation within its territory of activities calculated to foment such civil strife ".

[3] *United Nations Reports of International Arbitral Awards*; Vol. III, 1905.

of economic injury to neighbouring territory, e.g., by the escape of noxious fumes. Another illustration is the *Corfu Channel Case* (*Merits*) (1949),[1] in which the International Court of Justice held that once the Albanian Government knew of the existence of a minefield in its territorial waters in the Corfu Channel, it was its duty to notify shipping and to warn approaching British naval vessels of the imminent danger, and therefore it was liable to pay compensation to the British Government for damage to ships and loss of life caused through exploding mines. The Court stated that it was a " general well-recognised principle " that every State is under an obligation " not to allow knowingly its territory to be used for acts contrary to the rights of other States ".

In Article 74 of the United Nations Charter, the general principle of " good-neighbourliness " in social, economic, and commercial matters, is laid down as one which Member States must follow in regard to both their metropolitan and their dependent territories.

The principle of neighbourly obligations between States also underlies the United Nations General Assembly Resolution of November 3, 1947, condemning propaganda designed or likely to provoke or encourage threats to the peace, breaches of the peace, or acts of aggression.

Opinions differ not over the existence of the principle, but as to the limits of its application, and in particular in regard to the duties of States to provide safeguards in the use by them of nuclear materials, while also it is questioned whether a State devaluating or " freezing " its currency can be under any liability for damage thereby caused to other States.

Peaceful Co-existence

Closely associated with the principle of neighbourly obligations between States is the recently developed concept of "peaceful co-existence ". Five principles of peaceful co-existence were expressly agreed to by India and the People's Republic of China in the Preamble to the Treaty on Tibet signed at

[1] I.C.J. Reports (1949), 4 *et seq.*

Peking on April 29, 1954. These were:—(1) Mutual respect for each other's territorial integrity and sovereignty. (2) Mutual non-aggression. (3) Mutual non-interference in each other's affairs. (4) Equality and mutual benefit. (5) Peaceful co-existence. Subsequently, the doctrine of peaceful co-existence was referred to, or found expression in other treaties, and in numerous international declarations, such as the Declaration adopted by the United Nations General Assembly on December 14, 1957, and the Final Communiqué of the Afro-Asian Conference at Bandung, Indonesia, in April, 1955, which adopted ten principles on the subject.[1] There is also a rapidly growing literature on the concept of peaceful co-existence, and its precise place in international law.[2]

Unfortunately, writers and publicists appear to disagree as to the areas embraced by, and the limits of, the doctrine. Some would restrict the concept of peaceful co-existence to rules or principles ensuring that States belonging to different political or economic systems should respect each other's sovereignty, and should not seek to impose their system or ideas upon other States. Others would extend the concept to cover the subjects of disarmament, and self-determination, and even so far as to include duties of active co-operation in economic, cultural, and other fields. In any event, most of the principles which, it is said, should be proclaimed as norms of peaceful co-existence, are by no means novel, and seem to be expressed or implied already in the Charter of the United Nations, and in the Constitutions of other international organisations. Probably, the true value of the concept of peaceful co-existence lies in stressing the precise application of the rules in the Charter and in these Constitutions to an international community

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[1] See also the Statement of Neutrality by Laos on July 9, 1962, whereby it bound itself to apply " resolutely " the five principles of peaceful co-existence, and cf. article III of the Charter of the Organisation of African Unity, Addis Ababa, May, 1963.

[2] For useful bibliography, see *Report* of the Forty-ninth Conference at Hamburg of the International Law Association, 1960 at pp. 368–370. See in addition, Vallat, *Year Book of World Affairs*, 1964, pp. 249–258, Professor G. I. Tunkin's *Droit International Public: Problèmes Théoriques* (tr. from Russian, 1965), pp. 51–55, and Rosalyn Higgins, *Conflict of Interests* (1965), Part 3.

divided, as it is at present, into hostile blocs, and, if so, to formalise and codify the principles involved would mitigate tensions, even if not much was added to the terms of the Charter.[1]

2.—The Different Kinds of States and Non-State Entities

The position of States at international law often varies, and it is therefore necessary briefly to consider certain special cases which arise. There may also, equally briefly, be examined in this connection the cases of certain non-State entities, subjects of international law. Mention may be made of an intermediate class of what may be described as State-like entities, or collectivities (*collectivités étatiques*); perhaps, the Holy See and the Principality of Monaco[2] may be regarded as falling within this category.

Federal States and Confederations

A Confederation (*Staatenbund*) is constituted by a number of independent States bound together by an international treaty or compact into a Union with organs of Government extending over the member States and set up for the purpose of maintaining the external and internal independence of all. The Confederation is not a State at international law, the individual States maintaining their international position.

A Federal State is, however, a real State at international law, the essential difference between it and the Confederation being that Federal organs have direct power not only over the member States, but over the citizens of these States. In most Federal States, external policy is conducted by the Federal Government, but historically there have been exceptions to this rule. For example, the member States of the pre-1914

[1] In this connection reference should be made to the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, and in particular the principles proclaimed under the heading " The duty of States to co-operate with one another in accordance with the Charter ".

[2] On the international status of Monaco, see Jean-Pierre Gallois, *Le Régime International de la Principauté de Monaco* (Paris, 1964).

Federal Germany were to some extent States at international law; they could conclude treaties, appoint and receive envoys, etc., and questions of law affecting their relations were decided according to international law.

Protected and Vassal States and Protectorates

A vassal State is one which is completely under the suzerainty of another State.[1] Internationally its independence is so restricted as scarcely to exist at all.

The case of a Protectorate or a protected State arises in practice when a State puts itself by treaty under the protection of a strong and powerful State, so that the conduct of its most important international business and decisions on high policy are left to the protecting State.

Protectorates are not based on a uniform pattern. Each case depends on its special circumstances and more specifically on:—

(*a*) the particular terms of the treaty of protection;[2]

(*b*) the conditions under which the Protectorate is recognised by third Powers as against whom it is intended to rely on the treaty of protection.[3]

Although not completely independent, a protected State may enjoy a sufficient measure of sovereignty to claim jurisdictional immunities in the territory of another State (*per* Lord Finlay in *Duff Development Co.* v. *Kelantan Government*[4]). It may also still remain a State under international law.[5]

Condominium

A condominium exists when over a particular territory joint dominion is exercised by two or more external Powers. An

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[1] Vassalage is an institution that has now fallen into desuetude.

[2] *The Ionian Ships* (1855), Spinks 2, 193; Ecc. & Adm. 212.

[3] Advisory Opinion of the Permanent Court of International Justice on the *Nationality Decrees in Tunis and Morocco*, Pub. P.C.I.J. (1923), Series B, No. 4, at p. 27.

[4] [1924] A.C. 797, at p. 814. This is one of the most important distinctions between a protected State and a vassal; cf. *The Charkieh* (1873), L.R. 4, A. & E. 59.

[5] See *Case Concerning Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports (1952), 176.

example is the New Hebrides, in which the division of power is of some complexity, with some functions assigned to the joint administration, others residing in each of the national authorities (United Kingdom and France), subject to appropriate delegations of jurisdiction.

In a condominium, while the authority exercised over the population is a joint sovereignty, each of the jointly governing States in principle has separate jurisdiction over its own respective subjects.[1]

Members of the Commonwealth

The position of Members of the Commonwealth, the former British Commonwealth of Nations, has always been *sui generis*. It is only since the Second World War that they have finally completed a long process of emancipation, beginning as dependent colonies, next acquiring the status of self-governing colonies under the nineteenth century system of responsible government, and then as Dominions moving towards the final goal of statehood. So it is that since 1948 even the name and style of " Dominions " had to be discarded.

The Member States of the Commonwealth are now fully sovereign States in every sense. In the field of external affairs autonomy is unlimited; Members enjoy and exercise extensively the rights of separate legation and of independent negotiation of treaties. They are capable of being subjects of international disputes and of conflicts as between themselves. They may be separately and individually belligerents or neutrals. They have in fact concluded treaties with each other (cf. the " Anzac Pact " of 1944 between Australia and New Zealand). A marked development of the past seven years has been the gradual supersession of *inter se* Commonwealth rules by the application of international law itself to practically all the

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[1] *Division into Separate Zones:* Contrast with a condominium, a case of joint authority, the division of a territory or entity into two or more separate zones, each under the authority of a different State. Thus under the Memorandum of Understanding of October 5, 1954, signed in London by Great Britain, the United States, Italy, and Yugoslavia, the Free Territory of Trieste was divided into a Western and an Eastern Zone under the interim administration of Italy and Yugoslavia respectively.

relations between member States. Hence, also, the position of High Commissioners representing one member State in the territory of another has been assimilated to that of diplomatic envoys (cf. the British Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952).

As for the Commonwealth itself, it is of course neither a Super-State nor a Federation, but simply a multi-racial association of free and equal States who value this association, who support the United Nations, who follow common principles of non-discrimination as to colour, race, and creed, who recognise for the purpose of their association, although some of them be republics, that the British Sovereign is head of the Commonwealth, and who, subject to exceptions, have somewhat similar institutions and traditions of government. The Commonwealth possesses a secretariat, yet the association is, to use an appropriate description given by one Commonwealth statesman,[1] " functional and occasional ". Although it is sought through periodical Heads of Government Conferences, and latterly by Conferences of Chief Justices and Law Officers, to follow a common policy, differences of approach or of opinion are not excluded and may run a wide gamut (as in 1956, over the Anglo-French intervention in the Suez Canal zone, in 1962 and 1971 concerning the proposed terms of the United Kingdom's entry into the European Economic Community, in 1966 over the Rhodesian issue, and in 1971 over the question of the supply of arms by the United Kingdom to South Africa for joint defence of Indian Ocean sea routes). In ultimate analysis, the Commonwealth is held together by a web of mixed tangible and intangible advantages, that have evolved pragmatically, and are difficult to express in terms of legal relationships.

The Declaration adopted on January 22, 1971, by the Commonwealth Heads of Government Conference at Singapore contained some pertinent statements as to the nature and purposes of the Commonwealth, which was defined as " a voluntary association of independent sovereign States, each responsible for its own policies, consulting and co-operating

[1] Sir Robert Menzies.

in the common interests of their peoples and in the promotion of international understanding and world peace". The Declaration also affirmed that "membership of the Commonwealth is compatible with the freedom of member Governments to be non-aligned or to belong to any other grouping, association or alliance". Emphasis was placed on the aspect of consultation; the Commonwealth was declared to be "based on consultation, discussion and co-operation", and to provide "many channels for continuing exchanges of knowledge and views on professional, cultural, economic, legal and political issues among member States".

Trust Territories

Under the former League of Nations Covenant, there was initiated in 1919–1920 the experiment of mandated territories. These were former enemy territories which could not stand on their own feet, i.e., could not take their place in the international community without the support and guidance of a guardian Power. Accordingly, such territories were given under "mandate" to responsible States to be administered subject to the supervision and ultimate authority of the League of Nations, which in each case settled the terms of the mandate to be observed by the tutelary Power.

The Charter of the United Nations Organisation drawn up at San Francisco in 1945 introduced a new system of "trust territories" as a logical extension of the former mandates system. This trusteeship system was applicable to:—(i) the former mandated territories; (ii) territories taken from enemy States as a result of the Second World War; (iii) territories voluntarily placed under the trusteeship system by States responsible for their administration.[1]

The League mandates system was wound up in 1946 after the entry into force of the United Nations Charter, and in the expectation that the territories subject to mandate would be

[1] For discussion of the trusteeship system, and for comparison with the League of Nations mandates system, see generally Duncan Hall, *Mandates, Dependencies, and Trusteeship* (1948). For analysis of certain legal aspects of the system, see Sayre, "Legal Problems Arising from the United Nations Trusteeship System", *American Journal of International Law* (1948), Vol. 42, at pp. 263 *et seq.*

voluntarily placed under the trusteeship system by the Mandatory Powers. Accordingly no actual transfer of the territories to the United Nations took place, the majority of the Mandatory Powers having expressed an intention to bring these territories under the trusteeship provisions of the Charter. A curious position arose, however, with reference to the Mandated Territory of South West Africa, of which the Union of South Africa was Mandatory Power. South Africa did not follow the example of all other Allied Mandatory Powers, and refused to allow South West Africa to become a trust territory, and declined, further, to recognise the supervisory authority of the United Nations. The questions of the status of the Territory and of South Africa's obligations in that connection were submitted for determination to the International Court of Justice which, although ruling by a majority that it was not obligatory for South Africa to place the Territory under the trusteeship system, nevertheless, also by a majority advised that the Territory remained under the administration of South Africa, subject to the terms of the original mandate, and subject to the supervision of the United Nations General Assembly, which by necessary implication stood in the place of the organs of the League of Nations which had previously supervised the working of the mandates system.[1] In the *South West Africa Cases, 2nd Phase*[2], the International Court of Justice held that individual member States of the League had no legal claim or standing, by themselves, to enforce the terms of a mandate, this being a matter for organic or institutional action.

The Charter provides that trust territories are to be administered pursuant to trusteeship agreements under the auspices and supervision of the United Nations. The Administering Authority may be one or more States or the Organisation itself. The basic objectives of the trusteeship system are stated to be,

[1] See I.C.J. Reports (1950), 128. This view was upheld and reaffirmed by the International Court of Justice over twenty years later in its Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*). The Court ruled in addition that the failure of South Africa to comply with its obligation to submit to the supervision of United Nations organs made its continued presence in South West Africa illegal; see I.C.J. Reports (1971), 16, at pp. 28, 35–43.

[2] See I.C.J. Reports (1966), 6.

among other things, the advancement of the peoples of trust territories and their " progressive development towards *self-government or independence* " (Article 76 of the United Nations Charter). Although the latter phrase in italics shows that the ultimate destiny of trust territories is not necessarily the attainment of full statehood, in practice the goal aimed at was complete independence. Moreover, it should not be overlooked that the first basic objective stated in Article 76 of the Charter is the furtherance of international peace and security; in respect to certain trust territories, the system represented a compromise between the competing claims of interested Powers.

In the events which have happened, the basic objectives of the trusteeship system have been largely achieved. So far has the process of emancipation from tutelage gone that only two trust territories now remain:—(1) The Trust Territory of the Pacific Islands (the former Japanese mandated territories in the Pacific), designated as a " strategic area " pursuant to Article 82 of the Charter, and under the United States as Administering Authority. (2) New Guinea, under Australia as Administering Authority. Other trust territories have in different forms[1] achieved independence and statehood. In regard to the two remaining trust territories, the United Nations has sought, and is currently seeking, to establish the earliest possible " target dates " for the attainment of autonomy.

The functions of the United Nations in respect to the supervision of the trusteeship system and the approval of the terms of trusteeship agreements were carried out:—(*a*) in the case of the Pacific Islands, the sole trust territory designated as a " strategic area ", by the Security Council, the Trusteeship Council having the responsibility of examining the annual reports of the United States as Administering Authority; and (*b*) in the case of other trust territories, by the General Assembly, assisted by the Trusteeship Council operating under its authority. The Trusteeship Council is a principal organ of the

[1] In the case of the Trust Territory of Ruanda-Urundi, independence was achieved in 1962 in the form of two separate States, the Republic of Rwanda, and the Kingdom of Burundi. The Trust Territory of British Togoland was, in 1957, united with the Gold Coast to form the new independent State of Ghana, as a Member of the Commonwealth.

United Nations, and so differs fundamentally from the League of Nations Mandates Commission, which was a subsidiary organ of the League. Also by contrast with the Mandates Commission which consisted of members acting in a personal capacity, it is composed of delegates of Governments, being representatives partly of administering countries, partly of the permanent members of the Security Council, and partly of such number of other Member States of the United Nations elected for a three year term by the General Assembly as will ensure equal representation for States administering trust territories and those which do not (Article 86 of the Charter[1]).

According to the Charter, the trusteeship agreements, containing the basic terms on which each trust territory was to be administered by the particular Administering Authority concerned, were to be agreed upon by the " States directly concerned ", including the former Mandatory Power (see Article 79). The interpretation of this phrase occasioned serious disagreement,[2] but in view of the fact that only two trust territories remain and that further trusteeships of territories are unlikely, its meaning is now of purely academic significance. The trusteeship agreement for the Trust Territory of the Pacific Islands, being a " strategic area ", differed from other agreements in allowing the United States as Administering Authority to close certain areas for security reasons, and in making the

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[1] The decline since 1959 in the number of States administering trust territories, in measure as these territories became emancipated, has made continuous literal compliance with the principle of parity in this Article difficult, if not impossible. For example, in July, 1962, the Council consisted of the five permanent members of the Security Council, two of which, the United Kingdom and the United States, were Administering Authorities, Australia and New Zealand as States administering trust territories, and two non-administering countries, Bolivia and India. There are now only two administering powers, Australia and the United States, the latter being a permanent member of the Security Council, so that with the necessity of including the four other permanent members of the Council, the rule of parity cannot work. Upon the true construction of Article 86, it could not have been intended that the parity rule would govern such a situation (see also Note of Secretary-General of November 23, 1967). *Semble*, therefore, the present composition of the Trusteeship Council (Australia and the five permanent members of the Security Council) conforms with the true intent of Article 86.

[2] The General Assembly approved trusteeship agreements submitted to it, without identifying the " States directly concerned ".

concession of equal rights for other Member States of the United Nations dependent on security requirements. Each Administering Authority makes an annual report to the General Assembly based upon a questionnaire drafted by the Trusteeship Council. In supervising trusteeships, the Trusteeship Council has of course no means of enforcing its decisions although it can usefully exercise persuasion. It has power to consider and appraise reports, to receive petitions, complaints, and " communications " (so-called) from the peoples in the territories, or from individuals in or outside these, and to send missions on visit, but even in respect of these functions it is rather a deliberative and recommendatory organ than one with binding administrative authority.

The problem of legal sovereignty in the trusteeship system was solved to the extent that the administering countries expressly disclaimed any title to sovereignty.[1] In view of this explicit disclaimer, the question of where sovereignty did reside, which troubled many writers in connection with mandates, became then only of academic importance. However, in the light of what happened *ex post facto*, when the majority of trust territories became emancipated, there is much to be said for the view that sovereignty resided latently in the peoples themselves.

Finally, it should be mentioned that an Administering Authority has express power to use volunteer forces, facilities, and assistance from the trust territory in order that the territory may play its part in the maintenance of international peace and security (Article 84 of the Charter).

Status of Non-Self-Governing Territories under United Nations Charter

The United Nations Charter accords a special status to colonial territories, possessions, and dependencies under the general designation of " non-self-governing territories ". As in the case of trust territories, the concept of a trust reposing

[1] *Semble*, also, an Administering Authority could not unilaterally modify the status of a trust territory without the approval of the United Nations.

upon the administering States, is emphasised. By a Declaration regarding Non-Self-Governing Territories contained in Chapter XI of the Charter, Members of the United Nations administering such territories recognised the principle that the interests of the inhabitants were paramount, accepted as a sacred trust the obligation to promote their well-being to the utmost, and undertook to develop self-government, and to assist in the evolution of free political institutions.

They also bound themselves to transmit regular information on conditions in these territories to the Secretary-General of the United Nations. The information thus transmitted came to be examined by a Committee of the General Assembly, known as the Committee on Information from Non-Self-Governing Territories. This Committee, formerly appointed on an *ad hoc* basis for renewable terms of three years, was converted into a semi-permanent organ as a result of a General Assembly Resolution in December, 1961, appointing it until such time as the Assembly has decided that the principles embodied in Chapter XI of the Charter, and in the Assembly's Declaration of December 14, 1960, on the Granting of Independence to Colonial Countries and Peoples[1] had been fully implemented. It was empowered to review, and make recommendations concerning social and economic conditions in non-self-governing territories, and it had in fact received evidence other than information transmitted under Chapter XI of the Charter, including statements by Governments of administering countries, and by international institutions. In December, 1963, the General Assembly discontinued the Committee on Information, and transferred its functions to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.[2]

The provisions of Chapter XI of the Charter have been given, in practice, a rather wider operation than was probably contemplated when these were drafted. The General Assembly has apparently taken the view that Chapter XI has greater

[1] See below, pp. 135–137.
[2] See below, pp. 135–136.

force than that of a merely unilateral undertaking. By various Resolutions, and by the appointment of *ad hoc* Committees in respect to particular territories, the Assembly has sought to advance the attainment of independence by non-self-governing territories, to emphasise the obligations of States administering such territories, to promote the welfare of the inhabitants, and to procure a wider participation or association by the territories in, or with the work of the United Nations and its specialised agencies. A rather striking aspect is the extent to which thereby territories and dependencies have come under the cognisance of United Nations subsidiary organs.

Neutralised States

A *neutralised State* is one whose independence and political and territorial integrity are guaranteed *permanently* by a collective agreement of Great Powers subject to the condition that the particular State concerned will never take up arms against another State—except to defend itself—and will never enter into treaties of alliance, etc., which may compromise its impartiality or lead it into war.

The object of neutralisation is to safeguard peace by:—(*a*) protecting small States against powerful adjacent States and thereby preserving the balance of power; (*b*) protecting and maintaining the independence of " buffer " States lying between Great Powers.

The essence of neutralisation is that it is a *collective* act, i.e., the Great Powers concerned must expressly or impliedly assent to the status of neutrality permanently conferred on the country, and that it is *contractual*, i.e., a State cannot be neutralised without its consent, nor can it unilaterally announce its neutralisation. Thus in 1938, when Switzerland took steps to obtain recognition of its full neutrality by the League of Nations, after a prior declaration of its independence and neutrality, the Soviet Foreign Minister—Monsieur Litvinoff—protested, perhaps correctly, that Switzerland could not so declare its neutrality in the absence of prior agreement with all

other interested States. Nor is the case of the neutralisation of Austria in 1955 an exception to the principle. The Austrian legislature did, it is true, following upon the State Treaty of May 15, 1955, re-establishing an independent democratic Austria, enact a Constitutional Statute proclaiming Austria's permanent neutrality. But this self-declared neutrality was in pursuance of prior agreement[1] with the Soviet Union, and was recognised and supported by the other Great Powers, and by other States.

Neutralisation differs fundamentally from neutrality, which is a voluntary policy assumed temporarily in regard to a state of war affecting other Powers, and terminable at any time by the State declaring its neutrality. Neutralisation on the other hand is a permanent status conferred by agreement with the interested Powers, without whose consent it cannot be relinquished. It is thus also essentially different from " neutralism ", a newly coined word denoting the policy of a State not to involve itself in any conflicts or defensive alliances. (There can be some fine shades of distinction between " neutralism " and another expression, " non-alignment ".)

The obligations of a neutralised State are as follows:—

(*a*) not to engage in hostilities except in self-defence;

(*b*) to abstain from agreements involving the risk of hostilities, or granting of military bases, or use of its territory for military purposes, for example, treaties of alliance, guarantee, or protectorate, but not from non-political conventions, for example, postal or tariff Conventions;

(*c*) to defend itself against attack, even when calling on the guarantors for assistance, by all the means at its disposal;

[1] Indeed, under this agreement, Austria was to " take all suitable steps to obtain international recognition " of such declared neutralisation. In the recent case of the neutralisation of Laos, the unilateral Statement of Neutrality by Laos on July 9, 1962, was subsequently supported by a Thirteen-Power Declaration on July 23, 1962, that the sovereignty, independence, neutrality, unity, and territorial integrity of Laos would be respected (the thirteen Powers included Great Britain, the People's Republic of China, France, India, the United States and the Soviet Union).

(*d*) to obey the rules of neutrality during a war between other States;

(*e*) not to allow foreign interference in its internal affairs.[1]

The obligations of the States guaranteeing neutralisation are:—

(*a*) to abstain from any attack or threat of attack on the neutralised territory;

(*b*) to intervene by force when the neutralised territory is violated by another Power, and the guarantors are called on to act.

It is believed that under current conditions, and having regard to the vast changes in the conditions of warfare and armed conflict, including subversion and internal strife fomented from outside, together with the difficulty of circumscribing and localising any major conflict, the institution of neutralisation has only a limited, specific role to play in the context of international law.[2]

Outstanding cases of neutralised States have been Switzerland, Belgium and Austria. The most recent case is that of Laos, which became a neutralised State by virtue of:—(*a*) its unilateral Statement of Neutrality on July 9, 1962; and (*b*) the Thirteen-Power Declaration at Geneva on July 23, 1962, that this status of Laos would be respected, and in effect guaranteed. Belgium can no longer be regarded as a neutralised State because of its participation in certain pacts of security and mutual defence since the end of the Second World War (for example, the North Atlantic Security Pact of April 4, 1949), but Switzerland's status of permanent neutrality remains a fundamental principle of international law. Although more recent, Austria's neutralisation in 1955 is equally intended permanently to rest on the law of nations.

A neutralised State can become a member of the United Nations, for notwithstanding the provision in Article 2 paragraph 5 of the United Nations Charter that Member States

[1] In its Statement of Neutrality of July 9, 1962, Laos also bound itself not to allow any country to use Laotian territory for the purposes of interference in the internal affairs of other countries.

[2] Cf. C. E. Black, R. Falk, K. Knorr, and O. Young, *Neutralisation and World Politics* (1968).

must give the Organisation every assistance in any action taken in accordance with the Charter (which would include enforcement action), the Security Council may under Article 48 exempt a neutralised State from any such duty. It is significant, in this connection, that Austria was admitted to the United Nations on December 14, 1955, that is to say, subsequent to the general recognition of its neutralisation.

Right of Self-Determination of Peoples and Dependent Entities

The right of self-determination of peoples and dependent entities has been expressly recognised by the United Nations General Assembly in its Resolution on Self-Determination of December 12, 1958, and in its Declaration of December 14, 1960, on the Granting of Independence to Colonial Countries and Peoples. The right was defined in some detail, under the heading " The principle of equal rights and self-determination of peoples ", in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970. The Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights, unanimously approved by the General Assembly on December 17, 1966, and opened for signature on December 19, 1967, also recognise the right of peoples to self-determination.[1]

The right of self-determination has been treated as necessarily involving a number of correlative duties binding upon States, including the duty to promote by joint and separate action the realisation of the right of self-determination, and the transfer of sovereign powers to the peoples entitled to this right, and the duty to refrain from any forcible action calculated to

[1] See also Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa* (*Namibia*), I.C.J. Reports, 1971, 16, at pp. 54–56, where the International Court of Justice treated the people of the Mandated Territory of South West Africa as having an actual right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligation to submit to the supervision of United Nations organs.

deprive a people of this right. These duties have been expressed, or if not expressed are implied in the Declarations, *ante*, adopted by the General Assembly, and in addition find some support in the practice of the past decade. First, there has been the rapid emancipation of many colonies and non-self-governing territories. Second, there has been the impact of the above-mentioned Declaration on the Granting of Independence to Colonial Countries and Peoples. In this Declaration, the General Assembly proclaimed the necessity of bringing to a speedy and unconditional end, colonialism in all its forms and manifestations, and called for immediate steps to be taken to transfer all powers to the peoples of territories which had not yet attained independence. By a subsequent Resolution of November 27, 1961, the Assembly established a Special Committee of Seventeen to implement the Declaration, and this Committee, enlarged in 1962 to consist of twenty-four members, has since been active in all directions.[1] Third, the process of ratification and accession of the two Covenants, mentioned above, should consolidate acceptance of the duties correlative to the right of self-determination.

There still remains some difficulty as to what the expression " self-determination " itself means, or includes. Presumably, it connotes freedom of choice to be exercised by a dependent people through a plebiscite or some other method of ascertainment of the people's wishes.[2] Another difficult problem is to determine which communities of human beings constitute " peoples " for the purpose of enjoying the right of self-determination.[3] Aspects such as common territory, common language, and common political aims may have to be considered.

[1] The full title of the Committee is " Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ". By the beginning of 1971, it was reduced to a membership of twenty-one, as a result of the withdrawal of Australia, the United Kingdom, and the United States.

[2] Cf. the provisions for freedom of choice to be exercised by the people of West New Guinea, according to Article XVIII of the Netherlands-Indonesia Agreement of August 15, 1962.

[3] See Eagleton, *American Journal of International Law* (1953), Vol. 47, pp. 88–93, and D. B. Levin, *Soviet Year Book of International Law*, 1962, pp. 24–48.

Prior to 1958, it could be said that customary international law conferred no right upon dependent peoples or entities to statehood, although exceptionally some such right *ad hoc* might be given by treaty, or arise under the decision of an international organisation.[1] It is clear in the light of recent practice that such right is not conditioned upon the attainment of complete economic self-reliance.

Sovereignty of Peoples and Nations over their Natural Wealth and Resources

In a similar connection, is the so-called principle of " economic self-determination ", expressed in the United Nations General Assembly Resolution of December 21, 1952, affirming the right of peoples freely to use and exploit their natural wealth and resources. If the Resolution signified that, in the absence of treaty limitations or international law restrictions, a State was entitled to control the resources within its territory, it would merely enunciate a truism. The real object of the Resolution seems, however, to have been to encourage underdeveloped countries to make use of their own resources, as a proper foundation for their independent economic development.

Later, fuller and more elaborate expression was given to the principle in Resolutions of the General Assembly dated respectively December 14, 1962, and November 25, 1966, and the right of all peoples freely to dispose of their natural wealth and resources was affirmed in identical terms in Article 1 of the Covenant on Economic, Social and Cultural Rights of December 16, 1966, and Article 1 of the Covenant on Civil and Political Rights of the same date. Article 25 of the former Covenant also declared that nothing therein was to be interpreted as impairing the " inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources ". There

[1] As, e.g., by the Resolution of the United Nations General Assembly in November, 1949, that Libya and Italian Somaliland should become independent sovereign States, a Resolution adopted pursuant to the powers conferred by Annex XI, paragraph 3, of the Treaty of Peace with Italy of 1947.

have been other Resolutions of the General Assembly on the subject, and these, together with the 1962 and 1966 Resolutions, reflect not only the idea of a State's sovereign control over its own resources, not to be surrendered but to be safeguarded even when foreign capital is imported to promote development, but also an insistence, implicitly if not expressly, that it is the responsibility of the international community to assist in maximising the exploitation and use of the natural wealth of developing countries, and so contribute to strengthening their capability to promote their economic development by their own efforts. Since the ruling criterion is that of a State's permanent sovereignty over its own resources, it is this State's national law which according to the Resolutions must govern questions of compensation for nationalisation or expropriation of foreign enterprises, while remedies given in the national courts must be exhausted before seeking relief in the international forum.

This affirmation and re-affirmation of the principle of a nation's sovereign control over its own resources has undoubtedly generated some new currents in international economic law. One important result has been the far-reaching United Nations programme for the evaluation and development of natural resources.

3.—Associations or Groupings of States

States are free, consistently with their obligations under the United Nations Charter, to form associations or groupings for general or particular purposes. The Commonwealth, mentioned above,[1] remains an outstanding illustration, and so also the Organisation of American States (OAS), and the Organisation of African Unity. Some of these associations or groupings, for example the European Economic Community (Common Market), and the North Atlantic Treaty Organisation (NATO), are, in effect, of the character of international

[1] See pp. 124–126.

organisations, and therefore come within the ambit of Chapter 19, below.

Since the end of the Second World War, the number of such associations or groupings of States has rapidly increased. The principal functions or purposes served by them are political, or economic, or related to the mutual defence and security of the members. The novel feature of these new associations or groupings is not only their diversity, but the establishment in each instance of a permanent or semi-permanent machinery, to enable them to function as working unities.

The majority of such bodies are regional in character or have regional implications, but sometimes include States not located in the region concerned.

On the economic side, there is the European Economic Community (Common Market) established by the Treaty of Rome of March 25, 1957, the European Free Trade Association (EFTA) established by the Stockholm Convention of November 20, 1959, and the Latin American Free Trade Association (LAFTA) established by the Montevideo Treaty of February, 1960.

Examples of unions or alliances of States for mutual security purposes, supported by permanent machinery, are the North Atlantic Treaty Organisation (NATO) formed pursuant to the North Atlantic Security Pact of April 4, 1949, the South-East Asia Treaty Organisation (SEATO) established under the South-East Asia Collective Defence Treaty signed at Manila on September 8, 1954, and the association for security purposes of Australia, New Zealand, and the United States (ANZUS) under their Security Treaty signed at San Francisco on September 1, 1951.

It is too early as yet to determine the precise impact on international law of these associations or groupings, each with permanent organs, some of which indeed have been invested with unusual powers. Usages and practices may develop, pointing the way to a new field of international law.

Chapter 6

RECOGNITION

1.—Recognition in General[1]

The identity and number of States belonging to the international community are by no means fixed and invariable. The march of history produces many changes. Old States disappear or unite with other States to form a new State, or disintegrate and split into several new States, or former colonial or vassal territories may by a process of emancipation themselves attain to statehood. Then, also, even in the case of existing States, revolutions occur or military conquests are effected, and the status of the new Governments becomes a matter of concern to other States, which formerly had relations with the displaced Governments.

These transformations raise problems for the international community, of which the paramount one is the matter of *recognition* of the new State or new Government or other change of status involved. At some time or other, this issue of recognition has to be faced by other States, particularly if diplomatic intercourse must necessarily be maintained with the States or Governments to be recognised.

However, the subject is one of some difficulty, and at this stage of the development of international law, can be presented less as a collection of clearly defined rules or principles than as a body of fluid, inconsistent, and unsystematic State practice.

The reasons for this are twofold:—

(*a*) Recognition is, as the practice of most States shows, much more a question of policy than of law. The policy of the recognising State is conditioned principally by the necessity

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[1] See Chen, *The International Law of Recognition* (1951); Jean Charpentier, *La Reconnaissance Internationale et L'Evolution du Droit des Gens* (Paris, 1956); Hans-Herbert Teuscher, *Die Vorzeitige Anerkennung im Völkerrecht* (1959).

of protecting its own interests, which lie in maintaining proper relations with any new State or new Government that is likely to be stable and permanent.[1] Besides this, other political considerations, for example, trade, strategy, etc., may influence a State in giving recognition. Consequently there is an irresistible tendency in recognising States to use legal principles as a convenient camouflage for political decisions.

(*b*) There are several distinct categories of recognition. At the outset there are the categories already mentioned—the recognition of new States, and the recognition of new Heads or Governments of existing States. Although very much the same principles are applicable to both, it is important that they should not be confused.[2] In addition to these two heads of recognition, there are the recognition of entities as entitled to the rights of belligerency, the recognition of entities entitled to be considered as insurgent Governments, and the recognition of territorial changes, new treaties, etc. (see below). Finally, there is the distinction to bear in mind between recognition *de jure* and *de facto* of States and Governments.

It is important that in considering the international law and practice as to recognition, due allowance should be made for the exigencies of diplomacy. States have frequently delayed, refused, or eventually accorded recognition to newly-formed States or Governments for reasons that lacked strict legal justification.[3] For example, in the First World War, Great Britain, France, the United States, and other Powers recognised Poland and Czechoslovakia before these latter actually existed as independent States or Governments. Similarly, in the

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[1] This conclusion is drawn by Professor H. A. Smith from a study of British practice; see Smith, *Great Britain and the Law of Nations*, Vol. I (1932), at pp. 77–80.

[2] Hence, it is necessary when referring to a particular act of recognition to be most specific in stating what the State, Government, or other entity is recognised as being. It is inadequate merely to state that some entity has been " recognised ".

[3] Among such considerations have been the following:—That the entity recognised could give valued help as a co-belligerent; that the entity recognised was willing to conclude a general settlement with the recognising State; that recognition or non-recognition might offend an ally.

Second World War the grant of recognition was conditioned by the supreme necessity of strengthening the ranks in the struggle against the Axis Powers, as for example in the case of the recognition of the Governments-in-exile in London. Political and diplomatic considerations also explain the puzzling divergencies among States since 1948 so far as concerned the recognition of the newly emerged State of Israel, and of the People's Republic of China.

In form and in substance, recognition has continued to remain primarily a unilateral diplomatic act on the part of one or more States. No collective, organic procedure for granting recognition based on established legal principles has yet been evolved by the international community, although the provisions in the United Nations Charter (Articles 3–4) directed to the admission of States to membership of the Organisation may incidentally amount to a certificate of statehood.

Accordingly, the recognition of a new State has been defined with some authority[1] as:—

> ". . . the free act by which one or more States acknowledge the existence on a definite territory of a human society politically organised, independent of any other existing State, and capable of observing the obligations of international law, and by which they manifest therefore their intention to consider it a member of the international community ".

To express these two statements in another way, the State, to be recognised, must possess the four characteristics mentioned in the Montevideo Convention (see above, at p. 101), with particular regard to the capacity to conduct its international affairs, although the requirement of definiteness of territory is not generally insisted upon (cf. the case of the recognition of Israel in 1949, while its boundaries were still not finally determined).

Recognition as a Government, on the other hand, implies that the recognised Government is, in the opinion of the recognising State, qualified to represent an existing State.

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[1] By the Institute of International Law; see Resolutions adopted at Brussels in 1936, Article 1, *American Journal of International Law* (1936), Vol. 30, Supplement, at p. 185.

This act of recognition in both cases may be *express*, that is by formal declaration (which may be by diplomatic Note, *note verbale*, personal message from the head of State or Minister of Foreign Affairs, parliamentary declaration, or treaty),[1] or *implied* when it is a matter of inference from certain relations between the recognising State and the new State or new Government. The manner of recognition is not material, provided that it unequivocally indicates the intention of the recognising State. There are no rules of international law restrictive of the form or manner in which recognition may be accorded.

Recognition under modern State practice involves more than *cognition*, that is to say more than an avowal of knowledge that a State or Government possesses the requisite bare qualifications to be recognised. This is proved by the fact, *inter alia*, that substantial delays may occur before a State or Government is recognised, notwithstanding that its status may be beyond doubt. The practical purpose of recognition, namely, the initiation of formal relations with the recognising State, must also always be borne in mind. Once granted, recognition in a sense estops or precludes the recognising State from contesting the qualifications for recognition of the State or Government recognised.

Many writers have, however, sought to draw wider theoretical implications as to the object of recognition.

There are two principal theories as to the nature, function, and effect of recognition:—

(*a*) According to the *constitutive* theory, it is the act of recognition alone which creates statehood or which clothes a new Government with any authority or status in the international sphere.

(*b*) According to the *declaratory* or *evidentiary* theory statehood or the authority of a new Government exists as such prior to and independently of recognition. The act of

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[1] The Minister concerned may also, by Press Statement, expressly declare that an otherwise ambiguous Note or *note verbale* constitutes formal recognition.

recognition is merely a formal acknowledgment of an established situation of fact.

Probably the truth lies somewhere between these two theories. The one or the other theory may be applicable to different sets of facts. The bulk of international practice supports the evidentiary theory, inasmuch as while recognition has often been given for political reasons and has tended therefore to be constitutive in character, countries generally seek to give or to refuse it in accordance with legal principles and precedents. Also recognition has frequently been withheld for political reasons[1] or until such time as it could be given in exchange for some material diplomatic advantage to be conceded by the newly recognised State or Government—a clear indication that the latter already possessed the requisite attributes of statehood or governmental authority. Moreover, a mere refusal by a single State to recognise could not affect the situation if a great number of other States had already given their recognition. Nor have States in practice regarded non-recognition as conclusive evidence of the absence of qualifications to be a State or a Government. Indeed by insisting that unrecognised States or Governments must observe the rules of international law, they have implicitly acknowledged that they possess some status as such.

The evidentiary theory is further supported by the following rules:—

(*a*) The rule that if a question arises in the Courts of a new State as to the date at which the State came into existence, it will be irrelevant to consider the date when treaties with other States recognising it came into operation. The date when the requirements of statehood were in fact first fulfilled is the only material date.[2]

(*b*) The rule that recognition of a new State has retroactive

[1] As in the case of the early refusal to recognise the Soviet Union because of its failure to fulfil contractual obligations of the former Tsarist Government.

[2] See *Rights of Citizenship in Succession States Cases*, Annual Digest of Public International Law Cases, 1919–1922, Nos. 5, 6 and 7. See also Article 9 of the Charter of the Organisation of American States, Bogotá, 1948:—"The political existence of the State is independent of recognition by other States".

effect, dating back to its actual inception as an independent State.[1]

These two rules which apply also to newly recognised Governments are based principally on the necessary consideration that there should be no gap of time during which a State or Government is out of existence. In other words, continuity is the essence of State sovereignty or of governmental authority. Otherwise, many transactions, contracts, changes of status, etc., of the utmost importance to private citizens, would be null and void because made in a period when the laws of the particular State or Government under which they were effected were unrecognised.

The constitutive theory finds some support in the fact that only upon recognition does the recognised State or Government acquire any status, as such, in the municipal Courts of the recognising State.[2]

Is there a duty to grant recognition?

It has been urged that States are subject to a duty under international law to recognise a new State or a new Government fulfilling the legal requirements of statehood or of governmental capacity.[3] However, the existence of such a duty is

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[1] *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor* (*James*) *& Co.*, [1921] 3 K.B. 532; and as to the retroactive effect of recognition, see further below in this Chapter, pp. 164–165. A further authority against the constitutive theory is the *Tinoco Arbitration* (1923) where the Arbitrator held that the revolutionary Tinoco Government of Costa Rica which came into power in 1917 was a properly constituted Government, although not recognised by Great Britain, and that Great Britain was not estopped (i.e., precluded in law) by such prior non-recognition from later alleging that the Government was in fact a duly and properly constituted one; see *United Nations Reports of International Arbitral Awards*, Vol. I, pp. 371 *et seq.*

[2] See below at pp. 159–161.

[3] In observations forwarded to the United Nations in 1948 on the Draft Declaration on the Rights and Duties of States (see above, pp. 92–93), the British Government stated that it favoured a development of international law under which recognition would become a matter of legal duty for all States in respect to entities fulfilling the conditions of statehood, etc.

not borne out by the weight of precedents and practice, particularly the divergencies since 1949 in the recognition of the People's Republic of China, although it could perhaps be said that in recognising certain newly emerged States (i.e., decolonised territories or emancipated trust territories) some States considered that they were bound to accord recognition.

If indeed there were such a legal duty to recognise, it is difficult to say by whom and in what manner it could be enforced. To each duty, there must correspond a correlative right, and how would one define this right? Is it a right of the State claiming to be recognised, or a right of the international community, and how would such claims of right be presented? The answer to these questions must be that there is no general acceptance of the existence of the duty or the right mentioned. No right to recognition is laid down in the Draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in 1949. The action of States in affording or withholding recognition is as yet uncontrolled by any rigid rules of international law; on the contrary recognition is treated, for the most part, as a matter of vital policy that each State is entitled to decide for itself.[1] Podesta Costa's view that recognition is a " facultative " and not an obligatory act is more consistent with the practice. There is not even a duty on a State under international law to withdraw recognition if the qualifications of statehood or of governmental authority cease to exist. The apparent arbitrariness of State practice in this regard is tempered by the consideration that most States endeavour, as far as possible, to give recognition according to legal principles and precedents, to the extent at least that although they may withhold recognition for political reasons, when they do grant it they generally make sure that the State or Government to be recognised at least possesses the requisite legal qualifications. To this degree States do treat recognition as a legal act.

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[1] Also municipal Courts have adopted the view that the decision to recognise is a political one, to be performed by the executive, and not to be questioned in a Court of law; cf. *Oetjen* v. *Central Leather Company* (1918), 246 U.S. 297.

Implied Recognition

Implied recognition is very much a matter of the intention of the State said to have given recognition. The implication is made solely when the circumstances unequivocally indicate the intention to establish formal relations with the new State or new Government. Such clear-cut cases will naturally be limited. There are other cases in which a State may lay itself open to the inference of having recognised another State or Government, for example, by entering into some form of relations with it. Such conduct can usually amount to no more than recognition *de facto*, or recognition of an entity as an insurgent authority, or indicate an intention to maintain, through agents, informal relations without recognition.

In practice, the only legitimate occasions for conclusively implying recognition *de jure* are:—

(1) The formal signature of a bilateral treaty by the recognised and recognising States (for example, the Treaty of Commerce between Nationalist China and the United States in 1928) as distinct from mere temporary arrangements or agreements. It is not necessary that the treaty be ratified.[1]

(2) The formal initiation of diplomatic relations between the recognised and recognising State.

(3) The issue of a consular *exequatur* by the admitting State for a consul of an unrecognised State.

In certain exceptional circumstances, but not otherwise,[2] recognition has been inferred from the following circumstances:

(*a*) Common participation in a multilateral treaty. However, States such as Great Britain and the United States have, sometimes, when signing a Convention, declared that their signature was not to be construed as the recognition of a signatory or adhering Power not recognised by them.

(*b*) Participation in an international conference.

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[1] *Republic of China* v. *Merchants' Fire Assurance Corporation of New York* (1929), 30 F. (2d) 278.

[2] Note, e.g. the Protocol to the Declaration on the Neutrality of Laos, signed at Geneva on July 23, 1962. The United States, and the People's Republic of China, not recognised by the United States, were both parties to the Protocol.

(*c*) Initiation of negotiations between a recognising and a recognised State.

Recognition of the validity of the laws decreed or enacted by a particular entity, does not necessarily import recognition of the law-making entity.[1]

Recognition subject to a condition

Sometimes States are recognised subject to a condition, generally an obligation which they undertake to fulfil. Thus, the Berlin Congress of 1878 recognised Bulgaria, Montenegro, Serbia, and Rumania, under the condition only that these States should not impose any religious disabilities on any of their subjects.

The effect of such conditional recognition is that failure to fulfil the obligation does not annul the recognition, as once given this is incapable of withdrawal. By breaking the condition, the recognised State may be guilty of a breach of international law, and it is open to the recognising States to sever diplomatic relations as a form of sanction, or otherwise to proceed. But the status which the recognised State has obtained from the act of recognition cannot then be retracted. By way of exception, however, the conditional recognition of States or Governments which are just in process of emerging is probably revocable. Thus the recognition in 1919 by Great Britain of the Esthonian National Council " for the time being provisionally and with all necessary reservations as to the future "[2] was no doubt revocable in the sense that it did not constitute an undertaking to continue the recognition if conditions altered.

In this topic of conditional recognition, the term " condition " is thus not used in its true legal connotation as a vital term going to the root of a legal act, so that if the term be not performed such act becomes void or inoperative.

In practice States have repeatedly, as consideration for the grant of recognition, exacted from States or Governments to

[1] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at p. 961; [1966] 2 All E.R. 536, at p. 581.

[2] *The Gagara*, [1919] P. 95.

be recognised some guarantee or undertaking or stipulation (for example, respect for private property as in the case of the United States recognition in 1937 of the new Bolivian Government). This practice is consistent with the predominantly political character of the unilateral act of recognition. It is true, however, that if recognition should under international law become purely and simply the cognitive act of registering the existence of statehood or of governmental capacity, logically it could not be subject to any such extrinsic term or condition.

Collective Recognition

The advantages of recognition taking place by some collective international act, or through the medium of an international institution cannot be denied. It would obviate the present embarrassments due to unilateral acts of recognition.[1]

In the light of the Advisory Opinion of the International Court of Justice, on *Conditions of Membership in the United Nations*,[2] which recognises statehood as a primary qualification for admission to the United Nations, it is clear that such admission is tantamount to recognition of the Member admitted as a State.[3]

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[1] There are a number of historical precedents of collective recognition; e.g., the recognition of Bulgaria, Montenegro, Serbia and Rumania by the Berlin Congress of 1878, and of Esthonia and Albania by the Allied Powers in 1921.

[2] I.C.J. Reports (1948), at pp. 57 *et seq.*

[3] As distinct from the admission of a new Member State to the United Nations, there is the question of the acceptance of the credentials of the Government of an existing Member State. *Quaere* whether accepting within the United Nations the credentials of a revolutionary Government of a Member State involves the same considerations as the recognition of that Government. In a memorandum circulated to the Security Council members on March 8, 1950, the Secretary-General adopted the view that the two matters rested on different considerations. In this connection, see D. I. Feldman, *Soviet Year Book of International Law*, 1961, pp. 50–64. A stage may be reached where, unless the credentials of the effective Government are accepted in the same manner as it has been recognised, the Member State concerned will for all practical purposes be denied its due right of participating in the Organisation. The matter had been raised repeatedly from 1950 onwards in connection with the claim by the Soviet Government and other Governments of Member States that the Nationalist Government of China could no longer represent China within the United Nations, but that the credentials of the Government of the Communist People's Republic of China, which had been recognised by a number of States, should for that and other reasons be accepted. While ultimately, in 1971, support was obtained for acceptance of the latter Government's credentials, controversy centred on the point whether the former Government should remain a Member.

Recognition of a Head of State or of a new Government

As pointed out above, this has nothing to do with the recognition of a State itself. According to one American authority[1]:—

> "The granting or refusal of recognition (of a Government) has nothing to do with the recognition of the State itself. If a foreign State refuses the recognition of a change in the form of government of an old State, this latter does not thereby lose its recognition as an international person".

In the case of *existing States*, no difficulty arises except when changes in the headship of the State or of its Government take place in an abnormal or revolutionary manner.

Where the change proceeds in a formal and constitutional way, recognition by other States is purely a matter of formality. But in the case of a revolution the recognition of the revolutionary Government is a serious question and a decision thereon is only made with great care. It is practically impossible to lay down any definite legal principles on the matter, so materially do political considerations usually impinge thereon, while the practice is, as may be expected, confused and conflicting. The recognising Government should at least be satisfied as to the prospects of stability of the new Government. Although the premature recognition of a revolutionary Government may justifiably be treated by the legitimate Government as an unfriendly act, it is questionable in the light of modern practice whether, in the absence of some display of force or threat of force by the recognising State towards the legitimate Government, this can amount to a breach of international law (for example, an intervention).[2]

In the case of *nascent* States, recognition raises many problems for the recognising States; first, because of the merging of the

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[1] *Lehigh Valley Railroad Co.* v. *The State of Russia* (1927), 21 F. (2d) 396.

[2] A historical instance of premature recognition which wasi n fact treated as an intervention was that of the recognition by France in 1778 of the United States Government. The weight of subsequent practice, leaning in favour of the claims of revolutionary Governments commanding popular support, has tended to discount the view that any diplomatic assistance to such Governments may represent an intervention. In 1968–1969, during the course of the Nigerian Civil War, it was claimed that the recognition of the Biafran Government might constitute an intervention.

new State with its new Government and the difficulty of recognising the one without recognising the other; secondly, most States prefer, in the matter of recognition of nascent States, to be as non-committal as possible and to preface the date of recognition *de jure* by a stage of recognition *de facto*.

There is no difficulty, of course, where the new State is a former dependency or trust territory, and the parent or tutelary State, itself already *de jure* recognised, has consented to emancipation. Recognition can be accorded automatically, and is essentially then a legal act of a cognitive nature. This is indeed what happened in the case of the recognition of the large number of African and Asian States, which have emerged since the end of the Second World War.

Withdrawal of Recognition

As a rule, recognition *de jure* once given is irrevocable. This holds true even though recognition was given in the first instance from purely political motives to indicate to the world at large that relations with the recognised State or Government are being initiated. It is a paradox that when a gesture is made in a contrary sense, indicating that no further relations will be maintained with the formerly recognised State or Government, it is not in general attended by a withdrawal of recognition. A formal severance of diplomatic relations may be declared, but the once recognised State or Government does not otherwise lose its status in the international community. Thus, Great Britain recognised the Soviet Government *de jure* in 1924, but later broke off relations in 1927, and although relations were subsequently resumed, participated in the vote of 1939 expelling the Soviet Union from the League of Nations. Neither the rupture of diplomatic relations nor the act of expulsion annulled recognition of the Soviet Government.

Sometimes a refusal to recognise is virtually equivalent to a state of severance of diplomatic relations. This is particularly well illustrated by the attitude of the United States of non-recognition of the Soviet Government before November, 1933, when recognition was given. A communication of

the United States Department of State to the New York Court of Appeals in 1933 characteristically defined this attitude[1]:—

> " The Department of State is cognisant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact.
>
> The refusal of the Government of the United States to accord recognition to the Soviet regime is not based on the ground that the regime does not exercise control and authority in territory of the former Russian Empire, *but on other facts* ".

Of similar significance is the current refusal (since 1949) of the United States to extend recognition to the Government of the Communist People's Republic of China.

Non-recognition of a new State or new Government does not mean non-intercourse with non-recognising States, just as non-intercourse does not necessarily signify non-recognition.[2] For instance, the British Government has in practice never declined to have talks or to transact necessary business with the agents or Ministers of unrecognised States or Governments, as witness the discussions with the Rhodesian Government after its unilateral declaration of independence, although it has been made plain that such informal relations or non-committal exchanges did not in any sense amount to formal diplomatic intercourse. Thus frequently consular appointments have been made to such unrecognised communities, although care has been taken to express the appointments in such a way as not to involve even *de facto* recognition.[3] In

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[1] *Salimoff & Co.* v. *Standard Oil Co. of New York* (1933), 262 N.Y. 220

[2] In *Compania de Transportes Mar Caribe, S.A.* v. *M/T Mar Caribe* (1961), *American Journal of International Law* (1961), Vol. 55, p. 749, a United States District Court appears to have treated the rupture of diplomatic relations with Cuba by the United States on January 3, 1961, as a withdrawal of recognition.

[3] See Smith, *Great Britain and the Law of Nations* (1932), Vol. I, at p. 79. In 1949, Great Britain intimated to the newly formed Government of the Communist People's Republic of China that it was ready to conduct informal relations with authorities of that Government through British consular officers, while stopping short of *de facto* recognition (see *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1953] A.C. 70, at pp. 88–89).

the opinion of the International Law Commission in 1967,[1] a State may send a special mission to, or receive a special mission from, a State not recognised by it. Perhaps, the most significant recent example is the fact that on a large number of occasions since 1949 the United States has participated in discussions or negotiations with the Communist People's Republic of China, including the series of exchanges and contacts in Warsaw since 1955, although refusing to grant formal recognition. One may wonder whether this constitutes a *tertium quid,* in addition to recognition *de jure* and *de facto* (see *post*)—that is, a kind of non-formal tacit acceptance.

2.—Recognition De Jure and De Facto

The practice of States draws a distinction between recognition *de jure* and *de facto.*

Recognition *de jure* means that according to the recognising State, the State or Government recognised *formally* fulfils the requirements laid down by international law for effective participation in the international community.

Recognition *de facto* means that in the opinion of the recognising State, provisionally and temporarily and with all due reservations for the future, the State or Government recognised fulfils the above requirements in fact (*de facto*).

In modern times, the practice has generally been to preface the stage of *de jure* recognition by a period of *de facto* recognition, particularly in the case of a legally constituted government giving way to a revolutionary regime. In such a case, *de facto* recognition is purely a non-committal formula whereby the recognising State acknowledges that there is a legal *de jure* government which " ought to possess the powers of sovereignty, though at the time it may be deprived of them ",

[1] See paragraph 2 of draft Article 7 of the Commission's Draft of Articles on Special Missions, and commentary thereon, in the *Report* of the Commission on the Work of its Nineteenth Session (1967). Article 7 of the Convention on Special Missions, opened for signature on December 16, 1969, merely provides that the existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission, paragraph 2 of draft Article 7 having been omitted.

but that there is a *de facto* government " which is really in possession of them, although the possession may be wrongful or precarious ".[1] Meanwhile *de facto* recognition secures considerable economic advantages to the recognising State, enabling it to protect the interests of its citizens in the territory of that State or Government. At a later stage, when the need for reservations no longer exists because the future of the new State or new regime is completely assured, *de jure* recognition is formally given.

If there be conclusive evidence of continuing *de jure* recognition, a Court is not entitled to find that there has been *de facto* recognition, even of an entity subordinate to the *de jure* recognised Government.[2]

Where a Court sitting in a particular territory has to determine the status of a new Government which has illegally assumed control of that territory, there can be no question of recognition *de jure* of the legitimate Government and of recognition *de facto,* at the same time, of the new Government. The Court will have to decide, not merely whether the usurping regime is an established *de facto* Government, but whether it is a lawful Government at all.[3]

The point may be raised whether the *jus* of *de jure* recognition means:—(*a*) State law, (*b*) international law, or (*c*) abstract justice, in the sense of " right ". Ideally, it should mean international law, which in this regard should be guided by (*c*)—abstract justice—and should condition (*a*)—State law. Unfortunately, State practice falls far short of such standards, and the words *de jure* signify little more than the observation of legal or traditional forms in giving recognition, and a formal compliance by the recognised State or Government with the requisite qualifications.

None the less, British practice in the matter of *de jure*

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[1] See *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) & Co.,* [1921] 3 K.B. 532, at p. 543.

[2] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at pp. 903, 925; [1966] 2 All E.R. 536, especially at pp. 545, 559.

[3] See *Madzimbamuto* v. *Lardner-Burke,* [1969] 1 A.C. 645, at pp. 723–725.

recognition has been guided by a reasonably consistent policy based on precedent. To quote Professor H. A. Smith[1]:—

> ". . . The normal policy of this country for over a hundred years has been to insist upon certain conditions as a precedent to the grant of *de jure* recognition of a new State or a new Government. We have required, first, a reasonable assurance of stability and permanence. Secondly, we have demanded evidence to show that the Government commands the general support of the population. Thirdly, we have insisted that it shall prove itself both able and willing to fulfil its international obligations ".

As to *de facto* recognition, it is misleading to regard this as always tentative or revocable; more generally it is simply a convenient prelude to the more formal and more permanent type of recognition—recognition *de jure*. Both types of recognition presuppose effective governmental control in fact.[2]

To take illustrations from British practice, the Soviet Government was *de facto* recognised on March 16, 1921, but only *de jure* on February 1, 1924. In 1936, Great Britain *de facto* recognised the Italian conquest of Abyssinia, and in 1938 *de jure* recognised Italy's sovereignty over that region. Also Great Britain *de facto* recognised the progressive occupation of different parts of Spain by the insurgent forces in the course of the Spanish Civil War, 1936–1938, until finally *de jure* recognition was given to the Franco Government after all Spanish territory had been won over.

So far as concerns the legal incidents of recognition, there are few differences in English law between *de facto* and *de jure* recognition.

The *de facto* recognition by Great Britain of a foreign government is as conclusively binding, while it lasts, upon an English Court as *de jure* recognition, for the reasons stated

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[1] See Smith, *Great Britain and the Law of Nations* (1932), Vol. I, at p. 239. U.S. practice is to a similar effect; see M. M. Whiteman, *Digest of International Law* (1963), Vol. 2, pp. 72–73.

[2] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at pp. 956–957; [1966] 2 All E.R. 536, at p. 579.

by Warrington, L.J., in *Aksionairnoye Obschestvo A. M. Luther* v. *Sagor (James) and Co.*[1]

> " In the latter case, as well as in the former, the Government in question acquires the right to be treated by the recognising State as an independent sovereign State, and none the less that our Government does not pretend to express any opinion on the legality or otherwise of the means by which its power has been obtained ".

It follows also that the act of recognition *de facto* has retroactive operation exactly as in the case of recognition *de jure*.[1] Moreover, transactions between a British subject and the Government of a foreign State which has received *de facto* recognition from Great Britain are binding on that foreign State and cannot be repudiated by a subsequent Government which has overthrown its predecessor by force.[2]

One material difference is that it is not the practice of the British Crown to receive as properly accredited diplomatic envoys, representatives of States which have not been recognised *de jure*.

A conflict of authority between a displaced *de jure* Government and a newly recognised *de facto* Government may often arise. In such an event, an English Court of law adopts the view that so far as concerns matters in the territory ruled by the *de facto* Government, the rights and status of the *de facto* Government prevail. This rule would seem to follow from two notable cases, *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*,[3] decided by Clauson, J., and the *Arantzazu Mendi*,[4] decided by the House of Lords. The former decision arose out of the situation created by the Italian conquest of Abyssinia in 1936. After the Italian Government had been recognised *de facto*, it enacted certain laws which were in conflict with those issued by the exiled Emperor of Abyssinia—the *de jure* ruler

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[1] [1921] 3 K.B. 532, at p. 551.

[2] *Peru Republic* v. *Dreyfus Brothers & Co.* (1888), 38 Ch.D. 348. Also, although a State is recognised only *de facto* as having authority over a particular area of territory, it is to be treated as having full jurisdiction over persons within that area ; see *R.* v. *Governor of Brixton Prison, Ex parte Schtraks*, [1963] 1 Q. B. 55; [1962] 3 All E.R. 529, H.L.

[3] [1937] Ch. 513.

[4] [1939] A.C. 256.

who had been forced to flee from his conquered country. Clauson, J., held that as the authority of the *de jure* ruler was merely theoretical and incapable of being enforced, whereas actually the Italian Government was in control of Abyssinian territory and *de facto* recognised, effect must be given to the laws of this Government over those of the *de jure* monarch.

The case of the *Arantzazu Mendi* involved a conflict of rights between the legitimate and the insurgent Governments in Spain during the Spanish Civil War, 1936–1938, at a period when the insurgents had won over the greater part of Spanish territory. At this stage Great Britain continued to recognise the Republican Government as the *de jure* Government of Spain, but also recognised the insurgent administration as the *de facto* Government of that portion of Spain occupied by it. Proceedings were initiated in the British Admiralty Court by the *de jure* Government against the *de facto* Government to recover possession of a certain ship, and the latter Government claimed the usual immunity from suit accorded to a fully sovereign State. The ship was registered in a port under the control of the *de facto* Government, and had been handed over to that Government in England pursuant to a requisition decree issued by it. It was held that the writ must be set aside as the insurgent (or Nationalist) Government was a sovereign State and was entitled to immunity. The argument put forward on behalf of the *de jure* Government that the insurgent administration was not a sovereign State, since it did not occupy the whole of Spain, was rejected.

The decision in the *Arantzazu Mendi* has not escaped criticism, particularly on the ground that in such circumstances the concession of jurisdictional immunity to a *de facto* Government without full sovereignty goes too far.[1] Properly considered, however, the case is merely a logical extension of the principles laid down in *Aksionairnoye Obschestvo A. M. Luther*

[1] Counsel in *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1953] A.C. 70, at p. 75, described the decision as " the high-water mark of recognition of jurisdictional immunity in the case of *de facto* sovereignty ".

v. *Sagor (James) & Co.* and in *Bank of Ethiopia* v. *National Bank of Egypt*.[1] Taken together, the effect of the three decisions was virtually to erase a number of suggested distinctions between *de jure* and *de facto* recognition, so far as the municipal law effects of each are concerned.

None the less, recognition *de facto* may have a substantial function to perform in the field of international law. In this regard, its difference from recognition *de jure* is not merely one of a political character. By recognising a State or Government *de facto*, the recognising State is enabled to acknowledge the external facts of political power, and protect its interests, its trade, and citizens, without committing itself to condoning illegalitites or irregularities in the emergence of the *de facto* State or Government. To this extent recognition *de facto* is probably a necessary legal expedient.

Besides there are these important differences between *de jure* and *de facto* recognition which render the distinction one of substance:—(*a*) only the *de jure* recognised State or Government can claim to receive property locally situated in the territory of the recognising State;[2] (*b*) only the *de jure* recognised State can represent the old State for purposes of State succession, or in regard to espousing any claim of a national of that State for injury done by the recognising State in breach of international law; (*c*) the representatives of entities recognised only *de facto* are not entitled to full diplomatic immunities and privileges;[3] (*d*) *de facto* recognition can, in principle, owing to its provisional character, be withdrawn on several grounds other than those normally justifying a withdrawal of *de jure* recognition; and (*e*) if a sovereign State, *de jure* recognised,

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[1] See also for a decision on the same lines, *Banco de Bilbao* v. *Rey*, [1938] 2 K.B. 176, where it was held that the acts of the *de jure* Government were a mere nullity in the area controlled by the *de facto* Government.

[2] *Haile Selassie* v. *Cable and Wireless Co., Ltd.* (No. 2) (1938), 54 T.L.R 1087, reversed by Court of Appeal, [1939] Ch. 182, after *de jure* recognition of Italy's conquest of Abyssinia. However, the recognition *de jure* of a new State or Government cannot operate retroactively so as to invalidate acts of the previous *de jure* Government (*Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1953] A.C. 70).

[3] *Fenton Textile Association* v. *Krassin* (1921), 38 T.L.R. 259. This point is, however, doubtful.

grants independence to a dependency, the new State is to be recognised *de jure* and not otherwise.[1]

3.—Legal Effects of Recognition

Recognition produces legal consequences affecting the rights, powers, and privileges of the recognised State or Government both at international law and under the municipal law of States which have given it recognition. Also, when the subject of recognition arises for examination, however incidentally, by the municipal Courts of such States, various problems of evidence, legal interpretation and procedure enter into consideration.

Here it is important to bear in mind the limits between international law and State law. Recognition confers on the recognised State or Government a status under both international law and municipal law. In this section, we shall first deal with the status under municipal law, and accordingly will examine for this purpose the law and practice applied by Anglo-American Courts.

The capacity of a recognised State or Government may be considered from a negative aspect, by ascertaining the particular disabilities[2] of one which is unrecognised. The principal legal

[1] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at p. 906; [1966] 2 All E.R. 536, at p. 547.

[2] There may, however, be other matters besides disabilities. One illustration is that of questions of nationality; e.g., if a State is annexed by an unrecognised State, nationals of the annexed State will, in the municipal Courts of a non-recognising country, be deemed to retain their citizenship. Acts or transactions, "necessary to peace and good order among citizens", e.g., marriages duly performed or transfers properly registered, and therefore not relevant to any question of power or disability of a State or Government, may be valid notwithstanding the absence of recognition, the principle being that there should be no interruption of the administration of law and justice; see Grotius, *De Jure Belli ac Pacis*, Book I Chapter IV, s. xv. 1, *Texas* v. *White* (1868), 74 U.S. 700, at p. 733, *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853; [1966] 2 All E.R. 536, and Advisory Opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), June 21, 1971, I.C.J. Reports, 1971, 16. at p. 56 (registrations of births, deaths, and marriages not invalidated). This "necessity" doctrine ought not to be extended. *Semble*, it does not apply to the administrative orders and judicial decrees of an illegal regime, the Constitution and laws of which are illegal and void; see *Madzimbamuto* v. *Lardner-Burke*, [1969] 1 A.C. 645, at pp.727–729, and *Adams* v. *Adams*, [1971] P. 188, at pp. 208–211; [1970] 3 All E.R. 572, at pp. 585–588.

disabilities of an unrecognised State or Government may be enumerated as follows:—

(*a*) It cannot sue in the Courts of a State which has not recognised it. The principle underlying this rule was well expressed in one American case[1]:—

> ". . . A foreign power brings an action in our Courts not as a matter of right. Its power to do so is the creature of comity. Until such Government is recognised by the United States, no such comity exists ".

(*b*) By reason of the same principle, the acts of an unrecognised State or Government will not generally be given in the Courts of a non-recognising State the effect customary according to the rules of " comity ".

(*c*) Its representatives cannot claim immunity from legal process.

(*d*) Property due to a State whose Government is unrecognised may actually be recovered by the representatives of the regime which has been overthrown.

Recognition transmutes these disabilities into the full status of a sovereign State or Government. Accordingly, the newly recognised State or Government:—

(i) acquires the right of suing in the Courts of Law of the recognising State;

(ii) may have effect given by these Courts to its legislative and executive acts both past and future;

(iii) may claim immunity from suit in regard to its property and its diplomatic representatives;

(iv) becomes entitled to demand and receive possession of, or to dispose of property situate within the jurisdiction of a recognising State which formerly belonged to a preceding Government.[2]

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[1] See *Russian Socialist Federated Soviet Republic* v. *Cibrario* (New York Court of Appeals), 235 N.Y. 255 (1923). *Semble*, however, an unrecognised Government if truly exercising complete authority, cannot be sued in an American municipal Court, inasmuch as it is to be regarded as a sovereign Government (*Wulfsohn* v. *R.S.F.S.R.* (1923), 234 N.Y. 372). Cf. *United States* v. *New York Trust Co.* (1946), 75 F. Supp. 583, at p. 587.

[2] See *The Jupiter*, [1924] P. 236, and *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*, [1937] Ch. 513.

At international law, the status of a recognised State or Government carries with it the full privileges of membership of the international community. Thus it acquires the capacity to enter into diplomatic relations with other States and to conclude treaties with them. Also, such other States become subject to various obligations under international law in relation to the newly recognised State or Government, which in its turn incurs similar reciprocal obligations. Upon it, therefore, as from the date of recognition, fall both the burden and bounty of international law.

Recognition in the Courts of Law

The rule in British countries and in the United States is that though the existence of a new State or a new Government is merely a question of fact, it is one involving important political considerations and is therefore primarily to be determined by the political and not by the judicial organs of the State. Accordingly, on a question of recognition, the Court is entitled to consult the Executive on the principle that it must act in unison with the " will of the national sovereignty ", which is expressed in external affairs through the Executive alone. To hold otherwise might lead to a conflict between the Courts and the Executive at the expense of national interests; for example, if a Government recognised only by the Courts of a particular State and not by the Executive could thereby recover in that State property which it was contrary to national policy to hand over.

Considerations of evidentiary convenience have also conditioned this principle of consultation of the Executive. According to Lord Sumner in *Duff Development Co.* v. *Kelantan Government*,[1] British Courts act on the best evidence available, and the best evidence in this regard is a statement by the appropriate Secretary of State on behalf of the Crown.[2] This is so even if the statement purports to set out facts which in principle ought to be attested by the

[1] [1924] A.C. 797, at p. 823.
[2] See *Mighell* v. *Johore (Sultan)*, [1894] 1 Q.B. 149.

British Government in conjunction with other Governments concerned, or interested.[1] It is not the business of the Court to inquire whether a particular Department of State rightly concludes that a Government is recognised as sovereign, although if the Crown declined to answer the inquiry at all, secondary evidence in default of the best might be accepted. However, a statement by the Executive that a particular Government is *not* recognised does not preclude a British Court from holding that such Government is a sovereign Government,[2] especially in relation to questions not involving jurisdictional immunity.

The deference of American and British Courts[3] to the attitude of the Executive in this connection has not escaped criticism. It has been objected that this solicitude for the views of the Executive is so exaggerated as almost to amount to an obsession. Moreover, it is asserted that often the Courts have been more concerned not to embarrass the Executive in its conduct of foreign affairs than to protect material interests of private citizens affected by changes in statehood or Government. On the other hand it is difficult to see how, on a contested issue of this nature, a Court could take evidence or obtain the necessary materials for forming its judgment in any more satisfactory way. However, the Executive now sometimes elects to give restrictively phrased certificates, in such form that the Court may reach a decision uninfluenced by possible reactions on the Executive's conduct of foreign policy.

Generally speaking, a British Court will take judicial notice of:—(*a*) the sovereign status of a State or of its monarch;[4] (*b*) the recognition *de facto* and *de jure* of a foreign State or Government, and if in doubt will apply for information to the appropriate Secretary of State, whose answer is conclusive.

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[1] Cf. *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853; [1966] 2 All E.R. 536.

[2] See *Luigi Monta of Genoa* v. *Cechofracht Co., Ltd.*, [1956] 2 Q.B. 552.

[3] The American Department of State " Suggestion " (or Certificate) can go so far as to " suggest " immunity from jurisdiction in the case of a foreign State or Government, and this may be binding on an American Court; see *Rich* v. *Naviera Vacuba, S.A., and Republic of Cuba* (1961), *American Journal of International Law* (1962), Vol. 56, pp. 550–552.

[4] See *Mighell* v. *Johore* (*Sultan*), [1894] 1 Q.B. 149.

The statement submitted by the Executive to the Court and inspected by it should not be subjected to any strained or unreasonable construction, the purpose being to avoid creating a divergence between the Court and the Executive. Thus in *The Annette*,[1] the statement was to the effect that the Provisional Government of Northern Russia " had not yet been formally recognised ", and Hill, J., refused to infer from this that the said Government had been informally recognised.[2] It is established by the authorities that a clear, complete and unambiguous answer by the Secretary of State dispenses with further inquiry by the Court, and excludes other evidence, if offered.[3] Nor can the Executive be cross-examined as to the terms of its statement or certificate[4], although if these are not sufficiently plain the Court is entitled in ultimate resort to make its own independent examination[5].

A formal statement by the appropriate Secretary of State tendered to the Court is far from being the sole method of conveying the Executive's views. The Law Officers may appear, either by invitation of the Court or on an intervener,[6] to inform the Court of the attitude of the Crown. Also, letters sent by the Foreign Office to the solicitors acting for one party to the proceedings, and submitted to the Court, will be regarded as sufficient evidence of the Crown's views.[7]

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[1] [1919] P. 105.

[2] For forms of Foreign Office certificate, see the *Arantzazu Mendi*, [1939] A.C. 256, at p. 264; *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at pp. 902–903; and *Adams* v. *Adams*, [1971] P. 188, at p. 205; [1970] 3 All E.R. 572, at p. 583.

[3] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853, at pp. 956–958; [1966] 2 All E.R. 536, especially at p. 579, and *Van Heyningen* v. *Netherlands East Indies* (1949), Queensland State Reports 54. None the less, the certificate or statement of the executive may always be interpreted by a British Court; see *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna* v. *Boguslawski*, [1953] A.C. 11, at p. 43.

[4] See *Sayce* v. *Ameer Ruler Sadiq Mohammed Abbasi Bahawalpur State*, [1952] 1 All E.R. 326; affirmed, [1952] 2 All E.R. 64.

[5] See *Sultan of Johore* v. *Abubakar Tunku Aris Bendahara*, [1952] A.C. 318. In the *Feivel Pikelny Case*, London *Times*, July 1, 1955, Karminski, J., had recourse to *Hansard* (i.e., the record of the House of Commons debates) in order to determine the actual date of recognition, where the Foreign Office Certificate was ambiguous on the matter.

[6] As to the Attorney-General's right of intervention, see *Adams* v. *Adams*, [1971] P. 188, at pp. 197–198; [1970] 3 All E.R. 572, at pp. 576–577.

[7] See, e.g., *Banco de Bilbao* v. *Rey*, [1938] 2 K.B. 176, at p. 181.

Retroactive Effect of Recognition

As we have seen, the recognition of a new State or Government has a retroactive operation, and relates back to the date of inception of the particular State or Government concerned.

In British Courts, such retroactive operation is extremely wide. Thus:—(*a*) A cause of action based upon the existence of a particular State or Government at the date of institution of proceedings, is nullified if before or at the time of the hearing, the British Government recognises another State or Government as having been in existence at the date the action was commenced.[1] (*b*) A judgment of a Court of first instance based upon the existence of a particular State or Government at the date of judgment may be set aside on appeal if before or at the time the appeal is heard, the British Government recognises another State or Government as having been in existence at the time judgment was delivered.[2]

Two important decisions of the House of Lords, namely *Gdynia Ameryka Linie* (*Zeglugowe Spolka Akcyjna*) v. *Boguslawski*[3] and *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*[4] have further elucidated the retroactive effect, according to British Courts, of a recognition by Great Britain.

The former case shows that, in the matter of the retroactive operation of recognition, the certificate of the executive is to be treated as of overriding importance; hence, if such certificate plainly shows that recognition was not intended to relate back, any retroactive effect is excluded. In other words, whether and to what extent the act of recognition is retroactive must be governed by the intention of the recognising State, and this is logically consistent with the nature of recognition.

The latter case shows that duly vested proprietorial or other

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[1] *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*, [1937] Ch. 513.
[2] *Aksionairnoye Obschestvo A.M. Luther* v. *Sagor* (*James*) *& Co.*, [1921] 3 K.B. 532.
[3] [1953] A.C. 11.
[4] [1953] A.C. 70.

rights, resting upon a duly effected disposition or other legal act by the formerly recognised *de jure* Government cannot be invalidated by the subsequent recognition *de jure* of the new Government; *prima facie*, recognition operates retroactively not to invalidate the acts of a former Government, but to validate the acts of a *de facto* Government which has become the new *de jure* Government.

Both cases contain *dicta* in the judgments to the effect that, *prima facie*, recognition *de jure* cannot operate retroactively to validate acts done otherwise than in the territory, and so within the sphere of *de facto* control of the Government recognised; but this, it is emphasised, is only a *prima facie* rule.[1]

4.—Recognition of Insurgency and Belligerency

The topic of recognition of insurgency and belligerency, which had for many years been more or less a dead one, was revived in interest in the course of the Spanish Civil War, 1936–1938.

The problems which a civil war in a particular country may involve for outside Powers may be summed up as follows:— These outside Powers will generally, except when they feel vital interests are at stake, maintain a policy of non-interference in the domestic affairs of another State. However, there may come a time when it becomes impossible as a matter of practical politics to continue such an attitude either because:—

(*a*) The operations of insurgent forces may attain such a degree that they are in effective occupation of and constitute the *de facto* authority in a large part of the territory formerly governed by the parent Government.[2] In this case the problem is at once raised for outside Powers of entering into some contact or intercourse with the insurgents as the *de facto* authorities

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[1] See *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, *loc. cit.*, at p. 94.

[2] There may, prior to this, be simply recognition of the rebel forces as *insurgents*, the purpose of which is to prevent the rebels being treated as mere criminals or pirates, and to preclude any suggestion that the legitimate Government is to be held responsible for their acts. As to this distinction, see *The Ambrose Light* (1885), 25 Fed. 408, and below, pp. 287–288.

in order to protect their nationals, their commercial interests and their sea-borne trade in regard to the territory occupied.

(*b*) The actual war between the parent Government and the insurgent forces may reach such dimensions that outside Powers will be compelled to treat the civil war as a real war between rival Powers, and not as a purely internecine struggle. In other words, these Powers will have to recognise belligerency. This is because difficult problems may arise which, unless outside Powers accept the risk of being drawn into the war, cannot be solved without treating the rival parties as belligerents. This usually occurs where the naval operations of the contending forces interfere with the sea-borne trade of a maritime Power. For instance, a maritime Power might find it difficult to resist an improper search of its ships for contraband by either party unless it were prepared to use force; on the other hand, the concession of belligerent rights would normalise the situation, by sanctioning the right of search, without compromising the maritime Power's authority and rights at international law.

On account of (*a*), external Powers may decide on the *de facto* recognition of the insurgents, limited to the particular territory of which they are in effective occupation. Thus in 1937, Great Britain conceded *de facto* recognition to the insurgents in the Spanish Civil War, in regard to the territory under their control, and also went so far as to exchange Agents.

As to (*b*) certain conditions must exist before belligerency is recognised. First, the hostilities must be of a general character, as distinct from those of a purely local nature. Second, the insurgents must be in control of a sufficient portion of territory to justify the inference that they represent a rival Power of some magnitude. Third, both parties must act in accordance with the laws of war, and the insurgents in particular must have organised armed forces under a proper command. Even when all these conditions are present, the circumstances may preclude recognition of belligerency, as during the Spanish Civil War of 1936–1938 when the policy of " Non-Intervention " of the European Powers and their desire to avoid complications

leading to a general war, induced them to stop short of granting belligerent rights. It would appear, in other words, that the recognition of belligerency is facultative, and not a matter of duty.

The British practice in the matter of belligerent recognition was authoritatively stated by the Law Officers in 1867.[1] According to the terms of this statement, the mere declaration by insurgents that they have constituted a " Provisional Government " is insufficient to justify belligerent recognition. Before the grant is made, consideration should be given to the length of time that the insurrection has continued; the number, order, and discipline of the insurgent forces; and whether the newly constituted " Government " is capable of maintaining international relations with foreign States.

The grant of recognition of belligerency entails the usual consequences, to the recognising State, of a declaration of neutrality in the case of a regular war. The recognising State becomes entitled to neutral rights, and these must be respected by rival parties. At the same time, the status of belligerency confers certain rights under the laws of war on the parent Government and on the insurgents, which are of advantage as long as the struggle retains its pitch and intensity. In particular, the legitimate Government is exonerated from responsibility for acts committed by the insurgents in territory occupied by them.

Belligerent recognition is quite distinct from the recognition of either the parent or insurgent Governments as the legitimate Government. As stated by the British Foreign Secretary, in 1937[2]:—

> " Recognition of belligerency is, of course, quite distinct from recognising any one to whom you give that right as being the legitimate Government of the Country. It has nothing to do with it. *It is a conception simply concerned with granting rights of belligerency which are of convenience to the donor as much as they are to the recipients* ".

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[1] Smith, *Great Britain and the Law of Nations* (1932), Vol. I, at p. 263.
[2] Then Mr. Eden, later Sir Anthony Eden, and now Lord Avon.

5.—New Territorial Titles, Territorial Changes, and Treaties; Non-Recognition

Often States acquire new territorial or other rights by unilateral act on their part which may be:—(*a*) according to international law, or (*b*) in violation of international law. In case (*b*), recognition may be sought in order to turn a doubtful title into a good one and because the recognition will amount to a waiver by the other States of claims or objections inconsistent with the title thus recognised. In this way, the possibility that non-recognition may defeat a claim based upon acquiescence or prescription is excluded. The continuance of formal relations with the State concerned, after such territorial acquisition, does not of itself imply the recognition of the new territorial title.

In January, 1932, there was enunciated by Mr. Stimson, United States Secretary of State, a doctrine of non-recognition, which has since become widely known as the *Stimson Doctrine of Non-Recognition*. This declaration of policy was due to events in the Far East. In 1931, Japan, then a member of the League of Nations, invaded Manchuria, which was legally under the sovereignty of China. Subsequently, the Japanese forces overran and conquered Southern Manchuria. The United States refused to recognise this new situation or any treaties with China legalising it, and to clarify this attitude, Mr. Stimson, in a communication to the Chinese and Japanese Governments, announced that:—

> " The United States cannot admit the legality of any situation *de facto* nor does it intend to recognise any treaty or agreement between those Governments, or agents thereof, which may impair the treaty rights of the United States . . . and that it does not intend to recognise any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928 ".

The Treaty of Paris referred to in Mr. Stimson's communication was the General Treaty of 1928 for the Renunciation of War (known as the Briand-Kellogg Pact); this had been signed by the United States, as well as by China and Japan. Mr. Stimson claimed that by the doctrine a *caveat* would " be

placed upon such actions which, we believe, will effectively bar the legality hereafter of any title or right sought to be obtained by pressure of treaty violation ".

The Stimson doctrine of non-recognition was explicitly a statement of United States national policy,[1] although at the same time it was, according to Professor Briggs,[2] " in part, an attempt to establish the invalidity of treaties obtained through employment of duress in the wider sense of coercion against a State ". The Stimson declaration was followed some two months later by a Resolution adopted by the League of Nations Assembly on March 11, 1932, formulating a duty of non-recognition in these terms:—

> " It is incumbent upon the Members of the League of Nations not to recognise any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."

In the events which happened during the period 1932–1940, both the Stimson doctrine and the Assembly Resolution proved ineffectual, although towards the end of, and after the Second World War, the principle which they sought to uphold was to some extent vindicated by the restoration to certain States of the territory which had previously been taken from them by force.

Since the adoption of the United Nations Charter in 1945, followed by the establishment of the United Nations as a working body, there has been a discernible trend towards a doctrine of the non-recognition of territorial changes and treaties that have resulted 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.[3] This is reflected in the following:—(*a*) The

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[1] Which could be made effective by executive action in countries such as the United Kingdom and the United States where, in respect to recognition matters, a certificate or expression of opinion of the executive in an appropriate case will bind domestic courts. See pp. 161–163, *ante*.

[2] Herbert W. Briggs, *The Law of Nations. Cases, Documents and Notes* (2nd Edition, 1953), p. 847. See also the statement by Mr. Stimson, quoted in the preceding paragraph.

[3] Such threat or use of force is prohibited by Article 2, paragraph 4, of the United Nations Charter.

provision in the Bogotá Charter of the Organisation of American States, April 30, 1948 (see Article 17) that " no territorial acquisition or special advantages obtained either by force or by other means of coercion " are to be recognised.[1] (*b*) Article 11 of the Draft Declaration on the Rights and Duties of States, prepared by the International Law Commission in 1949, to the effect that every State is under a duty to refrain from recognising any territorial acquisition by another State obtained through the threat or use of force against the territorial integrity or political independence of another State, or " in any other manner inconsistent with international law and order ". (*c*) Article 52 of the Vienna Convention on the Law of Treaties of May 22, 1969, providing that a Treaty is void if its conclusion has been procured by the threat or use of force " in violation of the principles of international law embodied in the Charter of the United Nations ". (*d*) The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter, adopted by the General Assembly in 1970, proclaiming the following principle:—" No territorial acquisition resulting from the threat or use of force shall be recognised as legal ".

The question of obligatory non-recognition has arisen in relation to the current situations respectively in South West Africa (Namibia), where in spite of United Nations Resolutions and rulings of the International Court of Justice to the contrary, South Africa continues to purport to exercise authority as mandatory, as if it were not subject to the supervision of United Nations organs, and in Rhodesia, which is governed by a régime resulting from the unilateral declaration of independence of November 11, 1965. A Resolution adopted by the United Nations General Assembly on October 27, 1966, declared that South Africa had failed to fulfil its obligations as mandatory, with the result that the mandate was terminated and South

[1] Cf. for prior covenants of non-recognition by American States, the undertaking to this effect in the Anti-War Pact of Non-Aggression and Conciliation of 1933, and the Lima Declaration of 1938 on Non-Recognition of the Acquisition of Territory by Force.

West Africa came under the direct responsibility of the United Nations, thus carrying the implication that Member States were bound to recognise this position, and not to recognise the continuance of South Africa's status as a mandatory. Similarly, a Resolution adopted by the General Assembly on November 17, 1966, which, *inter alia,* condemned Portugal and South Africa for supporting the Rhodesian régime, and called upon the United Kingdom Government to take all necessary measures to put an end to that régime, involved the implication that Member States were under a duty not to recognise the régime. In a Resolution adopted on November 17, 1970, the Security Council urged States not to recognise the régime.

In its Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in South West Africa* (*Namibia*),[1] the International Court of Justice ruled:—(1) that inasmuch as the continued presence of South Africa in Namibia was illegal by reason of its refusal to submit to the supervision of United Nations organs, South Africa was under an obligation to withdraw its administration from the Territory immediately, and to end its occupation there; and (2) that Member States of the United Nations were under an obligation not to recognise the legality of South Africa's presence in Namibia, or the validity of South Africa's acts on behalf of or concerning Namibia, and were to refrain from any acts and any dealings with the South African Government implying recognition of the legality of, or lending support or assistance to, such presence and administration. Moreover, the validity or effects of any relations entered into by any State with South Africa concerning Namibia ought not to be recognised by the United Nations or its Member States. Although the Advisory Opinion is confined to rulings upon the particular circumstances of South Africa's relationship to Namibia, these pronouncements may well be used in the future for wider purposes to support a generalised rule imposing a duty of non-recognition of all territorial and other situations brought about in breach of international law.

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[1] I.C.J. Reports, 1971, 16, at pp. 54, 56.

Chapter 7

STATE TERRITORIAL SOVEREIGNTY AND OTHER LESSER RIGHTS OF STATES

1.—Territorial Sovereignty and Other Lesser Rights

As we have seen, one of the essential elements of statehood is the occupation of a territorial area, within which State law operates. Over this area, supreme authority is vested in the State.

Hence there arises the concept of "Territorial Sovereignty" which signifies that within this territorial domain jurisdiction is exercised by the State over persons and property to the exclusion of other States. This concept bears some resemblance to the patrimonial notions of ownership under private law, and in fact the early writers on international law adopted many of the civil law principles of property in their treatment of State territorial sovereignty. To this day, their influence has persisted so that in particular the rules as to acquisition and loss of territorial sovereignty plainly reflect the influences of the civil law, but it is manifest that there are certain dangers in having recourse to Roman law and civil law analogies. However, it may be that in certain areas of the subject there is room for a wider application of the *uti possidetis* principle ("as you possess, you shall continue to possess").[1]

Territorial sovereignty was described by the learned Max Huber, Arbitrator in the *Island of Palmas Arbitration*, in these terms[2]:—

> "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".

It is sometimes said that territorial sovereignty is indivisible, but there have been numerous instances in international

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[1] Cf. observations of Judge Quintana in the *Frontier Lands Case*, I.C.J. Reports (1959), 209, at p. 255.

[2] *American Journal of International Law* (1928), Vol. 22, at p. 875.

practice both of division of sovereignty, and of distribution of the components of sovereignty.

For instance, sovereignty is often shared jointly by two or more Powers as in the case of a condominium.[1] Moreover, leases or pledges of a territory are frequently made by one State to another, as for example the leases of Chinese territory to Russia, France, Germany, and Great Britain at the end of the last century during the so-called " Battle of the Concessions " between these Great Powers, and the leases of British bases in the West Atlantic to the United States in 1940 in exchange for fifty American destroyers which were urgently needed in the war against Germany. In the case of a lease, temporary sovereignty is exercised by the lessee State, while the lessor State possesses a sovereignty in reversion. Again, sometimes sovereignty over a territory is held by one or more Powers in trust for the population of the territory concerned, as for example in the pre-war case of the League of Nations control over the Saar before its return to Germany in 1935. Thus, international law does not appear to restrict the manner in which the sovereignty as to particular territory can be bestowed on, or withdrawn from any State.

Acquisition of Territorial Sovereignty

The five traditional and generally recognised modes of acquiring territorial sovereignty are:—Occupation, annexation, accretion, prescription, and cession. These modes are directly analogous to the civil law methods of acquiring private ownership.

As was pointed out in the *Island of Palmas Arbitration*,[2] these modes reduce essentially to the display of *effective* control and authority either by the State claiming sovereignty, or by a State from which the State claiming sovereignty can prove that title has been derived.[3] Thus occupation and annexation are based on an act of " effective apprehension "

[1] See p. 123, *ante*.

[2] See *American Journal of International Law* (1928), Vol. 22, at pp. 875–6.

[3] See Kelsen, *General Theory of Law and State* (1961 Edition), pp. 213–216, for discussion of the extent to which effectiveness governs the operation of these modes of acquiring title.

of the territory, while accretion can only be conceived of as an addition to a portion of territory where there already exists an actual sovereignty. Prescription depends on the continuous and peaceful display of sovereignty over territory for a long period, while cession presupposes that the ceding State has the power of effectively disposing of the ceded territory. It is claimed by some writers, notably Kelsen, that cession *per se* does not operate to transfer territorial sovereignty until the receiving State has effectively established its authority over the ceded territory.

One additional mode of acquisition of territorial sovereignty, not included above, should be mentioned, namely adjudication or award by a Conference of States. This usually occurs where a Conference of the victorious Powers at the end of a War assigns territory to a particular State in view of a general peace settlement; for example, the territorial redistribution of Europe at the Versailles Peace Conference, 1919. According to Soviet doctrine, territorial sovereignty may also be acquired by plebiscite, although this would appear to be less a mode of acquisition than a step preceding it.

Certain instances in the past of territorial sovereignty accruing to a State cannot readily be fitted into one or other of these traditional, generally accepted modes of acquisition. Such special cases have included, and may include the following:—(*a*) territory accruing to a State by reason of a boundary delimitation effected by a mixed demarcation commission, or under an award *ex aequo et bono* by an arbitral tribunal settling a boundary dispute; (*b*) the grant of territorial rights to a State under a treaty between it and some indigenous tribe or community, previously in sole and exclusive occupation of the area concerned; (*c*) long, continuous recognition by other States of a State's territorial sovereignty, notwithstanding obscurity or ambiguity surrounding the inception of that State's claim to title; (*d*) succession by a new State to the territory of its predecessor; (*e*) territory distributed as the result of a treaty of compromise or settlement in respect to disputed tracts of land. As to (*e*), the present writer would indeed favour a general head of acquisition under the provisions of a treaty, in the same way

as the draftsmen of the *Code Napoléon* (1803) admitted the acquisition of property as the result of obligations (see Book III, General Provisions, Article 711).

The modes-of-acquisition approach to the creation and transfer of territorial sovereignty is both sound in principle and of practical value, provided that care is taken, in using this approach, not to confuse the mode itself with its component elements or ingredients (e.g., in the case of the mode known as "occupation", the element of display of authority is an ingredient of, but not itself a mode of acquisition of territorial sovereignty).

Occupation

Occupation consists in establishing sovereignty over territory not under the authority of any other State whether newly discovered, or—an unlikely case—abandoned by the State formerly in control.

In determining whether or not an occupation has taken place in accordance with international law, the principle of effectiveness is applied for the most part. In the *Eastern Greenland Case*,[1] the Permanent Court of International Justice laid it down that occupation, to be effective, requires on the part of the appropriating State two elements:—(i) an intention or will to act as sovereign; (ii) the adequate exercise or display of sovereignty. In the case mentioned, title to Eastern Greenland was disputed by Norway and Denmark, and Denmark was able to prove circumstances which established these two elements on its part.

The element of intention is a matter of inference from all the facts, although sometimes such intention may be formally expressed in official notifications to other interested Powers. There must be evidence of nothing less than a permanent intention to assume control; a mere transient passage by the alleged occupying Power is by itself insufficient to satisfy this test. Nor are the independent, unauthorised activities of private individuals, without subsequent ratification, valid for this

[1] Pub. P.C.I.J. (1933), Series A/B, No. 53.

purpose.[1] Hence, discovery alone has been regarded by writers as conferring an " inchoate " title only, unless such discovery be consummated by some more significant acts or activity. As regards the second requirement of exercise or display of sovereignty, this may be satisfied by concrete evidence of possession or control, or according to the nature of the case, a physical assumption of sovereignty may be manifested by an overt or symbolic act[2] or by legislative or executive measures affecting the territory claimed, or by treaties with other States recognising the claimant State's sovereignty, by fixing of boundaries, and so on. The degree of authority necessary for this purpose will vary according to the circumstances; thus, a relatively backward territory does not require the same elaborate control and government as one more developed and civilised.

In the *Minquiers and Ecrehos Case*,[3] relating to disputed British and French claims to certain Channel islets, the International Court of Justice stressed the importance of actual exercise of " State functions ", e.g., local administration, local jurisdiction, and acts of legislative authority, as proving the continuous display of sovereignty necessary to confirm title. For this reason, upon the evidence as to long continued exercise of State functions by British authorities, the Court preferred the claim of Great Britain.

An act of occupation more frequently than not involves in the first instance an act of discovery. It now follows from the *Island of Palmas Arbitration*, *supra*, decided by M. Huber as Arbitrator, that a mere act of discovery by one State without more is not sufficient to confer a title by occupation, and that such incomplete appropriation must give way to a continuous and peaceful display of authority by another State. In this arbitration, the contest of title lay between the United

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[1] See *Fisheries Case*, I.C.J. Reports, 1951, 116, at p. 184, and Greig, *International Law* (1970), pp. 132–133.

[2] See the *Clipperton Island Arbitration* (1931), *American Journal of International Law* (1932), Vol. 26, 390. As this Arbitration shows, an actual manifestation of sovereignty on the *locus* of the territory creates a stronger title than a historic claim of right, unsupported by such a concrete act.

[3] I.C.J. Reports (1953), 47, at pp. 68–70.

States, claiming as successor to Spain which had originally discovered the island disputed, and the Netherlands, which according to the historical evidence submitted to the Arbitrator, had for a very long period purported to act as sovereign over the island. The Arbitrator adjudged the island to the Netherlands, and in giving the reasons for his award laid supreme emphasis on the fact that long continuous exercise of effective authority can confer title at international law.

It may be important to determine what extent of territory is embraced by an act of occupation. Various theories on this point have been held from time to time,[1] and two such theories have assumed particular significance in connection with the claims of certain States in polar regions, namely:—(1) The theory of *continuity*, whereby an act of occupation in a particular area extends the sovereignty of the occupying State so far as is necessary for the security or natural development of the area of lodgment. (2) The theory of *contiguity*, whereby the sovereignty of the occupying State reaches to those neighbouring territories which are geographically pertinent to the area of lodgment.[2]

Both theories are to some extent reflected in the claims made by States to polar areas according to the *sector principle*.[3] By claims based on this principle, certain States with territory bordering on the polar regions have asserted a sovereign title to land or frozen sea within a sector defined by the coastline of this territory and by meridians of longitude intersecting at the North or South Pole as the case may be. These claims

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[1] For discussion of the theories, see Westlake, *International Law* (2nd Edition, 1910), Vol. I, pp. 113 *et seq.*

[2] The theory of contiguity was rejected by Arbitrator Huber in the *Island of Palmas Arbitration*, p. 176, *ante*; he declared it to be " wholly lacking in precision ". In the *North Sea Continental Shelf Cases*, I.C.J. Reports (1969), 3 at pp. 30–31, the International Court of Justice preferred the theory of continuity to that of adjacency or proximity (i.e., contiguity) as an explanation of the coastal State's rights in regard to the continental shelf; see also pp. 224–225, *post*.

[3] The sector claims of Chile and Argentina in the Antarctic are based primarily on contiguity; see Greig, *International Law* (1970), p. 140. For a map of the Antarctic sector claims, see London *Times*, January 18, 1955. p. 9, or *North Sea Continental Shelf Cases, Pleadings, Oral Arguments, Documents*, Vol. I, 1968, p. 81; and *ibid.*, p. 82 for a map of the Arctic sectors.

have been pressed both in the Arctic (by the Soviet Union and Canada, for example) and in the Antarctic (by Argentina, Australia, Great Britain, Chile, France, New Zealand, and Norway).[1] The principal justification for sector claims is the inapplicability to polar regions, with their inaccessibility, climatic conditions, and lack of settlement,[2] of the normal principles of physical assumption of control implicit in the international law of occupation. Also the view has been advanced that the sectors themselves correspond to a just and equitable division. On the other hand, it is fairly arguable that the sector claims rest on no stronger basis than the mutual acquiescence of the claimant States. In effect, they amount to no more than notifications of future intention to assume full control, something akin to designations of spheres of influence or interest. Significantly, sector States have sought to fortify their title by the ordinary methods of administrative control, State activity, etc., traditionally employed by States desiring to acquire title by occupation. Other criticisms of sector claims are fairly and justly directed to the arbitrary character of the sector lines, and to the fact that these lines lie across large areas of the open sea.

One point is clear. The practice of a limited number of States in making sector claims has not created a customary rule that such a method of acquiring polar territory is admissible in international law. Here, it is only necessary to mention the reservations of non-sector States and doubts of jurists on the validity of sector claims, and the widely held view that polar areas should be subject to an international regime. Reference may be made in this connection to the Treaty on Antarctica signed at Washington on December 1, 1959, by the seven Antarctic sector States and

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[1] The British sector claim conflicts with the Argentinian and Chilean claims, which themselves overlap.

[2] These factors may be overcome by new technical developments in the field of aviation. Already, aviation has made it possible to supply winter bases in polar regions. In addition, " great circle " air routes across the Arctic have been pioneered and are in regular use. Apart from aviation, there is the possibility that the inaccessibility of polar regions may be reduced through the use of nuclear submarines. On July 31, 1962, two United States nuclear submarines met at the North Pole.

Belgium, Japan, South Africa, the Soviet Union, and the United States. This Treaty provides, *inter alia*, that Antarctica should be used for peaceful purposes only, that there should be freedom of scientific investigation there, that the parties should exchange information regarding Antarctic scientific programmes, that nuclear explosions and the disposal of radioactive wastes in Antarctica should be prohibited, and that all areas in Antarctica should be freely available for inspection by observers of the contracting States. It is, however, expressly provided in Article IV of the Treaty that nothing therein is to be interpreted as a renunciation of claims or of any basis of claim in Antarctica, and that no acts or activities taking place while the Treaty is in force are to serve as a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica, or create any rights of sovereignty there, while no new claim or enlargement of an existing claim is to be asserted. The result is that, during the currency of the Treaty, Antarctic sector claims are " frozen ", and the *status quo* of Antarctic non-sector bases of claim is preserved.

In order to further the principles and objectives of the Antarctic Treaty, six Consultative Meetings of the parties were held respectively at Canberra in 1961, Buenos Aires in 1962, Brussels in 1964, Santiago in 1966, Paris in 1968, and Tokyo in 1970.[1] The Brussels Meeting was especially notable for the adoption of the Agreed Measures for the Conservation of Antarctic Fauna and Flora, Article VIII of which provided for the zoning of " Specially Protected Areas ". A number of such areas have since been designated. At the Tokyo Consultative Meeting in 1970, two important Recommendations were adopted, one relating to man's impact on the Antarctic environment, which provided for research in the matter and for interim measures to reduce harmful environmental interference, and the other for exchange of information concerning launchings of scientific research rockets in the Treaty Area.

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[1] For text of the Recommendations and other measures adopted by the Consultative Meetings prior to the Tokyo Meeting of 1970, see the publication *Basic Documents, The Antarctic Treaty* (Tokyo 1970) prepared for the Tokyo Meeting.

Annexation

Annexation[1] is a method of acquiring territorial sovereignty which is resorted to in two sets of circumstances:—(*a*) Where the territory annexed has been conquered or subjugated by the annexing State. (*b*) Where the territory annexed is in a position of virtual subordination to the annexing State at the time the latter's intention of annexation is declared. Case (*a*) is the more usual, but there have been modern instances of case (*b*), as, for example, the annexation of Korea by Japan in 1910, Korea having then been under Japanese domination for some years. Conquest of a territory as under (*a*) is not sufficient to constitute acquisition of title; there must be, in addition, a formally declared intention to annex, which is usually expressed in a Note or Notes sent to all other interested Powers. It follows that sovereignty is not acquired by victorious States over the territory of a vanquished State, if they expressly disclaim an intention to annex it.[2] An annexation which results from gross aggression committed by one State against another, or which has been effected by force contrary to the provisions of the United Nations Charter, ought not, *semble,* to be recognised by other States.[3]

Accretion

Title by accretion[4] occurs where new territory is added, mainly through natural causes, to territory already under the sovereignty of the acquiring State. No formal act or assertion

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[1] Distinguish the so-called " peaceful annexation ", i.e., the taking over of territory in the name of a State, by proclamation followed by settlement, without the use of force to conquer the territory. Such " peaceful annexation " is in effect an ingredient of the method of acquisition by occupation. Cf. the use of the expression " peaceful annexation " in *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, P.C., at p. 291, with reference to the colonisation of Australia.

[2] Cf. the case of such a disclaimer by the Allied Powers in 1945 in respect to Germany after the unconditional surrender by the German Government. According to Judge Jessup in *The South West Africa Cases*, 2nd Phase, I.C.J. Reports, 1966, 6, at pp. 418–419: " It is commonplace that international law does not recognise military conquest as a source of title ".

[3] See above, pp. 168–171.

[4] See Hyde, *International Law* (2nd Edition, 1947), Vol. I, pp. 355–6.

of title is necessary. It is immaterial whether the process of accretion has been gradual or imperceptible, as in the normal case of alluvial deposits or alluvial formation of islands, or whether it has been produced by a sudden and abrupt transfer of soil, provided that this has become embedded, and was not in any event identifiable as originating from another location.[1] The rules of Roman private law regarding the division of ownership over alluvial deposits in streams or rivers between the riparian owners are by analogy applicable to the problem of apportioning sovereignty between riparian States where similar deposits occur in boundary rivers.

Cession

Cession is an important method of acquiring territorial sovereignty. It rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a State.

The cession of a territory may be voluntary, or it may be made under compulsion as a result of a war conducted successfully by the State to which the territory is to be ceded. As a matter of fact, a cession of territory following defeat in war is more usual than annexation. As examples of voluntary cession may be cited the sale of Alaska by Russia to the United States in 1867, and the exchange of Heligoland for Zanzibar by Germany and Great Britain in 1890. Compulsory cession is illustrated by the cession to Germany by France in 1871 of Alsace-Lorraine—subsequently returned to France at the end of the First World War.

Any transaction (such as a gift, sale, or exchange) will be valid as a cession which sufficiently indicates an intention to transfer sovereignty from one State to another.

A ceding State cannot derogate from its own grant. Hence, it is, that there necessarily pass under a cession of territory all sovereign rights pertaining to the territory ceded.

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[1] See Shalowitz, *Shore and Sea Boundaries*, Vol. II (1964), at pp. 537–539, as to the different meanings of accretion, alluvion, reliction, erosion, and avulsion.

Prescription

Title by prescription (i.e., *acquisitive* prescription) is the result of the peaceable exercise of *de facto* sovereignty for a very long period over territory subject to the sovereignty of another.[1] A number of jurists (including Rivier and de Martens) have denied that acquisitive prescription is recognised by international law.[2] There is no decision of any international tribunal which conclusively supports any doctrine of acquisitive prescription, although it has been claimed that the *Island of Palmas Case* (p. 176), represents such a precedent.[3] Nor is there any recognised principle of international law fixing in terms of years the period of time that will constitute a good root of title. As a practical matter it is also difficult to conceive of any case in which the lawful sovereignty of a State over territory would give way before possession and control by another. Indeed, it has never been accepted that the mere silence of a State with regard to territory claimed to belong to it could result in the divesting of its claim by anything less than the *indicia* of an effective occupation. In the *Frontier Lands Case* (Belgium-Netherlands),[4] it was held by the International Court of Justice that mere routine and administrative acts performed by local Netherlands officials in a certain area could not displace the legal title of Belgium to that area under a duly concluded Convention.

On the other hand, it is true that if territory formerly belonging to State A is to be acquired by another entity or State, there is no requirement at international law that State A must

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[1] This distinguishes acquisitive prescription from occupation, which involves the acquisition of sovereignty over *terra nullius*.

[2] Cf. *Survey of International Law in relation to the Work of Codification of the International Law Commission* (1949), published by the United Nations, at p. 39.

[3] In that case, Arbitrator Huber did not expressly base his award on any doctrine of acquisitive prescription.

[4] I.C.J. Reports (1959) 209. Also, subsequently, in the *Case concerning the Temple of Preah Vihear* (*Merits*) (Cambodia-Thailand) I.C.J. Reports (1962), 6, the Court declined to treat the acts of merely local administrative authorities in a certain disputed area, as negativing a consistent attitude of the central authorities of Thailand, accepting as valid a certain frontier line, which placed the area under the sovereignty of Cambodia.

evince an *animus disponendi.* If prescription is to be regarded as a good root of international legal title, the critical points are the length of the period of public and peaceful exercise of *de facto* sovereignty, whether this has remained uninterrupted, and the strength of the title displaced. The adequacy of length of the period would have to be decided by an international tribunal; and there should be caution in applying analogies from Roman law, or other systems of domestic law.

Acquisition of Territorial Sovereignty by Newly Emerged States

The acquisition of territorial sovereignty by newly emerged states, such as " decolonised " dependencies or emancipated trust territories appears to be *sui generis.* The theoretical dilemma here is that territory is one of the components of statehood, yet until the new State comes into being, in principle, there is no entity capable of taking title. In the writer's view, this abstract difficulty can be resolved by treating the people of the territory, as such, provided they have a sufficient degree of political maturity, as having or acquiring sovereignty pending the attainment of statehood.[1] Upon the foundation of the new State, there is simply a crystallisation of the situation, the territorial sovereignty of the people then becoming that of the State itself.

This view as to the acquisition of territory by newly emerged States is consistent with the principle proclaimed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations, adopted by the General Assembly in 1970, namely, that the territory of a colony or non-self-governing territory has under the Charter " a status

[1] Cf. Advisory Opinion of June 21, 1971, of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in South-West Africa* (*Namibia*), treating the people of the Mandated Territory of South West Africa as having a right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligation to submit to the supervision of United Nations organs. The Court referred to the people as a " jural entity "; see I.C.J. Reports, 1971, 16, at p. 56.

separate and distinct from the territory of the State administering it", which subsists until the people concerned has exercised its right of self-determination.

Loss of Territorial Sovereignty

To the modes of acquiring sovereignty over territory just considered, there correspond exactly similar methods of losing it. Thus territorial sovereignty can be lost by dereliction (corresponding to occupation on the acquisitive side), by conquest, by operations of nature (corresponding to accretion on the acquisitive side), and by prescription. There is, however, one method of losing territory which does not correspond to any mode of acquiring it, namely, revolt followed by secession of a part of the territory of the State concerned.

Sovereignty over the Air Space

The development of aviation as from the early years of the present century immediately raised problems as to the sovereignty of States over their superjacent air space.

Before the First World War (1914–1918) the only point on which there was universal agreement was that the air space over the open sea and over unappropriated territory was absolutely free and open. In regard to the air space over occupied territory and over waters subject to State sovereignty, there were a number of different theories,[1] but upon the outbreak of the First World War in 1914, it was found, as a matter of practical exigency, that the only one commanding acceptance by all States was the theory of sovereignty of the subjacent State over the air space to an unlimited height, i.e. *usque ad coelum*. This was adopted and enforced not merely by the belligerents, but also by neutral States. It was confirmed in Article 1 of the Paris Convention of 1919 for the Regulation of Aerial Navigation, whereby the parties recognised that every State has "complete and exclusive sovereignty" over the air space above its territory and territorial waters. As we shall

[1] These included, in addition to the *usque ad coelum* theory, the following:—(a) complete freedom of the air space; (b) sovereignty of the subjacent State up to a specific height, the remaining air space being free; (c) sovereignty of the subjacent State up to a specific height, that State having a right to regulate the passage of aircraft through the remaining air space.

see below,[1] this *usque ad coelum* principle has been affected by recent developments in the upper strata of the atmosphere and in outer space.

The Paris Convention contained elaborate provisions for the international regulation of air navigation, partly with the object of establishing uniformity. It established the distinction, which is still currently maintained between:—(a) scheduled international airlines or air services (described in Article 15 as " regular international air navigation lines " and " international airways "); and (b) aircraft not belonging to such scheduled airlines or air services. The latter aircraft, provided that they were of parties to the Convention, were to have " freedom of innocent passage " through the air space of other parties, subject to their observance of the conditions laid down in the Convention (Article 2). The former, however, were to have no right of operating, with or without landing, except with the prior authorisation of the States flown over (Article 15). The Convention and its annexed Regulations provided also for the registration of aircraft, for certificates of airworthiness, for aircrew licences, for rules of traffic near aerodromes, etc. The Convention did not apply to certain American States, including the United States, but these[2] became party to the Havana Convention of 1928 on Commercial Aviation, containing substantially similar provisions, although differing from the former instrument in being primarily a commercial agreement and in containing no annexed technical regulations.

In general, prior to the Second World War, landing rights for foreign aircraft remained within the discretion of the State concerned.

The prodigious increase in trans-continental and inter-oceanic aviation, following on technical developments both before and during the Second World War, raised new problems as to freedom of air transit and landing rights for international airlines. States operating regular international airlines which did not possess convenient air-strips in other parts of the world

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[1] See pp. 192–203.

[2] Chile, which was a party to the 1919 Convention, was also a party to the Havana Convention, but denounced the earlier Convention in 1936.

naturally clamoured for such rights as against States which did have these landing grounds. Also, as between States which desired to maintain their own scheduled air services, even to distant countries, problems arose of the allocation of air traffic. These and allied questions formed the subject of an International Civil Aviation Conference which met at Chicago in November, 1944. The object of this Conference at which over forty States were represented was to conclude world-wide arrangements governing commercial air traffic rights as well as technical and navigational matters relating to international aviation. The main discussions were concerned with obtaining agreement by all States to the concession of the " Five Freedoms of the Air ", namely, the rights of the airlines of each State to:—

(1) fly across foreign territory without landing;
(2) land for non-traffic purposes;
(3) disembark in a foreign country traffic originating in the State of origin of the aircraft;
(4) pick up in a foreign country traffic destined for the State of origin of the aircraft;
(5) carry traffic between two foreign countries.

The proposal of the " Five Freedoms " was fostered by the United States, the most powerful operator State, but no unanimous enthusiasm was shown at the Conference for making these part of the law of nations. Only the first two " Freedoms " appeared to obtain the support of a majority of the States represented. Accordingly, the Conference was constrained to draw up two Agreements:—(*a*) The International Air Services Transit Agreement providing for the first two " Freedoms ", namely, flying without landing, and landing rights for non-traffic purposes in foreign territory. Subject to the provisions of this Agreement, a State party might designate the route to be followed within its territory, and the airports which could be used. (*b*) The International Air Transport Agreement embodying all " Five Freedoms ". States parties to this Agreement might refuse to the aircraft of other States access to the internal air traffic within their

territory. The majority of the States represented at the Conference signed the first Agreement, but less than half signed the second, and a few States abstained from signing either. It is clear from this that the third, fourth, and fifth " Freedoms " do not command general acceptance as principles of international law.

Besides these two Agreements the Conference drew up a Convention on International Civil Aviation setting out general principles of international air law which were also to condition the privileges granted in the two Agreements, and establishing a permanent international civil aviation organisation. Further, the Convention provided codes of operation for aircraft and personnel and health and safety rules, and recommended customs and immigration methods and navigational facilities for Member States of the Organisation. The permanent aviation organisation under the title of the International Civil Aviation Organisation (I.C.A.O.) has been actively functioning since 1947 with considerable achievements to its credit in the legal and technical fields, including the adoption of standards and recommended practices as annexes to the Convention, and the adoption or conclusion of the Convention of 1948 on the International Recognition of Rights in Aircraft, of the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface, and of the Protocol of Amendment to the Warsaw Convention of 1929[1] concerning the

[1] The precise title of which is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929. The question of the revision of the Warsaw Convention, so far as concerns the upper limit of liability for passenger injury or death, the basis of responsibility, and related matters of insurance, became an acute issue in 1965–1966, arising out of the United States Government's dissatisfaction with the limit contained in the Convention, as amended at The Hague. This led to the negotiation in 1966 of the so-called " Montreal Agreement ", whereby a number of foreign and United States carriers operating in or into the United States undertook to accept a substantially higher limit and in effect acquiesced in the principle of absolute liability; cf. R. H. Mankiewicz, " Air Transport Liability—Present and Future Trends ", *Journal of World Trade Law*, Vol. III (1969) pp. 32–48. In February–March, 1970, the Legal Committee of the International Civil Aviation Organisation (ICAO) prepared draft articles of revision of the Convention, for submission to a diplomatic conference, increasing the upper limit of liability, and providing for absolute liability except where death or injury resulted solely from the passenger's infirmity; see *American Journal of International Law*, Vol. 64 (1970), pp. 641–644.

Liability of the Air Carrier to Passengers and Cargo, concluded at The Hague in 1955.

The Chicago Conference did not result in material alterations to the international law of the air. This is apparent from a perusal of the more general chapters (Chapters I–III) of the Convention on International Civil Aviation which lay down principles very similar to those adopted in the Paris Convention of 1919; for example, the principle of a State's complete and exclusive sovereignty over the air space above its territory (Articles 1–2), and the principles as to registration and nationality of aircraft (Articles 17–21). The drafting was sharpened in many respects; for example, Article 5, instead of granting " freedom of innocent passage " according to the somewhat ambiguous terms of Article 2 of the Paris Convention, granted to aircraft " not engaged in scheduled international air services " the right to " make flights into or in transit *non-stop* " across the territory of a State party, and to " make stops for non-traffic purposes " without obtaining that State's prior permission, subject to the right of that State (for example, for security reasons) to require immediate landing.[1] " Scheduled international air services " were not to be operated " over or into the territory " of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation, although non-scheduled aircraft might discharge passengers, cargo, or mail, subject to the regulations, etc., of the State concerned. Thus the distinction between scheduled international air services, whose rights of overflight or landing depend on the consent of the subjacent State, and non-scheduled aircraft, with restricted rights of passage and landing, was continued. One point of interest was that internal air traffic, i.e. air *cabotage*, might be reserved entirely to the territorial State, and by the conjoint effect of Articles 2 and 7, included traffic between the mother country and overseas

[1] Under the Convention, these rights of overflight and landing in territory are subject to a number of qualifications and restrictions; e.g. as regards routes, articles that may be carried, and areas that may be flown over.

territories or dependencies. Here again, the position under the Paris Convention remained unchanged.[1]

Other important points under the Convention are that State aircraft (including Government military aircraft) were to have no rights of flight over or landing in the territory of other States without special authorisation of the subjacent State, and that in time of war or duly notified emergency, declared to be such, States are free, whether as belligerents or neutrals, from obligations under the Convention, although they may opt to observe these. Reference should be made also to the duties laid down by the Convention in general terms that subjacent States should observe equality of treatment and non-discrimination in regard to other States using their air space, and that all States should take such measures as are necessary to make international air navigation safer and easier.

The above-mentioned principles represent the main general rules of the international law of the air. They embrace an exceedingly narrow range, leaving unregulated a host of important matters affecting international air traffic. The need still remains for a multilateral Convention to mitigate the effects of the current rivalry for air routes and air commerce, although such a Convention seems a visionary ideal.

As was foreshadowed when the Chicago Conference terminated, the subject of allocation of traffic between competing scheduled international airlines, which the Conference was not able to regulate by multilateral general agreement, has come under regulation in particular cases by bilateral agreements between the States concerned.[2] One of the most important of these treaties was the Bermuda Agreement of February, 1946, between Great Britain and the United States, which has served as a model for later bilateral agreements. This mushrooming of bilateral treaties conferring, subject to *ad hoc* conditions, all or some of the " Five Freedoms ", has not been without its defects; it has, for instance seriously impaired the uniformity

[1] The standard work on the law of international air transport is Bin Cheng, *The Law of International Air Transport* (1962).

[2] Non-scheduled air services also became the subject of bilateral agreements, and in one instance of a multilateral agreement, namely the Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, concluded at Paris on April 30, 1956.

of law and practices which was one of the primary objects of the Chicago Conference. On the other hand, a diligent examination of the treaties reveals a number of similar or common features, such as the dependence of transit and traffic rights upon reciprocity, the recognition of a principle that international air transport should be facilitated, and substantial uniformity in the drafting of administrative and technical clauses. In July, 1946, the United States had withdrawn from the Air Transport or "Five Freedoms" Agreement, thus recognising that the international regulation of air traffic by multilateral general agreement was impracticable. So, in respect at least of scheduled international airlines or air services, multilateralisation proved impossible, and as reflected in bilateral networks of intergovernmental agreements concerning transit, traffic, and landing rights, the doctrine of sovereignty in the "closed air space" now prevails. Indeed, in other areas, States appear to be extending rather than restricting this doctrine, for example by the establishment for security purposes of "air defence indentification zones" above the maritime approaches to their coasts,[1] and by other expedients.[2]

The recent emergence of wide-bodied airliners with greatly augmented passenger capacity and increased rate of frequency of journeys, by reason of higher speeds, has already pointed to some problems in the practical working of bilateralism, which is founded primarily upon the exchange of traffic rights. Such an exchange becomes difficult where, in respect to a particular country of embarkation and disembarkation, there is not enough volume of traffic for economic division among carriers, so that protectionist restrictions become necessary, unless it is clear that the volume will increase. For this reason, if the trend towards larger, speedier airliners continues upon a global scale, multilateral or regional solutions may be needed.

Apart from aviation traffic, problems of abuse of the air

[1] E.g., by the United States. For bibliographical note on air defence identification zones, see Taubenfeld, *Review of International Commission of Jurists*, December, 1969, p. 36 n. 2.

[2] An interesting post-war development has been the practice of nominating "air corridors", which may be used by approaching aircraft, leaving the remainder of the air space "closed" and under the absolute control of the authorities of the subjacent State, or territory.

have come within the scope of international law. In respect to radiocommunications, two principles have emerged:—(*a*) That every State has a right to prevent its air space being traversed by injurious transmissions of radio waves. (*b*) That every State is under a duty not to allow, and to prevent its territory being used for the transmission of radio waves injurious to other States.[1] Then there is the Moscow Treaty of August 5, 1963, banning nuclear weapon tests in the atmosphere, in outer space, and under water; under this Treaty to which over 100 States, but not all, are parties, the contracting States undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, at any place under their jurisdiction or control in the atmosphere, or beyond the limits of the atmosphere, including outer space, or under water including territorial waters or the high seas (see Article I generally).[2] Other modern technological developments appear to require some principles for the protection of all States from injury through the air space; for example, States by the use of rain-making devices in their air space may deprive adjacent States of the benefit of rain-bearing clouds, thereby causing a drought, or again by the use of atomic energy for certain purposes, may cause dangerous radiations affecting the air or clouds above the territory of neighbouring States. In this connection, although no State is an insurer for neighbouring States against damage to the air space, there is probably a duty not to cause gross or serious damage which can be reasonably avoided, and a duty not to permit the escape of dangerous objects. The trend towards strict liability in this regard is reflected in the Treaty on Principles governing the Activities of States in the Exploration of Outer Space, including the Moon and Other Celestial Bodies, signed on January 27, 1967, and in the Draft Convention on International Liability for Damage Caused by Space Objects, adopted on June 29, 1971 (see below).

In addition, there are problems such as those of pollution of the air and of aircraft noise, which now come within the scope of the wider subject of protection and improvement of the

[1] Cf. Le Roy, *American Journal of International Law* (1938), Vol. 32, at pp. 719 *et seq.*

[2] For the text of the Treaty, see *U.K. Treaty Series*, No. 3 (1964), Cmd. 2245

human environment under international law, and which, for this reason, are dealt with in Chapter 13, *post*, on Development, and the Human Environment.[1]

Finally, a brief reference may be made to the problems of international law created by air-cushion craft (i.e., hovercraft). Under the domestic legislation of certain countries, air-cushion craft have been treated to some extent as if they were aircraft. However, in its session of November 8, 1967, the Council of the International Civil Aviation Organisation (ICAO) amended the definition of aircraft in its Standards and Recommended Practices in such a way as to exclude air-cushion craft, the amended definition reading:—" Any machine that can derive support in the atmosphere from the reactions of the air, *other than the reactions of the air against the earth's surface* " (amendment in italics). If there is to be an autonomous international legal régime for air-cushion craft, as has been suggested by some international lawyers, it may be necessary in the first instance to classify and distinguish the different kinds of such craft.[2]

Upper Strata of the Atmosphere, Outer Space, and the Cosmos

New problems of international law have been created by the greatly intensified activities of States in the upper strata of the atmosphere, in outer space, and in the cosmos,[3] and by the correspondingly spectacular advances in space technology, in astronautical navigation, and in planetary exploration, both manned and unmanned.[4]

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[1] See pp. 374–383, *Post.*

[2] See Report of the 53rd Conference of the International Law Association, 1968, pp. 66–68, and 136–146. The subject of a Draft Convention on Hovercraft was considered at the 54th Conference in 1970, and a revised draft text is to be submitted at the 55th Conference in 1972.

[3] The term " cosmos " is used here to denote the remoter regions of outer space.

[4] The following represents a short list of recommended books and articles on space law:—Gyula Gal, *Space Law* (1969); McWhinney and Bradley (eds.), *New Frontiers in Space Law* (1969); D. Goedhuis, " Reflections on the Evolution of Space Law ", *Netherlands International Law Review*, Vol. XIII (1966), pp. 109–149; Professor Bin Cheng's articles, " The 1967 Space Treaty ", *Journal du Droit International*, July–September, 1968, pp. 532–644, " Analogies and Fiction in Air and Space Law ", *Current Legal Problems* 1968, pp. 137–158, and " The 1968 Astronauts Agreement or How not to Make a Treaty ", *Year Book of World Affairs*, 1969, pp. 185–208; and Howard J. Taubenfeld, " Progress in International Law: Outer Space and International Accommodation ", *Review of International Commission of Jurists*, December, 1969, pp. 29–38.

Into and through the upper strata of the atmosphere, that is beyond the present operating ceilings of conventional jet engine or piston engine aircraft[1], States have been able to project balloons, rockets, and long-range missiles, and to transmit radio waves, while non-conventional machines, such as rocket-powered aircraft, have demonstrated a capability to reach unprecedented altitudes in the airspace.

As to outer space and the cosmos, the launching of the first artificial earth satellite in 1957 by the Soviet Union has been followed by space activities on a constantly increasing scale. First, there have been not only the number, weight, and orbital ranges of the satellites and sub-satellites projected, but also their functional diversity, for purposes, *inter alia,* of meteorology, missile detection, navigation, earth survey, monitoring of pollution, ionospheric measurement, solar radiation measurement, photography, and communications, including telecommunications. Second, the Soviet Union and the United States as the two principal space Powers have conducted far-reaching experiments in penetration of the cosmos, beginning with the Soviet Union's success in 1959 in hitting the moon and photographing its reverse side, and continuing with even more distant space probing, to planets such as Mars and Venus. Third, the man-in-space programmes of these two Powers resulted in sustained orbital flights by cosmonauts, and culminated in the lunar landings and explorations by United States cosmonauts in 1969–1971, while both manned and unmanned rover vehicles[2] have traversed lunar territory and retrieved samples of lunar soil and rock. Apart from these concrete results, the feasibility of space shuttles and space stations appears to have been demonstrated.

In addition to the knowledge of the moon and planetary system gained from the lunar landings and space probes, there have been the great discoveries contributing to extra-terrestrial science, namely those concerning the nature of space itself, the

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[1] Even high altitude flights of conventional aircraft have necessitated the establishment of special control centres.

[2] The unmanned vehicle was the automated lunar rover *Lunokhod,* projected on the moon by the Soviet Union.

magnitude of the cosmic rays, the radiation zones surrounding the earth, the extent of the earth's magnetic field, the character of the ionosphere, and the measurement of micro-meteorite density.

It has been difficult indeed for the international law of space to keep up with the unflagging speed of this progress in space technology and exploration. Yet space law can only in a very limited way anticipate these advances, for the formulation of its rules is necessarily dependent upon reliable data obtained through activities in outer space and the cosmos. As Judge Manfred Lachs of the International Court of Justice, himself a distinguished space lawyer, has said in another connection[1]:—

> " Whenever law is confronted with facts of nature or technology, its solutions must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law."

It has been sought to formulate some of the rules applicable in this domain in the following instruments, namely:—(*a*) The nuclear weapons test ban treaty of 1963, referred to above, under which States parties undertake to prohibit, prevent, and not carry out nuclear weapon test explosions beyond the limits of the atmosphere, including outer space; (*b*) The Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, signed on January 27, 1967 (referred to, *post*, as the 1967 Space Treaty); (*c*) The Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, signed on April 22, 1968 (referred to, *post*, as the 1968 Astronauts Agreement); (*d*) The Draft Convention on International Liability for Damage Caused by Space Objects (referred to, *post*, as the 1971 Draft Liability Convention), adopted on June 29, 1971, by the Legal Sub-Committee of the United Nations Committee on the

[1] In the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, 3, at p. 222.

Peaceful Uses of Outer Space;[1] (*e*) The Draft Treaty concerning the Moon, submitted on June 4, 1971, to the United Nations Secretary-General by the Soviet Union, for consideration by the General Assembly at its 26th session, commencing in September, 1971. There is also a large measure of agreement on broad principles as reflected in a number of hortatory General Assembly Resolutions.[2] The most important instrument to date is the 1967 Space Treaty which propounds in effect a first code of space law, although it must be borne in mind that all the instruments are interdependent, and were largely influenced and conditioned by the principles and guidelines proclaimed by the General Assembly in its Resolutions.[3]

Upon the basis of these instruments and Resolutions, it is possible, allowing for the risks of generalisation, to formulate some of the fundamentals of the international law of space.

First, it is clear that the *usque ad coelum* rule, i.e., the doctrine of the sovereignty of the subjacent State to an unlimited height, cannot work in practice. States have not insisted on the rule, inasmuch as they have acquiesced, and still acquiesce in the repeated crossing, without their prior consent, of their superjacent space by orbiting satellites and capsules at heights of one hundred miles and more. Apart therefrom, there is some difficulty in applying to space, one of the considerations notionally underlying the *usque ad coelum* rule, namely, that of a vertical column which remains permanently and statically appurtenant to a particular subjacent State, because this does not strictly correspond to the scientific or astronomical facts.[4]

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[1] This Committee was established by the General Assembly on December 12, 1959, and primarily through its Legal Sub-Committee has proved to be the main forum for the initiation and adoption of law-making projects in the field of space law.

[2] As to the effect of the earlier Resolutions, see Bin Cheng, " United Nations Resolutions on Outer Space; ' Instant ' International Customary Law? ", *Indian Journal of International Law*, Vol. V (1965), p. 23.

[3] The 1967 Space Treaty and the 1968 Astronauts Treaty were in fact approved beforehand by General Assembly Resolutions on December 19, 1966, and December 19, 1967 respectively.

[4] Cf., Bin Cheng " From Air Law to Space Law ", *Current Legal Problems*, 1960, 228, at p. 232 and McDougal, *American Journal of International Law* (1957), Vol. 51, pp. 74–77.

On the other hand, most States agree on the *principle* that, particularly for security purposes, there must be sovereignty up to some upper limit, i.e., some demarcation either in the upper atmosphere itself, or between the atmosphere and space, although there is no *consensus* as to a precise figure for this height. The suggested limits have ranged from 300 miles upwards, although latterly a well-founded course of opinion favours 50 miles or thereabouts, out of regard for the lower limit of space in which artificial satellites have demonstrated ability to orbit.[1] There seems to be some apathy on the question of the necessity for fixing a demarcation height, and doubtless this reflects an underlying feeling that States may come to possess rights to a greater height than is now regarded as possible.[2] States appear ready to concede, albeit provisionally without any final waiver of their sovereignty, a right of innocent passage for objects launched for peaceful or scientific purposes, but not for military missiles. It seems undisputed that each State may claim sovereignty up to that height of the atmosphere where air density remains sufficient for the operation of conventional aircraft.

Second, outer space beyond this upper limit, whatever it may be, and celestial bodies are subject to international law and the United Nations Charter, are free for exploration and use by all States on a basis of equality, in conformity with international law, such exploration and use to be carried on for the benefit and in the interests of all mankind, and are not subject to national appropriation.[3] These principles were specifically commended to States by the United Nations General Assembly

[1] Under a resolution adopted by the 1968 Conference of the International Law Association, the term " outer space " as used in the 1967 Space Treaty should be interpreted so as to include all space at and above the lowest perigree achieved at the date of the Treaty (January 27, 1967) by any satellite put into orbit, without prejudice to the question whether at some later date the term is held to include space below such perigree.

[2] According to a working paper prepared by the United Nations Secretariat on the definition and/or delimitation of outer space (see U.N. document A/AC.105/C.2/7, 1970) no proposal on the matter appears to command general support, while States are even divided about the necessity for such definition or delimitation.

[3] *Quaere,* whether photographs from a satellite of State A of military installations, etc., of State B would be legitimate under these principles, if effected for defensive purposes only.

in its Resolutions of December 20, 1961, and of December 13, 1963, and were enunciated in articles I-III of the 1967 Space Treaty. Article IV indeed makes provision that the moon and other celestial bodies are to be used by all States parties exclusively for peaceful purposes, prohibiting thereon the establishment of military bases, installations, and fortifications, weapons testing, and military manoeuvres. Also under Article II, outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The Soviet Draft Treaty of 1971 concerning the Moon[1] contains, *inter alia,* provisions prohibiting:—(*a*) the establishment of sovereignty over any part of the moon by States, international organisations, or individuals; (*b*) military installations, weapon testing, or military activities on the moon; and (*c*) the placement on the moon, or in its orbit, of weapons of mass destruction.

Third, it is the duty of every State launching a satellite or object into orbit or beyond, to give due notice of the launching thereof, and information concerning such matters as orbits, weights, and radio frequencies. In its above-mentioned Resolution of December 20, 1961, the General Assembly called on States to furnish such information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary-General of the United Nations, and requested the Secretary-General to maintain a public registry of such information. Steps were subsequently taken to establish a public registry of information concerning outer space launchings.[2] Article XI of the 1967 Space Treaty casts a duty upon States parties to inform the United Nations Secretary-General, as well as the public and the international scientific community, of the nature, conduct, locations, and results of activities in space conducted by them, and such information is to be disseminated by the Secretary-General, immediately and effectively.

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[1] For text of Draft Treaty, see U.N. document A/8391.

[2] In a Resolution of December 16, 1969, the General Assembly noted " with appreciation " that, in accordance with the 1961 Resolution, the Secretary-General was continuing to maintain a public registry of objects launched into orbit or beyond.

This article stands in close relationship to Article 5 of the 1968 Astronauts Agreement, obliging States, according to the circumstances, to give notice of the location of space objects returned to earth, or to recover them, or to restore them to, or hold them at the disposal of the launching authority.

Fourth, having regard to the discoveries concerning the nature of outer space, it is the duty of every State launching objects into orbit or beyond to take precautions to avoid injury to other States, or any permanent changes in the environment of the earth, or the contamination of the upper atmosphere and outer space, and of celestial bodies and the earth, or any impairment of the free use or scientific exploration of the upper atmosphere and outer space. This basic duty has received more ample expression in the provisions of Articles VI, VII, and IX of the 1967 Space Treaty. Article VI sets out in the most general terms that States parties to the Treaty are to bear international responsibility for national activities in outer space, while Article VII, dealing specifically with the launching of space objects, lays down that each State party launching or procuring the launching of a space object, or from whose territory or facility an object is launched is internationally liable for damage to another State party or to its nautral or juridical persons by such object on earth, in the airspace, or in outer space. Article IX imposes a duty of non-contamination, and of prevention of harm to the environment of earth resulting from the introduction of extraterrestrial matter; there are also duties of consultation beforehand, if any activity or experiment is believed to be potentially harmful to the activities of other States parties in the exploration and use of outer space.

The liability of States for damage caused by space objects has been spelled out in more detail, as regards both substance and procedure, in the 1971 Draft Liability Treaty.[1] Under Articles II–III, a launching State is to be " absolutely liable "

[1] For text of the Draft Convention, see Report of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space on the Work of its Tenth Session (1971), paragraph 22.

to pay compensation for damage caused by its space object on the earth's surface or to aircraft in flight, provided however that if damage be caused elsewhere than on the surface of the earth to a space object of another launching State or persons or property aboard this object, it is to be liable only if the damage is due to its fault[1] or the fault of persons for whom it is responsible; while there is to be no liability for damage to nationals of the launching State or foreign nationals participating in the operation of the space object, or during the time when, by invitation, they are in the vicinity of the launching or recovery area (see Article VII). There is provision for a Claims Commission to function where the question of compensation cannot be settled by negotiation. The law to be applied, and the measure of compensation are governed by the controversial Article XII, according to which the matter is to be determined " in accordance with international law and the principles of justice and equity ", compensation being that which is required to restore the victim of damage to the condition which would have existed if the damage had not occurred.

Reference should also be made in this connection to Article 5, paragraph 4 of the 1968 Astronauts Agreement, under which a launching State receiving notification of the locating of one of its space objects, believed to be of a hazardous or deleterious nature, is immediately to take steps to eliminate possible danger or harm.

One suggestion of some interest has been made, namely, that there be so-called " crimes in space "; for example, the wilful disregard by a launching State of a patent risk of grave injury to the environment of the earth.

Fifth, communication by means of communication satellites should be freely available to all States upon a global and non-discriminatory basis. This principle was laid down in the above mentioned General Assembly Resolution of December 20, 1961, and was reaffirmed by the General Assembly in a Resolution of December 16, 1969. The arrangements for INTELSAT (i.e., International Telecommunications Satellite

[1] E.g., liability would be excluded in case of *vis major*, such as lightning striking a space vehicle upon re-entry.

Consortium), constituting a global communications satellite system, which was first established in 1964,[1] are founded upon the principle that all States have the right of non-discriminatory access to the use of the system. The subject of direct broadcast satellites, which has been under examination by a Working Group of the Committee on the Peaceful Uses of Outer Space,[2] involves a number of other legal implications.[3] Since broadcasts from such satellites to community or individual receivers will not be realised for some time, it is perhaps premature to examine the legal issues raised; at all events, it is claimed that such broadcasts must be governed by international law and by the provisions of the 1967 Space Treaty, and that every State should be entitled to refuse a programme that a foreign State proposed to beam into its territory.

Sixth, each State launching an object into outer space retains its sovereign rights over the object, no matter where it may be and where it may land. Correspondingly, the launching State remains responsible for damage done by its space objects to the extent set out above, while correlatively non-launching States are, under Article 5 of the 1968 Astronauts Agreement, bound according to the circumstances to give notice of the location of space objects returned to earth, or to recover them, or to restore them to, or hold them at the disposal of the launching authority.

Seventh, States are under a duty to facilitate the passage of objects intended for the exploration for peaceful purposes of outer space,[4] and to give aid to space ships making forced landings on their territory.[5] It is questionable whether the duty of facilitation requires a State to make available its cosmodromes for use by another launching State. A further difficult point is whether a State which has granted tracking

[1] For a summary-outline of the principal features of INTELSAT, see *Department of State Bulletin*, May 3, 1971, pp. 569–572.

[2] See Report of the Working Group on its Third Session (1970).

[3] *Ibid.*, paragraphs 23–30 for discussion of legal implications.

[4] See Bin Cheng, *Current Legal Problems*, 1960, at pp. 253–254, on the general duty of facilitation.

[5] This was referred to by Chairman Kruschchev of the Soviet Union in his letter of March 20, 1962, in reply to a letter by President Kennedy of the United States, dated March 7, 1962.

station facilities to one State should be bound to make these available to other States. In regard to rescuing astronauts, the principle of all possible assistance in the event of accident, distress, or emergency landing is laid down in Article V of the 1967 Space Treaty. coupled with provision for their safe and prompt return to the State of registry of the space vehicle. Astronauts are to be deemed " envoys of mankind " in outer space, and as between themselves, astronauts of one State party are to render all possible assistance to astronauts of other States parties so far as concerns activities in outer space and on celestial bodies. Although the obligations of non-launching States in this connection have been set out more specifically in the 1968 Astronauts Agreement, it may still be necessary to rely upon the width of the provisions in Article V of the 1967 Space Treaty, particularly for astronauts in distress in space itself, as distinct from their being in a plight upon their return to earth. The Astronauts Agreement imposes duties upon States parties of notification or public announcement regarding any plight or emergency landing of astronauts, of rescue and assistance where astronauts land in territory under the jurisdiction of the State concerned,[1] of contributing assistance to search and rescue operations in the event of their landing on the high seas or places not under the jurisdiction of any State, and of assuring the safe and prompt return of the astronauts to representatives of the launching authority.

As at the present date, no specific principles of international law concerning astronautical navigation, as such, have been formulated. It has been reasonably claimed that the freedom of the seas doctrine is applicable by analogy to outer space. To some extent, the analogy has already been applied, for under Article VIII of the 1967 Space Treaty, the State of registry of a space object is to retain jurisdiction and control over the object, and over any personnel aboard while the object is in outer space or on a celestial body.[2] The Treaty does not

[1] In this case, the rescuing State is to have direction and control of the necessary operations, but acting in close and continuing consultation with the launching authority (Article 2).

[2] There would necessarily have to be subsidiary rules concerning the manner of identification of spacecraft.

however provide for the grant of nationality to spacecraft (contrast Article 5 of the Geneva Convention of 1958 on the High Seas). As more is known of the factors governing the paths and speeds of space vehicles, and the scientific forces operating in the cosmos, it may become necessary to impose restrictive rules for navigational safety and to prevent interference by space vehicles with each other, as well as to ensure that no damage be done to the earth itself or its environment.

It has been sought to denuclearise outer space. Under the first paragraph of Article IV of the 1967 Space Treaty, States are under a duty not to place in orbit objects carrying nuclear or mass destruction weapons, or to install or station these on celestial bodies or in outer space; and a like provision concerning the moon is contained in the 1971 Soviet Draft Treaty concerning the Moon. Administration of outer space by the United Nations has not been universally favoured by the States.[1] Nevertheless, the United Nations can, in line with the belief expressed by the General Assembly in its Resolution of December 20, 1961, " provide a focal point for international co-operation in the peaceful exploration and use of outer space ".

Apart from the matters of space law, referred to above, the United Nations has been concerned with the practical applications of space technology for the benefit of mankind, and the result of the United Nations Conference on the Exploration and Peaceful Uses of Outer Space, held in Vienna in 1968, was to promote certain steps for the transfer of space technology to the developing nations. According to the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space,[2] three subjects among others will call for action in the

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[1] In 1959, the *ad hoc* United Nations Committee on the Peaceful Uses of Outer Space reported to the General Assembly that it did not favour the establishment of an international agency to assume an over-all responsibility for space matters. As Professor Taubenfeld has pointed out (see *Review of International Commission of Jurists*, December, 1969, at p. 30), the current régime of space law is " one of self-denial and is self-policed; the nations have firmly resisted creating any comprehensive, overall régime which would include the placing of authority and control for outer space activities in any international organisation ".

[2] See Report on the Work of its Tenth Session (1971), paragraph 29.

near future:—(*a*) matters relating to the registration of objects launched into space for the exploration or use of outer space; (*b*) matters relating to the regulations needed to govern substances coming from the moon and from other celestial bodies, including the principles governing activities in the use of the natural resources of the moon and other celestial bodies; (*c*) matters relating to activities carried out through remote-sensing satellite surveys of earth resources. Space law cannot be static; through the very nature of its subject-matter, it is evolutionary.

Rights less than Sovereignty—Spheres of Influence and Spheres of Interest

On many occasions, States have claimed in regard to certain regions or territories, rights less than territorial sovereignty, and falling short even of those exercised over a dependent territory or vassal State. Such inchoate rights were known in diplomatic terminology as " spheres of influence " or " spheres of interest ", and were most commonly asserted in the late nineteenth century when international rivalry for the exploitation of weak or backward countries was historically at its peak. Although in view of such international engagements as those contained in the United Nations Charter to respect the territorial integrity of other countries it would not be politic today to use these terms, it is hardly open to question that the concrete conceptions underlying them are still applied by the Great Powers.

Perhaps the best definition of a " sphere of influence " is that of Hall[1]:—

> ". . . an understanding which enables a State to reserve to itself a right of excluding other European powers from territories that are of importance to it politically as affording means of future expansion to its existing dominions or protectorates, or strategically as preventing civilised neighbours from occupying a dominant military position ".

A " sphere of interest " differs only in direction of emphasis from a " sphere of influence ". A State asserts a sphere of

[1] Hall, *International Law* (8th Edition), at p. 153.

interest in a particular region when it claims to possess in that region exclusive economic or financial concessions or exclusive rights of exploitation, which it will not allow other Powers to exercise.

2.—Parts of State Territory, or Other Areas in which Sovereign Rights are Exercised by States

Having examined the nature, extent, and scope of territorial sovereignty, we now turn to consider the various parts of State territory over which this sovereignty is wielded. We shall also consider other areas, such as the continental shelf and offshore waters, in which sovereign rights, falling short of territorial sovereignty, may be exercised by States.

Boundaries

Boundaries are one of the most significant manifestations of State territorial sovereignty. To the extent that they are recognised expressly by treaty, or generally acknowledged without express declaration, they constitute part of a State's title to territory.

A boundary is often defined as the imaginary line on the surface of earth, separating the territory of one State from that of another. This is perhaps too artificial. As one writer says[1]:—

> " A boundary is not merely a line but a line in a borderland. The borderland may or may not be a barrier. The surveyor may be most interested in the line. To the strategist the barrier, or its absence, is important. For the administrator, the borderland may be the problem, with the line the limit of his authority ".

Where the borderland is of such a character that, notwithstanding the boundary line running through it, the territory itself and its inhabitants are fused for all practical purposes, the two or more States concerned may tolerate (either by treaty or by conduct) the existence in the borderland of administrative

[1] Jones, *Boundary-Making* (1945), at p. 7. As to the use of maps in boundary disputes, see Alastair Lamb, *Australian Year Book of International Law*, 1965, at p. 51. See also generally J. R. V. Prescott, *The Geography of Frontiers and Boundaries* (London, 1965).

and other practices, for example the free movement of officials throughout the borderland, which would otherwise be in derogation of each other's sovereignty. The exceptional *de facto* relations between States and their citizens, arising out of such special conditions in a borderland area, are sometimes said to constitute relations of " *voisinage* ".

Boundary disputes have occasioned many important international arbitrations; for example, the *Alaska Boundary Arbitration* (1903), between the United States and Great Britain. Such disputes were also the subject of two instructive decisions of the International Court of Justice in 1959 and 1962 respectively, in the *Frontier Lands Case* (Belgium-Netherlands)[1] and in the *Case Concerning the Temple of Preah Vihear* (Merits) (Cambodia-Thailand).[2] In the former case, the Court gave effect to allocations of territory in a Boundary Convention of 1843,[3] thus deciding that Belgium was entitled to certain frontier lands; it refused to accept the contentions of the Netherlands that the Convention was vitiated by mistake, and that acts of sovereignty performed by local Netherlands officials in the disputed areas could displace Belgium's title, holding that these acts were only of a routine and administrative character.[4] In the latter case, the disputed area was the region of a certain Temple sanctuary (Preah Vihear), and there was a conflict between the frontier according to a Treaty of 1904, whereby it was to follow a watershed line, and the frontier according to boundary maps completed in 1907, and communicated in 1908 to the Siamese (now Thai) Government. As the Siamese Government and later the Thai Government had by their conduct apparently accepted the map frontier line, and had not shown that any special importance was attached to the watershed line, the Court held that the map line should

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[1] I.C.J. Reports (1959) 209.

[2] I.C.J. Reports (1962) 6. Note also the *Argentina-Chile Arbitration Award*, given December 14, 1966; see p. 206, n. 2, *post*.

[3] Actually in a " Descriptive Minute " annexed to the Convention, which had the same force as though inserted in the Convention.

[4] The Court also attached importance to the fact that, in 1892, the Netherlands did not repudiate a Belgian assertion of sovereignty in an unratified Convention.

be preferred, and that the Temple area was under the sovereignty of Cambodia.[1] Since these two decisions of the International Court of Justice, there have been two important arbitral awards in boundary disputes, that made in 1966 in regard to a boundary in the Andes area between Argentina and Chile,[2] and that given in 1968 in the *Rann of Kutch Arbitration* between India and Pakistan.[3]

In the terminology of the subject of boundaries, there is a firmly established distinction between " natural " and " artificial " boundaries. Natural boundaries consist of mountains, rivers, the seashore, forests, lakes and deserts, where these divide the territory of two or more States. But used in a political sense, the term " natural boundary " has a far wider significance; it denotes the line defined by nature, up to which a State considers its territory should be extended or delimited at the expense of, or as protection against, other States. Artificial boundaries consist either of signs purposely erected to indicate the course of the imaginary boundary line, or of parallels of longitude or latitude.

Most difficulty as regards boundary delimitation has arisen in the case of water boundaries. And of such water boundaries, undoubtedly the most troublesome have been river boundaries, the problem being to decide what line in the river should be the boundary, and how it should be defined. In the case of a non-navigable river, the boundary line in the absence of contrary treaty provision runs down the middle of the river or down its principal arm if it has more than one, following all turnings of both banks. This line is known as the " median line ", and was adopted for non-navigable rivers by the Peace Treaties of 1919–1920. Where the river is navigable, the boundary line as a rule runs through the middle line of the deepest navigable channel, or as it was technically called—the *Thalweg*. In the Peace Treaties of 1919–1920, the expression

[1] It was incidentally held that Thailand should withdraw forces stationed in the Temple area and restore to Cambodia certain objects removed from the temple.

[2] For text of award, see H.M.S.O. publication, 1966, bearing title, *Award of H.M. Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile, etc.*

[3] For article on this Arbitration, see Wetter, *American Journal of International Law*, Vol. 65 (1971), pp. 346–357.

employed was " the median line of the principal channel of navigation ",[1] which is more or less the same as the *Thalweg*.[2]

Sometimes a boundary line lies along one bank of the river, while the whole bed is under the sovereignty of the other riparian State. This is an exceptional case arising under treaty or by long established peaceable occupation.

In the case of lakes and land-locked seas, the choice of the suitable boundary line depends on the depth, configuration, and use of the particular lake or sea concerned. In a shallow lake or sea, the navigable channel, if any, may be taken as a convenient boundary. More generally, the boundary line will be the " median line ", as in the case of a river. Many special apportionments have been made by treaty, but these have been of the most arbitrary character, and have followed no definite pattern or principle.

As to bays or straits, no general rules for boundary delimitation can be given, as considerations of history and geography come into play. On many occasions, however, the " median line " has been accepted as the boundary.

Rivers

Where a river lies wholly within the territory of one State, it belongs entirely to that State, and generally speaking no other State is entitled to rights of navigation on it. Also where a river passes through several States, each State owns that part of the river which runs through its territory, but controversy has centred round the question of the rights of riparian and other States to navigate along the whole length of the river. Several writers on international law, commencing with Grotius, have been of opinion that there is a general right of passage for all States along such international rivers, but this view has never been generally accepted in practice, and is certainly not recognised as a customary principle of international law. Even writers who hold that there is freedom of navigation differ in their interpretation of the extent of this

[1] See, e.g., Article 30 of the Treaty of St. Germain.

[2] As to the *Thalweg*, see the judgment of Mr. Justice Cardozo in *New Jersey* v. *Delaware* (1934), 291 U.S. 361.

right:—(*a*) some writers hold that such right of passage is confined to time of peace only; (*b*) others assert that only countries through which an international river passes have a right of passage[1]; (*c*) a third group maintains that the freedom of passage is without any limitation, subject only to the right of each State to make necessary and proper regulations in respect to the use of the river within its boundaries. In principle, the interpretation (*b*) is a reasonable one, as States located on the upper portion of a river should not be debarred from access to the sea.

However, such measure of freedom of navigation as became established on international waterways was almost entirely the creation of treaty. The process began with the Treaty of Paris, 1814, and the Vienna Congress of 1815,[2] and continued with the Peace Treaties of 1919–1920, and the subsequent general Conventions concluded under the auspices of the League of Nations. As a result, there was, before the Second World War, a limited freedom of navigation on most of the great river systems of Europe, while river systems in other Continents[3] came under special regional agreements, or had been opened for navigation, subject to varying restrictions, by the States having sovereignty over them. Also, as the necessary framework for a free right of passage, international authorities had been set up to administer particular river systems. An outstanding example of a European river subject to such international control and regulation was the Danube. Under the Treaty of Paris, 1856, a body called the European Commission of the Danube consisting of representatives both of riparian and non-riparian States was established to regulate navigation on the most important sector—the lower Danube,

[1] The Permanent Court of International Justice stressed the principle of "community of interest" of riparian States in an international river; see the *River Oder Case* (1929), Pub. P.C.I.J., Series A, No. 23, at p. 27.

[2] The Final Act of the Congress proclaimed the principle of freedom o navigation along the rivers of Europe, but in the events which happened, this principle did not receive full application.

[3] For brief account of the position in regard to river systems in other continents, see Fenwick, *International Law* (4th Edition, 1965), pp. 459 *et seq.* As to rivers in the Middle East, see Hirsch, *American Journal of International Law* (1956), Vol. 50, pp. 81–100. As to the Moselle, see André Philippe, *Le Port de Mertert et la Navigation de la Moselle* (1966).

and on it were bestowed wide powers of administration. Under a Convention which came into force in 1922, a Definitive Statute of the Danube was adopted confirming the powers of the Commission but setting up two Commissions in lieu thereof to manage the upper and lower portions of the river. These arrangements stabilised the situation on the river for many years, but were completely upset by the Second World War.

In 1947, the Paris Peace Conference caused to be inserted in the peace treaties with Bulgaria, Hungary and Roumania a clause that navigation on the Danube, other than traffic between ports of the same State, should be free and open on a footing of equality. In 1948, a Conference to work out a new Convention to govern navigation on the Danube met at Belgrade. This conference by a majority and against the wishes of the delegations of France, Great Britain, and the United States adopted a new Convention providing for a Commission composed entirely of representatives of riparian States. These three countries claimed that the new Statute was invalid as displacing the acquired rights of non-riparian States under the earlier treaties. It should be added that by its Article 1, this Convention provided for freedom of navigation on the Danube.[1]

The Peace Treaties of 1919–1920 internationalised certain European rivers, and also laid the foundations of the work of the League of Nations through its Transit and Communications Organisation, whose avowed object was to achieve freedom of navigation on all rivers. The League sought to accomplish this by sponsoring the adoption of international Conventions providing for freedom of passage, such as the Convention on the Regime of Navigable Waterways of International Concern, and the Convention on Freedom of Transit,[2] both adopted at Barcelona in 1921.

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[1] But omitted the provision in Article 1 of the 1921 Convention that there should be no differentiation of treatment as between riparian and non-riparian States.

[2] The principle of international freedom of transit by the most convenient routes was again proclaimed in the General Agreement on Tariffs and Trade (GATT) of October 30, 1947 (see Article V).

The League of Nations also endeavoured to unify river law by sponsoring the conclusion in 1930 of Conventions dealing, for this purpose, with collisions between inland river vessels, the registration of inland shipping, and the flags of such vessels. More recent Conventions on the same lines are the Bangkok Convention of July 22, 1956, for facilitating inland navigation between Asian countries, and the Geneva Convention of March 15, 1960, relating to the Unification of Certain Rules concerning Collisions in Inland Navigation.

Yet, these treaties have neither singly nor cumulatively established a general right of passage along international rivers.

If general freedom of fluvial navigation appears too Utopian an ideal for international law to achieve, there is at least room for rules of more limited scope, tempering the restrictive practices followed by riparian States. Thus it might well be generally recognised that such States should not impose arbitrary or excessive dues and should not treat non-riparian States in a discriminatory or unequal manner, that access to fluvial ports should be free and equal, and that all navigable channels in internationally used waterways should be properly maintained, with due warning of dangers where necessary. Subject to this, the necessity for regional agreements dealing separately with the problems peculiar to each international river system cannot be gainsaid. As an example of regional co-operation, there may be cited the United States–Canada arrangements of 1954 for the St. Lawrence Seaway, opened in 1959, as well as the International Joint Commission established by these two countries under their Boundary Waters Treaty of 1909.

So far as the injurious use of river waters, or the diversion of and interference with the free flow of rivers is concerned, international law has not advanced to the stage of settled rules in either domain.[1] It is believed that there is a general readiness of States to admit that any such use or diversion or interference by one riparian State injuring the free navigability of a navigable international waterway to the detriment of a co-riparian State

[1] Cf. Hyde, *International Law* (2nd Edition, 1947), Vol. I, pp. 565 *et seq.*

is a breach of international law. Short of this, it is perhaps only possible to say that there is a duty on a riparian State not, by any use of the river waters under its control, to cause grievous or irreparable damage of an economic character to other riparian States, for example pollution,[1] which might reasonably have been prevented. In 1957, it was decided by the Arbitral Tribunal in the *Lake Lanoux Arbitration* (France-Spain)[2] that there was no duty on a riparian State under customary international law to consult, or obtain the prior agreement of a co-riparian, as a condition precedent of its right to begin new river works, although in carrying out the project it must take into account, in a reasonable manner, the interests of that co-riparian. Where the rivers concerned form part of a drainage basin, each riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the basin, a principle applied in numerous treaties. Essentially, such problems of the utilisation of rivers by one State to the injury of other States are a matter for treaty arrangement, or for settlement by arbitration or conciliation in the most equitable manner.[3]

In 1970, the idea was mooted of a general convention on the law of international watercourses, analogous to the Geneva Conventions of 1958 on the law of the sea. It has been justly claimed that the customary law on the subject of international

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[1] A new problem of pollution has arisen in regard to navigation, through the recent more intensive use of tourist vessels plying in international rivers.

[2] See *American Journal of International Law* (1959), Vol. 53, pp. 156–171.

[3] For the application of principles of equity in a case concerning a disputed use of river waters, see judgment of Judge Manly O. Hudson in the *Diversion of Water from the Meuse Case* (1937), P.C.I.J., Series A/B, Fasc. No. 70, at pp. 73 *et seq.* In past water disputes, the so-called principle of " equitable apportionment " has been applied. Some such principle underlies the Agreement signed on September 19, 1960, by India, Pakistan, and the International Bank for Reconstruction and Development, in settlement of the dispute since 1948 relating to the Indus, Chenab, and Jhelum Rivers. Pakistan had claimed that Indian activities were interfering with its measures for flood control, irrigation, and developing hydro-electric power. Under the Agreement, the waters of the Western rivers, Indus, Chenab, and Jhelum, were allocated to Pakistan, and the waters of the Eastern rivers, Ravi, Beas, and Sutlej to India after a transitional period of ten years, during which a temporary arrangement for mutual use of the waters of all the streams was to continue, pending the completion of water storage and irrigation works by Pakistan using the waters of the Western rivers.

rivers is inadequate to deal with the newer technological uses of rivers, the problems of pollution, and the trend towards systematic development of river basins as one unit. On the other hand, it is an equally cogent objection to such a proposal that to attempt to draft a universal text, encompassing the various regional, local, and other aspects, peculiar to certain international rivers and certain international drainage basins, is not practicable, and that regional or local regimes are preferable to a universal regime, which in the nature of things can only consist of highly general, if not abstract rules.

At its 52nd Conference at Helsinki in 1966, the International Law Association approved a set of draft Articles on the uses of waters of international rivers, and resolved that these should bear the title of the " Helsinki Rules on the Uses of Waters of international rivers and certain international drainage basins, of approval, and break new ground in certain respects, for example in the proposed rules to deal with water pollution and floating timber.[2] At least, the draft Articles reflect an enlightened appreciation of the new problems connected with regulations for the waters of international rivers and drainage basins, and could well serve as a basic draft for a proposed general Convention.

Internal Waters, the Territorial Sea,[3] and the Contiguous Zone

The customary rules of international law concerning the coastal waters of a maritime State were restated, and in certain respects extended, in the Convention on the Territorial Sea and Contiguous Zone, signed at Geneva on April 29, 1958, drawn up by the first Conference on the Law of the Sea. This Convention was based upon Draft Articles prepared by the International Law Commission.

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[1] See Report of the 52nd Conference of the Association, 1966, pp. 484–533 for text of the Rules, and commentary thereon.

[2] See Chapters 3 and 5, respectively, of the Rules.

[3] The International Law Commission expressed a preference for the term " territorial sea " over " territorial waters " to denote the maritime belt of coastal waters, because " territorial waters " may include internal waters; see *Report* concerning the work of the fourth session of the Commission (1952).

According to the Convention, the coastal waters of a maritime State fall into three categories:—

(1) Internal waters, for example, ports, harbours, roadsteads,[1] closed-in bays and gulfs, and waters on the shoreward side of the straight baselines from which the territorial sea may be measured, as mentioned below. Over such waters, the coastal State has sovereignty as complete as over its own territory, and may deny access to foreign vessels, except when in distress, or except when access to ports must be allowed by treaty,[2] or except when the passage of foreign vessels must be permitted under Article 5 paragraph 2 of the Convention (see below).

(2) The territorial sea, or maritime belt, being a belt of coastal waters to a width of at least three miles, measured from the low-water mark, or from selected straight baselines drawn at a distance from the coast. Subject to the right of innocent passage of foreign vessels (see below), and subject to the duty of the coastal State to warn passing vessels against known dangers of navigation, that State has sovereignty over the territorial sea.

(3) The contiguous zone, being a belt contiguous to the territorial sea, but not extending beyond twelve miles from the low-water mark or other selected straight baselines. The littoral State does not have sovereignty over this zone, but may exercise control therein for the purpose of enforcing compliance in its territory and territorial sea with certain of its laws and regulations (see below).

As to (1), internal waters, the effect of Article 5 paragraph 2 of the Convention is that where the selected straight baselines drawn by a coastal State have the result of transforming into internal waters, areas formerly considered as part of the territorial sea or of the high seas, foreign vessels are to have the same rights of passage through these newly created internal waters as through the territorial sea.

As to (2), the territorial sea, the attribution of this maritime

[1] As to roadsteads situated wholly or partly outside the outer limit of the territorial sea, see Article 9 of the Convention.

[2] As, e.g. if the coastal State and the flag State of the vessel seeking access are both parties to the Convention on the International Régime of Maritime Ports of December 9, 1923.

belt to the littoral State under customary international law, was conditioned by rational and historical considerations. Originally, several maritime States had asserted rights of appropriation and ownership of portions of the open sea,[1] but because no single State could ever effectively occupy large stretches of the ocean, these extensive claims were gradually whittled down until finally the only parts of the open sea over which a State was recognised to have sovereignty were such coastal waters as were necessary to that State's safety or which it had power to dominate. The principle of sovereignty over the maritime belt thus developed contemporaneously and coextensively with the doctrine of the freedom of the seas. By the beginning of the eighteenth century, the principle had completely established itself. It was indeed in 1702 that Bynkershoek[2] published his work, *De dominio maris dissertatio* (Essay on Sovereignty over the Sea), in which he adopted the rule that the littoral State could dominate only such width of coastal waters as lay within range of cannon shot from shore batteries:—" *Terrae potestas finitur ubi finitur armorum vis* " (territorial sovereignty extends as far as the power of arms carries).

Bynkershoek appears to have been the first jurist to enunciate the cannon-shot rule in these terms, although the rule was already well-known and invoked in practice before the publication of his book.

At a subsequent stage, an attempt was made to express the cannon-shot range as a definite figure in miles. It is not clear when precisely, as a matter of history, this first occurred. At all events, the cannot-shot rule became blended with a three-miles limit, although it is possible that the three-miles limit had an independent historical origin. As will appear, the point is now purely academic.

In the nineteenth century, the three-miles limit received widespread adoption by the jurists, as well as by the Courts[3] and in the practice of States. This continued too in the

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[1] These claims were made in the latter half of the Middle Ages, in the fifteenth and sixteenth centuries, and in the first half of the seventeenth century.

[2] See above, p. 12.

[3] E.g.. by Lord Stowell in *The Anna* (1805), 5 Ch. Rob. 373.

twentieth century, with two great maritime Powers, the United States and Great Britain, firm protagonists of the limit. Yet it failed to gain acceptance as a general rule of international law. Numerous States adopted a wider limit for the territorial sea, while in the last six years, an increasing number have come to favour a limit as extensive as twelve miles, and even greater distances. Indeed in February, 1970, it was officially made known that consultations had been proceeding for some time between the United States and other countries for the conclusion of a multilateral treaty to fix a maximum all-purpose limit of twelve miles.[1] In 1964, British fishery limits legislation, *viz.*, the Fishery Limits Act, 1964, which came into force in 1966, was enacted to ordain a twelve-miles coastal fisheries limit, subject to special rights for foreign fishermen within the range of six to twelve miles, designated as the " outer belt " (see s. 1).[2] Prior to these developments, the task of fixing a recognised maximum width of the territorial sea had been attempted by three international conferences, the Hague Codification Conference of 1930, the first Geneva Conference on the Law of the Sea in 1958, and the second Geneva Conference on the Law of the Sea in 1960, but in each case without success, and to no purpose except to give emphasis to the disagreements on the extent of the belt. At the Hague Codification Conference of 1930, the principal issue was whether the three-miles limit should be recognised as this maximum, but there was such firm opposition to it that, to quote Gidel,[3] it emerged as " the chief victim " of the Conference, as an " idol dethroned and not restored ". At the Geneva Conference on the Law of the Sea in 1958 and 1960, one issue was whether a twelve-miles limit should be recognised. The United States and Great Britain, together with other States, were prepared to concede a six-miles limit, but would not accept a twelve-miles limit. The twelve-miles

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[1] See pp. 232–233, *post*.

[2] The British legislation was in accordance with a system adopted in the European Fisheries Convention concluded at London in March 1964, and related Conference Resolutions.

[3] Gidel, *Le droit international public de la mer*, Vol. 3 (1934), p. 151.

limit was rejected, and compromise proposals based on a six-miles limit and a twelve-miles coastal fishery zone also failed to receive the necessary support.

States originally opposing a twelve-miles limit were concerned not only that the area of the high seas available for free navigation, free fisheries, and free overflight by aircraft be not diminished, but also had in mind fundamental matters of security, such as the possibility that, in time of war, belligerent Powers with large underwater fleets would have an advantage over Powers whose superiority lies in the possession of surface vessels of war, in that submarines might travel undetected through an extensive area of territorial sea belonging to neutral States. Such a clandestine use of the neutral territorial sea would obviously not be open to surface warships. For this, among other reasons, the three-miles limit while dead, had not been interred, but surely in the light of the current weight of State practice, and the consultations (mentioned, *ante*) with a view to fixing a twelve-miles limit by multilateral treaty, the time has come when the moribund three-miles limit should receive a decent burial.

In regard to the delimitation of the territorial sea, the Convention on the Territorial Sea and Contiguous Zone gives effect to the baselines method recognised by the decision of the International Court of Justice in 1951 in the *Anglo-Norwegian Fisheries Case*.[1] There the Court held that a Norwegian decree of July, 1935, delimiting an exclusive Norwegian fisheries zone by reference to straight baselines drawn through 48 selected points on the mainland or islands or rocks at a considerable distance from the coast, from which baselines the breadth of the territorial sea was to be measured, was not contrary to international law. Article 4 follows the Court's decision in providing:—(*a*) that in " localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity ", the method of straight baselines joining appropriate points may be employed

[1] I.C.J. Reports (1951), 116–206. For comment and discussion concerning the case, see Johnson, *International Law and Comparative Legislation Quarterly* (1952), Vol. 1, at pp. 145 *et seq.*

in forming the baselines from which the breadth of the territorial sea is to be measured; (*b*) that the drawing of such baselines must not depart to any appreciable extent from the general direction[1] of the coast; and (*c*) that the areas lying within the baselines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. The baselines must be clearly indicated on charts to which due publicity is given. If these conditions for permitting the drawing of baselines are satisfied, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, " the reality and the importance of which are clearly evidenced by a long usage ". In other words, in the absence of the requisite geographical conditions, economic interests of the coastal State cannot alone justify recourse to the baselines method. The baselines system is recognised and adopted in the above-mentioned United Kingdom Fishery Limits Act, 1964.

Where the straight baselines method is not permissible, the territorial sea is to be measured from the low-water line along the coast as marked on large scale charts officially recognised by the coastal State.

Underlying these provisions is the same general consideration as that in which the decision in the *Fisheries Case* is rooted, namely that the territorial sea is not so much a limited artificial extension of a State's territorial domain, as an appurtenant contiguous area wherein for economic, security and geographical reasons the coastal State is entitled to exercise exclusive sovereign rights.[2]

The nuclear weapons test ban treaty of August 5, 1963, referred to above[3] applies to tests in all three categories of the coastal waters of any State party to the treaty.

From the absolute sovereignty of the littoral State over the maritime belt flow two plenary rights of immense importance.

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[1] For critical comment on this concept of the " general direction " of the coast, see Shalowitz, *Shore and Sea Boundaries,* Vol. I (1962), pp. 74–75.

[2] As to the delimitation of the territorial sea in the case of islands, low tide elevations, States with coasts opposite or adjacent to each other, and rivers flowing directly into the sea, see Articles 10–13 of the Convention.

[3] P. 191, *ante.*

In the first place, the littoral State may reserve fisheries in the maritime belt exclusively for its own subjects. As a rule, the subjects of foreign States acquire fishery rights in such waters only where the littoral State has signed with the foreign State concerned a treaty permitting this. Secondly, the littoral State may if it so desires also reserve *cabotage* for its own subjects in coastal waters and exclude foreign vessels from this privilege. *Cabotage* in its modern sense means intercourse by sea between any two ports of the same country whether on the same coasts or different coasts provided that the different coasts are all of them the coasts of one and the same country.

In respect to the surface and subsoil of the maritime belt, and also the superincumbent air space, Article 2 of the Geneva Convention of 1958 on the Territorial Sea and Contiguous Zone removes any doubt[1] by providing that the coastal State has sovereignty over all these.

It is a recognised principle of customary international law that foreign merchant vessels have a right of innocent passage through the territorial sea. The nature and extent of this right of innocent passage are defined in detail in Articles 14 to 23 of the Convention on the Territorial Sea and Contiguous Zone. Government vessels, including warships, are to enjoy this right as well as merchant ships,[2] and in their case no prior authorisation or notification is stipulated. The right includes stopping and anchoring, but only insofar as these are incidental to ordinary navigation, or are rendered necessary by *force majeure* or by distress. Passage is " innocent " so long as it is not prejudicial to the peace, good order, or security of the coastal State; e.g., the transport of persons or goods which might endanger the safety of the coastal State, renders the passage

[1] Cf. *Bonser* v. *La Macchia,* [1969] A.L.R. 741, at pp. 744–745; *Re Ownership of Offshore Mineral Rights* (1967), 65 D.L.R. (2d) 353, at pp. 365–367.

[2] See Article 22, according to which Articles 14 to 17 are to apply to Government vessels operated for non-commercial purposes. Formerly, it was a matter of usage that warships were in time of peace allowed freely to navigate through coastal waters. In the *Corfu Channel Case* (*Merits*), I.C.J. Reports (1949) 4 *et seq.*, it was recognised that in time of peace warships are entitled to a right of innocent passage through such parts of the territorial sea as form an international highway.

objectionable. Moreover, a special rule applies to foreign fishing vessels; their passage is not to be considered innocent if they do not observe the laws and regulations of the coastal State for the prevention of fishing in the territorial sea. Submarines, passing through the territorial sea, are required to navigate on the surface and show their flag.

The coastal State must not hamper the innocent passage of foreign vessels through the territorial sea, although it may temporarily suspend passage in specified areas if such suspension is essential for the protection of its security, and provided that it has duly published such order of suspension. Vessels on passage through the territorial sea must comply with the laws and regulations of the coastal State, in particular those relating to transport and navigation. *Quaere*, whether the coastal State may prevent the passage of a merchant vessel which does not comply with its laws and regulations. In the case of warships, it is expressly provided in Article 23 of the Convention that if a warship does not comply with the coastal State's regulations as to passage through the territorial sea and disregards any request for compliance made to it, the coastal State may require the warship to leave the territorial sea.

These provisions of the Convention will in the future need some revision to deal with the right of passage of nuclear-powered vessels, and the need to ensure the safety of the coastal State.

As to the third category of coastal waters, the contiguous zone, the Convention recognises and gives effect to the doctrine that the coastal State may have rights for limited purposes in this zone.[1] Article 24 provides that in the contiguous zone, the littoral State may exercise, not sovereignty, but the control necessary to:—(*a*) prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea; (*b*) punish infringements of these regulations committed within its territory or territorial sea. Moreover, the contiguous zone is not to extend beyond twelve miles from

[1] The doctrine of contiguous zones appears to have been first enunciated by a noted French jurist, M. Louis Renault. See Riesenfeld, *The Protection of Coastal Fisheries under International Law* (1942) at p. 105.

the baselines from which the breadth of the territorial sea is measured.[1] It is obvious that Article 24 will need revision in the light of the new coastal fishery limits recently adopted by so many States, and in the light of the demise of the three-miles limit.

On the subject of internal waters and the territorial sea, mention should be made also of:—(*a*) The claims of Indonesia and the Philippines that the whole of the waters of archipelagoes may be claimed as internal waters, and that perimeter base lines may be drawn, enclosing them. Archipelagoes were not dealt with in the Convention. (*b*) The claims advanced by Chile, Ecuador, and Peru to exclusive sovereign rights, for fishing and fishery conservation purposes, over a zone of the contiguous sea extending to 200 miles in width. Joint action was taken by these three States to give sanctity to their claims by regional agreements at Santiago in 1952, and Lima in 1954, and by repeated declarations. These claims have been the subject of protest, and have not been generally recognised.

Straits

The rules as to the maritime belt considered above are partially applicable to straits.

Clearly the waters of straits of a width less than six miles, dividing the territory of the one State, are territorial; and if straits of such a width divide the territory of two States, the waters thereof are territorial, and the line of division will normally run down the middle. Controversy arises where the width of the straits exceeds six miles. Some writers hold that such waters are territorial, others do not. Besides, there is the case of certain straits which have long been regarded, through general acquiescence of States, as having a territorial character; for example, the Strait of Juan de Fuca, which is about fifteen miles wide, and which is divided between the littoral States, Canada to the North, and the United States to the South.

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[1] Article 30 of the Convention provides that after five years from the entry into force of the Convention, a request for its revision may be made by any party, and the United Nations General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

A right of innocent passage through such straits as form part of an international maritime highway is allowed both to foreign merchant shipping and to foreign men-of-war. In the *Corfu Channel Case* (*Merits*)[1] the International Court of Justice said that the " decisive criterion " of a strait as an international maritime highway was its geographical situation as connecting two parts of the open sea and the fact of its use for international navigation, not whether there was a considerable volume of traffic passing through it. Nor was the fact decisive that a strait was not a necessary route between two portions of the high seas, but only an alternative passage. In the light of Article 16 paragraph 4 of the Convention on the Territorial Sea and Contiguous Zone of April 29, 1958, this right was regarded as applicable to straits which are " used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State ", thus covering straits connecting the open sea with a territorial bay or landlocked sea, which are of the nature of an international maritime highway. There is some dispute nevertheless as to whether warships have at all times a right of passage through straits constituting an international highway, and consisting wholly of territorial sea.

Certain straits are subject to special local regulations, as for example the Straits of the Bosphorus and the Dardanelles, connecting the Black Sea with the Mediterranean, for which a special regime was provided by the Montreux Straits Convention of 1936. This Convention endeavoured to reconcile the interests of Turkey—the littoral State—with the rights of foreign maritime Powers. The general principle adopted by the Convention was to allow freedom of navigation to merchant vessels of all nations, whether in peace or in war, subject only to certain conditions and restrictions, and to the paramount right of Turkey to refuse a right of passage to merchant vessels of countries at war with it. There were also special provisions as to the passage of men-of-war, including limitations of tonnage at any one time, designed to safeguard the vital rights

[1] I.C.J. Reports (1949), at pp. 26 *et seq.*

and interests of Turkey, and the security of the Black Sea Powers.

Bays, Gulfs, and other Coastal Indentations

The decision of the International Court of Justice in the *Fisheries Case*,[1] and the Convention on the Territorial Sea and Contiguous Zone of April 28, 1958, have confirmed a trend perceptible in the decisions of international tribunals[2] and State practice to the effect that bays and gulfs raise from the standpoint of the littoral State entirely different considerations from those connected with the open coast, and therefore should more naturally come under that State's control, whether for reasons of defence or national integrity or because of economic matters. These considerations to some extent conditioned the conception, prior to the *Fisheries Case*, of " historic " bays or gulfs,[3] that is to say, those of which the waters had come to be regarded as territorial in the course of a long period of acquiescence by non-littoral States, irrespective of the distance between the headlands.

Prior to the *Fisheries Case*, the practice of Great Britain and some other States was to regard the waters of bays with an entrance not more than six miles wide as internal; there was, however, at the same time a considerable weight of opinion and practice to the effect that the waters of a bay enclosed by a baseline drawn across the bay at a point where it was not more than ten miles wide, were also internal. In the *Fisheries Case*, a majority of the Court favoured the recognition of the waters of bays or gulfs as internal waters where, by long practice of the coastal State, acquiesced in by other States, these had been treated as such, or where economic considerations or the close connection of the bay or gulf with the land domain justified the coastal State in proclaiming these as territorial waters. The

[1] I.C.J. Reports (1951) 116.

[2] E.g., the *North Atlantic Coast Fisheries Arbitration* (1910).

[3] E.g., in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394, it was held that the Bay of Conception having an entrance twenty miles wide was part of the territory of Newfoundland, on the ground that an unequivocal assertion of sovereignty by Great Britain early in the nineteenth century had remained unquestioned for over fifty years.

1958 Convention which covers only bays adjacent to one (and not two or more) countries, has, however, adopted a rather different and more precise approach. First, the Convention contains a definition of bays, in such a way as to exclude mere curvatures of the coast.[1] Second, if the distance between the low-water marks of the natural entrance of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby are to be considered as internal waters.[2] Where the distance between the low-water marks of the natural entrance points exceeds twenty-four miles, a straight baseline of twenty-four miles is to be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length. Third, these provisions are not to apply to " historic " bays,[3] or to any case where straight baselines may justifiably be drawn outside coastal indentations. Accordingly, this leaves room for States to establish sovereign claims to the waters of bays under historic title.

The Continental Shelf and Submarine Areas

New rules concerning the continental shelf and other offshore areas beyond the territorial sea were contained in the Convention on the Continental Shelf, signed at Geneva on April 29,

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[1] See Article 7. A bay is defined as a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and to constitute more than a mere curvature of the coast, and provided that the area of the indentation is as large as, or larger than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. Paragraph 3 of Article 7 lays down how the area is to be measured; it also makes provision for the case where islands are present within the indentation. As to whether the Thames Estuary is a bay, see E. D. Brown, *Australian Year Book of International Law*, 1966, pp. 102–103.

[2] Cf. the U.K. Territorial Waters Order in Council 1964, Article 4.

[3] The International Law Commission was requested by the General Assembly in December, 1959, to study the regime of " historic " waters, including " historic " bays. At the request of the Commission, the United Nations Secretariat prepared a study on the subject (for text of this study, see *Yearbook of the I.L.C.*, 1962, Vol. II, pp. 1–26). One conclusion of this study is that the doctrine of historic waters is not really an exception to the general rules of international law as to the delimitation of the maritime domain, but an independent doctrine standing upon its own merits and criteria.

1958, and drawn up by the first Conference on the Law of the Sea.[1] The Convention may be taken as enunciating the principles on which there is general agreement. It has materially altered the law of the high seas.

What is commonly meant by the " continental shelf " or the " continental platform " is the submerged bed of the sea, contiguous to a continental land mass, and formed in such a manner as to be really an extension of, or appurtenant to this land mass, but not situated in general at a greater depth beneath the sea level than 200 metres. At approximately this depth there occurs, as a rule, the first substantial " fall-off " to the vastly greater ocean depths. Beyond such outer edge or declivity of the continental shelf, the deep seabed descends by further stages, known according to current nomenclature[2] as the " continental slope ", and the " continental rise ", before sinking into the deeper ocean floor, or " abyssal plain ". The expression " continental margin " is in current use to encompass collectively the shelf, slope, and rise, the outer limit of such continental margin being the commencement, so far as it can be defined geomorphologically, of the abyssal plain.

In the *North Sea Continental Shelf Cases,*[3] it was this geological context which persuaded the International Court of Justice, when seeking to rationalise the basis of shelf claims, to attach primary importance to the consideration that the shelf was a natural prolongation or continuation of the land domain, and therefore appurtenant to territory over which the coastal State already had dominion.

The Convention represented the culmination of a trend which began in 1945–1949 when, by unilateral declarations, a number of maritime States laid claim to exclusive jurisdiction or control over the resources of the continental shelf, and

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[1] The Convention was based on Draft Articles prepared by the International Law Commission; see *Report* on the Work of the Commission's eighth session (1956).

[2] For the nomenclature adopted by the International Committee on Nomenclature of Ocean Bottom Features, Monaco, in 1952, see A. L. Shalowitz, *Shore and Sea Boundaries,* Vol. II (1964), pp. 342–343.

[3] I.C.J. Reports, 1969, 3, at pp. 30–31.

associated offshore areas.[1] It was sought to justify these claims by considerations of geographical contiguity, and of security. Although initially the object was to reserve to the littoral State such oil as might lie in shelf areas, the drilling of which had been made possible by advances in technology, the claims were expressed in terms sufficient to cover all minerals and even non-mineral resources. The actual extent of the claims varied; the Proclamation of the President of the United States in September, 1945, reserved only rights of "jurisdiction and control" over the natural resources of the subsoil and seabed of the shelf, expressly leaving intact the nature of the shelf waters as high seas and the right of free navigation, but in the later declarations of other States, claims were laid to sovereignty and ownership over the seabed and subsoil of, as well as over the waters of the shelf. Naturally, such claims involved an extension of jurisdiction or sovereignty beyond the territorial sea, even far beyond the width of the contiguous zones. For instance, the United States continental shelf was officially[2] described as:—

> ". . . almost as large as the area embraced in the Louisiana Purchase, which was 827,000 square miles, and almost twice as large as the original 13 colonies, which was 400,000 square miles. Along the Alaska coastline the shelf extends several hundred miles under the Bering Sea. On the Eastern coast of the United States the width of the shelf varies 20 miles to 250 miles, and along the Pacific coast it is from 1 to 50 miles wide."

Owing to the magnitude of the areas of the continental shelf, there was therefore little analogy between these claims and claims exclusively to control limited areas of the seabed outside the territorial sea for pearl, oyster, and other sedentary fisheries. These more limited claims rested on the occupation of the seabed as a *res nullius* or upon some historical or quasi-

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[1] In regard to the historical background of the continental shelf doctrine see Anninos, *The Continental Shelf and Public International Law* (1953), pp. 11–34, and the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, 3, at pp. 32–36. In 1916 and 1927, respectively, it was urged by De Buren and Professor Suarez that the territorial sea should be extended to cover the continental shelf.

[2] *Annual Report* of United States Secretary of the Interior for 1945, at pp. ix–x.

prescriptive title or upon some particular regional community of interest (e.g. the pearl fisheries in the Persian Gulf).

Some jurists went so far as to assert that a new principle of customary international law had emerged, entitling the coastal State to exclusive rights for the purpose of exploring or exploiting the resources of the seabed and subsoil of the continental shelf. In 1951, however, a learned Arbitrator[1] declared that the doctrine of the continental shelf did not have the " hard lineaments or the definitive status of an established rule of international law ", and in that connection, it could hardly be maintained that the various Acts and Proclamations of only a limited number of States, claiming sovereign rights over shelf areas, without uniformity, had by their recurrence contributed to the formation of a customary rule of international law.

Broadly speaking, the 1958 Convention recognised and gave effect to the doctrine which underlay the above-mentioned declarations of States, but stopped short of acknowledging any unlimited jurisdiction by a coastal State over shelf waters. None the less, some of the rationalisations in the Convention go very far. For instance, the concept of the continental shelf adopted by the Convention is purely notional, the geological concept of the shelf being discarded in favour of criteria of depth and exploitability,[2] irrespective of whether there is or is not a marine shelf geologically appurtenant to a coastal State. Thus in Article 1, the expression " continental shelf " is defined as referring to " the seabed and subsoil of the submarine areas adjacent to the coast outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas ". Even the word " continental " loses its force, as by the same Article, the expression " continental shelf " includes also " the seabed and subsoil of similar submarine areas adjacent to the coasts of *islands* ".

[1] Lord Asquith in *Arbitration between Petroleum Development, Ltd., and Sheikh of Abu Dhabi* (1951), *American Journal of International Law* (1953), Vol. 47, at pp. 156–159.

[2] Partly in order that a coastal State, without a true continental shelf, should receive equality of treatment.

Thus, the title " Convention on the Continental Shelf " is a misnomer, since the Convention applies not only to the continental shelf, but as well to considerable areas of non-shelf offshore waters, including submarine areas beyond shelf limits.

Article 2 grants to the coastal State " sovereign rights " of an exclusive nature for the purpose of exploring and exploiting the natural resources of the shelf.[1] Moreover, such rights are to pertain *ipso jure* to it, and are not to depend on an effective or notional occupation, or any formal claims by way of proclamation. The " natural resources " subject to these rights include, in addition to the mineral and non-living resources of the seabed and subsoil, sedentary organisms, that is to say, " organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil[2] ". The result was fundamentally to reverse previous rules, and to grant to coastal States, without regard to the acquired rights of fishing by non-coastal States, rights over sedentary fisheries going far beyond the exceptional restricted rights over such fisheries, mentioned above. A new and somewhat questionable rule was created, making it unnecessary to treat such restricted rights as a special exception to a general principle of freedom of fishing in the high seas.

Other articles in the Convention provide *inter alia*:—(*a*) that the status of the superjacent waters as high seas, and the status of the air space above such waters are unaffected;[3] (*b*) that, subject to the coastal State's right to take reasonable measures in exercise of the sovereign rights mentioned above, the establishment or maintenance of submarine cables or pipe lines on the shelf is not to be impeded; (*c*) that there is not to be any " unjustifiable " interference with navigation, fishing, or the conservation of the living resources of the sea, or any

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[1] *Quaere*, whether the technique of deep sea mines, for the purpose of testing, etc. for oil presence is within the scope of Articles 1 and 2.

[2] Thus, free-swimming fish or free-moving crustaceans, such as shrimps, are not covered by the expression " natural resources ".

[3] In *Matson Navigation Co.* v. *U.S.* (1956), 141 F. Supp. 929, it was held that the United States continental shelf was of the nature of high seas, and was not an area under United States territorial sovereignty.

interference with fundamental oceanographic or other scientific research carried out with the intention of open publication; (*d*) that necessary installations and devices, with surrounding safety zones to a distance of 500 metres may be established in shelf areas, provided that these are not to possess the status of islands or to have a territorial sea of their own or to affect the delimitation of the territorial sea of the coastal State, and are not (nor are the safety zones) to be established where interference may be caused to the use of recognised sea lanes essential to international navigation; (*e*) that due notice of construction, and permanent means of warning must be given of such installations; (*f*) that the coastal State is to retain unimpaired its right to exploit the subsoil by means of tunnelling irrespective of the depth of the water above the subsoil.[1]

Division of a Common Continental Shelf

Article 6 of the Convention on the Continental Shelf, which provides for the manner of division of a shelf common to States with opposite coastlines (see paragraph 1), or common to States adjacent to each other (see paragraph 2), calls for particular mention. " In the absence of agreement, and unless another boundary line is justified by special circumstances ", paragraph 1 lays down that the median line is to be the boundary in the former case, while, in the latter case, paragraph 2 applies the principle of equidistance from the nearest points of the territorial sea baselines. The International Court of Justice held in the *North Sea Continental Shelf Cases*[2] that in respect to the division of the common shelf of the German Federal Republic, the Netherlands, and Denmark, paragraph 2 was not binding upon the German Federal Republic, a non-party to the Convention, inasmuch as:—(*a*) that country had not accepted the rule in paragraph 2 in the manifest manner required for provisions in a multilateral Convention to bind a non-party

[1] Article 13 of the Convention provides that after five years from the entry into force of the Convention, a request for its revision may be made by any party, and the General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

[2] I.C.J. Reports, 1969, 3.

to that instrument; and (*b*) the equidistance principle had not through its application by a certain number of countries become thereby a settled rule of customary international law, in the absence of evidence that in applying it those countries had considered that they were legally bound to follow it (*opinio juris sive necessitatis*)[1]. The Court also ruled that, in the absence of the application to the instant cases of Article 6 of the Convention, the governing principles of international law concerning delimitation of a common continental shelf were first, that such delimitation should be the object of agreement between the countries specially concerned, and second, that any arrangement for division should be arrived at in accordance with " equitable principles ".

It was in relation to the judicial determination of such " equitable principles " that the Court's judgment is of such additional significance. According to the Court, it was in this connection fundamental, above all, that the means for effecting the delimitation should be carried out in such a way as to be *recognised as equitable*. Therefore, it ruled that the delimitation to be made by agreement between the States concerned in the instant cases should take account of all the relevant circumstances, in such a way as to leave, as much as possible, to each party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other, provided that if there were any overlap, overlapping areas were to be divided in agreed proportions, or failing agreement, equally, unless they should decide on a régime of joint jurisdiction, user or exploitation of the areas of overlap (for example, if the same deposit of oil or source of gas should lie on both sides of the line of division of the common shelf area).[2] The Court also declared that regard should be had to the general configuration of the coasts of the parties, with

[1] See pp. 41–42, *ante*.

[2] The unity of deposit criterion was adopted in the agreements concluded by the parties for the purpose of giving effect to the Court's judgment, and also in the Seabed Boundaries Demarcation Agreement of May 18, 1971, between Australia and Indonesia (see Article 7). For the Court's discussion of this criterion, see I.C.J. Reports, 1969, 3, at pp. 51–52.

provision for reasonable proportionality between shelf areas allocated and the lengths of the corresponding coastlines.

In January, 1971, the parties entered into agreements for the purpose of giving effect to the pronouncements of the Court.

Developments Since 1958 in the Law Concerning Coastal Waters, and the Seabed and Ocean Floor

The two Geneva Conventions of 1958 mentioned above, namely the Conventions on the Territorial Sea and Contiguous Zone, and on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas, together with the Geneva Convention on the High Seas[1] adopted at the same Conference which drew up those instruments, have been frequently referred to as constituting the " Geneva settlement ".

Assuming this description to be appropriate, the settlement was nevertheless only a partial one, for the Geneva Conference left unsettled four matters among others:—(1) the breadth of the territorial sea; (2) the question of innocent passage for warships at all times through straits constituting an international highway, and consisting wholly of territorial sea; (3) the right of passage through, and overflight in relation to the waters of archipelagoes; and (4) the question of protection and conservation of maritime species for purely scientific or tourist-amenity reasons. Nor was the settlement as a whole acceptable to all States; instead of ratifying or acceding to all four instruments *en bloc,* a number of States chose to become party to one or some only, in a selective manner. Besides, the exploitability criterion adopted in the Continental Shelf Convention as marking the outer shelf limit was seen paradoxically to be unsatisfactory from two opposing viewpoints. On the one hand, advances since 1958 in the technology of seabed exploration and exploitation, for example in drilling for oil and gas, opened the way for activities in ocean depths far beyond the limits envisaged at Geneva. On the other hand, the group of newly emerged States, technologically and financially at a disadvantage in relation to developed countries,

[1] See Chapter 8, *post*, pp. 276–284.

became gravely concerned at the possibility that the exploitability criterion might enable a small number of powerful coastal States to monopolise the exploitation of the ocean floor resources.

Another matter was that in March, 1967, a Liberian-registered oil tanker, the *Torrey Canyon,* ran aground off the southernmost coast of the United Kingdom, releasing about 100,000 tons of crude oil which nearly had catastrophic effects upon adjacent beaches. The result was to underscore boldly the deficiencies of international maritime law, as the possible consequences of a casualty affecting the new kind of giant oil tankers in common use had not been clearly foreseen or provided against. Indeed the dangers of such massive oil pollution prompted Canada in 1970 to enact the Arctic Waters Pollution Prevention Act, providing for pollution zones in Arctic waters extending up to 100 miles offshore, and within which all vessels, Canadian and foreign, were required to comply with prescribed standards of construction and navigation safety, and to observe strict obligations not to deposit waste; offending vessels might be destroyed or removed, as the case might be, and even be seized upon well-founded suspicion of a breach of the Act. The United States protested against the Canadian legislation.

In 1967, a Maltese initiative, involving a plan for declaring seabed resources beyond the continental shelf to be the common heritage of mankind, and to be developed in the interests of all States, with special regard to developing countries, led to far-reaching action within the framework of the United Nations. The plan was designed not only to avoid an uncontrolled and unregulated scramble by developed States to ravage the mineral wealth of the ocean floor, but also an arms race which might lead ultimately to militarisation of the deep seabed. In December, 1968, the United Nations General Assembly adopted four resolutions relating to the matter, the most important of which declared that the exploitation of the seabed and ocean floor " beyond the limits of national jurisdiction " should be carried out for the benefit of mankind as a whole, with the United Nations system as the focal point of international co-operation in this domain, and established a

42-member Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction to make recommendations upon the related questions.

In 1969-1971, progress in the direction contemplated by the General Assembly resolutions was to a large extent activated by this Seabed Committee. Further resolutions were adopted by the General Assembly in 1969, after receiving the Committee's report, including a resolution declaring that pending the establishment of an international régime in the seabed and ocean floor area, all States and persons, " physical or juridical " were bound to refrain from all activities of exploitation of the resources of the area, and that no claim to any part of the area or its resources was to be recognised.

Concurrently with the labours of the Seabed Committee, consultations had been proceeding between the United States and other States with a view to a general restructuring of the law of the sea and of oceanic resources. In his special Foreign Affairs Report to Congress on February 18, 1970, President Nixon said:—" As man's use of the oceans grow, international law must keep pace. The most pressing issue regarding the law of the sea is the need to achieve agreement on the breadth of the territorial sea, to head off the threat of escalating national claims over the ocean." On the same day, in an address at Philadelphia, the Legal Adviser to the Department of State[1] referred to the consultations with other States and to the general subject of reform of the law of the sea, and also said:—" As a result of our consultations we believe the time is right for the conclusion of a new international treaty fixing the limitation of the territorial sea at 12 miles, and providing for freedom of transit through and over international straits and carefully defined preferential fishing rights for coastal States on the high seas." A more radical step was taken on May 23, 1970, when President Nixon issued a statement of a new United States Policy on the Oceans; the Policy consisted of proposals that States should by international agreement renounce their sovereign rights in the seabed beyond the 200-metres limit,

[1] Mr. John R. Stevenson. For the text of his address, see Department of State Press Release No. 49, February 18, 1970.

establish an international régime for the area beyond this limit, authorise coastal States as Trustees for the international community to carry out the major administrative role in licensing the exploration and exploitation of natural resources from the limit of the national jurisdiction of coastal States to the edge of the " continental margin " and to share in the international revenues from the International Trusteeship Area which they administered, and to establish an international organisation to perform functions similar to those of the Trustee coastal States for the oceanic areas beyond the " continental margin ".[1] On August 3, 1970, the United States Government presented a Draft Convention, based upon these proposals, to the above-mentioned Seabed Committee as a working paper for discussion purposes.[2] In later official statements,[3] the United States proposals have been explained as providing for " equity " among all nations, coastal or non-coastal, and shelf or non-shelf, while also serving to prevent a process of " creeping jurisdiction " whereby coastal States gradually purport to assume sovereignty over waters above the seabed.

The final result of these merging developments was the adoption by the General Assembly of two important resolutions on December 17, 1970, one consisting of a Declaration of Principles Governing the Seabed and Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction, and the other representing a decision to convene a new law of the sea conference in 1973. The Declaration proclaims a number of principles and guidelines, including the following among others:—(*a*) that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area are the " common heritage of mankind "; (*b*) that the area is not subject to appropriation, or to

[1] *Department of State Bulletin,* June 15, 1970, p. 737. The " continental margin " would consist of the continental shelf, continental slope, and continental rise, collectively, the outer limit being represented by the commencement of the abyssal plain; see pp. 224–225, *ante.*

[2] For summary of the text of the Draft Convention, and for official statements thereon, see *Department of State Bulletin,* August 24, 1970, pp. 209–218.

[3] E.g., by the Legal Adviser to the Department of State, Mr. John R. Stevenson, *Department of State Bulletin,* April 19, 1971, pp. 529–533.

be the object of claims of sovereignty or sovereign rights by States; (*c*) that all activities of exploration or exploitation in the area are to be governed by an international régime to be established; (*d*) that the area should be reserved exclusively for peaceful purposes; and (*e*) that measures should be taken in co-operation to prevent injury to the marine environment and its ecological balance, to protect and conserve natural resources of the area, and to prevent damage to the flora and fauna. The terms of reference of the proposed Conference in 1973 are extremely wide, embracing the establishment of the international régime for the area, a precise definition of the area (i.e., of its shoreward limit), and " a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal State), the preservation of the marine environment (including, *inter alia,* the prevention of pollution) and scientific research ". This suggests in fact a complete re-opening of the Geneva settlement, with no sanctity for any of the four Geneva Conventions of 1958. The Seabed Committee was enlarged to an 86-member body, to serve as a preparatory committee for the Conference.

It remains to be seen whether, in the light of advancing technology, the concept of the " continental margin " (i.e., the collective representation of the continental shelf, the continental slope, and the continental rise, bounded by the commencement of the abyssal plain) can have value and utility for the proposed new régime of the seabed and deep ocean floor.

Meanwhile, in the period 1969–1971, there have been concrete additions to the *corpus* of the law of the sea, apart from the possibilities referred to above.

On November 29, 1969, two Conventions were adopted at Brussels to deal with oil pollution casualties of the *Torrey Canyon* genre (see *ante*), namely the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (which will be referred to as the Inter-

vention Convention), and the International Convention on Civil Liability for Oil Pollution Damage (to be referred to as the Liability Convention). The Intervention Convention is of limited scope, inasmuch as States parties are given certain rights of taking defensive measures against pollution or threat of pollution only " following " upon a maritime casualty or acts related to such a casualty; there are no specific provisions entitling coastal States to take preventive measures such as, for example, fixing sealanes or subjecting tankers to surveillance from shore-based stations, although States would not be debarred from making preparations beforehand to take such defensive measures as might conceivably become necessary in the event of a maritime casualty. In any event, the self-defensive measures are to be proportionate to the actual or threatened damage, while there are mandatory requirements for consultation with other States affected. The Liability Convention applies exclusively to " pollution damage caused on the territory including the territorial sea " of the coastal State. The tanker-owner is subjected to a principle of absolute liability, rather than liability based upon fault, but such absolute liability is one of a qualified character, for no liability for pollution damage attaches to the owner if he proves (the onus of proof presumably being upon him) that the damage:— (*a*) resulted from war, hostilities, civil war, insurrection or some unavoidable natural phenomenon; or (*b*) was caused by an act or omission with intent to cause damage by a third party; or (*c*) was wholly caused by the negligence or wrongful act of a Government or authority responsible for maintaining lights or providing navigational aids. A limit for liability is fixed, and fault comes into account to the extent that if the casualty occurred as a result of the owner's actual " fault or privity ", his liability is not restricted to the ceiling fixed by the Convention. Provision is made for the necessity of certificates of insurance or financial security where a tanker registered in a country party to the Convention carries more than 2,000 tons of oil in bulk as cargo.

An instrument of a different nature is the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and

Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, opened for signature on February 10, 1971. For the sake of brevity, this will be referred to as the Seabed Arms Control Treaty. It represents a first major step in preventing militarisation of the seabed and ocean floor. Under paragraph 1 of Article 1 parties are prohibited from placing nuclear weapons or other weapons of mass destruction on the seabed and ocean floor beyond the limits of a twelve-miles coastal seabed zone, while paragraph 2 provides that this obligation is to apply also to the twelve-miles zone, except that within that zone the undertaking is not to apply either to the coastal State itself, or to the seabed beneath the coastal State's territorial sea. In other articles, provision is made for processes of verification, and for the continuance of negotiations for wider measures to prevent militarisation. The Seabed Arms Control Treaty is an arms control measure, and therefore does not prohibit or limit the use of peaceful nuclear explosive devices in the seabed or ocean floor in order to obtain minerals, or to drill for oil and gas. This consideration must be taken into account when assessing claims that the Treaty has made a decisive contribution to the protection of the marine environment.

Canals

Canals which are inland waterways are part of the territory of the territorial States through which they pass, and by analogy are subject to the rules as to rivers.

As to interoceanic canals, special treaty rules are or have been applicable to the Suez, Panama and Kiel Canals. The Suez Canal was to some extent neutralised and demilitarised by the Convention of Constantinople of 1888, under which it was to be freely open in time of peace[1] as well as of war to merchant vessels and warships of all nations. It was not to be

[1] In September, 1951, the United Nations Security Council affirmed the principle of freedom of transit through the Suez Canal under this Convention by adopting a Resolution calling upon Egypt to terminate certain restrictive practices in respect to shipping passing through the Canal, which were designed by Egypt to operate as a "blockade" of the ports of Israel. From the comments of certain delegates, it appeared that the Constantinople Convention was regarded as dedicating an international maritime highway.

blockaded, and in time of war no act of hostility was to be allowed either in the canal itself or within three sea miles from its ports. These provisions could not, and did not in practice preclude a strong naval power, such as Great Britain, in time of war, from blocking access for enemy vessels to the Canal beyond the limit of three sea miles. Men-of-war were to pass through the Canal without delay, not staying longer than 24 hours in Port Said and Suez. Troops, munitions, and other war material were not to be shipped or unshipped inside the Canal or in its harbours, and no permanent fortifications were allowed in it, or the stationing of men-of-war. Subject to the provisions of the 1888 Convention, the Canal is territorially part of Egypt.

In 1956, Egypt purported to nationalise the Suez Canal Company which enjoyed a concession to operate the Canal. It thereupon became a vital question, as to what extent the free rights of States to use the Canal might be subject to impairment in the future. In ultimate analysis, this issue lay at the root of the Anglo-French intervention against Egypt in the Canal zone, in October–November, 1956.

There is an opinion of some weight to the effect that the rights to use the Canal are not dependent on the former concession, nor exercisable only on sufferance by Egypt, but are vested rights of an international character, guaranteed by international law. Reference may be made, apart from the 1888 Convention, to the Anglo-Egyptian Agreement of October 19, 1954, under which the parties recognised that the Canal was " a waterway economically, commercially and strategically of international importance ", and to the principles approved by the United Nations Security Council on October 13, 1956—among them, that freedom of passage should be maintained " without discrimination, overt or covert ", that the Canal should be " insulated " from the politics of any country, and that tolls and charges should be fixed by agreement. Egypt's Declaration of April 24, 1957,[1] in which it affirmed that it would respect

[1] For the text of the Declaration, see *American Journal of International Law* (1957), Vol. 51, pp. 673–675.

the terms and spirit of the 1888 convention, has however, prevented the issue from becoming clarified.

The Panama Canal comes under the operation of the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain, and subsequent treaties between the United States and Panama. The Hay-Pauncefote Treaty of 1901 contained an Article providing that " the Canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality ".[1] Although, strictly speaking, binding only as between the contracting States, this Article has been applied in practice by the United States to the vessels of all maritime nations. As in the case of the Suez Canal, it was provided by the Hay-Pauncefote Treaty that the Panama Canal should not be blockaded nor any act of hostility committed within it. In practice the treaty arrangements for neutralisation did not prevent the United States taking the necessary protective measures for the security of the Panama Canal zone.

The United States enjoys under the Hay-Varilla Treaty, signed on November 18, 1903, and repeatedly amended, occupation and control over the Panama Canal zone in perpetuity, although Panama claims the legal and nominal sovereignty. *De facto,* however, the United States possesses certain sovereign rights in the area, and this appears to be implicitly recognised in the United States-Panama Treaty of Mutual Understanding and Co-operation as to the Canal, of January 25, 1955 (cf. the provision in the Treaty conceding to Panama the right to tax non-American citizens working in the Canal zone). Although there have from time to time been official references (e.g., the joint statements on September 24, 1965)[2] to the negotiation of a new treaty in regard to the Canal, abrogating the 1903 Treaty, and acknowledging Panama's sovereignty over the area of the Canal zone, with the Canal " open at all times to

[1] Although it did not contain an express provision that the Panama Canal should be open to all vessels in time of peace as well as of war. Ideally the principle of non-discrimination should apply to all canals which are international highways; and cf. Baxter, *The Law of International Waterways* (1964), at p. 183.

[2] Progress towards a new Treaty was also reported on October 19, 1971.

the vessels of all nations on a non-discriminatory basis ", no such formal treaty has yet come into force.

The Kiel Canal was made freely open to the merchant vessels and men-of-war of all nations under the Treaty of Versailles of 1919, but in 1936 Germany denounced the relevant provisions. No doubt freedom of passage will be restored under the peace treaty, when it is made, with Germany. In the *Wimbledon Case*,[1] the Permanent Court of International Justice held in respect of the Kiel Canal, and applying the precedents of the Suez and Panama Canals, that the passage of a belligerent warship through an interoceanic canal would not compromise the neutrality of the riparian State.

3.—Servitudes

Under present practice, an international servitude[2] may be defined as an *exceptional* restriction imposed by treaty on the territorial sovereignty of a particular State whereby the territory of that State is put under conditions or restrictions serving the interests of another State, or non-State entity. A well-known example is the condition that the frontier town of Hüningen in Alsace should in the interests of the Swiss Canton of Basle never be fortified.

Servitudes must be rights *in rem*, that is attached to the territory under restriction, and involving something to be done or something that the State bound by the servitude must refrain from doing on that territory,[3] for example, fishery rights in the maritime belt, the right to build a railway through a territory, the use of ports, rivers, and aerodromes, etc. Since the right is one *in rem*, it follows that the servitude remains in force whatever happens to the territory of the State bound by the servitude; for example, if it be annexed or merged in another State.

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[1] Pub. P.C.I.J. (1923), Series A, No. 1, at pp. 25, 28.

[2] For a modern treatise on the subject, see Váli, *Servitudes of International Law* (2nd edition, 1958).

[3] An illustration is Article 7 of the Lateran Treaty of 1929 (restriction upon construction in adjacent Italian territory of new buildings that may overlook the Vatican City).

So far as Government practice is concerned, the doctrine of international servitudes is relatively modern. In the *North Atlantic Coast Fisheries Arbitration* (1910),[1] the Permanent Court of Arbitration stated that there was no evidence that the doctrine was one with which either American or British statesmen were conversant in 1818.

Servitudes were, however, frequently referred to in books by writers on international law acquainted with the Roman and Civil Law. In the late nineteenth and early twentieth century, there was some evidence that Government advisers were becoming more familiar with the notion, and in 1910 in the *North Atlantic Coast Fisheries Arbitration* the argument was advanced that certain fishery rights granted to the United States by Great Britain constituted a servitude, but the Permanent Court of Arbitration refused to agree with this contention.

In a later case before the Permanent Court of International Justice, namely *The Wimbledon* (1923),[2] it was claimed that the right of passage through the Kiel Canal was a State servitude, but the majority of the Court did not accept this contention, although it found favour with Judge Schücking. In the *Right of Passage over Indian Territory Case* (1960),[3] the International Court of Justice gave recognition to a customary right of passage for Portuguese private persons, civil officials, and goods over Indian territory between Daman and certain Portuguese enclaves, but inasmuch as it was held that such right was not general, being inapplicable to armed forces, armed police, and arms or ammunition, and was also subject to regulation and control by India, the right was hardly a servitude *stricto sensu.*

Initially, the doctrine of international servitudes was imported from the private law, and many authorities are of opinion that its translation to the international field has not been a success. There are cogent grounds for suggesting that the doctrine is not really a necessary one, and that international

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[1] For accessible relevant extracts from the award, see Green, *International Law Through the Cases* (3rd edition, 1970) at pp. 331 *et seq.*

[2] Pub. P.C.I.J. (1923), Series A, No. 1.

[3] I.C.J. Reports (1960) 6.

law can quite well dispense with its application. This view is at least supported by the rejection in the two cases mentioned of particular claims to servitudes.

If the term " servitude " be inappropriate or legally inexact, there ought nevertheless to be some convenient expression to embrace the rights given to States under the numerous arrangements of recent years for the granting of air, naval, or military bases,[1] or for the establishment of satellite, space vehicle or missile tracking stations (for example the Exchange of Notes at Washington of March 15, 1961, between the British and United States Governments concerning the Establishment for Scientific Purposes of a Space Vehicle Tracking and Communications Station in Bermuda). Perhaps the expression " territorial facilities " would be apt to cover these.[2] In regard to satellite and spacecraft tracking facilities, the point has been raised whether the grantor State is bound to extend the benefit of these to launching States other than the grantee State.

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[1] A matter of controversy is the extent to which such bases may be contrary to international law. This turns, *inter alia*, on the point whether Article 51 of the U.N. Charter (" inherent right of individual or collective self-defence " against armed attack) permits preparations and co-ordination in the event that an armed attack should occur against one State member of a collective defence grouping.

[2] The word " facility " is in fact used, apparently in this sense, in Article 7 of the Treaty of January 27, 1967, on the Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies (launching base of space objects).

PART 3
RIGHTS AND DUTIES OF STATES

CHAPTER 8
JURISDICTION

1.—GENERAL OBSERVATIONS

THE practice as to the exercise by States of jurisdiction over persons, property, or acts or events varies for each State, and these variations are due to historical and geographical factors which are likely to play a less important role in the future when countries become more knit together. For example, the Anglo-American group of States pay allegiance preponderantly to the *territorial* principle of jurisdiction, according to which each State may exercise jurisdiction over property and persons in, or acts occurring within, its territory.[1] This preferential attachment to the territorial theory springs from the circumstance that in the territories under Anglo-American dominion sea frontiers predominate, and the free or unrestricted movement of individuals or of property to or from other countries did not in the past occur so readily or frequently as between States bounded for the most part by land frontiers. On the other hand, the European States take a much broader view of the extent of their jurisdiction precisely because the Continent is a network of land or river frontiers, and acts or transactions of an international character have been more frequent owing to the rapidity and facility of movement across the frontiers between these countries.

Historically, it was not often that Anglo-American Courts were called upon to exercise jurisdiction wider than the territorial jurisdiction, but with the increasing speed of modern communications this is not likely to remain a permanent condition.

[1] For affirmation of this principle, see *Board of Trade* v. *Owen*, [1957] A.C. 602, at pp. 625, 626; [1957] 1 All E.R. 411, at p. 416.

International law sets little or no limitation on the jurisdiction which a particular State may arrogate to itself. It would appear to follow from the much discussed *Lotus Case* (1927),[1] decided by the Permanent Court of International Justice, that there is no restriction on the exercise of jurisdiction by any State unless that restriction can be shown by the most conclusive evidence to exist as a principle of international law. In that case the Permanent Court did not accept the French thesis—France being one of the parties—that a claim to jurisdiction by a State must be shown to be justified by international law and practice. In the Court's opinion, the onus lay on the State claiming that such exercise of jurisdiction was unjustified, to show that it was prohibited by international law.

There is one practical limitation on the exercise of wide jurisdiction by a particular State. To quote a distinguished Judge,[2] " no State attempts to exercise a jurisdiction over matters, persons or things with which it has absolutely no concern ". As, generally, persons or things actually in the territory of a State and under its sovereignty must affect that State, it will be found that the territorial basis of jurisdiction is the normal working rule.

2.—Territorial Jurisdiction

The exercise of jurisdiction by a State over property, persons, acts or events occurring within its territory is clearly conceded by international law to all members of the society of States. The principle has been well put by Lord Macmillan[3]:—

> " It is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits ".

According to the British practice, the mere physical presence of any person or thing within the territory is sufficient to attract jurisdiction without the necessity for either domicile

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[1] Pub. P.C.I.J. (1927), Series A, No. 10.
[2] Mr. Justice H. V. Evatt in 49 C.L.R. (1933), at p. 239.
[3] *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at pp. 496–7.

or residence.[1] Indeed, under the so-called principle of " transient jurisdiction ", a British Court may exercise jurisdiction in regard to a person, based on the service of proceedings on him during a mere fleeting visit to British territory.[2] Furthermore, the legislature is presumed to intend that its legislation shall be restricted in its application to persons, property and events in the territory over which it has territorial jurisdiction, unless a contrary intention appears, and statutes are construed with reference to this presumed intention.[3] A similar rule of construction is applied in the United States.[4]

For the purposes of territorial jurisdiction, besides actual territory, it has been customary to assimilate the following to State territory:—

(*a*) The territorial sea.
(*b*) A ship bearing the national flag of the State wishing to exercise jurisdiction.
(*c*) Ports.

(a) The territorial sea.—As mentioned in the preceding chapter, vessels of non-littoral States have a right of innocent passage through the waters of the territorial sea, or maritime belt, but there is no right of innocent overflight for aircraft. There was formerly some doubt whether foreign vessels which were merely in transit through the territorial sea were subject for all purposes to the jurisdiction of the littoral State. In *R.* v. *Keyn* (*The Franconia*)[5] it was held that an English Criminal Court had in the absence of a Statute no jurisdiction over a crime committed by a foreigner on a foreign vessel less than three miles from the coast. This decision astounded many English legal authorities, and was nullified by the enactment

[1] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at p. 584.
[2] Cf. *Carrick* v. *Hancock* (1895), 12 T.L.R. 59. Under the Supplementary Protocol of October 15, 1966 to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of April 26, 1966 (Hague Conference on Private International Law), a judgment based on the exercise of such jurisdiction is not to be recognised or enforced by the Courts of another State if the defendant so requests.
[3] *Blackwood* v. *R.* (1882), 8 App. Cas. 82, at p. 98 ; *MacLeod* v. *A.-G. for New South Wales*, [1891] A.C. 455.
[4] *U.S.* v. *Bowman* (1922), 260 U.S. 94.
[5] (1876), 2 Ex. D. 63.

of the Territorial Waters Jurisdiction Act, 1878, giving the Courts jurisdiction over offences committed within the maritime belt, which was defined as three miles from the shore. According to the Act, however, a foreigner was only to be prosecuted by leave of the Secretary of State.

The subject of arrests and criminal investigations on board foreign merchant vessels passing through the territorial sea, and of civil process against such vessels, is dealt with as part of the right of innocent passage in Articles 19–22 of the Convention on the Territorial Sea and Contiguous Zone, signed at Geneva on April 28, 1958. These provisions impose limitations on the jurisdictional rights of the coastal State, in the interests of minimising interference with shipping in transit.

In connection with crimes committed on board a foreign merchant vessel *during* its passage through the territorial sea, Article 19 provides that the coastal State may not arrest any person or conduct any investigation, except in the following cases:—(*a*) if the consequences of the crime extend to the coastal State; or (*b*) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or (*c*) if the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or (*d*) if it is necessary for the suppression of illicit traffic in narcotic drugs. These limitations do not apply to the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a ship passing through the territorial sea after leaving internal waters. With regard to crimes committed *before* the vessel entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters, the coastal State may not take any steps on board the vessel to arrest any person or conduct any investigation. Article 19 applies also to Government vessels, whether operated for commercial or non-commercial purposes (see Articles 21 and 22).

Civil process is dealt with in Article 20. First, the coastal State is not to stop or divert a foreign merchant ship passing through the territorial sea for the purpose of exercising civil

jurisdiction in relation to a person on board the ship. Second, the coastal State may not levy execution against or arrest such a vessel for the purpose of any civil proceedings, except only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the coastal waters; but this is without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign merchant ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters. Article 20 applies also to Government vessels operated for commercial purposes (see Article 21), but not to Government vessels operated for non-commercial purposes (see Article 22).

(b) **" Floating Island."**—A ship bearing the national flag of a State is for purposes of jurisdiction treated as if it were territory of that State, on the principle that it is virtually a " floating island ".[1] This rule applies whether the flag-ship is on the high seas or within foreign territorial waters. It applies particularly to warships and State ships used only on Government non-commercial service, inasmuch as under Articles 8 and 9 of the Convention on the High Seas, signed at Geneva on April 29, 1958, these have complete immunity on the high seas from the jurisdiction of any State other than the flag State. The " floating island " metaphor was, however, criticised in *R.* v. *Gordon-Finlayson, Ex parte An Officer*;[2] there the Court pointed out that a ship is not part of the territory of the flag State but jurisdiction may be exercised over the ship by that State in the same way as over its own territory.[3] A leading writer[4] on international law also severely condemned

[1] See *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161; 11 Cox C.C. 198. The rule was also applied in the decision of the Permanent Court of International Justice in *The Lotus*, Pub. P.C.I.J. (1927), Series A, No. 10, and in the decision of an international arbitral tribunal in *The Costa Rica Packet*.

[2] [1941] 1 K.B. 171. Cf. American decision in *Cunard S.S. Co.* v. *Mellon* (1923), 262 U.S. 100, at p. 123.

[3] For this reason, a crime committed on board a ship is, for the purposes of an extradition treaty, deemed to have been committed in the territory of the flag State, which is a party to the treaty; see *R.* v. *Governor of Brixton Prison, Ex parte Minervini*, [1959] 1 Q.B. 155; [1958] 3 All E.R. 318.

[4] Hall; see his *International Law* (8th Edition), pp. 301–304. See also below as to public vessels of foreign States, pp. 264–265.

the " floating island " theory and the principle of the territoriality of vessels on the high seas. Yet the theory continues to receive recognition and application.[1]

(c) **Ports.**—A port is part of internal waters, and therefore is as fully portion of State territory as the land itself. Nevertheless, ships of other States are subject to a special regime in port which has grown from usage, and varies according to the practice of the State to which the port belongs.

The general rule is that a *merchant vessel* enters the port of a foreign State subject to the local jurisdiction. The derogations from this rule depend on the practice followed by each State. There is, however, an important exception which belongs to the field of customary international law, namely, that a vessel in distress has a right to seek shelter in a foreign port, and on account of the circumstances of its entry is considered immune from local jurisdiction, subject perhaps to the limitation that no deliberate breaches of local municipal law are committed while it is in port. On the other hand, some authorities concede only a qualified immunity to such vessels.

As we shall see below,[2] foreign *public vessels* are subject to special rules of jurisdiction and their status in port is considered in connection with these rules.

Where offences or misdemeanours are committed on board vessels berthed in foreign ports, jurisdiction depends on the practice followed by the territorial State of the port concerned.

According to the British practice, foreign merchant vessels in British ports and British merchant vessels in foreign ports are subject to the complete jurisdiction and police regulations of the State of the port.[3] But in criminal matters, it is not usual for British authorities to intervene and enforce the local jurisdiction unless their assistance is invoked by or on behalf of the local representative—for example, a consul—of the flag State of the vessel, or those in control of the vessel, or

[1] See Article 23 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, of October 7, 1952, which provides that for the purposes of the Convention, a ship or aircraft on the high seas is to be regarded as part of the territory of the State in which it is registered.

[2] See below, pp. 264–269.

[3] See Smith, *Great Britain and the Law of Nations* (1935), Vol. II, pp. 253–4.

unless the peace or good order of the port is likely to be affected. British practice maintains that in each case it is for the authorities of the territorial State to judge whether or not to intervene.

The practice of the United States and of France is somewhat different from that of Great Britain, a distinction being drawn between:—(*a*) matters of internal discipline or internal economy of the vessel, over which the authorities of the flag State, including consuls, are considered to have primary jurisdiction; and (*b*) matters affecting the peace or good order of the port, which are reserved for the jurisdiction of local Courts and local authorities. Thus, in *Wildenhus' Case*,[1] the United States Supreme Court held that the stabbing and killing of one Belgian seaman by another on board a Belgian ship in an American port was subject to local prosecution, and was excluded from jurisdiction by the Belgian Consul.

The differences between the various State practices are far more a question of form than of substance, and it would appear possible by international agreement to bridge these artificial gaps (cf. in this connection the Convention and Statute of December 9, 1923, on the International Régime of Maritime Ports).

Technical Extensions of the Territorial Jurisdiction

Apart from the assimilation to territory of the maritime belt, of ships at sea, and of ports, certain technical extensions of the principle of territorial jurisdiction became necessary in order to justify action taken by States in cases where one or more constituent elements of an act or offence took place outside their territory. These extensions were occasioned by the increasing facilities for speedy international communication and transport, leading to the commission of crimes in one State which were engineered or prepared in another State. Some States in whose territory such ancillary acts took place, declined to prosecute or punish the offenders responsible on the ground that as the acts were accessory to a principal offence

[1] (1887), 120 U.S. 1.

committed elsewhere, the territorial jurisdiction did not apply.[1] But several States met the new conditions by technically extending the territorial jurisdiction:—

(*a*) Applying the *subjective territorial principle*, these States arrogated to themselves a jurisdiction to prosecute and punish crimes commenced within their territory, but completed or consummated in the territory of another State. Although this principle was not so generally adopted by States as to amount to a general rule of the law of nations, particular applications of it did become a part of international law as a result of the provisions of two international Conventions, the Geneva Convention for the Suppression of Counterfeiting Currency (1929), and the Geneva Convention for the Suppression of the Illicit Drug Traffic (1936).[2] Under these Conventions, the States parties bound themselves to punish, if taking place within their territory, conspiracies to commit and intentional participation in the commission of counterfeiting and drug traffic offences wherever the final act of commission took place, as also attempts to commit and acts preparatory to the commission of such offences, and in addition agreed to treat certain specific acts as distinct offences and not to consider them as accessory to principal offences committed elsewhere (in which case these specific acts would not have been punishable by the State in whose territory they took place).

(*b*) Pursuant to the *objective territorial principle*, certain States applied their territorial jurisdiction to offences or acts commenced in another State, but:—(i) consummated or completed within their territory, or (ii) producing harmful consequences to the social order inside their territory. The objective territorial theory was defined by Professor Hyde as follows:—

> " The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein

[1] See in this connection, the House of Lords decision in *Board of Trade* v. *Owen*, [1957] A.C. 602; [1957] 1 All E.R. 411, to the effect that a conspiracy in England to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie before an English Court. See also *R.* v. *Cox*, [1968] 1 All E.R. 410 (alleged conspiracy to commit fraud in France), and p. 250, n. 1, *post*.

[2] This Convention has continued to remain in force as between its parties notwithstanding the penal repression provisions of the Single Narcotic Drugs Convention of 1961.

justifies the territorial sovereign in prosecuting the actor when he enters its domain ".

Illustrations of the theory were given in an official League of Nations report concerned with the criminal jurisdiction of States over offences committed outside their territory;[1] these were:—(*a*) a man firing a gun across a frontier and killing another man in a neighbouring State; (*b*) a man obtaining money by false pretences by means of a letter posted in Great Britain to a recipient in Germany.

The objective territorial principle was applied in the provisions of the two international Conventions just referred to, and has also been recognised in decisions of English, German, and American Courts.[2] But the most outstanding example of its application has been the decision of the Permanent Court of International Justice in 1927 in the *Lotus Case*.[3] The facts in that case were shortly, that a French mail steamer, the *Lotus*, collided on the high seas with a Turkish collier, due allegedly to the gross negligence of the officer of the watch on board the *Lotus*, with the result that the collier sank and eight Turkish nationals on board perished. The Turkish authorities instituted proceedings against the officer of the watch, basing the claim to jurisdiction on the ground that the act of negligence on board the *Lotus* had produced effects on the Turkish collier, and thus according to the rule mentioned above,[4] on a portion of Turkish territory. By a majority decision, the Permanent Court held that the action of the Turkish authorities was not inconsistent with international law.

[1] Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law (1926), on Criminal Competence of States in respect of Offences committed outside their Territory. Cf. *Treacy* v. *Director of Public Prosecutions*, [1971] 1 All E.R. 110 (the offence of blackmail may be committed through the posting in England of a letter with menaces, and which is received in a foreign State).

[2] See, for example, *R.* v. *Nillins* (1884), 53 L.J.M.C. 157, *R.* v. *Godfrey*, [1923] 1 K.B. 24, and *Ford* v. *The United States* (1927), 273 U.S. 593. United States Courts have exercised extra-territorial jurisdiction under anti-trust legislation in respect to such arrangements between foreign corporations as have or may have monopoly-producing effects or repercussions in the United States. In the German Federal Republic, an alien may be rightfully convicted of an offence, committed abroad, of disclosing official secrets, if the result of such disclosure be to endanger the security of forces stationed in the Republic's territory; see *American Journal of International Law* (1958), Vol. 52, at p. 799.

[3] Pub. P.C.I.J. (1927), Series A, No. 10.

[4] See above, pp. 249–250.

Territorial Jurisdiction over Aliens

Territorial jurisdiction is conceded by international law as much over aliens as over citizens of the territorial State. As Judge J. B. Moore pointed out in the *Lotus Case*, no presumption of immunity arises from the fact that the person against whom proceedings are taken is an alien; an alien can claim no exemption from the exercise of such jurisdiction except so far as he may be able to show either:—(i) that he is, by reason of some special immunity, not subject to the operation of the local law, or (ii) that the local law is not in conformity with international law.

Territorial Jurisdiction over Criminals

Great Britain (by long tradition), the United States, and several other countries, adhere for the most part to a territorial theory of criminal competence. Indeed, the British theory, which has been modified as a result of the two international Conventions mentioned above,[1] goes so far as to deny to States the right to assume over non-nationals a criminal jurisdiction which is not properly territorial. But the practice of most other States departs from an exclusive territorial theory.

The territorial criminal jurisdiction is founded on various principles. Its normal justification is that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected, and in general this will be the State on whose territory the crimes are committed.[2] Important considerations also are that the territorial State has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes whether committed by subjects or citizens, or by aliens resident or domiciled within its territory.[3]

Although, as we have seen above, the territorial principle has been extended in several ways, it would appear from the

[1] See above, p. 249.

[2] See Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law (1926), on Criminal Competence, etc., cited above, p. 214.

[3] Harvard, *Research on International Law* (1935), Jurisdiction with respect to Crime, at pp. 483 *et seq.*

Cutting Case (1887)[1] that such principle alone does not justify a State prosecuting a non-national temporarily within its territory for an alleged offence against its laws, committed abroad on a prior occasion. The United States Government maintained this position in its exchanges with the Mexican Government over this case, which concerned the arrest in Mexico of an American citizen, Cutting, for having published in Texas an article alleged to constitute a libel on a Mexican citizen. The objections formulated by the United States against the application of the territorial principle to such a case, have subsequently been widely supported.

Exemptions from and Restrictions upon the Territorial Jurisdiction

Certain immunity from the territorial jurisdiction is by international law, and by municipal law, conferred on:—

(*a*) Foreign States and Heads of foreign States.
(*b*) Diplomatic representatives, and consuls of foreign States.
(*c*) Public ships of foreign States.
(*d*) Armed forces of foreign States.
(*e*) International institutions.

The immunity of these several objects from, at least, the civil (if not the criminal) jurisdiction is not one of an absolute character; that is to say, there is no definite prohibition under international law of a voluntary submission by these objects to the territorial civil jurisdiction. Hence, if the immunity be duly waived, the exercise of jurisdiction by the territorial State becomes permissible.

(a) Foreign States and Heads of Foreign States

The rule is that foreign States and Heads of foreign States may sue in the territorial Court, but cannot as a rule be sued there unless they voluntarily submit to the jurisdiction of that Court either *ad hoc* or generally by a treaty. As pointed out in Chapter 6, this immunity is dependent on recognition.

[1] Moore's *Digest of International Law* (1906), Vol. II, p. 228.

The same principles apply to foreign States as to the Sovereigns of such States, but it is a curious fact that the rule of immunity used to be stated—as for example by Marshall, C.J., of the United States Supreme Court, in 1812, in the classical case of *Schooner Exchange* v. *M'Faddon*[1]—in terms which applied only to foreign Sovereigns. The explanation is that the idea of the State as a juristic personality, distinct from its Sovereign, is of recent origin only. Thus, as late as 1867, doubt existed in England whether a foreign State under a Republican form of government could sue in English Courts, although this right had always been conceded to foreign Sovereigns.[2]

Several principles have been suggested as the basis of this immunity:—

(i) *Par in parem non habet imperium.* One sovereign power cannot exercise jurisdiction over another sovereign power, but only over inferiors.

(ii) Reciprocity or comity.[3] In return for a concession of immunity, other States or Sovereigns of such States make mutual concessions of immunity within their territory.

(iii) The fact that in general the judgment of a municipal court cannot be enforced practically against a foreign State or Sovereign thereof, or that the attempt to do so would be regarded as an unfriendly act.

(iv) An implication from the circumstances; the very fact that a State allows a foreign State to function within, or a foreign Sovereign to visit, its territory, signifies a concession of immunity, as no foreign State or foreign Sovereign could be supposed to enter on any other terms. One Judge well described this as " an implied obligation not to derogate from a grant ".[4]

(v) The merits of a dispute involving the transactions or

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[1] (1812), 7 Cranch 116.

[2] *U.S.A* v. *Wagner* (1867), 2 Ch. App. 582.

[3] But this was said by Lord Porter in *United States and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*, [1952] A.C. 582, at p. 613 to be not a basis of, nor to limit the immunity of a State.

[4] Jordan, C.J., of the New South Wales Supreme Court, in *Wright* v. *Cantrell* (1943), 44. S.R.N.S.W. 45, at pp. 52 *et seq.*

policy of a foreign Government ought not to be canvassed in the domestic Courts of another country.[1]

The rule of jurisdictional immunity of foreign States and foreign Heads of States has two aspects of significance:— (1) An immunity as to process of the Court. (2) An immunity with respect to property belonging to the foreign State or foreign Sovereign. Aspect (1) may best be considered in the light of the British practice, which is similar in essentials to that followed by most other States. The English authorities lay it down that the Courts will not by their process " implead " a foreign State or foreign Sovereign; in other words, they will not, against its will, make it a party to legal proceedings whether the proceedings involve process against its personality or aim to recover from it specific property or damages. In the *Cristina*,[2] it was held that a writ *in rem* for the recovery of possession of a vessel, requisitioned by a Government, impleaded that Government since it commanded the defendants to appear or to let judgment go by default, thus imposing a clear alternative of submitting to jurisdiction or losing possession of the ship and ancillary rights. The writ and subsequent proceedings were accordingly set aside.

This aspect of the rule of immunity is so strictly applied that process even *indirectly* " impleading " a foreign State or foreign Sovereign has been treated as to that extent bad. It was consistent with such strict application that British and American Courts should hold State-owned commercial ships to be immune from all territorial process.[3]

As to aspect (2) of the rule of immunity, the Courts apply the principle that they will not by their process, whether the foreign State or foreign Sovereign is a party to the proceedings or not, allow the seizure or detention or judicial disposition of property which belongs to such State or Sovereign, or of which it is in possession or control. If the foreign State or foreign Sovereign has no title to the property alleged to be impleaded,

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[1] *Per* Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379, at p. 422; [1957] 3 All E.R. 441, at pp. 463, 464.

[2] *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485.

[3] See below, pp. 264–269.

it must at least show rights to possession or control in order to claim immunity. Aspect (2) was applied in the case mentioned above, the *Cristina*, in addition to aspect (1), the House of Lords ruling that a writ *in rem* issued in Admiralty against a vessel in the control of a foreign Government for public purposes, imported process against the possessory rights of a foreign Sovereign. As a condition of obtaining immunity, the foreign Government needs only to produce evidence showing " that its claim is not merely illusory, nor founded on a title, manifestly defective."[1] It is not bound to give complete proof of its proprietary or possessory title.

The rule of immunity is not confined to proceedings *in rem*, for immunity can be claimed even if the proceedings are *in personam* but would if successful have the indirect effect of depriving the foreign State or foreign Sovereign of proprietary or possessory rights, or of any rights of control.[2]

In recent years when foreign States have engaged in a wide variety of commercial activities, the question has been raised whether a State has immunity from territorial jurisdiction in respect of acts relating to its trading affairs. The Courts of several countries, notably Italy and Belgium, have not refused to exercise jurisdiction in such cases. And in at least one American case,[3] it was ruled that a foreign trading corporation did not enjoy immunity merely because some of its stock was held

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[1] See *Juan Ysmael & Co. Inc.* v. *Government of Republic of Indonesia*, [1955] A.C. 72; [1954] 3 All E.R. 236. Cf. *Republic of Mexico* v. *Hoffman* (1945), 324 U.S. 30.

[2] See *United States and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England*, [1952] A.C. 582; [1952] 1 All E.R. 572 where the doctrine of immunity of a foreign Sovereign State was applied to a claim to recover property in the hands of a bailee for a foreign Sovereign State. In *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379; [1957] 3 All E.R. 441, the House of Lords held that immunity may be claimed if an action brought against an agent of a foreign State, with legal title to a local debt, is calculated or intended to displace such title to the debt, nor could the action proceed against the debtor Bank holding the moneys in question.

[3] *United States* v. *Deutsches Kalisyndikat Gesellschaft* (1929), 31 F. (2d) 199. See also *Pan American Tankers Corporation* v. *Republic of Viet-Nam* (1969), 296 F. Supp. 561 (continuous active participation by the Republic in all significant aspects of a cement transportation transaction held to be inconsistent with a governmental role related to political or sovereign acts), and *Amkor Corporation* v. *Bank of Korea* (1969) 298 F. Supp. 143 (private and commercial transaction).

by a foreign State, or because its commercial activities were regarded by the Government of that State as governmental or public.

The immunity of a foreign State or foreign Sovereign from jurisdiction is not in all cases an absolute one, as sometimes, depending on the nature of the remedy sought,[1] there is no exemption from process.[2] Thus the following proceedings appear to be exceptions to the rule of immunity:—

(i) Suits relating to the title to land within the territorial jurisdiction, not being land on which legation premises are established. The principle which is applied here is that the local State has too vital an interest in its land, to permit of any derogation from its jurisdiction over suits concerned with the title thereto.

(ii) A fund in Court (a trust fund) is being administered in which a foreign State or foreign Sovereign is interested, but not if the alleged trustee happens also to be a foreign sovereign Government.[3]

(iii) Representative actions, such as debenture holders' actions, where a foreign State or foreign Sovereign is a debenture holder.

(iv) The winding-up of a company in whose assets the foreign State or foreign Sovereign claims an interest.

State practice also shows that not all States are ready to concede a full extent of immunity from jurisdiction. First, some States apply the distinction mentioned above between State-like activities of foreign States or Sovereigns (*jure imperii*) and their purely commercial activities (*jure gestionis*), allowing immunity only in the former instance.[4] Secondly, the municipal Courts of certain States follow a practice of closely

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[1] *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at p. 494.

[2] It was expressly declared in the House of Lords decision, *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*, [1952] A.C. 318, at p. 343, that there is no " absolute rule that a foreign independent Sovereign cannot be impleaded in our Courts in any circumstances ".

[3] See *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379, at p. 401; [1957] 3 All E. R. 441, at p. 450.

[4] In *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379, at pp. 422–424; [1957] 3 All E.R. 441, at pp. 463, 464, such a distinction was also favoured by Lord Denning, but Viscount Simonds, Lord Reid, Lord Cohen, and Lord Somervell expressed their reservations as to Lord Denning's views.

examining the nature and object of each particular transaction, in respect to which immunity is claimed, to determine whether or not the transaction really pertains to the functions of the foreign State. Thirdly, there is no clear practice as regards the immunity of foreign Governmental agencies or instrumentalities, and of foreign semi-public corporations. Some States are prepared here to follow the municipal law of the foreign State concerned, other States have regard to circumstances other than that municipal law, in order to ascertain whether the agency or corporation is part of the foreign State.

As to foreign semi-public corporations, in particular if they are not of the character of departments of State, but simply separate juridical entities, the privilege of jurisdictional immunity does not attach. It would seem from *Krajina* v. *Tass Agency*[1] and *Baccus S.R.L.* v. *Servicio Nacional del Trigo*[2] that it is a question of degree whether separate juridical incorporation has proceeded so far as to deprive an agency of its character as a department of State, or whether notwithstanding its incorporation, it still possesses that character. A separate, incorporated legal entity may, by the reason of the degree of governmental control over it, nonetheless be an organ of the State.

A decisive criterion is whether the corporate entity is in effect the *alter ego* of a government.[3]

The immunity from process covers conduct by the foreign State or foreign Sovereign which is a breach of local municipal law. In such case, if the territorial State feels aggrieved by the breach of its laws, the only course open to it is to seek diplomatic redress. The immunity extends also in respect of personal acts such as a promise of marriage, and even if the foreign Sovereign is living incognito.[4]

As mentioned above, the immunity may be waived by express or implied consent. If the waiver is express, it must be made with full knowledge of its consequences, and with the full

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[1] [1949] 2 All E.R. 274.
[2] [1957] 1 Q.B. 438; [1956] 3 All E.R. 715.
[3] *Mellenger* v. *New Brunswick Development Corporation*, [1971] 2 All E.R. 593, at p. 596.
[4] *Mighell* v. *Johore* (*Sultan*), [1894] 1 Q.B. 149.

authority of the sovereign Government in question.[1] What amounts to an implied waiver depends on all the circumstances of the case, and the Courts have been extremely reluctant to infer a waiver of immunity. Thus it has been held that the following acts did not amount to a submission to jurisdiction:—

(*a*) A submission to arbitration proceedings preceding action, or even a subsequent application to set aside these proceedings.[2]

(*b*) Living in the jurisdiction and entering into contracts there.[3]

(*c*) Seizure by the agents of a foreign State of a vessel within the jurisdiction.[4]

(*d*) A clause in a contract,[5] to which the foreign Sovereign is party, whereby it is agreed that the Sovereign will submit to the jurisdiction of the territorial Courts in matters arising out of the contract.

Nothing short of an undertaking given in face of the Court at the time when the Court is asked to exercise jurisdiction will suffice as a submission to jurisdiction.[5]

In this connection may be considered the matter of *set-offs* or *counter-claims* against a State which has begun suit in the Courts of the territorial State. The principle is that a foreign State suing as aforesaid submits itself to the ordinary incidents of the suit, so that, for instance, a defendant may set up a set-off or counter-claim arising out of the same matter in dispute, but not an independent and unrelated cross-claim, the test being whether the cross-claim is sufficiently connected with or allied to the subject-matter of the foreign State's claim as to make it necessary in the interests of justice that it should be disposed of along with that claim.[6] The justification of this principle is

[1] See *Baccus S.R.L.* v. *Servicio Nacional del Trigo*, [1957] 1 Q.B. 438; [1956] 3 All E.R. 715.

[2] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 797.

[3] *Mighell* v. *Johore (Sultan)*, [1895] 1 Q.B. 149.

[4] *Compania Naviera Vascongado* v. *Cristina S.S.* [1938] A.C. 485. Yet a foreign Sovereign who waives jurisdiction by instituting proceedings, is not immune from jurisdiction in respect to a continuation of such proceedings (see *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar*, [1952] A.C. 318; [1952] 1 All E.R. 1261).

[5] *Kahan* v *Pakistan Federation*, [1951] 2 K.B. 1003, especially at p. 1016.

[6] See *High Commissioner for India* v. *Ghosh*, [1960] 1 Q.B. 134; [1959] 3 All E.R. 659 (claim substantially for money lent; counterclaim for damages for slander held inadmissible). Cf. Article 32 paragraph 3 of the Vienna Convention on Diplomatic Relations of April 18, 1961.

that if a foreign State or foreign Sovereign chooses voluntarily to litigate, it must abide by all the rules like any other litigant and ultimately take all the consequences of its decision to sue. According to a decision of the United States Supreme Court,[1] the principle may apply, and immunity be lost even in the case of an " indirect " counter-claim, that is to say one arising out of facts or transactions, extrinsic to those on which the plaintiff State's claim is based. The decisive test is, in effect, whether there has been on the part of the plaintiff State a definitive election to submit for all purposes to the Court in which the suit was instituted. These principles apply *mutatis mutandis* to proceedings by diplomatic representatives and consuls (see below; and cf. also Article 32 paragraph 3 of the Vienna Convention on Diplomatic Relations of April 18, 1961).

(b) Diplomatic Representatives, and Consuls, of Foreign States

The jurisdictional immunities of diplomatic agents are set out in Articles 31–32 of the Vienna Convention on Diplomatic Relations of April 18, 1961.[2] They enjoy absolute immunity from the criminal jurisdiction of the receiving State, and immunity from its civil and administrative jurisdiction[3] except in three special cases specified in Article 31, namely:—(*a*) Actions for recovery of purely private immovable property. (*b*) Actions relating to succession in which they are involved in a purely private capacity. (*c*) Actions relating to any private, professional or commercial activity exercised by them. In Great Britain, the immunity of diplomatic envoys rests partly on the common law, embodying the approved rules of custom of international law, and partly on Statutes, namely, the Diplomatic Privileges Act, 1708, the International Organisations (Immunities and Privileges) Act, 1950, the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act,

[1] *National City Bank* v. *Republic of China* (1955), 348 U.S. 356.

[2] Under Article 29, the person of a diplomatic agent is inviolable, and he is not liable to any form of arrest or detention.

[3] A person who acquires diplomatic status after proceedings have been instituted against him, becomes entitled to immunity, notwithstanding that he has previously taken steps in the action; see *Ghosh* v. *D'Rozario*, [1963] 1 Q.B.106; [1962] 2 All E.R. 640.

1952, dealing with the privileges of High Commissioners from the Commonwealth and of the Ambassador of Ireland, and their staffs and families, the Diplomatic Immunities Restriction Act, 1955 (see below, p. 263), the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act, 1961, and now the Diplomatic Privileges Act, 1964. Under the 1708 Act, which has always been regarded as merely declaratory of the common law, all writs whereby the person of an ambassador might be arrested or his goods seized, were null and void. The 1950 Act, replacing prior statutory provisions, extended the privileges of immunity from diplomatic representatives proper to a wider class, including officers of approved international organisations, members of organisations or Committees thereof, and persons on special missions relating thereto. The 1964 Act was passed to give effect to the provisions of the Vienna Convention of 1961, *ante*, and thus to enable ratification of the Convention.

This immunity of diplomatic envoys extends not merely to their own persons, but to their suite, and members of their family forming part of their household, provided that they are not nationals of the receiving State (see Article 37 of the Vienna Convention).[1] Usually, the practice in most countries is to deposit periodically with the Foreign Office or similar Government Department a list of personnel for whom exemption from the territorial jurisdiction is claimed. In this list will be found the names of first, second, and third secretaries, counsellors, attachés, etc.[2]

In Great Britain, statements of the Foreign Office as to the

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[1] For the special conditions governing the immunity of administrative and technical staff, and members of their families, members of the service staff, and private servants of members of the mission, see paragraphs 2–4 of Article 37 of the Vienna Convention. See also *In re C.* (*An Infant*), [1959] Ch. 363; [1958] 2 All E.R. 656 (a son of a diplomatic agent, ordinarily resident with him, cannot be made a ward of Court without the latter's consent).

[2] The mere possession of a diplomatic passport or visa, without actual membership of a diplomatic mission accredited to the territorial or any other State, is insufficient to confer immunity; see *United States* v. *Coplon and Gubitchev* (1950), 88 F. Supp. 915, and *U.S.* v. *Melekh* (1960), 190 F. Supp. 67 (United Nations employee with Soviet diplomatic passport). The publication of lists is provided for, in respect of persons covered by the International Organisations (Immunities and Privileges) Act, 1950, by Section 2 of that Act.

diplomatic status of a particular person are accepted as conclusive by British Courts in the same way as with foreign States and foreign Sovereigns.[1] This was emphatically laid down by the House of Lords in the leading case of *Engelke* v. *Musmann.*[2]

The immunity from jurisdiction is subject to waiver, which must be express (see Article 32 paragraph 2 of the Vienna Convention). If the person claiming privilege is of lesser rank than the head of the legation, the waiver must be made by or on behalf of the superior envoy or his Government, and must be made with full knowledge of the circumstances and of that person's rights; a waiver merely by a solicitor as such for that person is insufficient.[3] British Courts usually insist on strict proof of waiver.

If the Ambassador or other head of mission waives the privilege of a subordinate diplomatic official, then that privilege ceases irrespective of the desire of that official to retain his immunity.[4]

A waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver is necessary (see Article 32 paragraph 4 of the Vienna Convention).

When the mission terminates, immunity continues for a reasonable time to enable the envoy to leave the receiving country, and in any event, as to acts performed by him in the exercise of his functions (see Article 39 paragraph 2 of the Vienna Convention). This extension of the period of immunity does not apply to a diplomatic agent who has been dismissed, and whose immunity has been waived by the Ambassador or head of the mission.[5]

The principle on which the jurisdictional immunity of a diplomatic envoy is based is that he should be free to perform official business on behalf of his country, without disturbance,

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[1] See Chapter 6 above, at pp. 161–163.
[2] [1928] A.C. 433.
[3] See *R.* v. *Madan*, [1961] 2 Q.B. 1; [1961] 1 All E.R. 588.
[4] *R.* v. *A.B.*, [1941] 1 K.B. 454.
[5] *R.* v. *A.B.*, [1941] 1 K.B. 454.

interference, or interruption.[1] This principle applies so as to cast a shield of inviolability over the legation premises (unless used for subversive purposes), all property held for the better fulfilment of the envoy's mission, and means of transport (see Article 22 of the Vienna Convention).

It seems that if a diplomatic agent engages in espionage against the State to which he is accredited, that State is not bound to respect his jurisdictional immunity.[2]

If a diplomatic envoy passes through or is in the territory of a third State which has granted him a passport visa, if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State must accord him inviolability and such other immunities as may be required to ensure his transit or return (Article 40 paragraph 1 of the Vienna Convention).

Immunity from jurisdiction should not be confused with immunity from liability, for once the exemption from jurisdiction is effectively waived, liability may arise. The comments of Lord Hewart, C.J., in the case of *Dickinson* v. *Del Solar*[3] are in point:—

> ". . . Diplomatic agents are not, in virtue of their privileges as such immune from legal liability for any wrongful act. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. *Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction* ".

The new international organisations established during and immediately after the Second World War brought into being a class of international officials, such as the members of the Secretariat of the United Nations Organisation, and of delegates to meetings of international organs, whose duties and functions clearly required immunity from local jurisdiction of a similar

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[1] See *Engelke* v. *Musmann*, p. 261, *ante*, at pp. 449–450. This is the so-called *functional* conception of immunity of diplomatic envoys.

[2] See Canadian decision of *Rose* v. *R.*, [1947] 3 D.L.R. 618. Cf. *R.* v. *A.B.*, [1941] 1 K.B. 454. Whether mere suspicion of espionage would justify the arrest of a diplomatic agent is a moot question. On the alleged Soviet " harassment " of foreign diplomats, see *United States Department of State Bulletin* (1952), Vol. 27, pp. 786–8.

[3] [1930] 1 K.B. 376, at p. 380.

kind to that enjoyed by diplomatic representatives of foreign States.

Accordingly, legislation was enacted both in the United States and in Great Britain to extend immunity to these persons, as well as to the international organisations of which they were members.[1] In Great Britain, this was effected by the above-mentioned International Organisations (Immunities and Privileges) Act, 1950,[2] replacing earlier enactments, and the various Orders-in-Council pursuant to the Act, while in the United States there was passed the Federal International Organisations Immunities Act of 1945. The detailed provisions of the two Acts lie beyond the scope of this book, but in general it can be said that their effect is not as wide as is suggested by their titles. A limited but reasonably liberal immunity is conferred on international officials and delegates to international organs, which may, as in the case of diplomatic representatives, be waived by higher authority.[3] The extent of the immunity, where it exists, varies with the grade or category to which the particular official or delegate belongs. Thus, as with diplomatic envoys, the immunity is one not from legal liability but from jurisdiction.

Finally, it should be emphasised that the immunity of diplomatic envoys is applicable in respect of acts in their private, as well as in their official capacity. Such immunity for private acts has not been conceded to all classes of international officials under the new British and American legislation just referred to. In this connection, there has been a novel enactment in Great Britain, the Diplomatic Immunities Restriction Act, 1955, providing for the withdrawal by Order-in-Council of the immunity for private acts of foreign diplomatic envoys, their servants and staff, where British envoys are not accorded the same degree of immunity for private acts by the accrediting foreign States concerned.

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[1] See also Chapter 19 below, pp. 582–585

[2] Other examples of enactments of this kind are the European Coal and Steel Community Act, 1955, and the German Conventions Act, 1955.

[3] Cf. *The Ranollo Case* (1946), 67 N.Y.S. (2d) 31, where the Secretary-General of the United Nations did not press the immunity of his chauffeur.

Consuls

Consuls are not diplomatic agents, and in respect of private acts, are not immune from local jurisdiction, except where this has been specially granted by treaty. But apart from treaty provisions, as to official acts[1] within the limits of consular powers under international law, they are exempt from the jurisdiction of judicial or administrative authorities of the receiving State, unless the immunity is waived by the sending State. The rules applicable to the waiver of the immunity of diplomatic envoys apply *mutatis mutandis*. The justification of this limited consular immunity is that the consul is received by the country where he resides as an officer of a foreign State charged with the performance of consular duties, and to carry out these duties properly he obviously requires immunity from local process.

Consuls who are at the same time diplomatic representatives of their States, are entitled to general immunity even in respect of private matters.[2]

The subject of consular immunities is now dealt with in detail in the Vienna Convention on Consular Relations, signed on April 24, 1963 (referred to, pp. 390–391, 393, *post*).

(c) Public Ships of Foreign States

Men-of-war and public vessels of foreign States, while in the ports or internal waters of another State, are in a great measure exempt from the territorial jurisdiction. For this purpose, a private vessel chartered by a State for public purposes, for example, the transport of troops, transport of war materials, is a public vessel. Proof of character as men-of-war or as public vessels is supplied by the ship's flag

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[1] See *Waltier* v. *Thomson* (1960), 189 F. Supp. 319 (consular immigration officer immune from suit for allegedly false representations concerning prospects for immigrants).

[2] See *Parkinson* v. *Potter* (1885), 16 Q.B.D. 152, *Engelke* v. *Musmann*, [1928] A.C. 433, and *Afghan Minister* (*Consular Activities*) *Case* (1932), Annual Digest of Public International Law Cases, 1931–1932, p. 328. A consul who later acquires diplomatic status is immune from process as to acts outside the scope of his duties, committed while he was consul, so long as he retains his new status; see *Arcaya* v. *Paez* (1956), 145 F. Supp. 464.

in conjunction with the ship's documents, for example, the commission issued and signed by the authorities of the State to which she belongs.

There are two theories as to jurisdiction in the case of public ships of a foreign State:—(*a*) The " floating island " theory according to which a public ship is to be treated by other States as part of the territory of the State to which she belongs. By this theory, the jurisdiction of the territorial Court is excluded for all purposes where any act is done, or offending party found on board the ship. (*b*) The territorial Court accords to the ship and its crew and contents certain immunities depending not on an objective theory that the public ship is foreign territory, but on an implication of exemption granted by the local territorial law. These immunities conceded by local law are conditional and can in turn be waived by the State to which the public ship belongs.

In *Chung Chi Cheung* v. *R.*,[1] a case of a crime committed on board a Chinese public vessel in the territorial waters of Hong Kong, that is, British territory, the Judicial Committee of the Privy Council rejected the former and approved the latter theory. On the particular facts of the case, it held that the Chinese Government had waived immunity, and that the Hong Kong Court had jurisdiction. It pointed out that theory (*b*) alone was consistent with the paramount necessity for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. In support of its views, it cited the classical judgment of Marshall, C.J., of the United States Supreme Court, in *Schooner Exchange* v. *M'Faddon*,[2] where the immunity of public vessels was based on an " implied licence " to enter a port, the licence containing an exemption from the jurisdiction of the State which granted the rights of hospitality.

Where a public vessel is in port, no legal proceedings will lie against it, either *in rem* for recovery of possession, or for damages for collision or in respect of members of its crew. But the jurisdictional immunity extends only so far as necessary

[1] [1939] A C. 160.
[2] (1812), 7 Cranch 116.

to enable such public vessel to function efficiently as an organ of the State and for State purposes.

> "The foreign Sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction".[1]

Therefore such vessel is bound to observe the ordinary laws of the port such as quarantine and sanitary regulations, and not to assist in breaches of local revenue laws. Any failure to respect these laws and regulations would be a ground for diplomatic representations, and possibly for expulsion.

Crimes committed on board the vessel while in port, except against a local subject, remain within the exclusive jurisdiction of the authorities of the vessel's flag State, including the commander of the vessel itself. Furthermore, some authorities maintain that individuals who do not belong to the crew, and who, after committing a crime on shore, board the vessel in order to take refuge, cannot be arrested by the local authorities and removed from the vessel if consent to this course is refused by the commander of the ship. Where such consent is refused, the local authorities have their remedy through the diplomatic channel against the Government of the flag State. On the other hand, several authorities[2] have expressed the view that such fugitive criminal should be given up to the local police. Possibly, asylum may be granted on grounds of humanity, in cases of extreme danger to the individual seeking it. If members of the crew break the local laws while ashore, they are not protected, although normally the local police would hand them over to the ship's authorities for punishment or other action, but if the breaches were committed ashore while on duty, or in the course of official duties, the members of the crew concerned would, it appears, enjoy complete immunity from local jurisdiction.[3]

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[1] *Chung Chi Cheung* v. *R.*, [1939] A.C., at p. 176.

[2] E.g. Cockburn, C.J., cited in *Chung Chi Cheung* v. *R.*, [1939] A.C., at p. 172.

[3] See *Triandafilou* v. *Ministère Public* (1942), *American Journal of International Law* (1945), Vol. 39, pp. 345–347.

State-Owned Commercial Ships

For some time, foreign Governments have embarked in trade with ordinary ships, and have been competing with shippers and ship-owners in the world's markets. The question has therefore arisen whether the ordinary principles as to immunity of public vessels should apply to such ships. The argument for the affirmative has been based on the Government ownership of these vessels, and on the risk of " impleading " a foreign State when exercising jurisdiction in respect of the ship. It has also been put that the " maintenance and advancement of the economic welfare of a people in time of peace " is no less a public purpose than the maintenance and training of a naval force.[1]

On the other hand, severe criticism has been levelled at this modern development of the immunity of public vessels. The objections to the concession of immunity are two principally:— (1) The doctrine of the immunity of the property of foreign Sovereigns is a concession to the dignity, equality, and independence of foreign sovereign Powers and arises by virtue of the comity of nations. But it is not consistent with the dignity of sovereign States that they should enter the competitive markets of foreign commerce, and *ratione cessante*, the privilege of immunity should be withheld. (2) There is injustice to nationals of the territorial State when a foreign Government may sue these nationals for matters arising out of its commerce while at the same time enjoying absolute immunity should actions *in rem* or *in personam* be brought against it. It has been said in answer to these objections that the remedy to a person injured is by diplomatic representations through his Government. Lord Maugham's observations on the uncertain value of diplomatic redress form a trenchant commentary on this argument[2]:—

> " In these days and in the present state of the world, diplomatic representations made to a good many States afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government ".

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[1] *The Pesaro* (1926), 271 U.S. 562, at p. 574.
[2] *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at p. 515.

The position at present is that certain English and American decisions support the doctrine of immunity of State-owned trading vessels,[1] but there have been a number of judicial utterances distinctly unfavourable to the immunity of public vessels in commercial service.[2] It will be recalled also that under Articles 20 and 21 of the Convention on the Territorial Sea and Contiguous Zone of April 28, 1958, public vessels operated for commercial purposes are not exempt from civil process *in rem* if they are lying in the territorial sea, or passing through the territorial sea after leaving internal waters.[3] There is besides the fact that a number of countries refuse to concede such immunity, or are parties to the Brussels Convention of 1926, mentioned in the following paragraph.

After the First World War, a number of international conferences discussed the subject of jurisdiction over commercial ships owned by foreign Governments. There was an almost unanimous opinion that the same legal remedies and actions should apply as in the case of any other ship-owner. In April, 1926, a large number of States, including Great Britain, signed at Brussels an International Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels. This Convention came into force in 1937, but has been ratified or acceded to by only a small number of States. Its general effect was that ships and cargoes owned or operated by States were, in respect of claims relating

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[1] See *The Porto Alexandre*, [1920] P. 30, *The Parlement Belge* (1880), 5 P.D. 197, *The Maipo* (1918), 252 F. 627, and (1919), 259 F. 367, and *The Pesaro* (1926), 271 U.S. 562. For a Canadian decision upholding the immunity from arrest of a public ship, see *Flota Maritima Browning de Cuba S.A.* v. *The Canadian Conqueror*, [1962] S.C.R. 598, especially at p. 603. Note that in *Republic of Mexico* v. *Hoffman* (1945), 324 U.S. 30, the United States Supreme Court refused to allow immunity to a vessel owned by a foreign Government but not in its possession and service, where the Department of State did not expressly recognise that vessel's immunity.

[2] See, e.g. *per* Lord Maugham in *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at p. 521, and cf. judgment of Frankfurter, J. in *Republic of Mexico* v. *Hoffman*, *supra*. Also, more recently, Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad*, [1958] A.C. 379 at 422; [1957] 3 All E.R. 441, at p. 463, opposed the granting of immunity to foreign Governments in commercial transactions.

[3] See above, p. 246.

to the operation of the ships or the carriage of cargoes, to be subject to the same rules of liability as privately-owned vessels. From these provisions, there were excepted ships of war, or Government patrol vessels, hospital ships, and ships used exclusively on governmental and non-commercial service although even in regard to these, certain claims (for example, of salvage) were permissible. The International Law Commission has favoured the rules laid down in this Convention.

(d) Foreign Armed Forces

Armed forces admitted on foreign territory enjoy a limited, but not an absolute, immunity from the territorial jurisdiction.

The extent of the immunity depends upon the circumstances in which the forces were admitted by the territorial Sovereign, and in particular upon the absence or presence of any express agreement between the host and the sending State regulating the terms and conditions governing the entry of the forces in the territory.

In the absence of such an express agreement, the bare fact of *admission* of the forces produces certain generally recognised consequences of international law. The principle here applying was stated in classical terms by Marshall, C.J., of the United States Supreme Court in *Schooner Exchange* v. *M'Faddon*[1] and were condensed by a very learned Judge[2] into the following general doctrine:—

> " A State which admits to its territory an armed force of a friendly foreign Power impliedly undertakes not to exercise any jurisdiction over the force collectively or its members individually which would be inconsistent with its continuing to exist as an efficient force available for the service of its sovereign."

In other words, the principle is that the territorial or host State impliedly undertakes not to exercise any jurisdiction

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[1] 7 Cranch 116. Note that in terms Marshall, C.J.'s remarks were addressed to the *passage* of troops through foreign territory, and not to their sojourn.

[2] Jordan, C.J., of the New South Wales Supreme Court, in *Wright* v. *Cantrell* (1943), 44 S.R.N.S.W. 45, at pp. 52–3.

over members of the visiting force in such a way as to impair the integrity and efficiency of the force.[1]

Applying this principle, it follows that by implied grant or licence from the territorial State:—(1) The commander of the visiting force, and the Courts of such force, have *exclusive* jurisdiction over offences committed by the members within the area in which the force is stationed, or in relation to matters of discipline, or over offences committed outside the stationing area, but while the members concerned were actually on duty. (2) The visiting force and its members are immune from the local jurisdiction, whether civil or criminal, in regard to matters of internal administration of the force, or necessarily involved in the performance by such force of its duties (for example, the bearing of arms, use of motor transport, etc.). On the other hand, if the members of the force commit offences outside their area and while engaged on non-military duties, for example, recreation or pleasure, the territorial State may claim that they are subject to local law.

It follows further from the above principle that there is no complete waiver of jurisdiction by the territorial State when granting a licence or permission to an armed force to enter its territory; as one learned Judge[2] has put it, " the extent of the licence does not correspond with the extent of the waiver ".

Normally, the authorities or Courts of the visiting force will, at least in matters of discipline or internal administration, be immune from the supervisory jurisdiction of the local Courts by the exercise of the prerogative writs (for example, *habeas corpus*), unless perhaps there has been a clear case of exceeding their competence, such as a sentence passed upon a person who was not a member of the armed force.[3]

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[1] Also, although normally entitled to exercise jurisdiction, the receiving State may, on the grounds of comity or courtesy, allow the authorities of the visiting force to deal with the alleged offenders; cf. advice of Professor Yokota in connection with the arrest and prosecution of British naval ratings in Japan for robbery, London " Times " October 9, 1952.

[2] *Chow Hung Ching* v. *R.* (1949), 77 C.L.R. 449, at p. 463, per Latham, C.J.

[3] For an attempt to invoke this jurisdiction, see *Ex parte Ortoli* (1942), 59 Weekly Notes (New South Wales) 146. Cf. also *Re Amand,* [1941] 2 K.B. 239.

It is clear that opinions may differ as to how far immunity should be conceded to foreign visiting forces in order that military efficiency should be preserved. United States judicial pronouncements[1] and practice generally favour absolute immunity for this purpose; not so the British practice. Differences of opinion have indeed arisen with reference to the exercise of civil jurisdiction over members of a visiting force. In the case of *Wright* v. *Cantrell*[2] an Australian Court held as regards American forces on Australian territory for the purpose of the Pacific War, that the existence or efficiency of those forces would not be imperilled if an individual member were subject to a civil suit in the territorial Courts for an injury caused to a local citizen even in the course of that member's duties.

The above principles apply if there is no express agreement between the State admitting and State sending the armed forces. If, however, there is such an agreement, then *semble* its terms will govern the jurisdiction of the Courts; for example, if the admitting State agrees that the visiting forces shall be exempt from local jurisdiction in all civil and criminal matters, the Courts are bound by the exemption so conceded.[3]

The exemption from jurisdiction is conceded only to visiting armed forces, and not to a visiting band of men without armed organisation and unconnected with military operations, although they may take orders from persons of military rank; nor is it to be conceded if the members of the visiting band mix freely with the local inhabitants and are not a body subject to proper military discipline and organisation.[4]

During the Second World War, Great Britain and other countries in the British Commonwealth enacted legislation conferring on certain (but not all) Allied forces within their territories, notably the United States forces, complete jurisdiction over the respective members of these forces and a corre-

[1] See, e.g., *Tucker* v. *Alexandroff* (1901), 183 U.S. 424, and cf. Canadian decision, *Reference Re Exemption of United States Forces from Canadian Criminal Law*, [1943] 4 D.L.R. 11.

[2] (1943), 44 S.R.N.S.W. 45.

[3] See *Chow Hung Ching* v. *R.* (1949), 77 C.L.R. 449, where it was so held by the High Court of the Commonwealth of Australia.

[4] See *Chow Hung Ching* v. *R.*, *supra.*

lative exemption from local criminal jurisdiction except where the visiting force waived its exclusive right of jurisdiction.[1]

In the post-war period, States have had to meet the impact of an important new development, the stationing of troops and of accessory civilian or depot personnel in foreign territory in pursuance of regional security arrangements such as the North Atlantic Security Pact of April, 1949, or of international forces, including peacekeeping forces, under the United Nations Charter. A solution in this connection was adopted by the North Atlantic Powers in an Agreement signed in London on June 19, 1951, relative to the status of the forces of such Powers.[2] This provides that the sending and receiving States are to exercise concurrent jurisdiction over members of a visiting force of a North Atlantic Power and civilian component personnel, subject to:—(*a*) exclusive jurisdiction being exercised by each State respectively in regard to offences which are punishable only by its laws; (*b*) the sending State having the primary right to exercise jurisdiction, in cases of concurrent jurisdiction, in relation to offences solely against the property or security of such sending State, or against the person or property of members of the force or civilian component personnel, or offences arising out of any act or omission in performance of official duty, with the receiving State entitled to the primary right to exercise jurisdiction as to other offences. As to civil jurisdiction, no claim of immunity is to be pressed by the sending State except where members of the force act within the scope of their official duties. Other provisions in the Agreement enable review and modification of the subject of jurisdiction in the event of hostilities, and lay down certain minimum standards to be observed by the Courts of the receiving State. This has been followed by a number of other

[1] Jurisdiction was waived in 1944 by the American authorities in England in the celebrated case of *R.* v. *Hulten and Jones* (1945), London " Times ", February 20–21, 1945.

[2] This is discussed in an article by Rouse and Baldwin, *American Journal of International Law* (1957), Vol. 51, pp. 29–62. Somewhat similar principles have been followed in the stationing of forces agreements concluded by the Soviet Union; for texts, see *American Journal of International Law* (1958), Vol. 52, pp. 210–227. Note also the Tokyo Agreement of February 19, 1954, regarding the Status of United Nations Forces in Japan.

status and stationing agreements, coupled with *de facto* practices and arrangements, sometimes not governed by any defined guidelines or sometimes not the subject of any uniform or consistent application.

The ultimate effect however may be to cut down the general principle that the sending State has exclusive jurisdiction over offences by servicemen within the limits of their quarters, or while on duty.[1]

(e) International Institutions

International institutions such as the United Nations and the International Labour Organisation have been conceded immunity from the territorial jurisdiction both under international agreements (see the Conventions on the Privileges and Immunities of the United Nations and of the " Specialised Agencies " adopted by the United Nations General Assembly in 1946 and 1947) and under municipal law (see, for example, the British International Organisations (Immunities and Privileges) Act, 1950, and the United States Federal International Organisations Immunities Act of 1945).[2]

The subject of their general privileges and immunities is dealt with in Chapter 19, below.

3.—Personal Jurisdiction

Personal, as distinct from territorial jurisdiction, depends on some quality attaching to the person involved in a particular legal situation which justifies a State or States in exercising jurisdiction in regard to him. Practically, the jurisdiction is only employed when the person concerned comes within the power of the State, and process can be brought against him. This will occur generally when such person enters the territory of the State either voluntarily or as a result of successful extradition proceedings.

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[1] Nevertheless, the trend in the case of United Nations peacekeeping forces, of an international composition, is towards absolute immunity from the jurisdiction of the receiving State.

[2] Note also the various Headquarters Agreements concluded by the United Nations and the specialised agencies, referred to below, pp. 584–585.

According to present international practice, personal jurisdiction may be exercised on the basis of one or other of the following principles:—

(a) Active nationality principle.—Under this principle, jurisdiction is assumed by the State of which the person, against whom proceedings are taken, is a national. The active nationality principle is generally conceded by international law to all States desiring to apply it. There is indeed a correlative principle of the law of extradition that no State is bound to extradite from its territory a national guilty of an offence committed abroad.

(b) Passive nationality principle.—Jurisdiction is assumed by the State of which the person suffering injury or a civil damage is a national. International law recognises the passive nationality principle only subject to certain qualifications. Thus it would appear from the *Cutting Case*[1] that a State which does not admit the passive nationality principle is not bound to acquiesce in proceedings on this basis brought against one of its nationals by another State. The justification, if any, for exercising jurisdiction on this principle is that each State has a perfect right to protect its citizens abroad, and if the territorial State of the *locus delicti* neglects or is unable to punish the persons causing the injury, the State of which the victim is a national is entitled to do so if the persons responsible come within its power. But as against this, it may be urged that the general interests of a State are scarcely attacked " merely because one of its nationals has been the victim of an offence in a foreign country ".[2] The passive nationality principle is embodied in several national criminal codes, in particular the codes of Mexico, Brazil, and Italy. Great Britain and the United States, however, have never admitted the propriety of the principle.

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[1] See above, pp. 251–252.

[2] See Report of Sub-Committee of League of Nations Committee of Experts for the Progressive Codification of International Law, *Criminal Competence of States etc.* (1926), p. 5.

In the *Lotus Case*,[1] Judge J. B. Moore, an American Judge on the Permanent Court of International Justice, declared that an article of the Turkish Penal Code whereby jurisdiction was asserted over aliens committing offences abroad " to the prejudice " of a Turkish subject was contrary to international law, but it is not clear to what extent other members of the Court shared or differed from this view.

4.—Jurisdiction According to the Protective Principle

International law recognises that each State may exercise jurisdiction over crimes against its security and integrity or its vital economic interests. Most criminal codes contain rules embodying in the national idiom the substance of this principle, which is generally known as the *protective* principle.

In *Joyce* v. *Director of Public Prosecutions*,[2] the House of Lords seems to have held that the English common law recognises a principle of jurisdiction akin to the protective principle, namely that an alien owing some kind of allegiance to the Crown may be tried by British Courts for the crime of treason committed abroad. Underlying the House of Lords decision is the consideration that such a crime is one directly against the security and integrity of the realm, and its reasoning is applicable to other statutory offences of similar scope (for example, against the Official Secrets Acts).

The rational grounds for the exercise of this jurisdiction are two-fold:—(i) the offences subject to the application of the protective principle are such that their consequences may be of the utmost gravity and concern to the State against which they are directed; (ii) unless the jurisdiction were exercised, many

[1] See above, p. 250.

[2] [1946] A.C. 347. Cf. American decision of *U.S.* v. *Chandler* (1947), 72 F. Supp. 230. Also in *U.S.* v. *Rodriquez* (1960), 182 F. Supp. 479, the protective principle was used to justify the prosecution of aliens for false statements in immigration applications, and in *Rocha* v. *U.S.* (1961), 288 F. (2d) 545, the prosecution of defendants for being engaged in a " war brides racket ", i.e. conspiracy abroad to arrange sham marriages between aliens and American citizens, so as to gain a preferential immigration status, thereby evading American immigration laws. See also *Stegeman* v. *United States* (1970), 425 F. (2d) 984 (jurisdiction held to be exerciseable in respect to debtors guilty of fraudulent concealment of assets abroad, in breach of the Federal Bankruptcy Act of the United States, upon the ground that the Act was designed to serve important interests of government, related to national commerce and credit).

such offences would escape punishment altogether because they did not contravene the law of the place where they were committed (*lex loci delicti*) or because extradition would be refused by reason of the political character of the offence.[1]

The serious objection to the protective principle is that each State presumes to be its own judge as to what endangers its security or its financial credit. Thus in many cases, the application of the protective principle tends to be quite arbitrary.

5.—Jurisdiction on the High Seas

The rules of international law concerning the high seas or open sea were codified, and to some degree extended in the Convention on the High Seas, signed at Geneva on April 29, 1958, and drawn up by the first Conference on the Law of the Sea.[2]

The high seas or open sea received definition in Article 1 of the Convention as all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

The doctrine of the " freedom of the high seas " (or " freedom of the open sea ") is explained in Article 2, and the circumstances in which the doctrine became established, may briefly be mentioned.[3] Historically, navigation on the high seas was at first open to everybody, but in the fifteenth and sixteenth centuries—the periods of great maritime discovery—claims were laid by the powerful maritime States to the exercise of sovereignty, indistinguishable from ownership, over specific portions of the open sea. For example, Portugal claimed maritime sovereignty over the whole of the Indian Ocean and a very great proportion of the Atlantic, Spain arrogated rights to herself over the Pacific and the Gulf of Mexico, and even Great Britain laid claim to the Narrow Seas, and the North Sea.

[1] The principle of non-extradition for political crimes is now securely established; see below, pp. 351–352.

[2] This Convention was based on Draft Articles prepared by the International Law Commission. Under Article 35, after the expiration of a period of five years from the entry into force of the Convention, a request for revision of the Convention may be made by any party, and the United Nations General Assembly may decide upon the steps, if any, to be taken in respect of such request.

[3] See also above, pp. 213–215.

Grotius was one of the first strenuously to attack these extensive claims to sovereignty. His objections were based on two grounds:—(1) The ocean cannot be property of a State because no State can effectively take it into possession by occupation. (2) Nature does not give a right to anybody to appropriate things that may be used by everybody and are inexhaustible—in other words, the open sea is a *res gentium* or *res extra commercium.*

In opposition to the principle of maritime sovereignty, the principle of the freedom of the open sea began to develop, as Hall has pointed out,[1] in accordance with the mutual and obvious interests of the maritime nations. It was seen that too often, and to the great inconvenience of all States, conflicting claims were laid to the same parts of the open sea. Furthermore, it came to be realised that any claims to maritime sovereignty were of little practical value except in time of war when it was useless to assert them without the backing of a powerful navy. The freedom of the open sea was thus seen to correspond to the general interests of all States, particularly as regards freedom of intercourse between nations.

The term, the " freedom of the high seas ", as we now know it, signifies:—(*a*) that the high seas can never be under the sovereignty of any one particular State; (*b*) that there is absolute freedom of navigation on the high seas for vessels of all nations whether merchantmen or warships; (*c*) that in general no State may exercise jurisdiction over ships within that sea not bearing its flag; (*d*) that a State may, as a general rule, exercise jurisdiction over a particular ship only in virtue of the maritime flag under which that ships sails; (*e*) that every State and its citizens are entitled to make use of the high seas for laying submarine cables and oil pipelines (the so-called " freedom of immersion "), for the conduct of fisheries, and for scientific or technical purposes; (*f*) that there is absolute freedom of flight above the open sea for all aircraft.[2]

[1] Hall, *International Law* (8th Edition, 1924), at p. 189.

[2] See also Article 3 of the Convention on the High Seas, providing for access to the sea by land-locked States. Cf. the Convention on Transit Trade of Land-locked States, New York, July 8, 1965, and M. I. Glassner, *Access to the Sea for Developing Land-locked States* (1970).

These various components of the "freedom of the open sea" must now be read subject to the recent developments concerning the rights of coastal States over the continental shelf and contiguous submarine areas, considered in the previous Chapter.[1]

The "freedom of the open sea" has never warranted a state of unregulated lawlessness on the high seas, and certain rules for the exercise of jurisdiction over vessels at sea became necessary in order to avoid conditions of anarchy. As a measure of necessary supervision, the rule was early established that all vessels, public or private, on the high seas are subject to the jurisdiction (in general, exclusive) and entitled to the protection of the State under whose maritime flag they sail.[2] From this followed the corollary rules that no ship may sail under a particular flag without proper authority from the flag State, nor sail under a flag other than the one it is properly authorised to raise. Every State, coastal or non-coastal, has the right to sail ships under its flag (Article 4 of the Convention), but is under a duty not to allow a vessel wrongfully to sail under its flag. Moreover, there should be some "genuine link" between a vessel and the State which grants the right to fly its flag (Article 5). Vessels under an unauthorised flag are liable to capture and confiscation by the State whose flag has wrongfully been raised, and the warships of any State may call on suspicious vessels to show their flag.[3] If there is reasonable ground for suspecting that a merchant ship is engaged in piracy or the slave trade, it may be boarded, and if necessary searched (Article 22 of the Convention on the High Seas).

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[1] See above, pp. 219–220, and 223–228.

[2] The nationality of a vessel for "flag" purposes is determined by the State of registration; in other words, by the ship's documents. See Article 5 of the Convention on the High Seas. The principle of a single flag for each ship is laid down in Article 6 of the Convention. It is for each State to determine under its own law which ship has the right to fly its flag; see *Muscat Dhows Case* (Permanent Court of Arbitration, 1905), *U.N. Reports of International Arbitral Awards*, Vol. IX, p. 83.

[3] A vessel which is not sailing under the identifiable maritime flag of a State is not entitled to protection, and may be seized in suspicious circumstances; see *Naim Molvan, Owner of Motor Vessel "Asya" v. A.-G. for Palestine*, [1948] A.C. 351.

For the protection of the interests of maritime States, international law conceded to such States a right of " hot pursuit ". The matter is now dealt with in Article 23 of the Convention on the High Seas. This right of " hot pursuit " signifies that if the coastal State has good reason to believe that a foreign vessel has infringed its laws and regulations while in the territorial sea, it may be pursued and apprehended even on the high seas, provided that:—(*a*) such pursuit is commenced *immediately* while the vessel or its accessory boats be still within the internal waters or territorial sea, or within the contiguous zone, if the supposed offence be in respect of rights for the protection of which the zone was established; (*b*) the pursuit is continuous and uninterrupted;[1] (*c*) a visual or auditory (not radio) signal to stop has been given from such distance as to be seen or heard by the fugitive ship, i.e. a mere sighting is insufficient; (*d*) the pursuers are warships or military aircraft or other Government ships or aircraft specially authorised to that effect, although the craft making the arrest need not be actually the one which commenced pursuit. The right of hot pursuit ceases as soon as the vessel pursued enters the territorial sea of its own country or of a third State.

Also, the coastal State may exercise jurisdiction over foreign vessels outside the maritime belt where there is grave suspicion that such vessels are a source of imminent danger to the sovereignty or security of that State. This jurisdiction is permitted solely on the basis of, and as a measure of self-protection.[2] A currently debatable point in this connection is whether a coastal State is, upon grounds of self-defence, entitled in peace-time to arrest a foreign naval vessel in non-territorial waters for the reason that such vessel was conducting offshore electronics intelligence operations and other forms of sophisticated surveillance, as distinct from mere visual observation. This issue was raised in 1968 in the case of the arrest by a

[1] According to the standard work, Poulantzas, *The Right of Hot Pursuit in International Law* (1969), at p. 43, the two most important elements of a valid hot pursuit are its conduct without interruption, and its immediate commencement.

[2] See the case of the *Virginius*, Moore, *Digest of International Law*, Vol. II pp. 895 *et seq.* The International Law Commission did not however favour a right of visit and search in such cases.

North Korean patrol boat of the American electronics intelligence vessel, the *Pueblo,* then operating in North Korean coastal waters. However, a number of facts surrounding the *Pueblo* are the subject of dispute.

Other cases of the exercise of jurisdiction on the high seas are due to certain international Conventions whereby the States parties conceded to one another rights, in time of peace, of visiting and searching foreign vessels at sea. These rights were granted for limited purposes only, which are suggested by the titles of the particular Conventions concerned, for example, the Convention for the Protection of Submarine Telegraph Cables, 1884, the General Act of Brussels of 1890 for the Repression of the African Slave Trade, and the Interim Convention of February 9, 1957, for the Conservation of North Pacific Fur Seal Herds.[1]

Apart from these instances, there are some Conventions which cast duties on States to enforce certain rules, e.g., the Convention of 1954, as amended, for the Prevention of the Pollution of the Sea by Oil.

Questions of the regime on the high seas boil down usually to whether or not particular States are bound or entitled to exercise jurisdiction.[2]

In time of war, the rights of jurisdiction of belligerent maritime States on the high seas are considerably extended.

[1] For examples of such Conventions and treaties, see *Laws and Regulations on the Regime of the High Seas* (United Nations), Vol I (1951), at pp. 179 *et seq.*

[2] A new problem arose in 1964–1965, with the commencement of transmissions by offshore radio stations in the North Sea area, moored or on fixed installations outside territorial sea limits. A great deal of what was transmitted consisted of " pop songs " and non-classical music, with some religious broadcasting, while the programmes were interspersed with advertising. It was officially alleged that such stations were in breach of the municipal laws of North Sea countries, including telecommunication regulations. Essentially, the questions of international law involved reduce to whether or not an adjacent coastal country is entitled to exercise jurisdiction in respect to the stations, and the persons concerned in manning them. The proposition that the stations are acting in breach of general international law, as distinct from regulations in application of international Conventions, cannot really be sustained, and for this reason, among others, the term " pirate " bestowed upon them is inapt and misleading. Obviously it is not contrary to international law to listen to their programmes, nor *semble* is the mere fact that their transmissions can be received in a country sufficient to invest that country

(*Continued*)

A belligerent State has a general right of visit and search of neutral shipping in order to prevent breaches of neutrality such as the carriage of contraband. As we have seen,[1] rival parties in a civil war may obtain these powers of search as a result of the recognition of belligerency, and the consequent grant of belligerent rights.

The nuclear weapons test ban treaty of 1963, referred to in Chapter 7,[2] applies to nuclear weapons tests above or in the waters of the high seas.

Finally, all States have become bound by customary rules as well as by international Conventions[3] to observe certain regulations relative to the safety of navigation at sea, and to ensure, by legislation or otherwise, that vessels flying their flags shall act in conformity with these regulations. In collision cases on the high seas, the practice as to the exercise of jurisdiction by States has continued to be fluid. Some States claim jurisdiction where the damaged vessel is under their flag; other States, where the vessels involved in the collision consent to their jurisdiction; and certain other States, where the ship responsible for the collision is in one of their ports at the time proceedings are instituted. In the *Lotus Case*,[4] the Permanent Court of Inter-

with jurisdiction on the basis of the objective territorial principle. If the vessels are stateless, and the persons concerned, including those through whom advertising, fuel, etc., are supplied, are not nationals of any of the coastal countries, the question of whether any such country is entitled in international law to exercise jurisdiction is obscure. It is true that cogent arguments can be advanced in favour of the exercise of jurisdiction according to the protective principle, as it may be said that the security and good order of coastal countries are detrimentally affected by:—(*a*) the disturbance to the regime of allotted frequencies, caused by offshore broadcasts; (*b*) the interference with communications related to essential services, e.g., safety of navigation; (*c*) the possible interference with communications connected with space exploration, and space satellites. Under the auspices of the Council of Europe, an Agreement was concluded to deal with the subject, *viz.*, the European Agreement for the Prevention of Broadcasts Transmitted outside National Territories, signed at Strasbourg on January 22, 1965, and in the United Kingdom, the Marine, etc., Broadcasting (Offences) Act 1967 was enacted to strike down North Sea or other offshore broadcasts.

[1] See pp. 165–166, *ante*.

[2] See pp. 191, 194, *ante*.

[3] See, e.g., the London Convention of 1960, on the Safety of Life at Sea. Articles 10 and 12 of the Convention on the High Seas deal respectively with such measures to be taken by States for ships under its flag, as are necessary to ensure safety at sea, and for requiring masters of vessels to render assistance, etc., in cases of danger and distress.

[4] Pub. P.C.I.J. (1927), Series A, No. 10.

national Justice held, by a majority, that in collision cases on the high seas there is no rule of international law attributing exclusive penal jurisdiction to the flag State of a ship involved in the collision as regards an offence committed on that ship, and that jurisdiction could be exercised by the flag State of the ship on which the offence had produced its effects in the course of the collision. The rule in the *Lotus Case* was disapproved by the International Law Commission (see *Report* on the work of its eighth session, 1956) and by the Conference at Brussels in 1952, which adopted the Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation. Article 11 of the Convention on the High Seas now provides for the exclusive jurisdiction of the flag State in penal or disciplinary proceedings arising out of collision cases, subject to penal and disciplinary jurisdiction being conceded to a non-flag State over an accused person of its nationality, or the holder of a master's certificate, etc., issued by it. The general rules to be observed for preventing collisions at sea are set out in an annex to the Final Act of the London Conference of 1960 on the Safety of Life at Sea; these came into operation generally on September 1, 1965.

Conservation of the Living Resources of the High Seas

Fears that modern technical improvements in fishing, leading to unrestricted exploitation, might deplete the living resources of the high seas, have prompted efforts to devise an international regime to ensure conservation. In the absence of general control by an international organ, any such regime must depend on individual and collective action by States to supervise conservation measures.

This indeed is the purpose of the Convention on Fishing and Conservation of the Living Resources of the High Seas, signed at Geneva on April 29, 1958, and drawn up by the first Conference on the Law of the Sea.[1] It supplements a number of existing regional treaties of fishery conservation.

[1] The Convention is based upon Draft Articles drawn up by the International Law Commission. Article 20 provides that after the expiration of a period of five years from the entry into force of the Convention, a request for revision of the Convention may be made by any party, and the United Nations General Assembly may decide upon the steps, if any, to be taken in respect of such request.

Article 1 reaffirms the right of free fishing in the open sea; it recognises that the nationals of all States may freely engage in fishing on the high seas subject to their treaty obligations, to the interests and rights of coastal States under the Convention, and the provisions as to conservation in the Convention. It also imposes on all States the duty to adopt, or to co-operate with other States in adopting such measures for their respective nationals[1] as may be necessary for conservation.

The principal provisions of the Convention, other than Article 1 may be summarised as follows:—(*a*) A State whose nationals fish any stock or stocks in any area of the high seas, not exploited by citizens of other States, is duty bound to edict conservation measures for its own nationals in that area, when necessary. (*b*) If the nationals of two or more States are engaged in fishing the same stock or stocks in any area or areas, these States are to prescribe conservation measures by common agreement, and, failing agreement are to resort to arbitration.[2] (*c*) A coastal State has a special interest in the maintenance of the productivity of the living resources of the high seas in any area adjacent to its territorial sea; even if its nationals do not operate in these areas, it is entitled to participate in collective controls, and it has the right in the absence of agreement with other States concerned, to introduce unilateral measures of conservation appropriate to any stock, provided that these are urgently necessary, are based on appropriate scientific findings, and do not discriminate against foreign fishermen. (*d*) Any State which, even if its nationals are not engaged in fishing in an area not adjacent to its coast, has a special interest in conservation in that area, may agree with the State or States whose nationals are engaged in fishing there, on conservation measures, and failing agreement, may resort to arbitration. (*e*) The primary method of arbitration is to be by reference to a special

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[1] Thus excluding the enforcement of such measures against the nationals of other States.

[2] This word is used, although the Convention does not refer to the process of reference thereunder as "arbitration". Article 5 deals with the position, both as to (*a*) and (*b*), where nationals of other States subsequently engage in fishing the same stock or stocks.

Commission of five members, established in accordance with the provisions of Article 9.

As the Convention goes beyond mere codification of the law, and lays down entirely new rules, its provisions will apply only as between States who become parties.[1]

Developments since 1958 in the Law of the High Seas

The subject of developments since 1958 in the law of the high seas has been treated in the preceding chapter (see pp. 230–236).

6.—Jurisdiction According to the Universal Principle: Piracy

An offence subject to universal jurisdiction is one which comes under the jurisdiction of all States wherever it be committed. Inasmuch as by general admission, the offence is contrary to the interests of the international community, it is treated as a delict *jure gentium* and all States are entitled to apprehend and punish the offenders. Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished.

There are probably today only two clear-cut cases of universal jurisdiction,[2] namely the crime of piracy *jure gentium*, and war crimes (see below, pp. 518–520). All States are entitled to arrest pirates on the high seas, and to punish them irrespective of nationality, and of the place of commission of the crime. The principle of universality of punishment of war crimes was affirmed by the Geneva Conventions of 1949 relative to prisoners of war, protection of civilians, and sick and wounded personnel. In the *Eichmann Case* (1962), the Supreme Court

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[1] A European Fisheries Convention was signed at London on March 9, 1964, partly to extend limits of territorial fishery waters, partly for conservation purposes (see Article 4); it distinctly recognises the special interest and legal authority of the coastal State, subject to a duty not to discriminate and to consult upon request (see Article 5).

[2] The transport of slaves is not such a case; a State may prevent and punish the transport of slaves only in ships authorised to fly its flag, or prevent the unlawful use of its flag for that purpose (Article 13 of the Convention on the High Seas).

of Israel, sitting as a Court of Appeal, relied in part upon the principle of universal jurisdiction in upholding the conviction by a Court in Israel of Eichmann, a war criminal, for war crimes and crimes against humanity, thereby overruling ob-objections that Eichmann's actions occurred in Europe during the Second World War before the State of Israel was actually founded, and that his offences were committed against people who were not citizens of that State.

Crimes or delicts *jure gentium*,[1] other than piracy and war crimes, raise somewhat different considerations. Thus the offences of drug trafficking, trafficking in women and children, and counterfeiting of currency have been brought within the scope of international Conventions, but have been dealt with on the basis of " *aut punire, aut dedere* ", that is, the offenders are either to be punished by the State on whose territory they are found or to be surrendered (extradited) to the State which is competent and desirous of exercising jurisdiction over them. This is so even with the international crime of genocide under the Genocide Convention of 1948 (see Article VI, which provides for a trial by the Courts of the State in the territory of which the crime was committed, or by an international tribunal, and hence not by the Courts of all States).

Piracy Jure Gentium

In its jurisdictional aspects, the offence of piracy *jure gentium* is quite unique. A pirate is subject to arrest, trial, and punishment by all States on the ground that he is an enemy of mankind (*hostis humani generis*).[2] The ship or aircraft involved is similarly subject to seizure by all States. By his conduct, the pirate is deemed automatically to lose the protection of his flag State and any privileges due to him by virtue of his nationality.

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[1] As to which, see *Historical Survey of the Question of International Criminal Jurisdiction* (United Nations Secretariat, 1949), at pp. 1 *et seq.*

[2] So far is this the case that the taking of property by a pirate *jure gentium* does not divest the title of the true owner (*pirata non mutat dominium*); see Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 616–617.

Formerly it sufficed to define piracy as meaning simply murder or robbery on the high seas by persons who were in effect outlaws. But this definition was gradually widened to bring it into line with conditions not prevalent when the customary rules on the subject were first evolved. According to Article 15 of the Convention on the High Seas of April 29, 1958, piracy consists of any illegal acts of violence, detention, or any act of depredation, committed for private ends by those aboard a private ship or private aircraft, and directed, either on the high seas, against a ship or aircraft, or persons or property thereon, or, in territory or waters of the nature of *terra nullius* (i.e. not under the jurisdiction of any State) against a ship or aircraft or persons or property thereon. It also includes acts of an accessory nature to the main offence; e.g. inciting. In 1934, it had been held by the Judicial Committee of the Privy Council, in the case of *Re Piracy Jure Gentium*,[1] that actual robbery was not an essential element of the crime of piracy, and that a frustrated attempt to commit a robbery on the high seas could be considered piracy. It follows from this now extended meaning of piracy that the offence may be prompted by motives other than gain, e.g. revenge. Moreover, the instrument of the offence may be an aircraft as well as a ship, while the victim may be another aircraft, provided that it is on the high seas or in *terra nullius*.

Because of the operative words " committed for private ends ", acts inspired by political motives and which would otherwise be treated as piratical, do not constitute piracy *jure gentium*. In respect to the other operative words " *against* another ship or aircraft or *against* persons or property " on board, it has been claimed that the hijacking of an aircraft can never be piracy *jure gentium*, because the offence is committed " within " and not against the aircraft, nor against the persons or property on board.

At the outset, it is necessary to distinguish piracy at international law and piracy at municipal law. Under the laws of

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[1] [1934] A.C. 586.

certain States, acts may be treated as piratical which are not strictly speaking acts of piracy *jure gentium*. For example, under English criminal law the transport of slaves on the high seas is piracy, but is not so according to international law. In the same way, one must distinguish piracy *jure gentium* from acts (such as, e.g., arms running) which may be deemed to be piracy under bilateral treaties or under joint declarations of policy by States, for the strict meaning of piracy *jure gentium* cannot be extended by such treaties,[1] or by joint declarations, designed to govern only the relations between the States subscribing to them.

Private vessels or aircraft only can commit piracy, except that a public vessel or aircraft under the control of a crew which has mutinied may be treated as private, if the crew commit piratical acts (Article 16 of the Convention on the High Seas). A man-of-war or other public ship under the orders of a recognised Government or recognised belligerent Power is not a pirate. Difficulties in this connection have arisen when hostilities at sea have been conducted by insurgents in the course of a civil war. Obviously it is to the interests of the legitimate parent Government to declare that the insurgent vessels are pirates and to put them at the mercy of the navies of the great maritime Powers. The British practice, however, has been not to treat these insurgent vessels as pirates so long as they abstain from repeated or wilful acts of violence against the lives and property of British subjects. It would seem, however, that insurgent units, which commit acts of violence or depredation, in no way connected with the insurrection, such as entirely arbitrary attacks upon foreign shipping, may legitimately be treated as guilty of piracy *jure gentium*.

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[1] See, however, Oppenheim, *International Law*, Vol. I (8th Edition, 1955), p. 613. Examples of such treaties are:—(*a*) the abortive Treaty concluded at the Washington Naval Conference of 1922 providing that persons violating the humane rules of maritime warfare should be tried and punished " as if for an act of piracy "; and (*b*) the Nyon Arrangement of 1937 for joint action by the European Powers to prevent sinkings of merchant vessels in the Mediterranean by unidentified submarines during the course of the Spanish Civil War, which attacks were referred to as " piratical acts ". As to the inapt use of the word " pirate " as applied to offshore radio stations in the North Sea area, see p. 280, n. 2, *ante*.

A test is sometimes suggested for distinguishing the unlicensed violence of piracy from the recognised action permitted to insurgents, namely that there is an insurgent government or administration with which foreign States may conduct relations, and which is capable of assuming responsibility for the acts of those serving in its armed forces. The test therefore is whether the insurgent vessels are acting under the orders of a responsible government[1] against which a State, affected by any injury to its citizens, may obtain redress according to the recognised principles of international law. Inasmuch as the essence of piracy is the absence of any government which can be held responsible for the piratical acts, it follows that generally speaking, apart from the circumstances in which the acts were committed (e.g., if such acts consist of entirely arbitrary attacks upon foreign shipping), the offence of piracy is negatived if there be such a government.

The seizure of piratical vessels or aircraft should be carried out only by warships or military aircraft, or other ships or aircraft on government service authorised to that effect (see Article 21 of the Convention on the High Seas).

7.—Problems of Jurisdiction with Regard to Aircraft

One consequence of the increase in the volume, range, and frequency of the international air traffic, coupled with the growing number of countries in which the aircraft of regular airlines are registered, has been the emergence of difficult problems of jurisdiction in respect to offences committed on board aircraft in flight. If this were not enough, another development has been the grave menace to the safety and reliability of international civil aviation due to the multiplication of hijacking incidents, and of terrorist acts against aircraft about to take off or land, and against airline passengers.

The first major attempt to deal with these problems was made

[1] In the case of the *Ambrose Light* (1885), 25 Fed. 408, an American Federal Court held that an armed vessel commissioned by Colombian insurgents was properly seized as a pirate because there had been no express recognition of the insurgents as belligerents.

by the Tokyo Convention of September 14, 1963, on Offences and Certain Other Acts Committed on Board Aircraft. The main objects of the Convention were:—(*a*) to ensure that persons committing crimes aboard aircraft in flight, or on the surface of the high seas, or any area outside the territory of any country, or committing acts aboard such aircraft to the danger of air safety, would not go unpunished simply because no country would assume jurisdiction to apprehend or try them; (*b*) for protective and disciplinary purposes, to give special authority and powers to the aircraft commander, members of the crew, and even passengers. Aircraft used in military, customs, or police services were excluded from the scope of the Convention. Normally, it is the subjacent State which exercises jurisdiction over offences committed in its airspace, but an over-flying aircraft may not have landed or been called upon to land, with the result that the subjacent authorities are deprived of the opportunity of taking police action, or the commission of the offence may not have been noticed until the aircraft reaches a destination outside the territory of the country in whose airspace the offence was committed. Object (*a*) was achieved principally by providing that the country of registration of the aircraft is competent to exercise jurisdiction over the offences and acts mentioned, and by obliging States parties to the Convention to take the necessary measures to establish their jurisdiction as the country of registration (see Article 3). Coupled with this was the provision in Article 16 that offences committed aboard an aircraft are for purposes of extradition to be treated as if they had occurred also in the territory of the country of registration; hence, if the offender takes refuge in a country which is party to the Convention and also party to an extradition treaty with the country of registration, making the alleged offence an extradition crime, the offender can be duly extradited. The Convention did not exclude the criminal jurisdiction of countries which exercise this according to the active nationality principle or passive nationality principle.

The Convention contained detailed provisions giving effect to object (*b*), and enabling the aircraft commander to disembark

an offender and deliver him, if necessary, to the competent authorities of a State party to the Convention. However, these provisions are not to apply in the airspace of the country of registration of the aircraft, and they apply to overflights across the high seas or territory outside the territory of any country only where:—(i) the last point of take-off or next point of intended landing is situated in a country, not the country of registration; or (ii) the aircraft subsequently flies into the airspace of a country not that of registration, with the offender still on board.

With regard to hijacking, it is fair to say that the Tokyo Convention made no frontal attack upon this offence, but dealt in only a limited manner with hijackers; for example, by enabling hijackers to be taken into custody or subjected to restraint in the same manner as other offenders, and by providing for restoration of control of the hijacked aircraft to the lawful commander, and for the continuance of the journey of passengers and crew.

A more ambitious, more elaborate effort to deal with hijacking was made in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature on December 16, 1970. By this date, hijacking had assumed the proportions of a world-wide problem, which threatened to undermine international aviation. The Convention was confined to hijacking, leaving the matter of armed attacks, sabotage, and other forms of violent action directed against civil aviation and aviation facilities to be dealt with by a later diplomatic conference. The Convention did not fully apply the *aut punire, aut dedere* principle (i.e., the country where the offender might happen to be should prosecute him, or extradite him to a country having jurisdiction to try him for the offence), but provided a reasonably adequate framework for the exercise of jurisdiction, with obligations of extradition or rendition according to the existence of an extradition treaty or of a reciprocal practice of rendition.

The key provisions in the Convention are Article 1, defining the offence of hijacking, although not calling it such, Article 2, obliging each State party to make the offence punishable by

severe penalties, and Article 4, providing that States parties are to take measures to establish jurisdiction over the offence and related acts of violence against passengers or air crew. The offence is defined as unlawfully, by force or threat, or by any other form of intimidation, seizing or exercising control of an aircraft " in flight ", or attempting to commit such an act, or being the accomplice of any person performing or attempting to perform such an act. Under Article 3, paragraph 1, an aircraft is considered to be " in flight " at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing—and experience has shown this may be an important point—the " flight " is deemed to continue until the competent authorities take over responsibility for the aircraft and for persons and property on board. Under Article 4 (see above), jurisdiction is to be established by contracting States in the following cases:—(*a*) when the offence is committed on board an aircraft registered in the contracting State; (*b*) when the hijacked aircraft lands in a contracting State's territory with the alleged hijacker still on board; (*c*) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business in the contracting State, or—if no business—his permanent residence there.

The Convention applies only to civil aircraft, and not to aircraft used in military, customs, or police services, but it is immaterial whether the aircraft is engaged in an international or domestic flight. However, for general purposes, the Convention is only operative if the place of take-off, or the place of actual landing of the hijacked aircraft be situated outside the territory of the State in which the aircraft is registered. This restriction does not affect the far-reaching provisions in Article 6 for taking custody of a hijacker or alleged hijacker present in a contracting State's territory, in Article 7 for the obligatory prosecution of non-extradited alleged hijackers, in Article 8 for the inclusion of hijacking as an extraditable offence in extradition treaties or the treatment of the offence as an extraditable one in the relations between States which surrender

alleged offenders on a basis other than that of an extradition treaty, and in Article 10 for mutual co-operation between States in relation to criminal proceedings against alleged hijackers, for these provisions in Articles 6 to 10 are to apply whatever the place of take-off or the place of actual landing of the hijacked aircraft, if the hijacker or alleged hijacker is found in the territory of a State other than the State of registration of that aircraft.

The Hague Convention is not as stringent as it should be, and throughout reflects a compromise between different approaches to criminal law and to the rendition of offenders, but its prompt conclusion, in the surrounding circumstances, did meet an urgent need.

Chapter 9

STATE RESPONSIBILITY

1.—Nature and Kinds of State Responsibility

Frequently action taken by one State results in injury to, or outrage on, the dignity or prestige of another State. The rules of international law as to State responsibility concern the circumstances in which, and the principles whereby, the injured State becomes entitled to redress for the damage suffered.[1]

Obviously the redress to be obtained will depend on the circumstances of the case. Most usually the injured State will attempt to get *satisfaction* (as it is called) through diplomatic negotiations, and if only its dignity has been affected, a formal apology from the responsible State or an assurance against the repetition of the matters complained of, will generally be regarded as sufficient. Pecuniary reparation, as distinct from satisfaction, is, however, sometimes necessary, particularly where there has been material loss or damage, and in many instances the question of liability and the amount of compensation have to be brought for adjudication before an international arbitral tribunal.

The wrongs or injuries which give rise to State responsibility may be of various kinds. Thus a State may become responsible for breach of a treaty, in respect of the non-performance of contractual obligations, for injuries to citizens of another State, and so on. The breach of duty may be:—(*a*) an act, or (*b*) an omission.

In ultimate analysis, State responsibility is governed by international standards (although in particular branches an international standard may incorporate a national standard), and it depends on international law whether and to what extent the act or omission of a particular State is deemed legitimate or wrongful. Where the acts or omissions of a State

[1] The subject of State responsibility has been under consideration for some time by the International Law Commission.

measured by such standards are held to be legitimate, State responsibility does not arise. For example, as all States are generally conceded to have complete power to refuse to admit aliens into their territory, the States of which the aliens are nationals have no claim against any State which has refused ingress. Similarly, where international law concedes jurisdiction to a State which proceeds to exercise it, there is no breach of duty for which that State is responsible.

The law of State responsibility is still in evolution, and may possibly advance to the stage where States are fixed also with responsibility for breaches of international law which are " international crimes ".[1]

Another important matter which will have incidence on the developing law of State responsibility is the extent to which States are or may become involved in the control of ultra-hazardous activities, e.g. nuclear experiments, the development of nuclear energy, space exploration[2], and the " sonic boom " or " sonic bang " of new types of aircraft. This is not a domain in which traditional diplomatic procedures of protest, demands for satisfaction, and claims can be of avail. Dangers must be anticipated, and if possible completely excluded; e.g., if there be such a risk as an alteration of the environment of the earth. It may be necessary to impose strict duties of consultation, notification, registration and providing information, while even a process of injunction, mandatory or restraining, may need to be developed. There may be room for other international safeguards.

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[1] At the 1962 session of the International Law Commission, some members were of the opinion that " under modern international law, State responsibility arose less in connection with the treatment of aliens than as a result of acts which endangered or might endanger international peace, such as aggression, denial of national independence, or of exchange of friendly relations with States, and violations of provisions of the United Nations Charter " (see *Report of* Commission on the Work of its Fourteenth Session, 1962, at p. 31). One of the principles proclaimed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter, adopted by the General Assembly in 1970, is:—" A war of aggression constitutes a crime against the peace, for which there is responsibility under international law ".

[2] See pp. 192–203, *ante*.

Federal States

The question frequently arises as to the *incidence of liability* when injury is done by or through a State Member of a Federation or by or through a protected State. The accepted rule appears to be that the Federal State and the protecting State are responsible for the conduct respectively of the State Member and the protected State, inasmuch as in the realm of foreign affairs they alone are recognised as having capacity to enter into relations with other States. This is true even although the facts and events which give rise to responsibility are actually matters constitutionally within the exclusive competence of the State Member or the protected State. In this connection it will be no defence to an international claim to plead the provisions of the Federal Constitution or of the treaty of protection. British practice has adopted these principles, and in the course of the preparatory work for the Hague Codification Conference of 1930 it was officially stated on behalf of Great Britain that:—

> " The distribution of powers between (a Federal State) and the other or subordinate units on whose behalf it is entitled to speak is a domestic matter with which foreign States are not concerned ".

Limits between International Law and Municipal Law

It is important when considering practical cases of State responsibility to keep clearly in mind the limits between international law and municipal law. This distinction has a particular bearing on two matters:—(*a*) the breach of duty or non-performance by a State of some international rule of conduct which is alleged to give rise to responsibility; (*b*) the authority or competence of the State agency through which the wrong has been committed.

As to (*a*), the breach or omission must in ultimate analysis be a breach of, or omission to conform to, some rule of international law. It is immaterial that the facts bring into question rights and duties under municipal law as between the State alleged to be responsible and the citizens

of the claimant State. Further, it is no answer to an international claim to plead that there has been no infraction of municipal law if at the same time a rule of international law has been broken.

As to (*b*), it is in general not open to any State to defend a claim by asserting that the particular State agency which actually committed the wrongful act exceeded the scope of its authority under municipal law. A preliminary inquiry as to the agency's authority under municipal law is necessary as a matter of course, but if, notwithstanding that the agency acted beyond the scope of its authority, international law declares that the State is responsible, international law prevails over municipal law.

It follows from these two principles, (*a*) and (*b*), that as already mentioned in Chapter 4 above,[1] a State may not invoke its municipal law as a reason for evading performance of an international obligation.

2.—Responsibility for Breach of Treaty, or in Respect of Contractual Obligations; Expropriation of Property[2]

State responsibility for breach of a treaty obligation depends upon the precise terms of the treaty provision alleged to have been infringed. More often than not this raises purely a question of construction of the words used. If the treaty provision is broken, responsibility follows. According to the Permanent Court of International Justice in the *Chorzów Factory* (*Indemnity*) *Case*,[3] it is a principle of international law that " any breach of an engagement involves an obligation to make reparation ".

Somewhat different considerations apply to the case of contracts entered into between a State and alien citizens or corporations. A breach by a State of such a contract will not necessarily

[1] See above, pp. 96–98.

[2] See generally on the rules of international law as to expropriation, Wortley, *Expropriation in Public International Law* (1959).

[3] P.C.I.J. (1928), Ser. A, No. 17, at p. 29.

engage its responsibility at international law, nor will such responsibility, when it exists, be identical in kind with the liability under the contract. Here, the responsibility at international law arises only if the State breaks some duty extraneous to the contract, for example, if it be guilty of a denial of justice to the other contracting party. A State may, however, impliedly contract with another State that it will observe the terms of arrangement with a citizen of the latter State, although it would seem from the decision of the International Court of Justice in the *Anglo-Iranian Oil Company Case* (*Jurisdiction*)[1] that weighty proof is required of such an implied treaty.

The responsibility of a State for expropriating[2] foreign private property is an entirely different matter, and here modern conditions appear to have wrought changes. In the nineteenth century, any expropriation of the property of a foreign citizen would have been regarded as a clear basis for an international claim. At the present time, however, the widening control by States over the national economy and over almost every aspect of private enterprise, and the measures of nationalisation of different industries adopted by so many States, make it difficult to treat, as contrary to international law, an expropriation of foreign property for a public purpose in accordance with a

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[1] I.C.J. Reports (1952), at pp. 109 *et seq.*; there the British Government claimed that when, in 1933, it sponsored the conclusion of a new oil concession contract between Persia and the Anglo-Iranian Oil Company, Persia engaged itself towards Great Britain not to annul or alter the concession. The Court rejected the contention, holding that there was no privity of contract between Persia and Great Britain (*ibid.*, at p. 112).

[2] The terms " nationalisation " and " confiscation " have also been used. The term " expropriation " appears, however, to be the generic term, and to include " nationalisation ", i.e. the taking of property by a State with view to its continued exploitation by that State in lieu of the exploitation by private enterprise; see *Anglo-Iranian Oil Co.* v. *Idemitzu Kosan Kabushiki Kaisha*, International Law Reports (1953), 305, for the view that nationalisation is merely a species of expropriation. The term " confiscation " is used to denote a temporary acquisition of property, as in time of war or an arbitrary or penal taking of property, without compensation (cf. García Amador's Fifth Report on International Responsibility, presented in 1960 to the International Law Commission).

declared domestic policy, applied without discrimination to the citizens of the expropriating State and to aliens alike.[1]

Practice, doctrine, and case-law unite in showing that to be valid under international law, an expropriation of foreign property must:—(1) be for a public purpose or in the public interest; (2) not discriminate against aliens as such; (3) not involve the commission of any unjustified irregularity.

It is believed also that an expropriation of foreign property is contrary to international law if it does not provide for the prompt payment by the expropriating State of just, adequate, and effective compensation.[2] On the other hand, some writers maintain and some Courts have held[3] that the absence of any such proper provision for compensation does not render the expropriation illegal under international law, but that at most there is a duty to pay such compensation, the expropriation remaining lawful for all purposes, including transfer of title. There is even a difference of opinion concerning the measure of the compensation payable; some writers are of the opinion that it need only be reasonable in the circumstances, having regard to the state of the economy of the expropriating State. It is clear, however, that compensation which is of a nominal value only, or which is indefinitely postponed, or which is the subject of a vague and non-commital promise, or which is below the rate of compensation awarded to nationals of the expropriating State, is contrary to international law.

In the case of an unlawful expropriation, the expropriating State must, in addition to paying the compensation due in

[1] But note the provision in Article 2 paragraph 3 of the Covenant on Economic, Social and Cultural Rights of December 16, 1966, that developing countries, " with due regard to human rights and their national economy ", may determine to what extent they will guarantee to non-nationals the economic rights recognised in the Covenant.

[2] See decision of Supreme Court of Aden in *Anglo-Iranian Oil Co., Ltd.* v. *Jaffrate*, [1953] 1 W. L. R. 246, treating as invalid the Iranian legislation of 1951 nationalising British oil interests in Iran, Bin Cheng, *Transactions of Grotius Society* (1960), Vol. 44, p. 267 at pp. 289 *et seq.*, and Wortley, *op. cit.*, at pp. 33 *et seq.*

[3] See, e.g. decision of Bremen District Court in 1959, concerning the Indonesian legislation of 1958, nationalising Dutch enterprises, referred to by Domke, *American Journal of International Law* (1960), Vol. 54, p. 305, at pp. 306–7, and 312–315. Cf. also *In re Claim by Helbert Wagg and Co., Ltd.*, [1956] Ch. 323, at 349.

respect of a lawful expropriation, pay also damages for any loss sustained by the injured party.[1]

An English Court will not recognise or enforce a foreign expropriation law which is unlawful, in the sense mentioned above,[2] of being a purely confiscatory measure.

The " Calvo Clause "

It is convenient at this point to discuss the clauses of the type known as the " Calvo Clause ". These clauses (named after the Argentinian jurist, Calvo) are frequently inserted in contracts between Central and South American Governments and foreign companies or persons to whom concessions or other rights are granted under the contracts. Under such a clause the foreign concessionaire renounces the protection or assistance of his government in any matters arising out of the contract. The following clause, which was adjudicated upon in the *North American Dredging Company Case*[3] before the United States-Mexico General Claims Commission, is an example:—

> " The contractor and all persons, who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract ".

The object of such a clause is to ensure that legal disputes arising out of the contract shall be referred to the municipal

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[1] See *Chorzów Factory (Indemnity) Case*, Pub. P.C.I.J. (1928), Series A, No. 17 at 46–48.

[2] Cf. however, *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, at 123–124, and *In re Claim by Helbert Wagg and Co., Ltd.*, [1956] Ch. 323, at 346–349.

[3] Annual Digest of Public International Law Cases, 1925–1926, No. 218.

Courts of the State granting the concession or other rights, and to oust the jurisdiction of international arbitral tribunals or to prevent any appeal for diplomatic action to the national State of the company or individual enjoying the concession, etc. Its insertion in so many contracts with Latin American States was due to the number of occasions when on rather weak pretexts concessionaire companies or persons in these States sought the intervention of their own governments to protect their interests without any recourse to the remedies available in local municipal Courts.

There have been several conflicting decisions by international arbitral tribunals on the legality of the Calvo Clause. In a number of cases it has been held null and void on the ground that an individual cannot contract away the right of his government to protect him. In other cases the arbitrators have treated it as valid and as barring the claim before them. Thus, in the *North American Dredging Company Case* (p. 299), the United States-Mexico General Claims Commission dismissed the claim on the ground that under the clause it was the duty of the claimant company to use the remedies existing under the laws of Mexico, and on the facts the company had not done this. This decision has been accepted by the British Government as good law. On the other hand, in the case of the *El Oro Mining and Railway Co., Ltd.*,[1] where the Calvo Clause was pleaded as a defence, the British-Mexican General Claims Commission declined to dismiss the claim inasmuch as the claimant company had actually filed suit in a Mexican Court, and nine years had elapsed without a hearing. Therefore, it could not be said that the claimant company had sought to oust the local jurisdiction.

Perhaps the better opinion as to the Calvo Clause may be summed up as follows:—

(1) In so far as such clause attempts to waive in general the sovereign right of a State to protect its citizens, it is to that extent void.

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[1] Annual Digest of Public International Law Cases, 1931–1932, No. 100.

(2) But, to quote a statement of the British Government, " There is no rule to prevent the inclusion of a stipulation in a contract that in all matters pertaining to the contract, the jurisdiction of the local tribunals shall be complete and exclusive ". In other words, it would be obviously improper for the individual to treat the State against which he seeks redress as an inferior and untrustworthy country, and to apply for his government's intervention without making any claim in the local Courts.

(3) Where such a stipulation purports to bind the claimant's government not to intervene in respect of a clear violation of international law, it is void.

To sum up, it may be said that the Calvo Clause is ineffective to bar the right of States to protect their nationals abroad, or to release States from their duty to protect foreigners on their territory.

Debts

Claims asserting the responsibility of a State for debts more frequently arise in cases of State succession where an annexing or successor State seeks to evade the financial obligations of its predecessor. Such claims also occur, however, in many other cases where governments fail in the service of loans or default in contributions to international institutions of which they are members.

Three theories have been advanced as to the right of a State to protect subjects, creditors of another State:—

(1) Lord Palmerston's theory, enunciated in 1848, that the former State is entitled to intervene diplomatically, and even to resort to military intervention as against a defaulting debtor State.

(2) The " Drago Doctrine " (so called after the Argentinian Minister of Foreign Affairs who first affirmed it in 1902) that States are duty bound not to use against a defaulting debtor State compulsory measures such as armed military action. This doctrine was intended to apply in favour of Central and South American States as a virtual corollary to the Monroe

Doctrine[1]; accordingly, in its later form, it laid down that the public debts of such American States could not " occasion armed intervention nor even the actual occupation of the territory of American nations by a European Power ". Drago's objections were principally confined to the use of armed force in the collection of public debts; he was not directly opposed to diplomatic intervention or to claims before international tribunals. Subsequently, the Hague Convention of 1907 for limiting the Employment of Force for the Recovery of Contract Debts provided that the States parties to the Convention would not resort to armed force in order to recover contract debts due to their nationals by another State, except where the State refused to accept arbitration or to submit to an arbitral award.[2]

(3) According to the most generally accepted theory, the obligation of a debtor State is similar in all respects to obligations under international agreements in general. Therefore no special rules nor special methods of redress are applicable where a debtor State defaults.

3.—Responsibility for International Delinquencies (Wrongs Unconnected with Contractual Obligations)

In practice, most cases of State responsibility, at least before international tribunals, arise out of wrongs alleged to have been committed by the State concerned. By wrong in this connection is meant the breach of some duty which rests on a State at international law and which is not the breach of a purely contractual obligation. To such wrongs, more frequently the term " international delinquency " is applied. It is too early yet to measure the effects of the impact on the present topic of the increasing tendency under international law to cast responsibility on individuals for delinquencies (see Chapter 3, above).

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[1] See above, pp. 114–115.

[2] Having regard to the obligations of States Members of the United Nations to settle their disputes peacefully, and to refrain from the threat or use of force against other States (see Article 2 of Charter), the " Drago Doctrine " has lost much of its importance and application.

Most of the cases which come under this head concern injuries suffered by citizens abroad. Indeed, the topic of protection of citizens abroad really makes up most of the law on this subject. These injuries may be of different kinds, for example, injuries to property in the course of riots, personal injuries, improper arrests by the local authorities, the refusal of local judicial tribunals to accord justice or due redress, and so on. Generally speaking, a person who goes to live in the territory of a foreign State must submit to its laws; but that is not to say that certain duties under international law in respect to the treatment of that person do not bind the State. Examples are the duty on the State to provide proper judicial remedies for damage suffered, and the duty to protect alien citizens from gratuitous personal injury by its officials or subjects.

It may be said that according to international law, aliens resident in a country have a certain minimum of rights necessary to the enjoyment of life, liberty and property, but these are most difficult to define.

In the subject of international delinquencies, it is important to apply the notion of *imputability*. This notion assists in clarifying the subject and in providing a proper framework for its theory. To take a practical example, if an agency of State X has caused injury to a citizen of State Y in breach of international law, technically we say that State X will be responsible to State Y for the injury done. What this means is that the organ or official of State X has committed a wrongful act, and the conduct in breach of international law is *imputed* from the organ or official to the State. The *imputation* is thus the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the State.[1]

[1] The *Harvard* Draft Convention on the International Responsibility of States for Injuries to Aliens uses the expression " attributable " rather than " imputable " (see Articles 1 and 15). In connection with State responsibility, the International Law Commission also preferred " attribution " to " imputation ", upon the ground that this would obviate the ambiguities inherent in the notions of " imputation " and " imputability ", which are used in an entirely different sense in certain systems of internal criminal law; see *Report* of the Commission on the Work of its Twenty-second Session (1970), paragraph 77.

The practical necessity of the notion is founded on the importance of keeping clear the limits between international law and municipal or State law. Breaches of duty by State agencies may be imputed to the respondent State according to rules of international law, even though under municipal law such acts would not have been imputed to that State, because, for example, the agency concerned had acted outside the scope of its authority.

Imputability therefore depends on the satisfaction of two conditions:—(*a*) conduct of a State organ or official in breach of an obligation defined in a rule of international law; (*b*) that according to international law, the breach will be attributed to the State. It is only if the breach is imputable that the State becomes internationally responsible for the delinquency. Responsibility begins where imputability ends. As has been emphasised by the International Law Commission[1]:—

> "... The attribution of an act or omission to the State as an international legal person is an operation which of necessity falls within the scope of international law. As such it is distinct from the parallel operation which may, but need not necessarily, take place under internal law."

In establishing the incidence of State responsibility, the inquiry proceeds as follows:—

(1) It is first of all necessary to determine whether the State organ or official guilty of the relevant act or omission had or had not a general authority under municipal law in that connection.

(2) If it be found that the State organ or official has this general competence the next matter to be investigated is whether the breach of duty is or is not imputable, so as to make the State responsible at international law. Here international law acts entirely autonomously. For instance, it may be that although the State organ or official exceeded the authority conferred by municipal law, international law will none the less impute liability to the State. Thus, in the

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[1] *Report* of the Commission on the Work of its Twenty-second Session (1970), paragraph 77.

Youmans Case,[1] a lieutenant of State forces in a town in Mexico was ordered by the mayor of the town to proceed with troops to quell riots against and stop attacks being made on certain American citizens. The troops, on arriving at the scene of the riot, instead of dispersing the mob, opened fire on the house in which the Americans were taking refuge and killed one of them. The other two American citizens were then forced to leave the house, and as they did so were killed by the troops and the mob. The troops had disobeyed superior orders by their action in opening fire. It was held that the Mexican Government was responsible for the wrongful acts of the soldiers even though they had acted beyond the scope of their authority.

(3) But if it be ascertained that the State organ or official was not generally competent under municipal law, so that the acts were completely *ultra vires*, no imputation of liability arises. Where an incompetent State agency commits an *ultra vires* act, it cannot be said to have acted on behalf of the State. To quote the Report of a League of Nations Sub-Committee[2]:—

> " If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with *an act which, judicially speaking, is not an act of the State.* It may be illegal, but from the point of view of international law, the offence cannot be imputed to the State ".

However, even in these circumstances a State may become responsible if through the omissions or default of other officials or organs it has facilitated the commission of the *ultra vires* act, or has broken an independent duty of international law, such as a duty to take steps to restrain the commission of the wrongful act, or to take measures to prevent the recurrence of the offence.[3] Thus the State may incur an indirect responsibility arising out of the *ultra vires* acts. It may possibly also be

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[1] Annual Digest of Public International Law Cases, 1925–1926, p. 223.

[2] Report of Sub-Committee of Committee of Experts for the Progressive Codification of International Law (1927) in League of Nations Doc. C.196, M.70, 1927, V, p. 97.

[3] See report of Sub-Committee of Committee of Experts for the Progressive Codification of International Law, *op. cit.*, p. 97.

liable in such circumstances if it has " held out " the incompetent agency as having authority (unless there be some constitutional or legal prohibition of the acts of " holding out " relied upon by the claimant State), but even then the " holding out " would still necessitate an imputation to the respondent State of conduct by some instrumentality other than the incompetent agency which tortiously acted or omitted to act.

(4) Where the illegal acts are committed by private citizens and not by an organ or official of the State the grounds for not imputing liability to the State are much stronger, for the doctrine of imputability rests on the assumption that the delinquency has been committed by an agency *at least* of the State concerned. But here again, by their omissions, or default, the agencies of the State may have broken some independent duty of international law, and liability may then be imputed to the State; for example, if it fails in its duty of repression and punishment of the guilty persons.[1] It is sometimes said that before a State is liable in this connection, there must be some implied complicity in the wrongful act either by negligent failure to prevent the injury, or to investigate the case, or to punish the guilty offender.

One particular example of damage done by private individuals has several times come before arbitral tribunals,[2] namely, that inflicted on the property or persons of aliens in the course of mob riots. It has been ruled on these occasions that the State is responsible for the acts of the rioters only if it is guilty of a breach of good faith or has been negligent in preventing the riots. If the State reasonably affords adequate protection for the life and property of aliens, it has fulfilled its duty at international law towards these persons. To quote the Report

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[1] Article 13 of the above-mentioned *Harvard* Draft Convention (p. 303, n. 1, *ante*), limits the scope of this duty by relation to criminal acts, and stipulates that the injured alien or some other alien (e.g., a relative) must have thereby been deprived of the opportunity to recover damages from the delinquent; otherwise such inadequacy of efforts of apprehension or prosecution are not of themselves grounds of an imputable liability.

[2] See, e.g., the *Home Missionary Society Case*, Annual Digest of Public International Law Cases, 1919–1922, pp. 173–4.

of the League of Nations Sub-Committee mentioned above:—

> " Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression ".

General Principles as to Protection of Citizens Abroad[1]

The rules of State responsibility under this head depend on keeping a proper balance between two fundamental rights of States:—

(i) the right of a State to exercise jurisdiction within its own territory, free from control by other States;
(ii) the right of a State to protect its citizens abroad.

Most frequently claims are laid on the basis of what is termed " denial of justice ".[2] In a broad sense, the term covers all injuries inflicted on citizens abroad in violation of international justice, whether by judicial, legislative or administrative organs, for example, maltreatment in gaol, or arbitrary confiscation of property; but in its narrow and more technical sense it connotes misconduct or inaction on the part of the judicial agencies of the respondent State, denying to the citizens of the claimant State the benefits of due process of law. To constitute a " denial of justice " in this narrow sense there must be some abuse of the judicial process or an improper administration of justice, for example, obstructing access to the Courts, unwarranted delays in procedure, a manifestly unjust judgment of the Court, a refusal to hear the defendant, or a grossly unfair trial.

In the *Chattin Claim* (1927)[3] the United States-Mexico

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[1] A State may also, under this heading of " protection of citizens abroad ", become liable towards an international institution for injuries done to officials of the institution, while acting within the scope of their duties; see Advisory Opinion of the International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949), at pp. 174 *et seq.*

[2] See, on the whole subject, Freeman, *The International Responsibility of States for Denial of Justice* (1938).

[3] See *American Journal of International Law* (1928), Vol. 22, p. 667.

General Claims Commission found that a denial of justice had occurred on Mexico's part, and it cited certain facts in support.

> " Irregularity of Court proceedings is proven with reference to the absence of proper investigations, the insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open Court a mere formality, and a continued absence of seriousness on the part of the Court ".

The Commission also pointed out that the relevant procedure followed (in 1910-1911) was insufficient by international standards. Similarly, in the *Cutting Case*,[1] the United States intervened with Mexico in regard to the trial of an American citizen who had been arrested on a charge of criminal libel.[2]

Important in this connection is the matter of *exhaustion of local remedies*, particularly where claims for denial of justice are brought before international tribunals. It appears to be the rule that no State should intervene or claim in respect of an alleged denial of justice to a national or other wrong until all local remedies open to that national have been exhausted without result. The obvious principle underlying the rule is that until there has been recourse to the proper final Courts or authorities of the respondent State it cannot be said that there has been a denial of justice. Another consideration is that every opportunity for redress in the municipal sphere should be sought before the matter assumes the more serious aspect of a dispute between States.

A detailed consideration of the local remedies rule lies outside the scope of this book, but certain principles may be briefly formulated:—(*a*) a local remedy is not to be regarded as adequate and need not be resorted to if the municipal Courts are not in a position to award compensation or damages; (*b*) a claimant is not required to exhaust justice if there is no justice to exhaust; for example, where the supreme judicial

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[1] See above, pp. 251–252.

[2] A mere error in judgment of an international tribunal does not amount to a denial of justice; see *The Salem Case* (1932), *United Nations Reports of International Arbitral Awards*, Vol. II, at p. 1202.

tribunal is under the control of the executive organ responsible for the illegal act, or where an act of the legislative organ has caused the injury suffered; (*c*) where the injury is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal Courts,[1] *semble* the injured foreign citizens are not required to exhaust local remedies.

On the other hand, as the *Ambatielos Arbitration* (1956), between Greece and Great Britain, shows,[2] local remedies are not exhausted if an appeal to a higher Court is not definitely pressed or proceeded with, or if essential evidence has not been adduced, or if there has been a significant failure to take some step necessary to succeed in the action.

According to the decision of the International Court of Justice in the *Interhandel* (*Preliminary Objections*) *Case*,[3] the local remedies rule applies *a fortiori* where the national of the claimant State concerned is actually in the course of litigating the matter before the municipal Courts of the respondent State, and the municipal suit is designed to obtain the same result as in the international proceedings. Moreover, the rule applies even though the municipal Courts may be called upon to apply international law in reaching a decision on the matter.

State Responsibility and the Fault Theory[4]

It is often said that a State is not responsible to another State for unlawful acts committed by its agents unless such acts are committed wilfully and maliciously or with culpable negligence.

It is difficult to accept so wide a conclusion and so invariable

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[1] However, if this is not clearly shown, only the municipal Courts themselves can determine the issue of jurisdiction, so that the local remedies rule applies; see *Panevezys-Saldutiskis Railway Case*, Pub. P.C.I.J. (1939), Series A/B No. 76.

[2] See *American Journal of International Law* (1956), Vol. 50, pp. 674–679.

[3] I.C.J. Reports (1959), 6.

[4] The subject is discussed in García Amador's 5th Report to the International Law Commission on International Responsibility; see *Yearbook* of the Commission, 1960, Vol. II, 41, at pp. 61–64.

a requirement. A general floating condition of malice or culpable negligence rather contradicts the scientific and practical considerations underlying the law as to State responsibility. Few rules in treaties imposing duties on States contain anything expressly in terms relating to malice or culpable negligence, and breaches of those treaties may without more involve the responsibility of a State party. It is only in specific cases when particular circumstances demand it that wilfulness or malice may be necessary to render a State responsible; for example, if the State knowingly connives in the wrongful acts of insurgents or rioters, it would become liable, although not generally otherwise. Moreover, fault can seldom enter into account in the case of alleged breaches of international law by legislative or judicial organs, or where the relevant State agency is acting in the exercise of a statutory discretion, and there is no evidence of arbitrariness or capriciousness.

Further, the actual decisions of international arbitral tribunals fail to justify a general condition of malice or culpable negligence. An instructive precedent is supplied by the case of the *Jessie* which came before the British-American Claims Arbitral Tribunal in 1921. There the United States was held responsible to Great Britain for the action of its officers, although such action was *bona fide* and in the belief that it was justified by a joint regulation adopted by the two countries. The Tribunal laid down the wide principle that:—

> " Any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands ".

Thus the Tribunal did not hold that the presence of malice or culpable negligence was a condition precedent of State responsibility.

In the field of State responsibility for nuclear activities, there has to be, subject to the nature of the situations arising and subject to reasonable general qualifications, some form of strict or absolute liability. The difficulties here are not to

be minimised.[1] The safety of the international community cannot be ensured under a system whereby a State would be responsible only if it were proved to be negligent in the management of nuclear fuels and nuclear installations. This involves the additional difficulty which in some instances may require the problem of insurance to be dealt with, of the availability of sufficient financial resources to meet large-scale liabilities for major damage.

The unavoidable dangers involved in nuclear activities, particularly those related to the use of, and experiments with, nuclear weapons, together with the increase in the number of non-nuclear-weapon States engaged in the development of nuclear energy, partly explain the signature on July 1, 1968, of the Treaty on the Non-Proliferation of Nuclear Weapons. The dangers inherent in the nuclear arms race also materially influenced the conclusion of the Treaty. The two key provisions are contained in Articles I and II. Article I provides that each nuclear-weapon State party to the Treaty is not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly, and also is not to assist, encourage, or induce any non-nuclear-weapon State to manufacture or acquire or control such weapons or devices. Article II obliges each non-nuclear-weapon State party to the Treaty not to receive the transfer from any transferor whatsoever of nuclear weapons or devices, directly or indirectly; and not to manufacture or acquire these, or to seek or receive assistance in their manufacture. Under Article IV, the right of all parties, subject to Articles I and II, to use nuclear energy for peaceful purposes is preserved, while non-nuclear-weapon States parties are through agreements negotiated with the

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[1] Cf. R. Fornasier, " Le Droit International Face au Risque Nucléaire ", *Annuaire Français de Droit International*, Vol. X (1964), pp. 303–311. Note also the following instruments: (1) Convention on Third Party Liability in the Field of Nuclear Energy, Paris, July 29, 1960, with Supplementary Convention. (2) Convention on the Liability of Operators of Nuclear Ships, Brussels, May 25, 1962. (3) Convention on Civil Liability for Nuclear Damage, Vienna, May 21, 1963.

International Atomic Energy Agency (IAEA), pursuant to Article III, to accept the safeguards system evolved by that organisation.[1]

The Treaty is a compromise, and possibly does not represent an ideal solution, but without it nuclear proliferation would have been removed from the major controls established under its provisions.

4.—Claims

Inasmuch as a State has a right to protect its citizens abroad, it is entitled to intervene diplomatically or to lodge a claim for satisfaction before an international arbitral tribunal if one of its subjects has sustained unlawful injury for which another State is responsible. The claimant State is deemed to be injured through its subjects, or to be asserting its right to ensure respect for the rules of international law *vis-à-vis* its own nationals,[2] and once the intervention is made or the claim is laid, the matter becomes one that concerns the two States alone. The injured subject's only right is to claim through his State as against the State responsible. Some writers indeed hold the view that if the injured subject waives his rights of compensation, his State can none the less prosecute a claim for the injury done to him.

Sometimes it is expressed that this right corresponds to an administrative duty of the State towards such of its nationals as have suffered injury.[3] But State practice (for example, of the Department of State of the United States) shows that most States regard the sponsoring of claims by nationals as entirely within their discretion. Whether or not protection be a right or a duty of the State, it is now well established that in the international forum, as a rule, the only recognised claimants

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[1] This is a truly international system, involving both reporting and inspection. Prior to the Treaty, a large number of countries were subject to the system; see the address, September 21, 1966, by the Director-General of IAEA to the 10th General Conference, and M. Willrich, *American Journal of International Law*, Vol. 60 (1966), pp. 34–54.

[2] See *Panevezys-Saldutiskis Railway Case*, Pub. P.C.I.J. (1939), Series A/B No. 76.

[3] See *Gschwind* v. *Swiss Confederation*, Annual Digest of Public International Law Cases, 1931–1932, at pp. 242–3.

are States. To quote the Permanent Court of International Justice[1]:—

> " Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant ".

It follows from the general principle that once compensation has been assessed and paid by the defendant State to the claimant State, the defendant State, apart from express contract, is not interested in nor entitled to concern itself with the manner in which the complainant State disposes of the sum of money awarded. The complainant State need not in fact remit to its injured citizen the whole of the compensation received by it.

The persons on behalf of whom a State is entitled to propound an international claim are primarily its nationals, but may include also " protected " subjects such as those placed under that State's diplomatic protection, and even aliens who have complied with almost all the conditions of naturalisation. In the majority of cases, international arbitral tribunals have applied the rule that the injured person must have the nationality of the claimant State or other recognised status at the time the injury was suffered and must retain it until the claim is decided (or at least until the claim is presented), but other requirements and refinements in connection with the nationality of the injured party have also been adopted by different arbitrators. The necessity for the rule was expressed by the United States–Germany Mixed Claims Commission as follows[2]:—

> " The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other national is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. . . . *Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on* behalf of those who after suffering injuries

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[1] *Mavrommatis Palestine Concessions Case (Jurisdiction)*, Pub. P.C.I.J. (1924), Series A, No. 2, at p. 12.

[2] See Report of Decisions of the Commission, at pp. 175 *et seq.* Cf. also the difficult case of *The Bathori*, [1934] A.C. 91.

should assign their claims to its nationals or avail themselves of its naturalisation laws for the purpose of procuring its espousal of their claims ".

Where the party injured is a company or corporation, the matter is likewise governed by the " nationality of claims " canon. Only the national State is entitled to espouse the claim of the company or corporation, the nationality of which is determined by tests referred to in Chapter 11, *post*.[1] Difficulties may arise however in the case of the so-called " triangular " situation, namely: (*a*) Injury in breach of international law is done to a company incorporated and with its registered office in State A. (*b*) The act occasioning the injury has been committed by State B, where the company has carried on its operations. (*c*) The principal shareholders of the company are nationals of, and resident in State C. Is State C entitled to espouse the claims of the shareholders who have incurred loss through the act of State B?

The principles governing such a situation were clarified in 1970 by the International Court of Justice in the *Barcelona Traction Case* (Belgium-Spain),[2] where the Court ruled in favour of the respondent State, Spain, upon the antecedent ground that Belgium had no *locus standi* to espouse before the Court claims of alleged Belgian nationals who were shareholders in the subject company, Barcelona Traction, Light and Power Company, Limited, inasmuch as the latter was incorporated in Canada and was, in an international legal sense, of Canadian nationality. The reasoning relied upon by the Court may be expressed as follows:—(*a*) International law was bound to have regard to the general tenor of rules of national legal systems, which was to the effect that an infringement of a company's rights by outsiders did not involve liability towards the shareholders, even if their interests were detrimentally affected by the infringement. Consistently, therefore, the *general* rule of international law was that the national State of the company concerned was entitled to exercise diplomatic protection

[1] See p. 343.

[2] *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, p. 3.

for the purpose of seeking redress for an international wrong done to the company. (*b*) A different principle might apply if the wrong were aimed at the direct rights of the shareholders as such (e.g., the right to attend and vote at general meetings), but in the instant case, Belgium had conceded that its claim was not based upon any infringement of the direct rights of shareholders, but only upon the alleged illegal measures taken in Spain against the company. (*c*) The general rule of the exclusive entitlement of the national State of the company might conceivably, in certain cases, give way to the right of the national State of the shareholders, for example where the company itself had ceased to exist, or the protecting national State of the company lacked capacity to exercise diplomatic protection; however, in the instant case the Barcelona Traction, Light and Power Company, Limited had not ceased to exist as a corporate entity in Canada, nor was the Canadian Government incapable of exercising diplomatic protection, although for reasons of its own, its interposition on behalf of the company had ceased as from 1955.

The Court did not accept certain propositions, namely:—(i) If investments formed part of a country's national economic resources, and these were prejudicially affected contrary to that country's right to have its nationals enjoy a certain standard of treatment, it could claim for breach of international law done to it. A claim of this nature would have to be based on treaty or special agreement, which did not exist between Belgium and Spain. (ii) For reasons of equity, a country should be entitled in certain cases to take up the protection of its nationals who were shareholders in a company, the victim of a breach of international law. Any such alleged equitable justification would open the door to competing claims on the part of different States, thereby creating insecurity in international economic relations.[1]

[1] In its judgment (see paragraph 99) the Court referred to the case of a company established in a foreign country in order to obtain tax or other advantages, and said that it did not seem " to be in any way inequitable " that these advantages should be balanced by the risk that a State other than the national State of shareholders would be solely entitled to exercise diplomatic protection.

The net effect of the Court's decision is then that an international Court ought to be reluctant to " pierce the corporate veil " in order to allow a country other than the national State of the company to seek redress for an international wrong done to the company.

According to the decision of the International Court of Justice in the *Nottebohm Case* (*Second Phase*),[1] where the person, whose claim is being propounded by the claimant State, is a national of it by naturalisation, the claimant State will not be entitled to proceed, if such person has no close and genuine connection with that State, sufficient for the grant of its nationality. A somewhat similar principle applies if he is of dual nationality; his " real and effective nationality " must be that of the claimant State.[2]

In the *I'm Alone Case*[3] between Canada and the United States, the Canadian Government was held entitled to claim although only the nominal or *de jure* owner of the vessel—the *I'm Alone*—was of Canadian nationality, the real or *de facto* owners being actually Americans. Counsel for the United States urged that the damages awarded would ultimately go into the pockets of American citizens, but this was treated as an irrelevant consideration.

This doctrine of " nationality of claims " has with some justification been condemned as artificial, and the theory that a claimant State is injured through its subjects has been described as a pure fiction, but they are both supported by the weight of State practice and arbitral decision.

It remains to point out that States may by treaty lay down special principles or provide for a special procedure *inter partes* for claims in respect of disputes, or for tortious injuries received

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[1] See I.C.J. Reports (1955) 4.

[2] Cf. *Florence Strunsky Mergé Case* (1955), *American Journal of International Law* (1956), Vol. 50, p. 154.

[3] See *United Nations Reports of International Arbitral Awards*, Vol. III, p. 1609. This case arose out of the sinking in 1929 of the *I'm Alone*, a British schooner of Canadian registry, by a United States coastguard vessel at a point on the high seas more than 200 miles from the United States coast. The *I'm Alone* was engaged in the smuggling of alcoholic liquor into the United States, but the Canadian Government claimed that the sinking was illegal and not justified by any Convention with the United States.

by their citizens.[1] In that connection, reference may be made to article 25 of the Convention of March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of Other States, enabling private investors who are nationals of a State party to settle investment disputes with the Government of another State party. In the case of a private investor, who is a natural person, he is to have the nationality of the State concerned on the date of the consent of the parties to submit the dispute to settlement and on the date of the *registration* of the relevant request for settlement by arbitration or conciliation; but a person who on either date possessed the nationality of the investment-receiving State is ineligible to use the machinery of the Convention, even if the investment-receiving State consented to access being given. However, in the case of a private investor who is a body corporate or other entity, the position is not so rigid; not only is access allowed to corporations, etc., which had the nationality of a State party other than the investment-receiving State on the date of the consent to submit, but also to those who on that date held the nationality of the investment-receiving State, provided that the latter State agrees to treat the claimant as the national of another State, because of foreign control. This is a radical advance, enabling regard to be had to the realities of control of corporations and companies.

Damages

Under international law, in matters of State responsibility, a claimant State is always entitled to some damages where its claim has been sustained, irrespective of whether the wrongful act subject of the claim has caused material damage, or injury, or pecuniary loss. Further, if the wrongful act be an infringement, contrary to international law, of the rights of a private citizen whose claim has been espoused by that State, the damage deemed to have been suffered by the claimant

[1] See, e.g. Article VIII of the Agreement of the North Atlantic Powers of June 19, 1951, regarding the Status of their Forces (claims in respect to acts or omissions of members of the forces or civilian components), and cf. the claims provisions in the stationing of forces agreements concluded by the Soviet Union.

State is an independent damage not identical with that suffered by the individual. To quote the Permanent Court of International Justice in the *Chorzów Factory* (*Indemnity*) *Case*[1]:—

> "The damage suffered by an individual is never . . . identical in kind with that which will be suffered by a State; *it can only afford a convenient scale for the calculation of the reparation due to the State*".

This principle is consistent with the award in the *Lusitania Death Claims*, arising out of the sinking of the British vessel, the *Lusitania*, by a German submarine in 1915. The United States-Germany Mixed Claims Commission, in claims by the United States on behalf of American citizens drowned when the vessel sank, refused to grant vindictive or exemplary damages[2] against the German Government.[3] On the other hand, such damages appear to have been awarded by the United States-Mexico General Claims Commission in the *Janes Case* (1926), where the claim was lodged by the United States in regard to the failure of the Mexican authorities to take prompt and effective action to apprehend the murderer of an American citizen. The Commission awarded damages for the "indignity" done to the relatives of the victim by the murderer's non-punishment.[4]

In several instances, international arbitral tribunals have awarded two separate heads of damage, one in respect of the damage suffered by individuals, and the other in respect of injury to the claimant State. Such an award was made in the *I'm Alone Case* (p. 316), and is consistent with the views expressed by the International Court of Justice that the United Nations can claim compensation both in respect of itself and of

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[1] Pub. P.C.I.J. (1928), Series A, No. 17, at p. 28.

[2] Vindictive or exemplary damages are damages given on an increased scale in respect of acts committed maliciously or with gross negligence or in other circumstances of aggravation.

[3] Annual Digest of Public International Law Cases, 1923–1924, No. 113.

[4] Annual Digest of Public International Law Cases, 1925–1926, No. 158. Apart from arbitral awards, States have in practice repeatedly paid indemnities in the form of vindictive damages to other States for breaches of duty of more than ordinary concern.

the damage to individuals arising out of injuries suffered by its officials in the course of their duties.[1]

In practice, however, most States limit their claims to the loss actually suffered by the individual,[2] and such loss is also usually the measure of the arbitral tribunal's award, irrespective of the degree of blame attachable to the delinquent or respondent State.

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[1] See Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949), pp. 174 *et seq.*

[2] In the *Chorzów Factory (Indemnity) Case* (1928), P.C.I.J., Series A, No. 17, at 46–48, the Permanent Court of International Justice laid down that the measure of damages for an international wrong is determined by what is necessary to make restitution, together with special damages for loss not covered by such restitution. The International Court of Justice awarded to Great Britain the replacement value of one destroyer that had been lost through explosions for which Albania was held liable; see the *Corfu Channel (Assessment) Case* (1949), I.C.J. Reports 244.

Chapter 10

SUCCESSION TO RIGHTS AND OBLIGATIONS

1.—Succession in General

The subject discussed in the present Chapter is more frequently treated in the text-books under the titles of " State Succession "[1] and " Succession of Governments ", although this terminology is somewhat inappropriate.[2]

In the former case of so-called " State Succession " we are principally concerned with the transmission of rights or obligations from States which have altered or lost their identity to other States or entities, such alteration or loss of identity occurring primarily when complete or partial changes of sovereignty take place over portions of territory. The questions of international law involved may be summarised as:—

(1) To what extent are the existing rights and obligations of the predecessor State extinguished, or—where there is a change of sovereignty over portion only of the territory of that State—to what extent do they remain vested in that State?

(2) To what extent does the successor State, i.e., the State to which sovereignty has passed wholly or partially, become entitled to such rights or subject to such obligations?

In this connection the term " State Succession " is a misnomer, as it presupposes that the analogies of private law,

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[1] The subject has been covered in a number of valuable studies and documents prepared or circulated by the United Nations Secretariat, and submtteid to the International Law Commission for the purpose of its continuing work on succession; these are listed in the *Report* of the Commission on the Work of its Twenty-second Session (1970), paragraph 36, and the lengthy footnote 53 to this paragraph. For a specialist treatise, see O'Connell, *State Succession in Municipal Law and International Law* (two volumes, 1967).

[2] It bears the title " Succession of States and Governments " in the *Report* of the International Law Commission on the Work of its Twenty-first Session in 1969 (see title of Chapter III), and the title " Succession of States " in the *Report* of the Commission on the Work of its Twenty-second Session in 1970 (see title of Chapter III).

where on death or bankruptcy, etc., rights and obligations pass from extinct or incapable persons to other individuals, are applicable as between States. The truth, however, is that there is no general principle in international law of succession as between States, no complete juridical substitution of one State for the old State which has lost or altered its identity. What is involved is primarily a change of sovereignty over territory, through concurrent acquisition and loss of sovereignty, loss to the States formerly enjoying sovereignty, and acquisition by the States to which it has passed wholly or partially. It is not feasible to carry over to international law analogies concerned with the transmission of a *universitas juris* under domestic law. So far as rights and duties under international law are concerned, no question whatever of succession to these is involved. The State which has taken over is directly subject to international law, simply by virtue of being a State, not by reason of any doctrine of succession.

In the second case of the so-called " Succession of Governments ", a different problem is involved. The change of sovereignty is purely *internal*, whether it takes place through constitutional or revolutionary processes. A new Government takes up the reins of office, and the question is to what extent are the rights and obligations of the former Government extinguished, and to what extent does the new Government become entitled to such rights or bound by such obligations.

In more correct terminology, the two cases therefore resolve themselves into:—(*a*) The passing of rights and obligations upon *external* changes of sovereignty over territory.[1] (*b*) The passing of rights and obligations upon *internal* changes of sovereignty, irrespective of territorial changes. Each of these cases will be discussed in turn.

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[1] The case must involve a real external change of sovereignty; thus when Austria was liberated from German control in April, 1945, that liberation did not create a new State for the purposes of succession to Germany; see *Jordan* v. *Austrian Republic and Taubner* (1947), Annual Digest of Public International Law Cases, 1947. No. 15.

2.—Passing of Rights and Obligations upon External Changes of Sovereignty over Territory

The most common situations in which external changes of sovereignty over territory take place are these:—(i) Part of the territory of State A becomes incorporated in that of State B, or is divided between several States, B, C, D, and others. (ii) Part of the territory of State A is formed as the basis of a new State. (iii) The whole of the territory of State A becomes incorporated in that of State B, State A in effect becoming extinguished. (iv) The whole of the territory of State A becomes divided between several States, B, C, D, and others, again involving the extinction of State A. (v) The whole of the territory of State A forms the basis of several new States, State A again becoming extinguished. (vi) The whole of the territory of State A becomes part of the territory of a single new State, again involving the extinction of State A.

These cases of external changes of sovereignty by no means exhaust the multifarious situations which may arise. Changes of sovereignty over territory may take place not only from States to States, but also from States to non-State entities, for example, international institutions;[1] and non-State entities, for example, trust territories and Protectorates, may themselves acquire sovereignty on attaining Statehood. Besides, the diversity of situations and factors involved must not be overlooked. There may be variations in the *mode* of the change of sovereignty, which may be by annexation, adjudication by international Conference, voluntary cession, or revolution. Much may depend also on the size of the territory concerned, the number of inhabitants affected, and the social and economic interests involved, which inevitably play a role in these days of modern States with their complex structure. Finally, the nature of the particular rights and obligations, which are alleged to pass, must be considered.

For all these reasons, it is difficult to present the subject as

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[1] E.g., the temporary legal sovereignty of the League of Nations, 1920–1935, over the German territory of the Saar.

a body of coherent principles. No facile criteria can be offered as a guide.[1] As Professor H. A. Smith said[2]:—

> ". . . The complexity and variety of the problems which arise in practice are such as to preclude accurate and complete analysis within narrow limits ".

None the less, a consideration of the practice, and of judicial authority and doctrine,[3] suggests a tendency to pay regard to the question whether it is just, reasonable, equitable, or in the interests of the international community that rights or obligations should pass upon external changes of sovereignty over territory. It is significant that criteria of justice and reasonableness seem to have been applied in recent succession practice, for example, in the arrangements of 1947–8 between Pakistan and India on the occasion of the division of the Indian Empire and their emergence as two new States.[4] Moreover, treaties providing *expressis verbis* for the transfer of certain obligations upon changes of sovereignty have generally been interpreted by international tribunals in the light of considerations of reason and justice.[5]

Yet State practice on the subject is unsettled and full of inconsistencies. Possibly, owing to the uncertainty of the international law of succession, the modern tendency is to deal

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[1] Suggested tests or distinctions in the literature have been:—(*a*) The distinction between *universal* and *partial* succession. (*b*) Whether the international personality of the predecessor State has substantially continued through the change of sovereignty. (*c*) The distinction between *personal and territorial* rights and obligations.

[2] *Great Britain and the Law of Nations* (1932), Vol. I, at p. 334.

[3] See, e.g., Opinion on *Claims against Hawaii* (1899) of U.S. Attorney-General Griggs, *Opinions of Attorneys-General*, Vol. 22, pp. 583 *et seq.*, *Advisory Opinion on the Settlers of German Origin in Territory ceded by Germany to Poland* (1923), P.C.I.J., Series B, No. 6, at pp. 36 *et seq.*, and Hurst, *International Law* (Collected Papers, 1950), at p. 80. Cf. upon the aspect of whether it is reasonable that obligations should pass, *Szcupak* v. *Agent Judiciaire du Trésor Public* (1966), 41 *International Law Reports*, 20.

[4] E.g., in the solution adopted of India remaining a Member of the United Nations and Pakistan applying separately for membership. See memorandum prepared by the United Nations Secretariat in 1962 on succession of States in relation to United Nations membership; *Yearbook of the I.L.C.*, 1962, Vol. II, pp. 101-103.

[5] See, e.g., the *Case of Certain German Interests in Polish Upper Silesia* (1926), P.C.I.J., Series A, No. 7.

expressly with all possible cases under a treaty between the parties affected (the so-called " voluntary succession ").[1]

It is, however, a sound general working rule, and one applied in the case-law, to look at the texts of any relevant laws, treaties, declarations, and other arrangements accompanying the change of sovereignty, and ascertain what was the intention of the State or States concerned as to the continuance or passing of any rights or obligations.

The nature of the subject requires that each of the categories of rights and obligations be dealt with in turn.

(1) Succession to Treaty Rights and Obligations

There is no general rule that all treaty rights and obligations pass, nor any generally accepted principle favouring the greatest possible continuity of treaty relations.

Where a State becomes extinguished by the loss of all its territory, *prima facie* no rights and obligations of an executory[2] character under treaties pass to the successor State, with the exception of:—(*a*) Such treaties as pertain directly to the territory that has changed masters, for example, treaties creating a servitude[3] or quasi-servitude such as a right of passage, or treaties neutralising or demilitarising the territory concerned. (*b*) Multilateral Conventions relative to health, narcotics, and similar matters, which are intended to apply, notwithstanding such changes, in respect of the territory. This *prima facie* rule

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[1] The particular treaty concerned may, or may not, provide for succession to rights or obligations; see, e.g. Article 37 paragraph 1 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on October 7, 1952, according to which, when the whole or part of the territory of a Contracting State is transferred to a non-Contracting State the Convention is to cease to apply to the territory so transferred as from the date of transfer. A good example of voluntary succession is the Agreement of August 7, 1965, relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State; cf. S. Jayakamur, " Singapore and State Succession. International Relations and Internal Law ", *International and Comparative Law Quarterly*, Vol. 19 (1970), pp. 398–423.

[2] In the case of *executed* obligations under certain treaties, e.g., treaties of cession or boundary demarcation, where there is a subsequent change of sovereignty, no question of succession of treaty rights is involved, but the territory, boundary, etc., simply passes to the successor State.

[3] See above, pp. 239–241.

may have to give way to controlling facts or circumstances rendering it reasonable or equitable that certain treaty rights and obligations should pass; for example, if the particular treaty were one under which the consideration had been executed in favour of the extinct State, and the successor State had taken the benefit of that consideration, the latter would become liable to perform the corresponding obligations.[1] *Semble*, also, if the successor State represents merely an enlargement of the predecessor State (as in the case of the incorporation of Prussia into the German Empire), prior treaty rights and obligations would pass in principle.

Where the predecessor State does not become extinguished, for instance, where part only of its territory is lost to it, *prima facie* the passing of treaty rights and obligations depends on the nature of the treaty. Rights or obligations under political treaties, for example, of alliance, are as a rule deemed not to pass, and this on the whole seems reasonable, particularly where the treaty presupposes that the predecessor State shall be the only entity with which the other States parties were prepared to enter into a political arrangement. There is, however, an absence of agreement as to what constitutes a political treaty. Rights or obligations under multilateral Conventions intended to be of universal application on health, technical, and similar matters may pass,[2] except those Conventions which are the constituent instruments of international organisations, and which require the admission of the successor State by decision of an international organ before it can become a party,[3] or Conventions which by their express or implied terms preclude the successor State from becoming a party to the Convention, or from becoming a party except with the consent

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[1] Cf. Opinion of U.S. Attorney-General Griggs, p. 323, *ante*, stating that the successor State " takes the burdens with the benefits ".

[2] Thus, after becoming separated from India in 1947, Pakistan was recognised as becoming party automatically to certain multilateral Conventions of universal application binding India. See memorandum prepared by the United Nations Secretariat in 1962, *Yearbook of the I.L.C.*, 1962, Vol. II, pp. 101–103.

[3] See below, pp. 577, 597–599.

of all existing parties. Treaties creating servitudes or quasi-servitudes, or obligations pertaining to, or for the benefit of the territory subject of the change of sovereignty or adjoining territory, may also pass.[1] Treaties outside these categories, such as of commerce, and extradition, do not pass unless some strong consideration requires this. In the case of a treaty of extradition, it would generally be unreasonable to bind the successor State under it, because normally such a treaty relates to special offences and procedure under the municipal criminal law of the predecessor State, and a different penal code may be in force in the case of the successor State.[2]

The extensive decolonisation or emancipation of dependent and trust territories, 1956–1970, produced a welter of practice concerning the extent to which:—(*a*) treaties formerly applying to them, e.g., under " territories clauses " of Conventions, continued to apply to them in their new international capacity; (*b*) treaty rights and obligations generally of the parent or tutelary State passed to them. It is a bewilderingly hopeless exercise to seek to spell out from this practice any new *general* customary principles of international law; one circumstance alone would be sufficient to negate the value and significance of any such effort, namely the number and nature of the different expedients adopted by newly emerged States to deal with the question of what treaties they would either recognise or refuse to acknowledge as applicable to them; among such expedients were " devolution agreements " and " inheritance agreements " with the parent or tutelary State,[3] or unilateral declarations[4], including the so-called " temporising declaration " whereby

[1] Cf. the *Case of the Free Zones of Upper Savoy and Gex* (1932), P.C.I.J., Series A/B, No. 46, at p. 145, under which France was regarded as having succeeded to Sardinia in the matter of an obligation to respect a territorial arrangement between Sardinia and Switzerland.

[2] For three decisions (unreported) upholding the continued application of an extradition treaty, see Report of the 53rd Conference of the International Law Association, 1968, p. 628.

[3] For the practice concerning these agreements, see the Report of the 53rd Conference of the International Law Association, 1968, pp. 610-627.

[4] See Report, *op. cit.*, at p. 624, describing the practice in regard to Conventions of the International Labour Organisation (I.L.O.) previously in force in a dependent territory; upon attaining independence, the new State should make a declaration that such Conventions will continue to be respected.

the newly emerged State agreed to accept, wholly or partially, upon a basis of reciprocity, the former treaty régime pending a treaty-by-treaty review, and a final decision based upon such investigation.[1] Some newly emerged States preferred indeed to give general notice that they were beginning with a " clean slate ", so far as their future treaty relations were concerned.

This very diversity of action, apart from other considerations, appears inconsistent with the proposition that the practice has given rise to rules of general law as to succession *stricto sensu.* Moreover, when it is claimed, for example, that a devolution agreement may, with regard to a particular treaty, operate by way of novation between the parent State, the new State, and the other State party, or that a unilateral declaration may have effect upon the basis of estoppel or preclusion so as to bind the new State, these are not illustrations of the application of principles of succession, but rather of the incidence of the law of treaties or of the rules as to estoppel. Not to be overlooked also is the practical problem in many cases of determining, in the light of the law of treaties and of general principles of international law, whether a former treaty is inherently or by its terms invokable against the new State; in this connection, the provisions of the devolution agreement or unilateral declaration may be legally irrelevant.[2]

(2) Succession to Non-Fiscal Contractual Rights and Obligations

The extent to which these pass is highly debatable. The following principles may perhaps be formulated:—

(*a*) A contractual right which is solely of the nature of a claim to unliquidated damages, and which cannot be alternatively enforced as a quasi-contractual right against the predecessor or successor State (for example, by reason of some benefit taken over by such State) does not survive the change of sovereignty. But if some element of quasi-contract is involved, for example, unjustified enrichment to the pre-

[1] An example of such a " temporising " declaration is the note sent by Nauru on May 28, 1968, to the United Nations Secretary-General, some four months after attaining independence.

[2] On this matter of the practical difficulties, see Lawford, " The Practice Concerning Treaty Succession in the Commonwealth ", *Canadian Yearbook of International Law,* 1967, pp. 3–13.

decessor or successor State, the right and corresponding obligation may survive.[1]

(*b*) A contractual right which is of the nature of a *vested* or *acquired* right ought to be respected by the successor State. To be such a vested or acquired right, it must be liquidated in nature and correspond to some undertaking, or enterprise, or investment of a more or less established character;[2] or—in more general terms—the right must be such that it would be unjust for the successor State not to give effect to it. Hence a merely executory contractual right, without more, is not a vested or acquired right. This concept of vested or acquired rights has been accepted by municipal and international tribunals,[3] although in view of the element of appreciation involved, there still remains some uncertainty regarding its scope, while latterly it has not escaped criticism. On the one hand, it is claimed that the concept of vested or acquired rights cannot be applied except subject to certain qualifications, one such qualification being that rights not in conformity with the public and social order of the successor State, even if vested or acquired, ought not to be binding upon that State. On the other hand, some would reject the concept altogether, or at least altogether in relation to newly emerged States having problems of development, except in very special cases (e.g., debts of public utility).[4]

The doctrine of vested or acquired rights did operate to temper the stringency of earlier rules relating to succession to contractual rights and obligations, including the rule of non-

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[1] There was some difference of opinion in the International Law Commission at its Session in 1969 concerning the current applicability of the principle of unjust enrichment, particularly its applicability in the context of decolonisation, having regard to the possible necessity for new States to nationalise and exploit their natural resources in the manner best suited to their economic development; see *Report* of the Commission on the Work of its Twenty-first Session (1969), paragraphs 47–55.

[2] Cf. *Jablonsky* v. *German Reich*, Annual Digest of Public International Law Cases, 1935–7, Case No. 42.

[3] See, e.g., *Advisory Opinion on the Settlers of German Origin in Territory ceded by Germany to Poland* (1923), P.C.I.J., Series B, No. 6, and *United States* v. *Percheman* (1833), 7 Peters 51, and cases cited in *British Year Book of International Law*, 1950, p. 96, n. 1.

[4] See *Report* of the International Law Commission on the Work of its Twenty-first Session (1969), paragraphs 43–46 and 52–55.

succession laid down by the English Court of Appeal in *West Rand Central Gold Mining Co.* v. *R.*[1] in 1905 to the effect that in the case of extinction of a predecessor State by conquest and annexation, the successor State as conqueror remains entirely free to decide whether or not to become subrogated to the contractual rights and duties of its predecessor. The latter view was indeed to some extent inconsistent with prior opinion and practice, and *semble* would not be followed today as an absolute principle.

(3) Succession and Concessionary Contracts

The general weight of practice and opinion[2] lies in the direction of holding that obligations under concessionary contracts are terminated upon changes of sovereignty resulting in the extinction of the predecessor State,[3] unless indeed the successor State renews the concession.[4] It is not clear why this is necessarily so in every case,[5] because even the executory rights and obligations under the concession may correspond to some substantial benefit which has accrued to the successor State, making it only just and reasonable that the concessionaire should continue to enjoy his rights. As against that consideration, the concessionaire is in theory always entitled to obtain compensation on just terms for the loss of his rights, including the loss of executory rights, so that these rights would terminate

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[1] [1905] 2 K.B. 391.

[2] See First Report of 1968 by the Special Rapporteur of the International Law Commission on succession in respect of non-treaty rights and duties, paragraph 139, *Yearbook of the I.L.C.*, 1968, Vol. II, p. 115. See also paragraphs 144–145, where the views are propounded that the economic conditions in which the concession was granted and the requirements of the new economic policy of the successor State should be taken into consideration, and that the right of new States to carry out nationalisations cannot be impeded by concessionary contracts.

[3] If only part of the territory of the predecessor State is transferred, and the concession relates to the resources of the remaining territory, presumably the concessionaire retains his rights against the predecessor State.

[4] In practice successor States have frequently renewed concessions, although it could not be inferred from this that they acknowledged a legal obligation to do so.

[5] The intentions of the predecessor and successor States may in fact be that the concession should continue; see Hyde, *International Law* (2nd edition, 1947), Vol. I, at pp. 425–8.

subject only to an obligation upon the successor State to make due compensation. The concessionaire is often said to retain an interest in the money invested and the labour expended, and this, whether classified as an acquired right or otherwise, should be respected by a successor State.[1]

(4) Succession and Public Debts

Both practice and doctrine reveal great divergencies on the question whether the successor State is obliged to take over public debts.[2]

On the face of it, the successor State, having obtained the benefit of the loan by the very fact of taking over the territory, should be responsible for the public debts of the predecessor State relating to the territory that has passed. This principle of responsibility, resting on the basis of " taking the burden with the benefits " has been repeatedly upheld by the United States.[3] The same principle applies with particular force where the visible benefits of the loan are directly associated with the territory that has passed, for instance, if the proceeds of the loan have been devoted to the erection of permanent improvements on the territory.[4]

At the same time, regard must be paid to the terms of the actual contract of loan, and if the debt be secured on the revenues of the predecessor State, and in respect of the territory which passed, it would be unreasonable to make the successor State liable beyond the taxable capacity of the territory which has changed sovereigns.[5]

No obligation accrues for a successor State in respect of a public debt incurred for a purpose hostile to the successor

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[1] Cf. also with regard to a concessionary contract, although the case rests on its own peculiar facts, the *Mavrommatis Palestine Concessions Case* (1924), P.C.I.J., Series A, No. 2, at p. 28, and (1925), Series A, No. 5.

[2] See, generally, on the subject Feilchenfeld, *Public Debts and State Succession* (1931).

[3] E.g., in 1938 when it claimed that Nazi Germany, having absorbed Austria by bloodless conquest, was liable to service former Austrian loans; see Hyde, *op. cit.*, Vol. I, pp. 418–9.

[4] See Hyde, *op. cit.*, Vol. I ,pp. 409–10.

[5] See Hyde, *op. cit.*, Vol. I, pp. 413–4, and pp. 416–7.

State, or for the benefit of some State other than the predecessor State.[1]

A difficult problem is that of the incidence of a public debt of the predecessor State, the territory of which becomes separated into several parts, each under the sovereignty of new or existing States. The rule that the debt becomes divided among the successors is favoured by doctrine, although not supported by the award in the *Ottoman Debt Arbitration* (1925).[2] In practice, the debts of a predecessor State have been apportioned by treaty[3] among the successor States according to some equitable method of distribution, for example, proportionately to the revenues of each parcel of transferred territory or rateably in some other reasonable manner.

(5) Succession and Private or Municipal Law Rights

Such of these rights as have crystallised into vested or acquired rights must be respected by the successor State, more especially where the former municipal law of the predecessor State has continued to operate, as though to guarantee the sanctity of the rights.[4]

However, the continuance of any such rights is subject to any alterations affecting them made to the former municipal law by the successor State, for there is no rule of international law obliging the latter to maintain the former municipal legal system. The successor State can always displace existing rights and titles by altering the former municipal law, unless in doing so, it breaks some other independent duty under international law, for instance, by expropriating the property of aliens arbitrarily, and not for a public purpose.

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[1] Thus in 1898 at the peace negotiations between Spain and the United States, which gained control over Cuba during its successful war with Spain, the American Peace Commissioners refused to recognise a so-called Cuban public debt, which had been raised by Spain for its own national purposes, and for interests in some respects adverse to those of Cuba.

[2] See *United Nations Reports of International Arbitral Awards*, Vol. I, at pp. 571–2.

[3] See, e.g., Article 254 of the Treaty of Versailles, 1919.

[4] See *Advisory Opinion on Settlers of German Origin, etc., loc. cit.*

(6) Succession and Claims in Tort (or Delict)

There is no general principle of succession to delictual liabilities.

According to the principles enunciated in two well-known cases, the *Robert E. Brown Claim*[1] and the *Hawaiian Claims*,[2] the successor State is not bound to respect an unliquidated claim for damages in tort.[3] If, however, the amount of the claim has become liquidated by agreement of the parties or through a judgment or award of a tribunal, then in the absence of any suggestion of injustice or unreasonableness, the successor State may be bound to settle the amount of this liquidated claim. This rule is irrespective of whether the change of sovereignty is forcible or voluntary. It is not clear even from the justifications given for the rule, why it should apply as an invariable proposition; for instance, where a tort relates to territory, as where there has been a wrongful diversion of water, or where some permanent benefit has accrued to the successor State, it may in some circumstances be reasonable to bind the successor State to respect the unliquidated claim against its predecessor.[4]

(7) Succession and Public Funds and Public Property

It is generally recognised that the successor State takes over the public funds and public property, whether movable or immovable, of the predecessor State.[5] This principle of succession extends to public franchises and privileges, as well as to rights of a proprietorial or pecuniary character.

(8) Succession and Nationality

The problem here is whether and to what extent the successor State can claim as its nationals citizens of the predecessor State.[6] *Prima facie*, persons living or domiciled in the territory,

[1] See *American Journal of International Law* (1925), Vol. 19, at pp. 193 *et seq.*
[2] See *American Journal of International Law* (1926), Vol. 20, at pp. 381 *et seq.*
[3] See also *Kishangarh Electric Supply Co. Ltd.* v. *United States of Rajasthan* (1959), *American Journal of International Law* (1960), Vol. 54 at pp. 900–901.
[4] See Hyde, *op. cit.*, Vol. I, at pp. 437–40.
[5] See the *Peter Pázmány University Case* (1933), P.C.I.J., Series A/B, No. 61, at p. 237.
[6] See Weis, *Nationality and Statelessness in International Law* (1956), pp. 149–154.

subject of change, acquire the nationality of the successor. Difficulty arises in formulating rules concerning the position of citizens of the predecessor, normally living or domiciled in such territory, but outside it at the time of change.

There is no duty at international law upon the successor State to grant any right of option as to citizenship, nor, correspondingly, is there any duty upon the predecessor State to withdraw its nationality from persons normally living or domiciled in the transferred territory. Most cases, it will be found, have been regulated in detail by treaty or agreement.

(9) Succession and Customary Rights Relating to Territory

In principle, a customary right relating to territory, which has become established in favour of one State against the predecessor State, must be respected by the successor State in whom the particular territory subject to the right becomes vested. The decision of the International Court of Justice in the *Right of Passage over Indian Territory Case* (1960)[1] to the effect that Portugal was entitled to a certain right of passage over Indian territory, which had first become established by custom during British rule over India, is not a clear authority for this proposition, because the practice constituting the custom had continued as such for some time after India succeeded to Great Britain so as in effect to amount to a custom as between India and Portugal.[2]

3.—Passing of Rights and Obligations upon Internal Changes of Sovereignty

The principle which applies here is known as the principle of *continuity*, namely, that notwithstanding internal alterations in the organisation of government, or in the constitutional structure of a particular State, the State itself continues to be bound by its rights and obligations under international law, including treaty rights and obligations.[3] Hence each successive

[1] I.C.J. Reports (1960), 6.

[2] It was held that the right was subject to regulation and control by India, and that under the circumstances in question, passage might be refused.

[3] See the *Tinoco Arbitration* (1923), *United Nations Reports of International Arbitral Awards*, Vol. I, 369, at p. 377.

Government is, as a rule, liable for the acts of its predecessors.

This principle received an extended application in 1947 in the view which commanded general support that, despite the considerable alterations to its Constitution when India emerged as an independent State, it continued as an original Member of the United Nations with all former rights and obligations. That opinion prevailed in practice, the new India being automatically recognised as a Member of the United Nations.[1]

The principle of continuity is not to be applied unreasonably. Hence, if the provisions of a treaty binding upon the State are predicated, expressly or impliedly, on the assumption of a specific form of government or a specific Constitution continuing, and the latter are altered, the treaty will cease to bind the new Government. Besides, there may be such fundamental revolutionary changes with the advent of the new Government, politically, economically, or socially, that it is impossible in fact to hold the Government to certain serious or burdensome obligations.[2]

A problem of a special nature may arise in regard to a Government which usurped office by illegal or unconstitutional means, and established *de facto* control for a period during which various obligations were incurred towards other States. If such other States had notice from the displaced Government that no new treaty engagements entered into by the usurping Government would be recognised if the displaced Government re-established control, then *prima facie* such treaties would be entered into at the peril of the parties concerned, and the Government displaced could claim not to be bound thereby when it resumed office.

Another special case arises where an insurgent Government is established temporarily as the *de facto* Government in control of a portion of the territory of the whole State and is subsequently suppressed by the parent Government, as occurred

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[1] See memorandum prepared by the United Nations Secretariat in 1962 on succession of States in respect to United Nations membership; *Yearbook of the I.L.C.*, 1962, Vol. II, pp. 101–103.

[2] For discussion of the refusal of the Soviet Government to be bound by Tsarist treaties, see Taracouzio, *The Soviet Union and International Law* (1935), pp. 235–290.

in the American Civil War when the Confederate Government of the Southern States was overthrown. In such a case, the parent Government is not responsible for the debts or delinquencies of the insurgent Government[1] unless, perhaps, the debt be one incurred for the benefit of the State as a whole, and in regard to alleged delinquencies, unless the parent Government has itself broken some independent duty of international law, for example, by facilitating the commission of the delinquency.

[1] For opinion of Sir Robert Phillimore to this effect, see Smith, *Great Britain and the Law of Nations* (1932), Vol. I, at pp. 412 *et seq.*

Chapter 11

THE STATE AND THE INDIVIDUAL

1.—Nationality

Nationality is the most frequent and sometimes the only link between an individual and a State, ensuring that effect be given to that individual's rights and obligations at international law. It may be defined as the status of membership of the collectivity of individuals whose acts, decisions, and policy are vouchsafed through the legal concept of the State representing those individuals. One of the best passages descriptive of the status is that contained in the judgment of the British-Mexican Claims Commission in *Re Lynch*.[1]

> " A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality *is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community.* This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State ".

Most of the rules as to nationality are the sole concern of municipal law. It has long been conceded that it is the prerogative of each State to " determine for itself, and according to its own constitution and laws what classes of persons shall be entitled to its citizenship ".[2]

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[1] Annual Digest of Public International Law Cases, 1929–1930, p. 221, at p. 223. See also definition by the International Court of Justice in the *Nottebohm Case* (*Second Phase*), I.C.J. Reports (1955), at p. 23.

[2] Per Gray, J., in *United States* v. *Wong Kim Ark* (1898), 169 U.S. 649, at p. 668. None the less no State may arbitrarily impress its nationality on persons outside its territory, having no genuine connection with it, or on persons residing in its territory without any intention of permanently living there; see Moore, *Digest of International Law* (1906), Vol. III, pp. 302–310, and *Nottebohm Case* (*Second Phase*), *loc cit.*, below at p. 340. Nor are States under a duty to recognise a nationality acquired by fraudulent misrepresentation or non-disclosure of essential facts.

Under changes in 1948 to the legislation of each of the Member States of the British Commonwealth, the law as to British nationality was revised.[1] Each Member State has its own " citizens " (i.e., nationals), but in addition there is the status of British " subject " which denotes membership of this Commonwealth and comprises certain privileges. The terminology may, perhaps, cause confusion.

Varied indeed are the different rules on nationality found in State laws, this lack of uniformity being most manifest in the divergencies relating to original acquisition of nationality. Thus the laws of one group of States provide that a person's nationality is determined by that of his parents at birth (*jus sanguinis*), those of a second group equally by parentage (*jus sanguinis*) and by the State of the territory of birth (*jus soli*), those of a third group principally by parentage (*jus sanguinis*) and partly by the State of territory of birth (*jus soli*), and those of a fourth group principally by the State of territory of birth (*jus soli*) and partly by parentage (*jus sanguinis*).

The lack of uniformity in State nationality laws has resulted in troublesome problems of multiple nationality, statelessness, and disputed nationality of married women. An attempt to cope with such problems was made in 1930, when the Hague Codification Conference adopted a Convention on the Conflict of Nationality Laws, two ancillary Protocols on, respectively, Military Obligations and Double Nationality, and a Certain Case of Statelessness, and a Special Protocol with regard to Statelessness. More recent instruments are the Convention on the Nationality of Married Women opened for signature on February 20, 1957, and the Convention on the Reduction of Statelessness of August 30, 1961.

Nationality should be distinguished from the following:—

(*a*) Race.

(*b*) Membership or citizenship of the States or provinces of a Federation. This local citizenship falls short of the inter-

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[1] For a general treatise on the law of nationality in the Commonwealth, see Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland*, Vol. 1 (1957) and Vol. 2 (1960).

national status of nationality, although it may entitle the holder eventually to claim these fuller and wider rights.

(*c*) The right to diplomatic protection. For example, under United States law and practice many persons enjoy a right to protection without being American subjects.[1] Similarly, it has been held that French protected subjects do not necessarily become French nationals.[2]

(*d*) Rights of citizenship, which may be denied to persons who are nationals. Disabilities in citizenship, even of a serious nature, do not involve loss of nationality. This is shown by the case of *Kahane* v. *Parisi and the Austrian State*[3] where it was held that Jews in Rumania who were denied many privileges and subjected to many severe restrictions were none the less Rumanian nationals.

(*e*) The status of British "subject" under the British Nationality Act, 1948, and cognate Commonwealth legislation (see above).

International Importance of Nationality

It is always material to know of which State a particular person is a national. The reason is that nationality has various important incidents at international law:—

(i) The right to diplomatic protection abroad is an essential attribute of nationality. We have already seen that in questions of State responsibility, it is regarded as a vital right of each State that it should be entitled to protect its subjects abroad. The English common law conception of nationality coincides with this principle; as early as *Calvin's Case*,[4] it was ruled that allegiance and protection were the correlative aspects of nationality—"*Protectio trahit subjectionem et subjectio protectionem*".

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[1] See *The Costello Case*, Annual Digest of Public International Law Cases 1929–1930, at pp. 188–9.

[2] Decision of the Franco-German Mixed Arbitral Tribunal in *Djevahirdjhian* v. *Germany*, Annual Digest of Public International Law Cases, 1927–1928, pp. 310 *et seq.*

[3] Decision of the Austro-German Mixed Arbitral Tribunal, Annual Digest of Public International Law Cases, 1929–1930, pp. 213 *et seq.*

[4] (1608), 7 Co. Rep. 1a.

(ii) The State of which a particular person is a national may become responsible to another State if it has failed in its duty of preventing certain wrongful acts committed by this person or of punishing him after these wrongful acts are committed.[1]

(iii) Generally, a State does not refuse to receive back on its territory its own nationals.

(iv) Nationality imports allegiance, and one of the principal incidents of allegiance is the duty to perform military service for the State to which such allegiance is owed.

(v) A State has a general right to refuse to extradite its own nationals to another State requesting surrender.

(vi) Enemy status in time of war may be determined by the nationality of the person concerned.

(vii) States may frequently exercise criminal or other jurisdiction on the basis of nationality.[2]

Clearly difficulties may arise in many cases where the nationality of a particular individual is in doubt. The authorities have long established that the question is to be decided by the municipal law of the State whose nationality such person is alleged to possess; according to Russell, J., in *Stoeck* v. *Public Trustee*[3]:—

> " The question of what State a person belongs to must ultimately be decided by the municipal law of the State to which he claims to belong or to which it is alleged that he belongs ".

This principle is supported by Articles 1 and 2 of the Hague Convention of 1930 on the Conflict of Nationality Laws. These provisions are as follows:—

> " *Article* 1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international Conventions, international custom, and the principles of law generally recognised with regard to nationality.
>
> " *Article* 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State ".

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[1] See, however, above, p. 305.
[2] See above, pp. 274–275.
[3] [1921] 2 Ch. 67, at p. 78.

It should be added that a duly authorised passport is *prima facie* evidence of nationality.[1]

Acquisition of Nationality

The practice of States shows that nationality may be acquired in the following principal ways:—

(1) By birth either according to *jus soli*—the territory of birth—or *jus sanguinis*—the nationality of the parents at birth —or according to both.

(2) By naturalisation, either by marriage, as when a wife assumes her husband's nationality, or by legitimation, or by official grant of nationality on application to the State authorities. According to the decision of the International Court of Justice in the *Nottebohm Case* (*Second Phase*),[2] States are not under a duty to recognise a nationality acquired by a person who has no genuine link or connection with the naturalising State.

(3) The inhabitants of a subjugated or conquered or ceded territory may assume the nationality of the conquering State, or of the State to which the territory is ceded.[3]

Loss of Nationality

According to the practice of States, nationality may be lost by:—

(1) Release, or renunciation, for example, by deed signed and registered at a consulate, or by declaration of alienage upon coming of age.

(2) Deprivation, for example, under special denationalisation laws passed by the State of which the person concerned is a national.[4]

(3) Long residence abroad.

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[1] See Sandifer, *Evidence Before International Tribunals* (1939), at pp. 154–5, and cf. *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347.

[2] I.C.J. Reports (1955), 4.

[3] Other methods of acquiring nationality are by option, and entry into the public service of the State concerned.

[4] According to *R.* v. *Home Secretary, Ex parte L.*, [1945] K.B. 7, the municipal Courts of a belligerent State are not bound in time of war to give effect to the denationalisation laws of an enemy belligerent State. *Contra, United States ex rel. Schwarzkopf* v. *Uhl* (1943), 137 F. (2d) 898.

So far as both international law and municipal law are concerned, there is a presumption against the loss of one nationality that has been held for some time, and a heavy onus of proof must be discharged before the loss is recognised. For instance, by Article 7 of the Hague Convention of 1930 on the Conflict of Nationality Laws, the mere grant of an expatriation permit is not to entail the loss of nationality of the State issuing the permit. Under English law, an individual seeking to establish loss of nationality of a particular State must not merely satisfy the Court by positive evidence as to the facts of the municipal law under which he alleges such loss,[1] but must also prove that nationality has been lost for all purposes and with all its incidents, and any possibility that a right of protection or a chance of resumption of nationality still exists will prevent the onus being discharged.[2]

Double Nationality, Statelessness, and Nationality of Married Women

Owing to the conflict of nationality laws and their lack of uniformity, it often arises that certain individuals possess double nationality.[3] A frequent instance is the case of a woman who, marrying somebody not of her own nationality, may retain her nationality according to the law of the State of which she is a national and acquire the nationality of her husband according to the law of the State of which her husband is a national. Double nationality may also result from birth in the territory of a State, not the State of which the parents are nationals, although usually a minor is given a chance to opt for one or the other nationality on the attainment of his majority. A right of option, otherwise, may be conferred by treaty.

Articles 3 to 6 of the Hague Convention of 1930 on the Conflict of Nationality Laws deal with some difficulties arising out of double nationality. Of particular importance is Article 5,

[1] *Hahn* v. *Public Trustee*, [1925] Ch. 715.
[2] *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67; *Ex parte Weber*, [1916] 1 A.C. 421, at p. 425.
[3] For general treatise on this subject, see Bar-Yaacov, *Dual Nationality* (1961).

which provides that within a third State a person of more than one nationality shall be treated as if he only had one nationality, and such third State shall recognise exclusively either:—(*a*) the nationality of the country in which he is habitually and principally resident, or (*b*) the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Articles 8–11 of the Convention deal with the nationality of married women, containing provisions mitigating the artificial and technical principle that their nationality follows that of their husbands, and enabling them under certain conditions to retain premarital nationality. An advance on these provisions was made in the Convention on the Nationality of Married Women opened for signature on February 20, 1957, under which each Contracting State agrees that neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor a change of nationality by the husband during marriage, shall have any automatic effect on the wife's nationality, and provision is made for facilitating, through naturalisation, the voluntary acquisition by an alien wife of her husband's nationality.

Statelessness is a condition recognised both by municipal law[1] and by international law. It has indeed become in recent years a major problem of international law, the very urgency and acuteness of which prompted the insertion of Article 15 in the Universal Declaration of Human Rights of December, 1948, that " everyone has the right to a nationality ", and that " no one shall be arbitrarily deprived of his nationality ". Statelessness may arise through conflicts of municipal nationality laws, through changes of sovereignty over territory, and through denationalisation by the State of nationality.[2] It is a condition which not only means great hardship and lack of security for individuals; but involves the existence of a serious gap in the application of international law.[3]

[1] See *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67.

[2] See " A Study of Statelessness " (United Nations Department of Social Affairs, 1949).

[3] See *Report* of the International Law Commission on the work of its Fifth session (1953), at p. 22.

Remedial action for the condition lies in:—(*a*) Imposing duties upon States to regard a certain nationality as acquired, or not to regard a certain nationality as lost, or to grant a nationality upon special grounds or subject to special conditions. Limited progress in this field was achieved by certain treaty provisions adopted in 1930 at the Hague Codification Conference,[1] and recently by the Convention on the Reduction of Statelessness, adopted at New York on August 30, 1961.[2] (*b*) Obliging States to refrain from denationalisation measures unless there be just cause. (*c*) The conferment by liberal-minded States of their nationality upon stateless persons. Many States have begrudged this solution. (*d*) Relief from the disadvantages of this unprotected status through international Conventions allowing the use of identity or travel documents, and privileges of admission by foreign States with rights of residence, of practising an occupation, etc. In this regard, the Convention on the Status of Refugees signed at Geneva on July 25, 1951,[3] and the Convention relating to the Status of Stateless Persons signed at New York on September 28, 1954, conferred important benefits on stateless persons.

The subject of statelessness, and of remedial action in regard to it, was under study for some time by the International Law Commission, and by the General Assembly of the United Nations.

Nationality of Corporations and Unincorporated Associations

The nationality of corporations and unincorporated associations is entirely a modern conception, and becomes relevant when it is necessary to determine the nationality of such corporations or associations for the purpose of applying the

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[1] See Articles 13 and 15 of the Convention on the Conflict of Nationality Laws, the Protocol on a Certain Case of Statelessness, and the Special Protocol with regard to Statelessness.

[2] This convention contains, *inter alia*, provisions enabling persons who would otherwise be stateless to acquire the nationality of the country of birth, or of one of the parents at the date of birth, and also provides that a loss of nationality, which would otherwise take place under certain circumstances, is to be conditional upon the acquisition of another nationality.

[3] Note also the Protocol of January 31, 1967, in extension of this Convention

" nationality of claims " principle[1] in a case before an international tribunal, or for giving effect to a treaty applying to " nationals " of a State.

There is no unanimity of opinion regarding the tests to be applied for ascertaining the nationality of these bodies. *Prima facie*, the nationality of a corporation or limited company is that of the State of incorporation. This test is also adopted by some treaties. The national status of the individual corporators or shareholders is not generally a material consideration in this connection.[2] *Prima facie*, also, the nationality of an unincorporated association is that of the State in which the association has been constituted, or of the State in which the governing body of the association is normally located for administrative purposes.

2.—Rights and Duties of States with regard to Aliens

Admission of Aliens

Four principal opinions have been held regarding the admission of aliens into countries not of their nationality:—

(*a*) A State is under a duty to admit all aliens.

(*b*) A State is under a duty to admit all aliens, subject to the qualification that it is entitled to exclude certain classes, for example drug addicts, persons with diseases, and other undesirables.

(*c*) A State is bound to admit aliens but may impose conditions with regard to their admission.

(*d*) A State is fully entitled to exclude all aliens at will.

So far as State practice is concerned, it may be said that the first view has never been accepted as a general rule of international law.

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[1] See pp. 312–317, *ante*.

[2] As to the question of the legal capacity of the national State of the shareholders to espouse a claim by them for injury done to the company itself, see *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, p. 3, discussed pp. 314–315, *ante*.

Most States claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of sovereign government. The Courts of Great Britain and the United States have laid it down that the right to exclude aliens at will is an incident of territorial sovereignty. In Great Britain, this right was unhesitatingly declared in the leading case of *Musgrove* v. *Chun Teeong Toy*.[1] Similarly, in the United States this view has been stated by the Supreme Court in the two leading cases of *Nishimura Ekiu* v. *U.S.*[2] and *Fong Yue Ting* v. *U.S.*,[3] in equally unqualified terms.

The absence of any duty at international law to admit aliens is supported by an examination of State immigration laws, showing that scarcely any States freely admit aliens. If further evidence be necessary, it is supplied by the several agreements and Conventions concluded since 1920, providing for the admission of refugees, of which an important example is the Geneva Convention on the Status of Refugees of July 25, 1951.

While theoretically almost all States claim the right to exclude aliens, in practice they do not exercise this right to its fullest extent.[4] As a general rule, conditions are imposed on admission, or only certain classes, for example, tourists, students, are freely admitted. Moreover, there is one practical limitation on the full exercise of the right which every State must carefully take into account, namely, that the entire prohibition of the citizens of one particular State would diplomatically be regarded as an affront or as an unfriendly act towards that State.

Most frequently the case of reciprocal admission or exclusion of aliens by different States is dealt with by bilateral treaties of commerce and navigation, or of establishment.[5] Usually States do not press their rights under such treaties because to do so might restrict their own freedom of action.

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[1] [1891] A.C. 272. [2] (1892), 142 U.S. 651. [3] (1893), 149 U.S. 698.

[4] Certain States, e.g., Great Britain and the Netherlands, indeed insist on a right to grant territorial asylum to refugees from countries where they are subject to persecution on political, racial, or religious grounds.

[5] The Treaty of Rome of March 25, 1957, establishing the European Economic Community (Common Market) provides for the free movement of nationals of the States parties in the area of the Community.

Legal Position of Aliens when Admitted

An alien entering the territory of a State becomes subject to its laws in the same way exactly as citizens of that State. Most States, however, place aliens under some kind of disability or some measure of restrictions of varying severity. Frequently they are denied voting rights or the right to practise certain professions or the power of holding real estate.

In 1924, the Economic Committee of the League of Nations classified the treatment of aliens abroad under the following headings:—

(*a*) Fiscal treatment, for example, in respect of taxation.

(*b*) Rights as to the exercise of professions, industries, or occupations.

(*c*) Treatment in such matters as residence, the holding of property, and civil privileges and immunities.

(*d*) Conditions of admission and immigration.

As to (*a*), unless possessing diplomatic immunity, resident aliens are not exempt from ordinary civil taxes or customs dues. Leading English and American decisions have also affirmed the right of all States at international law to tax property physically within their jurisdiction belonging to non-resident aliens.[1]

As to (*c*), aliens are exempt from any compulsory obligation to serve in the armed forces of the country in which they reside, unless the State to which they belong consents to waive this exemption.[2] This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion.[3] During the Second World War most belligerent States compelled resident aliens to perform some

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[1] *Winans* v. *A.G.*, [1910] A.C. 27; *Burnet* v. *Brooks* (1933), 288 U.S. 378.

[2] In the U.S., aliens can be called up for service, but have the right to opt out, in which event: (*a*) if they subsequently leave the U.S., they cannot return; and (*b*) if they stay, they will not be granted U.S. citizenship. In 1966, the Australian Government purported to make alien migrants subject to compulsory service, formal protests being received from the U.S.S.R., Italy, Spain, and other countries.

[3] See judgment of Latham, C.J., in decision of Australian High Court, *Polites* v. *The Commonwealth* (1945), 70 C.L.R. 60, at pp. 70–71.

kind of service connected with the war effort, even to the extent of making voluntary service in the armed forces an alternative to the performance of compulsory civilian duties. In certain instances, this was sanctioned by agreement or treaty between the States concerned.

As noted above in Chapter 9 on State Responsibility, an alien carries with him a right of protection by his national State, although the latter is not duty bound to exercise that right. Grossly unfair discrimination or outright arbitrary confiscation of the alien's property would, for example, be legitimate ground for intervention by that State. An alien's *vested rights* in his country of residence are also entitled to protection. But as the decision of the Permanent Court of International Justice in the *Oscar Chinn Case*[1] shows, protection of vested rights does not mean that the State of residence is duty bound to abstain from providing advantages for local enterprises, which may cause loss to an alien in his business. A number of States, including the Afro-Asian group, hold that the national standard of treatment should apply, inasmuch as an alien entering impliedly submits to that standard, otherwise he could elect not to enter.

A resident alien owes temporary allegiance or obedience to his State of residence, sufficient at any rate to support a charge of treason.[2]

Expulsion and Reconduction[3] of Aliens

States are generally recognised as possessing the power to expel, deport, and reconduct aliens. Like the power to refuse admission, this is regarded as an incident of a State's territorial sovereignty. Not even a State's own citizens are immune from this power, as witness the denationalisation and expulsion by certain States in recent times of their own nationals.

The *power* to expel and the *manner* of expulsion are, however, two distinct matters. Expulsion (or reconduction) must be

[1] Pub. P.C.I.J. (1934), Series A/B, No. 63. For certain prohibitions against discrimination in regard to resident refugee aliens, see Articles 3, 4, 14 and 16 of the Geneva Convention on the Status of Refugees, of July 25, 1951.

[2] *De Jager* v. *A.-G. of Natal*, [1907] A.C. 326.

[3] As distinct from expulsion, reconduction amounts to a police measure whereby the alien is returned to the frontier under escort.

effected in a reasonable manner and without unnecessary injury to the alien affected. Detention prior to expulsion should be avoided, unless the alien concerned refuses to leave the State or is likely to evade the authorities. Also an alien should not be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality, or political views.[1] Nor should he be exposed to unnecessary indignity.

International law does not prohibit the expulsion *en masse* of aliens, although this is resorted to usually by way of reprisals only. It may, however, be treated as an unfriendly act.

3.—Extradition, Rendition and Asylum

The liberty of a State to accord asylum to a person overlaps to a certain extent with its liberty to refuse extradition or rendition of him at the request of some other State, an overlapping best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule extraditable. Asylum stops, as it were, where extradition or rendition begins, and this interdependence[2] makes it convenient to consider the two subjects together.

Extradition

The term " extradition " denotes the process whereby under treaty or upon a basis of reciprocity one State surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Normally, the alleged offence has been committed within the territory or aboard a ship[3] flying the flag of the

[1] See Article 33 of the Geneva Convention on the Status of Refugees, of July 25, 1951, and cf. *United States ex rel. Weinberg* v. *Schlotfeldt* (1938), 26 F. Supp. 283.

[2] No question of asylum, and therefore of interdependence between it and extradition, arises however where a State is requested to extradite its own resident nationals. Article 1 of the Declaration on Territorial Asylum adopted by the United Nations General Assembly on December 14, 1967, recommends that all States should " respect " (this would include refraining from an application for extradition) asylum granted to persons who have sought refuge from persecution, including persons struggling against colonialism.

[3] *R.* v. *Governor of Brixton Prison, Ex parte Minervini*, [1959] 1 Q.B. 155; [1958] 3 All E. R. 318.

requesting State, and normally it is within the territory of the surrendering State that the alleged offender has taken refuge. Requests for extradition are usually made and answered through the diplomatic channel.

The following rational considerations have conditioned the law and practice as to extradition:—

(*a*) The general desire of all States to ensure that serious crimes do not go unpunished. Frequently a State in whose territory a criminal has taken refuge cannot prosecute or punish him purely because of some technical rule of criminal law or for lack of jurisdiction. Therefore to close the net round such fugitive offenders, international law applies the maxim, "*aut punire aut dedere*", i.e., the offender must be punished by the State of refuge or surrendered to the State which can and will punish him.

(*b*) The State on whose territory[1] the crime has been committed is best able to try the offender because the evidence is more freely available there, and that State has the greatest interest in the punishment of the offender, and the greatest facilities for ascertaining the truth. It follows that it is only right and proper that to the territorial State should be surrendered such criminals as have taken refuge abroad.

With the increasing rapidity and facility of international transport and communications, extradition began to assume prominence in the nineteenth century, although actually extradition arrangements date from the eighteenth century. Because of the negative attitude[2] of customary international law on the subject, extradition was at first dealt with by bilateral treaties. These treaties, inasmuch as they affected the rights of private citizens, required in their turn alterations to the laws and

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[1] "Territory" can cover, for this purpose, also ships and aircraft registered with the requesting State; see Article 16 of the Tokyo Convention of September 14, 1963 on Offences and Certain Other Acts Committed on Board Aircraft (offences committed on board aircraft in flight to be treated for purposes of extradition as if committed also in country of registration).

[2] On the one hand, customary international law imposed no duty upon States to surrender alleged or convicted offenders to another State, while on the other hand, it did not forbid the State of refuge to deliver over the alleged delinquent to the State requesting his surrender.

statutes of the States which had concluded them. Hence the general principle became established that without some formal authority either by treaty or by statute, fugitive criminals would not be surrendered nor would their surrender be requested. There was at international law neither a duty to surrender, nor a duty not to surrender. For this reason, extradition was called by some writers a matter " of imperfect obligation ". In the absence of treaty or statute, the grant of extradition depended purely on reciprocity or courtesy.[1]

As regards English municipal law, the special traditions of the common law conditioned the necessity for treaty and statute. At common law the Crown had no power to arrest a fugitive criminal and to surrender him to another State; furthermore, treaties as to extradition were deemed to derogate from the private law rights of English citizens, and required legislation before they could come into force in England.[2] Thus from both points of view legislation was essential, and the solution adopted was to pass a general extradition statute —the Extradition Act, 1870—which applies only in respect of countries with which an arrangement for the surrender of fugitive offenders has been concluded, and to which the Act itself has been applied by Order-in-Council.

International law concedes that the grant of and procedure as to extradition are most properly left to municipal law. There are some divergences on the subject of extradition between the different State laws, particularly as to the following matters:—extraditability of nationals of the State of asylum; evidence of guilt required by the State of asylum; and the relative powers of the executive and judicial organs in the procedure of surrendering the fugitive criminal.

Before an application for extradition is made through the diplomatic channel, two conditions are as a rule required to be satisfied:—

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[1] Reference should be made to the European Convention on Extradition, December 13, 1957 (Council of Europe) as an illustration of a multilateral extradition treaty.

[2] See above, pp. 20-21.

(*a*) There must be an extraditable person.
(*b*) There must be an extradition crime.

We shall discuss each of these conditions.

(a) Extraditable Persons

There is uniformity of State practice to the effect that the requesting State may obtain the surrender of its own nationals or nationals of a third State. But most States usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between States who observe absolute reciprocity of treatment in this regard, requests for surrender are sometimes acceded to.

(b) Extradition Crimes

The ordinary practice as to extradition crimes is to list these in each bilateral extradition treaty.

Generally, States extradite only for serious crimes,[1] and there is an obvious advantage in thus limiting the list of extradition crimes since the procedure is so cumbrous and expensive. Certain States, for example, France, extradite only for offences which are subject to a definite *minimum* penalty, both in the State requesting and in the State requested to grant extradition. In the case of Great Britain, extradition crimes are scheduled to the Extradition Act, 1870.

As a general rule, the following offences are not subject to extradition proceedings:—(i) political crimes; (ii) military offences, for example, desertion; (iii) religious offences. The principle of non-extradition of political offenders crystallised in the nineteenth century, a period of internal convulsions, when tolerant, liberal States such as Holland, Switzerland, and Great Britain, insisted on their right to shelter political refugees. At the same time, it is not easy to define a " political crime ". Different criteria have been adopted:—(*a*) the motive of the

[1] Recent practice shows a general disposition of States to treat alleged " war crimes " as extradition crimes. However, there are a number of decisions of municipal Courts treating war crimes as political offences for the purpose of extradition (cf. *Karadzole* v. *Artukovic* (1957), 247 F. (2d) 198), so that extradition is refused.

crime; (*b*) the circumstances of its commission; (*c*) that it embraces specific offences only, e.g. treason or attempted treason[1]; (*d*) that the act is directed against the political organisation, as such, of the requesting State; (*e*) the test followed in the English cases, *Re Meunier*,[2] and *Re Castioni*,[3] that there must be two parties striving for political control in the State where the offence is committed, the offence being committed in pursuance of that goal, thereby excluding anarchist and terrorist acts from the category of " political crimes ". More recently, in *R.* v. *Governor of Brixton Prison, Ex parte Kolczynski*,[4] the Court favoured an even more extended meaning, holding in effect that offences committed in association with a political object (e.g. anti-Communism), or with a view to avoiding political persecution or prosecution for political defaults, are " political crimes ", notwithstanding the absence of any intention to overthrow an established Government.

A number of decisions by municipal Courts show that extradition will not be denied for actual offences, including crimes of violence, having no direct and close relation to political aims, although committed in the course of political controversy, or by persons politically opposed to the requesting Government.[5] In this connection, the question of war crimes gives rise to difficulties; to some extent the issues involved are matters of degree, insofar as a war crime may or may not transcend its political implications.

International law leaves to the State of asylum the sovereign right of deciding, according to its municipal law and practice, the question whether or not the offence which is the subject of a request for extradition is a political crime.[6]

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[1] A number of bilateral and other treaties after the Second World War, including the Paris Peace Treaties of 1947 with Italy, Rumania, Bulgaria, Hungary, and Finland, provided for the surrender of " quislings ", persons guilty of treason, and so-called " collaborationists " with the enemy occupying authorities.

[2] [1894] 2 Q.B. 415. [3] [1891] 1 Q.B. 149. [4] [1955] 1 Q.B. 540.

[5] Cf. *R.* v. *Governor of Brixton Prison, Ex parte Schtraks*, [1963] 1 Q.B. 55.

[6] *Quaere*, whether an English Court should accept an unconditional undertaking by the requesting State not to apply a particular law to the extraditee; see *Armah* v. *Government of Ghana*, [1966] 3 All E.R. 177.

As regards the character of the crime, most States follow the rule of *double criminality*, i.e., that it is a condition of extradition that the crime is punishable according to the law both of the State of asylum and of the requesting State. The application of the rule to peculiar circumstances came before the United States Supreme Court in 1933 in the case of *Factor* v. *Laubenheimer*.[1] There, proceedings were taken by the British authorities for the extradition of Jacob Factor on a charge of receiving in London money which he knew to have been fraudulently obtained. At the time extradition was applied for, Factor was residing in the State of Illinois, by the laws of which the offence charged was not an offence in Illinois. It was held by the Supreme Court that this did not prevent extradition if, according to the criminal law generally of the United States, the offence was punishable; otherwise extradition might fail merely because the fugitive offender would succeed in finding in the country of refuge some province in which the offence charged was not punishable.

A further principle sometimes applied is known as the *principle of speciality*, i.e., the requesting State is under a duty not to try or punish the offender for any other offence than that for which he was extradited. This principle is frequently embodied in treaties of extradition and is approved by the Supreme Court of the United States. In Great Britain its application is a little uncertain; in *R.* v. *Corrigan*[2] the Extradition Act was held to prevail over a Treaty of Extradition with France embodying the speciality principle, and it was ruled that the accused there could be tried for an offence for which he was not extradited.

Rendition

This more generic term " rendition " covers instances where an offender may be returned to a State to be tried there, under *ad hoc* special arrangement, in the absence of an extradition treaty, or even if there be such a treaty between the States

[1] 290 U.S. 276.
[2] [1931] 1 K.B. 527.

concerned, and irrespective of whether or not the alleged offence is an extraditable crime.

A deportation or refusal of asylum may have the *effect* of a rendition, although from the point of view of the deporting State or State of purported entry, it is not of this nature *stricto sensu*.[1]

Asylum

The conception of asylum[2] in international law involves two elements:—(*a*) shelter, which is more than merely temporary refuge; and (*b*) a degree of active protection on the part of the authorities in control of the territory of asylum.

Asylum may be *territorial* (or internal), i.e., granted by a State on its territory; or it may be *extra-territorial*, i.e., granted for and in respect of legations, consular premises, international headquarters, warships, and merchant vessels to refugees from the authorities of the territorial State. The differences between the principles applying to the two kinds of asylum flow from the fact that the power to grant *territorial* asylum is an incident of territorial sovereignty itself, whereas the granting of *extra-territorial* asylum is rather a derogation from the sovereignty of the territorial State insofar as that State is required to acquiesce in fugitives from its authorities enjoying protection from apprehension.[3]

Consistently with this distinction, the general principle is that every State has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard, while the right to grant extra-territorial asylum is exceptional and must be established in each case.

Both types of asylum have this in common, that they involve an adjustment between the legal claims of State sovereignty, and the demands of humanity.

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[1] Cf. *R.* v. *Governor of Brixton Prison, Ex parte Soblen*, [1963] 2 Q.B. 243 (deportation allowable under aliens legislation, even though alleged offence is non-extraditable, and even if there be a request for rendition).

[2] See for treatment of various aspects of asylum Report of the 51st Conference of the International Law Association, Tokyo (1964), pp. 215–293.

[3] See *Asylum Case*, I.C.J. Reports (1950), at 274–275.

1. Territorial Asylum

A State's liberty to grant asylum in its territory is of ancient origins, and extends not only to political, social, or religious refugees, but to all persons from abroad, including criminal offenders; it is merely one aspect of a State's general power of admission or exclusion from its territory. Normally, however, persons not being nationals of the territorial State, and who are held in custody on foreign vessels within that State's waters, will not be granted asylum. It is a matter of controversy whether a State may grant asylum to prisoners of war detained by it, but unwilling to be repatriated.[1]

It is sometimes said that the fugitive has a " right of asylum ".[2] This is inaccurate, as fugitives have no enforceable right in international law to enjoy asylum. The only *international* legal right involved is that of the State of refuge itself to grant asylum. Municipal legal systems (see, for example, the Constitutions of France and Italy) do indeed sometimes provide for a right of asylum to individuals fleeing from persecution, and an example of a modern international instrument (not being a binding Convention) providing for an individual right of asylum from persecution is the Universal Declaration of Human Rights, 1948 (see Article 14). But, so far, no such individual right is guaranteed by international law, although a Declaration on Territorial Asylum adopted by the United Nations General Assembly on December 14, 1967, recommends that, in their practices, States should follow a number of standards and *desiderata,* among which are the following:—(*a*) A person seeking asylum from persecution (see Article 14, *ante*, of the Universal Declaration of Human Rights) should not be subject to rejection at the frontier, or if he has already entered the territory in which he seeks asylum, to expulsion or compulsory return. If there are overriding reasons of national security, or if it be necessary to safeguard the population, as in the case of

[1] See also below, pp. 521–522.

[2] It has been claimed that there is such an individual right of asylum because the fugitive is not usually surrendered, in the absence of an extradition treaty, and because if his offence is political, he is not generally subject to extradition, but the flaw in this proposition is that it takes account only of persons to whom asylum has been granted, not of those to whom asylum has been refused.

a mass influx, asylum may be refused, but the State concerned should consider granting the person seeking refuge an opportunity, by way of provisional asylum or otherwise, of going to another State (Article 3). (*b*) Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations should consider, " in a spirit of international solidarity ", appropriate measures to lighten the burden on that State (Article 2). (*c*) Asylum granted to persons seeking refuge from persecution should be respected by all other States (Article 1).

The liberty of States to grant asylum may, of course, be cut down by treaties of the States concerned of which, as we have seen, extradition treaties are the commonest illustration. In principle, asylum ought not to be granted to any person, with respect to whom there are well-founded reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity (see Article 1 paragraph 2 of the Declaration on Territorial Asylum, referred to, *ante*).

2. Extra-territorial Asylum

(*a*) *Asylum in Legations.*—Modern international law recognises no general right of a head of mission to grant asylum in the premises of the legation.[1] Such grant seems rather prohibited by international law where its effect would be to exempt the fugitive from the regular application of laws and administration of justice by the territorial State. The lack of any such general right of diplomatic asylum was affirmed by the International Court of Justice in the *Asylum Case*,[2] which dealt with the application of alleged regional Latin-American rules of international law concerning such asylum.

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[1] See Satow, *Guide to Diplomatic Practice* (1957) (edited Bland), at p. 219. It is significant that the Vienna Convention on Diplomatic Relations of April 18, 1961, provides for no such right.

[2] See I.C.J. Reports (1950), pp. 266 *et seq.* In the *Haya de la Torre Case* (1951), I.C.J. Reports, pp. 71 *et seq.*, arising out of the same facts, the Court held that where asylum in legation premises has been granted without justification, the head of the mission concerned is not obliged to deliver the fugitive to the local authorities, in the absence of a treaty binding him to do so.

Exceptionally, asylum may be granted in legation premises:—(*a*) As a temporary measure, to individuals physically in danger from mob disorder or mob rule, or where the fugitive is in peril because of extreme political corruption in the local State, the justification being presumably that by the grant of asylum, an urgent threat is temporarily tided over. (*b*) Where there is a binding local custom, long recognised, that such diplomatic asylum is permissible. (*c*) Under a special treaty (usually allowing such right in respect of political offenders only) between the territorial State and the State which is represented by the legation concerned.

(*b*) *Asylum in Consulates or Consular Premises.*—Similar principles, subject to the same exceptions, apply as in the case of legation premises.

(*c*) *Asylum in the Premises of International Institutions.*—The Headquarters Agreements of the United Nations and of the specialised agencies reveal no general right of international institutions to grant asylum or even refuge in their premises to offenders as against the territorial State, and *semble* not even a right of protection on humanitarian grounds. It is difficult to conceive, however, that a right to grant temporary refuge in an extreme case of danger from mob rule would not be asserted and conceded.

(*d*) *Asylum in Warships.*—This has been discussed in a previous Chapter.[1]

(*e*) *Asylum in Merchant Vessels.*—Merchant vessels are not exempt from the local jurisdiction, and therefore cannot grant asylum to local offenders.

4.—Human Rights and Fundamental Freedoms[2]

At the date of writing, the formulation of binding general rules of international law for the protection of human rights

[1] See above, p. 266.

[2] See on the whole subject, John Carey, *U.N. Protection of Civil and Political Rights* (1970); P. N. Drost, *Human Rights as Legal Rights* (1965); and Nagendra Singh, *Human Rights and International Co-operation* (1969). For general bibliography, see Rhyne, *International Law* (1971), p. 391 n. 1, and p. 395 n. 3.

and fundamental freedoms by adequate machinery for their enforcement remains more a promise than an achievement. It is true that in Europe there have been established an international administrative body and an international Court for the purpose of protecting human rights, namely the European Commission of Human Rights and the European Court of Human Rights, but these two organs operate under jurisdictional and procedural restrictions, and in respect to that limited number of States only which have accepted their competence. There are also a large number of international Conventions, mentioned below, including the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights both adopted December 16, 1966. Apart therefrom, however, there has been little concrete progress in the direction of establishing effective machinery to protect individual rights beyond the point of proclaiming conceptions, attempting definitions, making programmatic statements or declarations, establishing organs with limited powers of promotion, investigation, or recommendation,[1] and encouraging the mass communication of the aims and ideals to be realised. A number of human rights and fundamental freedoms are not the subject of protection by any binding general international Convention or Conventions.

The following are the principal instruments in which attempts have been made to enunciate or guarantee human rights standards:—

(1) The United Nations Charter[2] and the Constitutions of the specialised agencies. These neither impose binding obligations on Member States to observe human rights, nor concretely define such rights. Pledges are expressed in the most general language, and the powers of the United Nations and

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[1] E.g., the Human Rights Commission, a Functional Commission of the United Nations Economic and Social Council, and its Sub-Commission. Another example is the Inter-American Commission on Human Rights established in August, 1959, by the Organisation of American States (OAS).

[2] See as to the effect of these provisions in United States municipal law, note, above, p. 92, n. 1.

its organs laid down in terms only of recommendation, promotion, and encouragement.

(2) The Paris Peace Treaties of 1947 with Italy, Rumania, Bulgaria, Hungary, and Finland. These contained general pledges only to respect human rights, unsupported by any Court or machinery to enforce them. They proved of little value in 1948–1950 when the matter of alleged breaches of human rights by Rumania, Bulgaria, and Hungary was raised in the United Nations General Assembly.[1]

(3) The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December, 1948. This Declaration represented the first of three stages of a programme designed to achieve an International Bill of Rights, based upon universally binding obligations of States, and reinforced by effective curial and administrative machinery. Chronologically, the three stages were to be:—1. A Declaration defining the various human rights which ought to be respected. 2. A series of binding covenants on the part of States to respect such rights as defined. 3. Measures and machinery for implementation.

Consequently, the Declaration could not and did not purport to be more than a manifesto, a statement of ideals, a " path-finding " instrument. To that extent, it has achieved as much as could be expected. Its most important contribution lies in the pioneering formulation of the principal human rights and fundamental freedoms that ought to be recognised. To reproach the Declaration for the absence of provision of enforcement machinery or for the fact that it is not a binding legal instrument, is to misconstrue its original limited purpose —to provide a generally acceptable catalogue of man's inalienable rights.

(4) The European Convention for the Protection of Human Rights and Fundamental Freedoms signed by the Member

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[1] As to which see Renouf, " Human Rights in the Soviet Balkans ", *World Affairs* (1950), pp. 168–80; and Advisory Opinion of the International Court of Justice on the *Interpretation of the Peace Treaties*, I.C.J. Reports (1950), 65, 221.

States of the Council of Europe at Rome, November 4, 1950.[1] Sponsored by the Council of Europe, this important regional Charter of human rights went beyond the Universal Declaration of Human Rights in:—(*a*) imposing binding commitments to provide effective domestic remedies in regard to a number of the rights specified in the Universal Declaration; (*b*) the close and elaborate definition of such rights as it embraced, and of the exceptions and restrictions to each of such rights; (*c*) the establishment of a European Commission of Human Rights to investigate and report on violations of human rights at the instance of States parties, or—if the State against which complaint is laid, has so accepted—upon the petition of any person, non-governmental organisation, or group of individuals within that State's jurisdiction. The Commission became competent to receive applications of the latter type in July, 1955, after (as required by the Convention) six States had accepted the right of individual recourse; the number of accepting States has since increased. The Convention also provided for a European Court of Human Rights with compulsory jurisdiction, to come into being upon at least eight States accepting such jurisdiction.[2] This was achieved in September, 1958, and the Court was set up in January, 1959; it delivered its first judgment on November 14, 1960, in the *Lawless Case*. On December 21, 1965, the British Government accepted the relevant optional provisions, so recognising the right of recourse to the Commission, and the jurisdiction of the Court.

Although the Commission has been very active and has dealt with hundreds of applications, the great majority of these have been declared inadmissible under the Convention because of failure to exhaust local remedies, lapse of a period of 6 months or more after final decision by a domestic Court

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[1] The Convention has since been amended by a number of Protocols, adding to the list of rights protected by the Convention, enabling the European Court of Human Rights to give advisory opinions on the interpretation of the Convention, and for improving the internal procedure of the European Commission of Human Rights.

[2] An abortive move was made in 1946–1947 at the Paris Peace Conference to create a European Court of Human Rights.

(Article 26), activities of applicants aimed at the destruction of the rights and freedoms guaranteed by the Convention (Article 17),[1] and other grounds, such as the anonymity of the applicant. If the application is admissible, the Commission's primary action, if it has been unable to dispose of the matter by conciliation, is to transmit its report on the question of a breach of a right under the Convention to the Committee of Ministers of the Council of Europe, which may decide on the measures[2] to be taken if there has been a breach, unless the matter is referred to the Court within a period of 3 months. As to the Court, only the States accepting its jurisdiction and the Commission, and not individuals, have the right to bring a a case before it. The technicalities and limitations which surround the exercise of jurisdiction by the Court in a matter referred to it by the Commission are well illustrated in its two rulings in the *Lawless Case* (p. 360),[3] one dealing with questions of procedure concerning *inter alia* the complainant's right to receive a copy of the Commission's report, the other with the merits of the application, that is to say the allegation of breach of human rights.[4] Yet the influence of the Court is not to be

[1] In 1957, the Commission held that, for this reason, the German Communist Party was not entitled to make an application against the German Federal Republic complaining of a violation of the right to freedom of association, in that an order for its dissolution had been made in 1956 by the Federal Constitutional Court. On the other hand, in the *Lawless Case* in 1961, the Court held that even if the applicant were a member of the Irish Republican Army and this organisation were engaged in such destructive activities as mentioned, this did not absolve the respondent State, Ireland, from observing those provisions of the Convention conferring freedom from arbitrary arrest and from detention without trial.

[2] These measures may include requiring action to correct the breach; if satisfactory action has not been taken in the prescribed period, the Committee of Ministers is to decide what effect should be given to its decision.

[3] Considerations of space preclude discussion of this case. See *American Journal of International Law* (1962), pp. 187–210 for the Court's ruling on the merits.

[4] On the questions of procedure, the Court ruled that the complainant was entitled to receive a copy of the report, but not to publish it, and that the complainant's point of view could be put before the Court, not directly by himself, but through delegates of the Commission, or in the Commission's report, or in his evidence, if called as a witness. On the merits, the Court held that the complainant's arrest and detention without trial were justified by a public emergency threatening the life of the respondent country, Ireland, within the meaning of Article 15 of the Convention, and that this emergency had been duly notified under this Article to the Secretary-General of the Council of Europe.

minimised; both directly and indirectly, it has led to changes in legislation,[1] and this has occurred, in particular, where it was sought to avoid an anticipated adverse decision. In other cases which have come before it, raising questions as to the scope and effect of rights in the Convention and Supplementary Protocol of 1952, the Court has given important rulings, to which due respect will be paid by the domestic courts of States parties.[2]

(5) The Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights adopted by the United Nations General Assembly on December 16, 1966 and opened for signature on December 19, 1966. These two Covenants have represented an attempt to complete the second stage, referred to above, of binding covenants to observe human rights. A single Covenant was first contemplated, but the United Nations General Assembly reversed its directive to the Human Rights Commission, requesting it to prepare two separate covenants dealing respectively with economic, social, and cultural rights, and with civil and political rights. These instruments were the subject of continuous consideration and revision by the General Assembly.

Although the two Covenants recognise different sets of rights, they contain some common provisions, for instance as to the recognition of the right of self-determination, and as to the prohibition of discrimination. On the other hand, they differ in respect to the machinery set up under each. The Covenant on Civil and Political Rights provides for a Committee with the responsibility of considering reports from States parties, and of addressing comments, if necessary, to these States and to the Economic and Social Council of the United Nations. Inasmuch as it was felt that economic, social and cultural rights could be achieved less quickly than civil and political rights, because the latter could be safeguarded by

[1] The *De Becker Case*, as to which see *Yearbook of European Convention on Human Rights*, 1962 (1963), pp. 320–337, resulted in a change of legislation.

[2] As, e.g., in 1968 in the *Wemhoff* and *Neumeister Cases* (right to trial within a reasonable time, and questions of length of detention pending trial), and in the *Belgian "Linguistic" Case* (the right to education does not oblige Governments to educate in a particular language, and what constitutes discriminatory treatment). Cf. the later *Stögmüller* and *Matznetter Cases* (whether the preventive detention of the complainants extended beyond a reasonable time).

immediate legislation, whereas the former depended upon resources becoming progressively available to each State, the Covenant on Economic, Social, and Cultural Rights provides merely for the submission of periodical reports to the Economic and Social Council upon the progress made and measures taken to advance the rights concerned.

(6) Obligations to respect certain human rights are contained in the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others opened for signature on March 31, 1950, the Convention on the Status of Refugees of July 25, 1951, and the Supplementary Geneva Convention of September 7, 1956, for Abolishing Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (e.g. serfdom, debt bondage), in five Conventions adopted by Conferences of the International Labour Organisation, namely, the Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organise and Collective Bargaining Convention, 1949, the Equal Remuneration Convention, 1951, the Abolition of Forced Labour Convention, 1957, and the Discrimination (Employment and Occupation) Convention, 1958 and in the important International Convention on the Elimination of All Forms of Racial Discrimination, of December 21, 1965. Under the last-mentioned Convention, provision was made for the establishment of a Committee on the Elimination of Racial Discrimination, to deal with allegations of violations of human rights, and to consider reports from States parties on measures adopted to give effect to the Convention. The Committee commenced work in 1970, after the entry into force of the Convention in 1969.

Reference should also be made to:—

(*a*) The influence upon municipal law of these Charters and instruments relating to human rights; for example, as revealed in the decisions of certain municipal Courts, that contracts which conflict with human rights should be held illegal and invalid on the ground of public policy,[1] and as shown in the

[1] See e.g. *In re Drummond Wren*, [1945] 4 O.R. 778.

guarantees for human rights contained in the Constitutions of certain new States which attained independence after 1945.[1]

(*b*) The undertakings by Italy and Yugoslavia under the Memorandum of Understanding of October 5, 1954, as to Trieste, to apply the Universal Declaration of Human Rights in their respective administrative zones in Trieste.

(*c*) The formulations or definitions of human rights in such programmatic statements as the American Declaration of the Rights and Duties of Man of 1948, the Declaration of the Rights of the Child adopted by the General Assembly on November 20, 1959, and the Fifteen General Principles on Freedom and Non-Discrimination in the Matter of Political Rights adopted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in January, 1962.[2]

(*d*) The American Convention on Human Rights, opened for signature on November 22, 1969. In addition to detailed definitions of human rights, provision is made for establishing an Inter-American Court of Human Rights; States parties wishing to accept the Court's jurisdiction may make declarations to this effect when ratifying or adhering to the Convention (see Article 62).

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[1] See, e.g. sections 17–32 of the Constitution of Nigeria, which became independent in 1960.

[2] Reference should also be made to the various Resolutions, from time to time, of the Human Rights Commission for promoting and developing human rights throughout the world. These are transmitted for approval or other action to the Economic and Social Council. The Commission has evolved a procedure whereby a Sub-Commission working group meets in separate session to consider human rights complaints reaching the United Nations, for the purpose of referring to the Sub-Commission those complaints revealing a consistent pattern of gross violations of human rights; see John Carey, *U.N. Protection of Civil and Political Rights* (1970), pp. 91–92.

Chapter 12

THE STATE AND ECONOMIC INTERESTS—INTERNATIONAL ECONOMIC AND MONETARY LAW

Modern States exercise wide control over the economy, including such aspects of private economic enterprise as the export and import trade, internal and external investment, shipping, agricultural production, and private banking. It is only natural that they should enter into agreements with each other to regulate *inter partes* those economic and monetary matters which affect two or more of them jointly. Most of these agreements are bilateral, e.g. trade treaties, or treaties of commerce and navigation, or treaties of establishment, but there have been agreements of a more general character, including the Articles of Agreement, respectively, of the International Monetary Fund,[1] of the International Bank for Reconstruction and Development,[1] and of the International Finance Corporation,[2] the Convention of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, the Treaty of Rome of March 25, 1957, establishing the European Economic Community, the General Agreement on Tariffs and Trade (GATT) of October 30 1947, the Constitution of the Food and Agriculture Organisation (FAO), and the international commodity agreements, such as the Third International Tin Agreement of 1965, the International Sugar Agreement 1968, the International Coffee Agreement 1968, and the Arrangement of 1970 concerning Certain Dairy Products.

There has thus developed a new field of the regulation of

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[1] Adopted by the United Nations Monetary and Financial Conference, at Bretton Woods, from July 1 to 22, 1944.

[2] Adopted at Washington on May 25, 1955.

international economic matters.[1] The difficulty, however, is to extract from all these numerous treaty provisions principles of general application, which can truly be postulated as binding rules of international law. It is really only possible to indicate certain directions in which this treaty practice concerning State economic interests is moving.

First, a principle appears to be taking shape, imposing upon every State a duty not to institute discriminatory trade restrictions, or discriminatory taxes or levies upon trade against another State, unless genuinely justified by balance-of-payments difficulties. There does not appear to be any distinction in this connection between wilful and unintentional discrimination, as it is sufficient if there be discrimination *de facto*. In either event, as the practice of the Contracting Parties to the General Agreement on Tariffs and Trade (GATT), p. 365, *ante*, shows, it is the duty of States to correct or remove the element of discrimination.

Unfortunately, there is bound to be controversy as to what constitutes a discrimination. If under a trade treaty between State A and State B, the parties agree to grant to each other special reciprocal State privileges, e.g. by way of reduced customs duties, is State X entitled to complain of discrimination if goods exported from its territory to these States continue to be subject to the former amount of duty? If State X were a party to a treaty with these States, providing for most-favoured-nation treatment, the inequality of customs privileges would clearly amount to discrimination.[2] In the absence of any such treaty with a most-favoured-nation clause or obligation, it is difficult to accept the view that the grant of reciprocal trade privileges between two States *inter partes* can represent a discrimination as against a third State, and the decision of the

[1] The importance of this field of regulation of international economic matters was recognised by the United Nations General Assembly in its Resolution of December 17, 1966, establishing the United Nations Commission on International Trade Law with the functions, *inter alia*, of harmonising and unifying the law of international trade, promoting wider participation in international Conventions and preparing new Conventions, and promoting the codification of international trade customs and practices. The Commission held its first session in January–February, 1968.

[2] See *Case concerning Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports (1952), 176, at 192 *et seq.*

Permanent Court of International Justice in the *Oscar Chinn Case*[1] provides persuasive authority against such a view. It was the object of the General Agreement on Tariffs and Trade, *supra*, to extend the most-favoured-nation obligation,[2] so as to ensure non-discrimination generally in customs and taxation matters (see Article I).

Second, insofar as private foreign investment is concerned, there is emerging a principle that the State in which such investment is made should not by its exchange control laws and regulations hamper or prevent the payment of profits or income to the foreign investors, or the repatriation of the capital invested (although there is no absolute or unconditional right to repatriate capital), unless:—(a) such restrictions are essential for the maintenance of monetary reserves; or (b) *semble*, the restrictions are temporarily necessary for reasons of the health and welfare of the people of the country of investment. Any such restrictions should also be non-discriminatory.[3] With regard to the *entry* of capital, although the general trend of international law is towards the promotion of investment, investment-receiving States are not debarred from prescribing requirements for the screening, approval, and registration of any capital inflow.[4]

A number of proposals have been made in recent years for the protection and encouragement of private foreign investment, including a suggested international Convention defining the fundamental mutual rights of private foreign investors and

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[1] Pub. P.C.I.J. (1934) Series A/B, No. 63.

[2] *Most-favoured-nation Clause:* The most-favoured-nation clause which, notwithstanding erosions under recent developments, still governs a large part of the world trade, has been under study by the International Law Commission. At its 1968 Session, the Commission reached the conclusion that the study should not be confined to the role of the clause in international trade, but should cover the whole area of the practical application of the clause, regarded as a legal institution of an extensive nature, with impact, upon matters such as rights of establishment, and land-holding by aliens. See *Report* of Commission on Work of its Twentieth Session (1968), paragraph 93.

[3] Although discriminations in favour of the foreign investor, e.g. by granting specially attractive terms, are not prohibited.

[4] See *The Protection and Encouragement of Private Foreign Investment* (Butterworths, 1966, ed. J. G. Starke), on the subject of foreign investments legislation and practice.

capital-importing countries,[1] a project for an international investments tribunal, and a code of multilateral investment insurance. These proposals provided the background for the first major step taken in investment protection under international law, namely the above-mentioned Convention of March 18, 1965 for the Settlement of Investment Disputes between States and Nationals of Other States, setting up international conciliation and arbitration machinery on a consensual basis so that private foreign investors might have direct access thereto to settle legal disputes with investment-receiving States.

However, as pointed out by the International Court of Justice in the *Barcelona Traction Case*,[2] one overriding general principle is that an investment-receiving State, while bound to extend some protection in law to the investments concerned, does not thereby become an insurer of that part of the investing State's wealth corresponding to such investments. Certain risks must remain.

Third, the above-mentioned international commodity agreements indicate a movement towards rules of international law, obliging producing and purchasing States to co-operate in ensuring the stability of commodity prices, and in equating supply with demand. Negatively, they show that there is no rule of international law, which prevents a State from restricting production, having regard to economic exigencies. However, as a different regulatory system is followed by the contracting States in each of the commodity agreements, lack of uniformity precludes the drawing of any more general conclusions.

Fourth, there appears to be an emerging principle[3] that States should avoid practices such as dumping and the unrestricted disposal of accumulated stocks that may interfere with

[1] See as to the Abs-Shawcross Draft Convention on Investments Abroad, of April, 1959, *The Encouragement and Protection of Investment in Developing Countries* (1961) (British Institute of International and Comparative Law) at pp. 10–11.

[2] *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, p. 3 (see paragraph 87 of the judgment of the Court).

[3] See the Resolution of the United Nations General Assembly of December 19, 1961, on International Trade as the Primary Instrument for Economic Development.

the industrial development of the so-called " developing " countries (i.e. those which not being highly developed or industrialised, are in process of developing mainly an industrial economy). This principle is no doubt merely a particular illustration of the rule of economic good neighbourliness which should be followed by all States; it underlies the basic purposes of the International Monetary Fund and of the Meetings of the Contracting Parties to the General Agreement on Tariffs and Trade (p. 365), that the growth of international trade should be facilitated in order to contribute to the promotion of full employment and the development of national productivity. In general, States taking measures for their own economic protection should have regard to the possible harmful effects upon the economies of other States.[1]

Fifth, international law is moving towards the abolition of quantitative restrictions on imports and exports, except where these are temporarily and urgently required to solve problems of maintenance of currency reserves (see Articles XI to XIV of the General Agreement on Tariffs and Trade, *supra*).

Sixth, States appear ready to recognise a principle that in matters not materially involving the revenue, or balance-of-payments issues, customs formalities should be simplified, and administrative restrictions on, or barriers to trade should be minimised. This is illustrated not only by the General Agreement on Tariffs and Trade (p. 365), but by Conventions such as the International Convention to Facilitate Importation of Commercial Samples and Advertising Material signed at Geneva on November 7, 1952, and more recently by the Resolution of December 20, 1965 of the United Nations General Assembly favouring the " progressive unification and harmonisation of the law of international trade ", and the betterment of conditions to facilitate trade.

Seventh, the principle that the developing (or under-developed) countries are entitled to special economic assistance is

[1] This principle to some extent underlies the work of the Organisation for Economic Co-operation and Development (OECD), established in 1961, as a permanent institution for the harmonisation of national economic policies, with the express purpose of making available to its members all knowledge relevant to the formulation of rational policy in every economic field, and of sharing experiences through meetings at Ministerial and official levels.

firmly established, and is reflected in the provisions of the new Part IV, added by the Protocol of February 8, 1965 to the General Agreement on Tariffs and Trade, referred to *supra*, and in the current work of the United Nations Conference on Trade and Development (UNCTAD).[1] Indeed, it may be said that by way of exception to the concept of development of free and open trading relationships, the extension of new preferences, subject to consultation with the countries significantly affected, as an expedient for encouraging the export of selected products from less-developed countries, is not excluded by any general rules of international law; this seems to be shown by the " waivers " granted by the GATT Contracting Parties in 1966 and 1971 to enable Australia and other developed countries to grant tariff preferences to under-developed States, and in the steps taken by the Organisation for Economic Co-operation and Development (OECD) in 1970–1971 to procure the introduction of a generalised system of trade preferences in favour of developing countries, so as to increase their export earnings and make possible further economic development, preferences being in this case an instrument for promoting rather than for restricting trade.

In this matter of consultation, it may be added that economic good-neighbourliness makes it incumbent upon States to consult with each other, and to be accessible for the receipt of representations, in connection with the application of the above-mentioned principles.[2] All this is however expressed or implied in the provisions of the Articles of Agreement of the International Monetary Fund, of the General Agreement on Tariffs and Trade, and of other multilateral and bilateral instruments.

These are among the evolving principles of international economic law of general significance, and they embrace only a limited field, leaving a whole range of international economic questions not even subject to emergent doctrines.

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[1] See also the U.N. General Assembly Resolution of December 20, 1965 (accelerated flow of capital and technical assistance to the developing countries).

[2] See p. 369, n. 1, *ante*, as to the Organisation for Economic Co-operation and Development (OECD).

Apart from these areas of tentative acceptance, there are a number of growing international economic doctrines, e.g., the promotion by international action of policies conducive to balanced economic growth, and the obligation on a State, in technical economic terms, to keep demand at an appropriate level and to graduate national expenditure in line with the growth of production, that may be yet translated into ruling principles of international law. It would however be bold to predict that this will take place in the very near future.

International Monetary Law

International monetary law consists of the complex of international rules and guidelines which have been created, largely upon the basis of traditional banking and trading practices, in an effort to ensure fair and efficient methods of conducting international financial transactions. It includes, for example, the following:—(*a*) the rules and principles constituting the par value system, embodied in the Articles of Agreement of the International Monetary Fund (IMF), referred to, *ante*, under which each State party maintains a fixed value of its currency relative to gold and other currencies, with alteration of the value being confined to circumstances of fundamental disequilibrium, and generally requiring the prior consent of the Fund; (*b*) the provisions of the Articles of Agreement of the Fund and of the General Agreement on Tariffs and Trade (GATT), under which restrictions on trade and on current payments are generally allowable only in situations of balance-of-payments difficulties and are subjected to international control; (*c*) the provisions of the Articles of Agreement of the Fund, and related arrangements and practices, designed to foster the interconvertibility of currencies; (*d*) the *de facto* arrangements implementing the above-mentioned rules, and serving to preserve monetary stability. One of the keystones of the system is the International Monetary Fund which has worked well within the main important areas for which it was designed, that is to say, avoidance of discriminatory currency arrangements, reasonable exchange

stability for the purpose of international trading, the elimination of competitive exchange depreciation, and the promotion of international monetary co-operation.

However, it is not to be doubted that international monetary law is now very much at the cross-roads. The gold crisis in March, 1968, the dollar-mark crisis in Western Europe in April–May, 1971, and the crisis in August, 1971, arising out of the United States Government's decision to cease conversion into gold of foreign-held dollars, have demonstrated the fragility of the system. The magnitude and velocity of arrival of each of these crises served to underscore the weaknesses in the rules, and the need for revision and recasting. But the international community has not been prepared to undertake any drastic restructuring of international monetary law; this was shown in the introduction in 1968–1969 of the so-called " two-tier " system for gold transactions, and of the Special Drawing Rights Facility as a measure for relieving the problem of international liquidity.[1] It could hardly have been expected that these arrangements would become firm additions to the general rules of international monetary law.

The problem remains of the mechanism of exchange rate adjustment, which has failed from time to time to withstand unforeseen pressures. The International Monetary Fund system, sometimes known as the " adjustable-peg " system, represents a compromise between fixed and flexible exchange rates. There are two opposing views as to its advantages and disadvantages. On the one hand, there are those who maintain that, as soon as national economies come out of alignment by reason of different degrees of inflation and economic productivity, exchange rates are thrown out of gear and financial crises occur, giving rise to urgent demands for additional liquidity, and encouraging movements of capital, partly speculative, and partly conditioned by a natural desire to obtain security or a higher return. It is further said that the

[1] A country's external liquidity, which can be in the form of reserves or credit facilities, may be taken, from one point of view, as consisting of all those resources to which it has ready access for the purpose of financing its balance-of-payments deficits.

system could not work effectively, if it were not for practices such as stringent action to reduce excess of internal spending, and the increasing recourse to transactions by way of " Euro-dollars " (" Euro-dollars " are in effect no more than the dollar liabilities of banks in certain Western European countries, including the United Kingdom). It is accordingly claimed that the rules should be changed so as to permit variations of exchange rates within a wider band, or with allowance for wider margins. On the other hand, the opponents of flexing of exchange rates contend that the present system has served to encourage the growth of world trade and exchanges of capital, and that a new trend to flexibility would lead to such uncertainties as to endanger such volume of trade and investment as now prevails.

Chapter 13

DEVELOPMENT AND THE ENVIRONMENT

1.—General

Two of the most pressing problems confronting the international community at the present time are those of development, and of the protection and improvement of the human environment. Needless to say, both problems have been given priority within the framework of the United Nations. By a Resolution of October 24, 1970, the United Nations General Assembly proclaimed the Second Development Decade, beginning on January 1, 1971, while by an earlier Resolution of December 3, 1968, it decided to convene a United Nations Conference on the Human Environment to be held at Stockholm in 1972.

The link between these two areas in which international law is currently feeling its way may not be immediately obvious. It could be said, for instance, that the former topic of development is concerned with the situation of developing countries, whereas the degradation of the environment is a state of affairs with which, primarily, the developed, and not the developing countries, are afflicted. In such a statement, a number of relevant matters are overlooked. First, any multilateral agency responsible for the promotion of development projects, involving large scale financial aid, must concern itself with the ecological effects of the projects in developing countries, otherwise ecological detriments would have to be set off against the benefits to accrue to the developing country concerned.[1] Second, so far as development has been treated as a branch of the general science of economics, and so far as criteria and indicators of the quality, as distinct from the quantity of development have been evolved, one of the accepted indicators

[1] The President of the International Bank for Reconstruction and Development has instructed the Bank's staff to evaluate the ecological consequences of Bank-financed development projects; see *Finance and Development*, Part No. 3, 1970, p. 3.

of development quality is the standard of environment of the country subject of development.[1] Third, it may be remembered, as referred to in an earlier Chapter,[2] that the General Assembly has in a number of Resolutions proclaimed the inalienable right of all countries (particularly developing countries) to exercise permanent sovereignty over their natural resources in the interest of their national development; in the 1966 Resolution, such proclamation was made in the context of a recital in the preamble that " natural resources are limited and in many cases exhaustible and that their proper exploitation determines the conditions of the economic development of the developing countries both at present and in the future ". But the depletion of exhaustible natural resources represents one of the identifiable problems involved in the protection of the human environment. Indeed, among the six major areas settled by the Preparatory Committee of the Stockholm Conference on the Human Environment (see above) for consideration by Conference Committees is that of " the environmental aspects of natural resources management ". Significantly, another of these six major areas bears the title, " development and environment ".

It is for these reasons[3] that the two subjects of development and of the human environment are treated together in the present Chapter.

2.—Development

The international law of development has not reached the stage yet where it can be set down as a substantial body of binding rules, conferring specific rights upon developing States and imposing duties on developed countries. For the most part, it is best described as institutional law, that is to say the law of the various bodies and agencies through which development is

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[1] See *Department of State Bulletin,* August 24, 1970, pp. 230–231.

[2] See pp. 137–138, *ante.*

[3] Another reason, which may be advanced, is that development assistance, both technically and financially, is required in the case of developing countries faced with problems of maintaining or restoring environmental quality; see Report of the Secretary-General of the United Nations on Problems of the Human Environment, May 26, 1969 (Document E/4667), paragraph 74.

promoted and development aid is channelled. At the same time, a large number of standards and guidelines have been defined or proclaimed, and these enter into the province of international law no less than do the Recommendations adopted by the International Labour Conference,[1] or the Recommendations adopted by the Antarctic Treaty Powers.[2] The special needs of development of developing countries have nevertheless had an impact upon certain general principles of international economic law, and have served to reduce the stringency of the duty of non-discrimination between States, and to exclude the international standard of treatment of resident aliens in developing countries from the point of view of local mercantile operations, and international trading.

The definition of " development " presents insuperable difficulties by reason of the range of operations encompassed. According to the Report in 1970 of the United Nations Committee for Development, containing proposals for the Second United Nations Development Decade[3]:—" It cannot be over-emphasised that what development implies for the developing countries is not simply an increase in productive capacity but major transformations in their social and economic structures ". The Report went on to point out that " the ultimate purpose of development is to provide opportunities for a better life to all sections of the population ",[4] and to achieve this, it would be necessary in developing countries to eliminate inequalities in the distribution of income and wealth, and mass poverty and social injustice, including the disparities between regions and groups, while there would have to be arrangements for new employment opportunities, greater supplies of food and more nourishing food, and better education and health facilities. On a different level, there should be international co-operative measures to establish, strengthen, and promote scientific research and technological activities which have a bearing upon the expansion and modernisation

[1] See pp. 624–625, *post*.
[2] See pp. 3, 179, *ante*.
[3] *Report*, p. 5.
[4] *Report*, p. 11.

of the economies of developing countries.[1] The Committee recognised that " at the present state of knowledge, the intricate links permeating the process of development are not all amenable to quantification on the basis of a common framework."[2]

As these general objectives have to be tailored to the requirements of each individual developing country, the difficulty in framing general rules of law as to development can be appreciated.

Ten objectives, which may be regarded as standards of development, were proposed in the Report in 1969 of the Commission on International Development[3] established by the President of the World Bank Group, namely:—(1) The creation of a framework for free and equitable trade, involving the abolition by developed countries of import duties and excessive taxes on those primary commodities which they themselves do not produce. (2) The promotion of private foreign investment, with offsetting of special risks for investors. (3) Increases in aid should be directed at helping the developing countries to reach a path of self-sustained growth. (4) The volume of aid should be increased to a target of one per cent of the gross national product of the donor countries. (5) Debt relief should be a legitimate form of aid. (6) Procedural obstacles should be identified and removed. (7) The institutional basis of technical assistance should be strengthened. (8) Control of the growth of population. (9) Greater resources should be devoted to education and research. (10) Development aid should be increasingly multilateralised. Such multilateralisation would contribute to a uniform development of the principles governing the grant and receipt of aid.

On October 24, 1970, the United Nations General Assembly adopted a policy statement under the title of the " International Development Strategy ", to be applied during the Second Development Decade (1971–1980). This lays down *desiderata*

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[1] *Report*, p. 38.
[2] *Report*, p. 14.
[3] The Report has become known as the " Pearson Report ", by reason of Mr. Lester Pearson's chairmanship of the Commission.

consistent with the above-mentioned ten objectives, including the requirement that economically advanced countries should endeavour to provide by 1972, if possible, one per cent of their gross national product in aid to the developing countries.

The cornerstone of the present law of development is the institutional structure, heterogeneous as it is, which contributes to making possible development on an international scale. The various principal organisations, bodies, and agencies involved in the process include the United Nations, working through such organs and channels as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP), the related agencies of the United Nations including the International Bank for Reconstruction and Development and its affiliates, the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD), the European Economic Community, and the Colombo Plan Committee. In addition, an important role is played by the regional development banks, such as the Asian Development Bank, the Inter-American Development Bank and the African Development Bank. One area of the international law of development is represented by the rules and practice that are evolving for the co-ordination of the efforts of these different agencies.

2.—Protection and Improvement of the Human Environment

It is a commonplace now that a crisis of global proportions is affecting the human environment, through pollution of the atmosphere and of maritime, coastal, and inland waters, through degradation of rural lands, through destruction of the ecological balance of natural areas, through the effect of biocides upon animal and plant life, and through the uncontrolled depletion and ravaging of the world's natural resources, partly by reason of the explosive growth of human populations and partly as a result of the demands of industrial technology. The problems involved in this environmental crisis, and the various causes and factors which brought it about were analysed in

detail by the Secretary-General of the United Nations in a Report on the Problems of the Human Environment, dated May 26, 1969 (Document E/4667), prepared in relation to the summoning of the United Nations Conference on the Human Environment, referred to at the commencement of the present Chapter. In a Resolution of December 15, 1969, the United Nations General Assembly endorsed the Report, assigned to the Secretary-General overall responsibility for organising and preparing the Conference, and established a twenty-seven-member Preparatory Committee to assist him.

The Report identified three basic causes as responsible for the deterioration of the environment, namely, accelerated population growth, increased urbanisation, and an expanded and efficient new technology, with their associated increase in demands for space, food, and natural resources (see paragraph 8 of the Report).

As was stressed by the Secretary-General, the subject has to date been dealt with by international law-making Conventions in only a fragmentary manner, with room for much progress. Illustrations of such piecemeal measures are provided by Article IX of the Treaty of 1967 on the Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Celestial Bodies, obliging States parties to conduct space studies and exploration in such manner as to avoid adverse changes in the environment of the earth from the introduction of extraterrestrial matter, by the African Convention on the Conservation of Natural Resources adopted by the Organisation for African Unity (OAU) in 1968, by the International Convention of 1954, as amended, for the Prevention of the Pollution of the Sea by Oil, by the International Plant Protection Convention of 1951, by the two Brussels Conventions of November 29, 1969, relating to Intervention on the High Seas in cases of Oil Pollution Casualties and on Civil Liability for Oil Pollution Damage,[1] and by a number of arrangements designed to control pollution in particular river systems. The Nuclear Weapons Tests Ban Treaty of 1963,[2] the Treaty

[1] See pp. 234–235, *ante*.
[2] See p. 191, *ante*.

of 1967 for the Prohibition of Nuclear Weapons in Latin America, the Treaty of 1968 on the Non-Proliferation of Nuclear Weapons,[1] and the Treaty of 1971 on the Prohibition of the Emplacement of Nuclear Weapons on the Seabed and Ocean Floor and Subsoil Thereof,[2] may also be regarded as measures of environmental protection, insofar as their object is to prevent radio-active contamination of the environmental areas to which they relate. Also paragraph 11 of the General Assembly's Declaration of December 17, 1970, of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof beyond the Limits of National Jurisdiction,[3] affirmed that States were to take appropriate measures for, and co-operate in establishing a regime to govern the prevention of pollution and contamination to the marine environment, and of interference with the ecological balance of this environment, and to govern also the protection and conservation of the natural resources of the seas, and the prevention of damage to the flora and fauna of the marine environment.

The Secretary-General's Report also detailed the various activities of the related or specialised agencies of the United Nations, bearing upon the human environment (see Annex to the Report). These included, for example, various standard-setting instruments (Recommendations and Codes) of the International Labour Organisation (ILO) for protection of workers against pollution of the working atmospheric environment, or against radio-active contamination (e.g., the Convention on Protection of Workers against Ionising Radiations); the work of the Food and Agriculture Organisation of the United Nations (FAO) in the domain of water development, management, and conservation, of conservation and development of plant resources, and of the scientific aspects of marine pollution; the studies on the scientific problems of the environment under the auspices of the United Nations Scientific, Educational and Cultural Organisation (UNESCO), including the Conference of 1968 convened by it on the Scienti-

[1] See pp. 311–312, *ante*.
[2] See pp. 235–236, *ante*.
[3] See pp. 233–234, *ante*.

fic Basis for Rational Use and Conservation of the Resources of the Biosphere; the work of the World Health Organisation (WHO) in the definition of environmental standards, the identification of environmental hazards, and the study of induced changes in the environment; and investigations by the International Civil Aviation Organisation (ICAO) of the problems of aircraft noises in the vicinity of airports, and of sonic boom due to supersonic aircraft.

It emerges from the Secretary-General's Report that international regulatory action is in principle appropriate for the following:—(*a*) Problem of pollution and contamination of the oceans and atmosphere, partly because these may be the object of general use, partly because of the impossibility in certain cases of localising the effects of polluting or contaminating agents. (*b*) Wild species and nature reserves, upon the basis that these are a common heritage of mankind. International agreement may be necessary to control the export, import, and sale of endangered species. (*c*) The depletion of marine resources, having regard to the dependence of mankind upon the sea as a source of protein. (*d*) The monitoring of changes in the earth's atmosphere, climate, and weather conditions. (*e*) The definition of international standards of environmental quality. (*f*) Reciprocal controls of, and restraints upon certain industrial operations in all countries, where such operations can endanger the environment, so as to remove inducements to obtain competitive advantages by ignoring the consequences of the processes which are a hazard to the environment.[1] Precedents for international action in this case are represented by International Labour Conventions, one of the aims of which is to ensure that economic competition between States does not thwart the realisation of proper standards of working conditions.

As at the date of writing, substantial progress has been made by the Preparatory Committee for the Stockholm Conference of 1972. There is already agreement, in advance of the Conference, upon a number of measures, including the establishment of global and regional monitoring networks for the detection of

[1] See *Report*, paragraph 75.

changes in the environment brought about by human activities, and for the surveillance of all environmental elements. What the Conference will do is formally to confer such agreement, and set in motion the necessary steps for the actual creation of working arrangements.

One of the instruments to be adopted by the Stockholm Conference will be a proposed Declaration on the Human Environment, somewhat similar to the Universal Declaration of Human Rights of 1948, and in like manner proclaiming standards, principles, and goals to be accomplished by the international community in the solution of national and international environmental problems. The responsibility of producing the draft text of this Declaration was in the first instance assigned to an Inter-Governmental Working Group of the Preparatory Committee for the Conference. The Preparatory Committee has set up four other Inter-Governmental Working Groups, one to be concerned with monitoring and surveillance arrangements, as mentioned, *ante*, and the others to deal respectively with the subjects of marine pollution, conservation, and the degradation of soils.

In regard to marine pollution, it is hoped that the Stockholm Conference may produce either international action on certain aspects of damage to the marine environment, or the establishment of useful guidelines and criteria, including recommendations which may be of assistance to the two maritime Conferences to be held in 1973, namely the Conference under the auspices of the Inter-Governmental Maritime Consultative Organisation (IMCO) on pollution from ships, and the Conference on the Law of the Sea.[1] In this connection, it is relevant to point out that a valuable report on the scientific basis for international legislative control of marine pollution was produced by the Technical Conference of the Food and Agriculture Organisation of the United Nations (FAO), dealing with Marine Pollution, held at Rome in December, 1970.[2] Obviously, in view of the Stockholm Conference and the two maritime Conferences projected for 1972, this document cannot

[1] See pp. 233–234, *ante*.
[2] For text of the *Report*, see Document FIR:MP/70/Rep. 5.

be the last word, but it contains a number of important practical recommendations, including the suggestion that a system of registration should be set up on an urgent basis to cover the dumping of all persistent or highly toxic pollutants into the sea.

The subject of conservation, as part of the general problem of environmental protection, embraces not only the maintenance of the integrity of areas of natural, cultural, or historical significance, but also the safeguarding of threatened species of animals and plants. It is expected that the Stockholm Conference will agree to establish a World Heritage Foundation to deal with the conservation of natural, cultural, or historical areas, thus recognising the principle of universal zoning in the interests of mankind in general. In regard to animals and plants, preparatory work is to be carried out so that the Conference may, at its option, take action upon a draft Convention to regulate the import, export, and transit of endangered species.

So far as soil degradation is concerned, an international Convention alone does not seem to be contemplated. The Preparatory Committee supports the novel idea of a Plan of Action, to be endorsed by the Conference, for enabling national authorities to follow out national programmes of soil preservation and reclamation. The measures part of this Plan of Action may include a Convention, but this is not necessarily so. A whole series of novel expedients, such as the creation of a Special Fund, the use of national advisory bodies, and the equipment of regional research and trading centres, will be proposed to the Stockholm Conference.

In all this, the question of improvement of the human environment, as distinct from its protection and preservation, is not to be overlooked.

One of the six major areas which it has been decided to assign to Conference Committees, bears the title, " The international organisational implications of proposals for action ". It would seem probable that a new environmental organisation will be set up by way of addition to the existing United Nations family of international agencies, unless the Conference feels that there are objectionable financial and administrative implications in this course.

PART 4

INTERNATIONAL TRANSACTIONS

CHAPTER 14

THE AGENTS OF INTERNATIONAL BUSINESS; DIPLOMATIC ENVOYS, CONSULS, AND OTHER REPRESENTATIVES

1.—DIPLOMATIC ENVOYS

NEARLY all States today are represented in the territory of foreign States by diplomatic envoys and their staffs. Such diplomatic missions are of a permanent character, although the actual occupants of the office may change from time to time. Consequent on a development over some hundreds of years, the institution of diplomatic representatives has come to be the principal machinery by which the intercourse between States is conducted.

In fact, however, the general rise of permanent as distinct from temporary diplomatic missions dates only from the seventeenth century. The rights, duties, and privileges of diplomatic envoys continued to develop according to custom in the eighteenth century, and by the early nineteenth century the time was ripe for some common understanding on the subject, which as we shall see, took place at the Congress of Vienna in 1815. Developments in diplomatic practice since 1815 rendered necessary a new and more extensive codification of the laws and usages as to diplomatic envoys, which was achieved in the Vienna Convention on Diplomatic Relations concluded on April 18, 1961.[1] Customary international law will, however, continue to govern questions not expressly regulated by the Convention (see Preamble).

[1] Based on Draft Articles prepared by the International Law Commission; for commentary thereon, which is applicable to the corresponding Articles of the Vienna Convention, see *Report* of the Commission on the Work of its Tenth Session (1958).

Classification of Diplomatic Envoys

Originally, some controversy centred around the classification of diplomatic representatives, particularly as regards matters of precedence and relative status. Ambassadors sent on a temporary mission were called " Extraordinary " as contrasted with resident envoys. Later the title " Extraordinary " was given to all Ambassadors whether resident or temporary, and the title of " Plenipotentiary " was added to their designation. In its literal sense the term " Plenipotentiary " signified that the envoy was fully empowered to transact business on behalf of the Head of State who had sent him on the mission.

The designation " Envoy Extraordinary and Minister Plenipotentiary " came to be applied to almost all diplomatic representatives of the first rank, such as Ambassadors and Ministers, with the exception of Ministers resident. This titular nomenclature survives today, although the reasons for its use are not commonly appreciated.

The Congress of Vienna in 1815 attempted to codify the classifications and order of precedence of diplomatic envoys. This codification, better known as the " Regulation of Vienna ", was, subject to certain adjustments, incorporated in the provisions of Articles 14 to 18 of the Vienna Convention on Diplomatic Relations of April 18, 1961. According to these provisions, heads of diplomatic mission are divided into three classes:—

(1) Ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank.[1]

(2) Envoys, ministers, and internuncios accredited to Heads of State.[2]

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[1] This class does not include Legates, as previously under the Regulation of Vienna, because the new codification purports to deal only with heads of mission. Also, the provisions of Article 2 of the Regulation of Vienna that only Ambassadors, Legates, or nuncios should possess the representative character in relation to the accrediting Head of State, were not adopted.

[2] No provision was made for the class of " Ministers resident ", which was established by the Conference at Aix-la-Chapelle in 1818, in modification of the Regulation of Vienna. As to this former class, see Twiss, *The Law of Nations* (2nd. edition, 1884) Vol. I, at p. 344.

(3) *Chargés d'affaires* accredited to Ministers for Foreign Affairs.

Except in matters of precedence and etiquette[1], there is to be no differentiation between heads of mission by reason of their class. The class to which heads of their missions are to be assigned is to be agreed between States. Heads of mission are to take precedence in their respective classes in the order of the date and time of taking up their functions; for this purpose, they are considered as taking up their functions either when they have presented their credentials, or when they have notified their arrival and a true copy of their credentials has been presented to the Minister for Foreign Affairs of the receiving State, or other Ministry according to the practice of this State. Alterations in the credentials of a head of mission not involving any change of class, are not to affect his precedence. These provisions as to precedence are to be without prejudice to any practice of the receiving State regarding the precedence of the representative of the Holy See. The procedure to be observed in each State for the reception of heads of mission is to be uniform in respect of each class.

The attribution of the title of Ambassador, as distinct from Minister, to the head of a diplomatic mission depends on various factors, including the rank of the States concerned. Sometimes an embassy is a matter of tradition, as for example between France and Switzerland. Usually, however, now, the population and importance of the country of mission are the determining factors.[2] There are none the less many cases of anomalies in the allocation of embassies, which reflect a lack of uniformity of practice.

An envoy on an *ad hoc* mission is usually furnished with a

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[1] "Etiquette" includes ceremonial matters, and matters of conduct or protocol.

[2] In its *Report*, *op. cit.*, the International Law Commission made significant mention of the growing tendency of most States today to appoint Ambassadors, rather than Ministers, as heads of missions. The titular rank of Minister is now, in fact, being used more and more for a responsible or senior member of the legation.

document of Full Powers[1] setting out his authority which in due course he presents to the authorities of the State with whom negotiations are to be conducted, or to the Committee on Full Powers of the Conference at which he is to represent his country.

Appointment and Reception of Diplomatic Envoys

The machinery of diplomacy used to be attended by a good deal of ceremony and ritual, and to a certain extent this still applies. Ceremonial procedure, for instance, is generally observed in regard to the arrival and departure of diplomatic envoys.

The appointment of an individual as Ambassador or Minister is usually announced to the State to which he is accredited in certain official papers, with which the envoy is furnished, known as Letters of Credence or *Lettres de Créance*; these are for remission to the receiving State. Apart from the Letters of Credence the envoy may take with him documents of Full Powers relating to particular negotiations or other specific written instructions.

States may refuse to receive diplomatic envoys either:—(*a*) generally, or in respect to a particular mission of negotiation; or (*b*) because a particular envoy is not personally acceptable. In the latter case, the State declining to accept the envoy is not compelled to specify its objections to the accreditation or to justify them (see Article 4 paragraph 2 of the Vienna Convention). Consequently, to avoid any such conflict arising, a State wishing to appoint a particular person as envoy must ascertain beforehand whether he will be *persona grata*. Once such assent or *agrément* is obtained, the accrediting State is safe in proceeding with the formal appointment of its envoy. None the less, at any later time, the receiving State may, without having to explain its decision, notify the sending State that the envoy is *persona non grata*, in which case he is recalled, or his functions terminated (Article 9 of the Vienna Convention).

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[1] See also below, pp. 409–411.

Rights, Privileges, and Immunities of Diplomatic Envoys.[1]

These are primarily based on the need to ensure the efficient performance of the functions of diplomatic missions (see Preamble to Vienna Convention), and to a secondary degree on the theory that a diplomatic mission personifies the sending State (the " representative character " theory). The theory of " exterritoriality ", whereby the legation premises represent an extension of the sending State's territory, may now be discarded for all practical purposes. In the Australian case of *Ex parte Petroff* (1971, unreported), where two persons had been charged with throwing explosive substances at the Chancery of the Soviet Union's Embassy in Canberra, in the Australian Capital Territory, it was sought to argue in prerogative writ proceedings that the magistrate concerned had no jurisdiction to deal with the alleged offences as these were committed on foreign territory. Fox, J., of the Supreme Court of the Australian Capital Territory, rejected this contention and expressly held, after a full review of the authorities, that an embassy is not a part of the territory of the sending State, and that the accused could be prosecuted for such alleged offences against the local law.

As we have seen,[2] diplomatic envoys enjoy exemption from local civil and criminal jurisdiction.

They also have a right to inviolability of the person. This protects them from molestation of any kind, and of course from arrest or detention by the local authorities (see Article 29 of the Vienna Convention). Inviolability attaches likewise to the legation premises and the archives and documents of the legation (see Articles 22 and 24 of the Vienna Convention).

Articles 34 and 36 of the Vienna Convention provide that diplomatic agents are exempt from all dues and taxes,[3] other than certain taxes and charges set out in Article 34 (e.g.

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[1] Articles 20 to 41 of the Vienna Convention deal with these rights, privileges, and immunities in detail. Considerations of space have precluded a full treatment in the text, or an examination of the position of the subordinate personnel of diplomatic missions, as provided for in the Convention.

[2] See above pp. 259–261.

[3] As to the exemption in respect of the legation premises, see Article 23 of the Vienna Convention.

charges for services rendered), and also from customs duties. The latter exemption was formerly a matter of comity or reciprocity.

A new right is conferred by Article 26 of the Convention, namely a right of members of a diplomatic mission to move and travel freely in the territory of the receiving State, except in prohibited security zones. Other privileges and immunities dealt with in detail in the Convention include the freedom of communication for official purposes (Article 27), exemption from social security provisions (Article 33), and exemption from services and military obligations (Article 35).

Termination of Diplomatic Mission

A diplomatic mission may come to an end in various ways:—

(1) Recall of the envoy by his accrediting State. The letter of recall is usually handed to the Head of State or to the Minister of Foreign Affairs in solemn audience, and the envoy receives in return a *Lettre de Récréance* acknowledging his recall. In certain circumstances, the recall of an envoy will have the gravest significance; for example, where it is intended to warn the receiving State of the accrediting State's dissatisfaction with their mutual relations. Such a step is only taken where the tension between the two States cannot otherwise be resolved.

(2) Notification by the sending State to the receiving State that the envoy's function has come to an end (Article 43 of the Vienna Convention).

(3) A request by the receiving State that the envoy be recalled. This is equally a step of grave significance inasmuch as it may presage a rupture of diplomatic relations.

(4) Delivery of passports to the envoy and his staff and suite by the receiving State, as when war breaks out between the accrediting and receiving States.

(5) Notification by the receiving State to the sending State, where the envoy has been declared *persona non grata* and where he has not been recalled or his functions terminated,

that it refuses to recognise him as a member of the mission (Articles 9 and 43 of the Vienna Convention).

(6) Fulfilment of the object of the mission.

(7) Expiration of Letters of Credence given for a limited period only.

2.—Consuls

Consuls are agents of a State in a foreign country, but not diplomatic agents. Their primary duty in such capacity is to protect the commercial interests of their appointing State, but commonly a great variety of other duties are performed by them for the subjects of their State; for example, the execution of notarial acts, the granting of passports, the solemnisation of marriages, and the exercise of a disciplinary jurisdiction over the crews of vessels belonging to the State appointing them.[1]

The laws and usages as to the functions, immunities, etc. of consuls were codified, subject to certain adaptations, alterations, and extensions, in the Vienna Convention of April 24, 1963, on Consular Relations (based on Draft Articles adopted in 1961 by the International Law Commission). The Convention covers a wide field, but does not preclude States from concluding treaties to confirm, supplement, extend, or amplify its provisions (Article 73), and matters not expressly regulated by the Convention are to continue to be governed by customary international law (see Preamble).

The institution of consuls is much older than that of diplomatic representatives, but the modern system actually dates only from the sixteenth century. Originally consuls were elected by the merchants resident in a foreign country from among their own number, but later the Great Powers established salaried consular services and consuls were despatched to different countries according to the requirements

[1] Formerly, in certain countries, consuls exercised extra-territorial jurisdiction over their fellow-nationals to the exclusion of local municipal Courts. As to this, see the decision of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports (1952), 176, at pp. 198 *et seq.*

of the service. Consuls are frequently stationed in more than one city or district in the State to which they are sent, thus differing from diplomatic envoys. There are, of course, other differences. Consuls are not equipped with Letters of Credence, but are appointed under a commission issued by their Government; the appointment is then notified to the State where the consul is to be stationed, the Government of which is requested to issue an *exequatur* or authorisation to carry out the consular duties. If there is no objection to the appointment of the person concerned as consul, the *exequatur* is issued. Normally a consul does not enter on his duties until the grant of an *exequatur*. If, subsequently, his conduct gives serious grounds for complaint, the receiving State may notify the sending State that he is no longer acceptable; the sending State must then recall him or terminate his functions, and if the sending State does not do so, the receiving State may withdraw the *exequatur*, or cease to consider him as a member of the consulate. Article 23 of the Vienna Convention of 1963, goes much further than this accepted practice, permitting a receiving State at any time to notify the sending State that a consular officer is not *persona grata*, or that any other member of the consular staff is not acceptable.

Heads of consular posts are divided into four classes:— (a) Consuls-general. (b) Consuls. (c) Vice-consuls. (d) Consular agents (see Article 9 of the Vienna Convention of 1963, *ante*). Generally speaking, they take precedence according to the date of grant of the *exequatur*.

Rights and Privileges of Consuls

Consuls seldom have direct communication with the Government of the State in which they are stationed except where their authority extends over the whole area of that State, or where there is no diplomatic mission of their country in the State. More usually such communication will be made through an intermediate channel, for example, the diplomatic envoy of the State by which they are appointed. The procedure is governed by any applicable treaty, or by the municipal law

and usage of the receiving State (see Article 38 of the Vienna Convention of 1963).

As pointed out above[1] consuls do not, like diplomatic envoys, enjoy complete immunity from local jurisdiction. Commonly, special privileges and exemptions are granted to them under bilateral treaty, and these may include immunity from process in the territorial Courts. Apart from this it is acknowledged that as to acts performed in their official capacity and falling within the functions of consular officers under international law, they are not subject to local proceedings unless their Government assents to the proceedings being taken.

In practice a great number of privileges have attached themselves to the consular office. In the absence of such privileges, consuls would not be able properly to fulfil their duties and functions, and accordingly as a matter of convenience they have become generally recognised by all States. Examples of such privileges are the consul's exemption from service on juries, his right of safe conduct, the right of free communication with nationals of the sending State, the inviolability of his official papers and archives,[2] and his right if accused of a crime to be released on bail or kept under surveillance until his *exequatur* is withdrawn or another consul appointed in his place. Certain States also grant consuls a limited exemption from taxation and customs dues.

In general, however, the privileges of consuls under customary international law are less settled and concrete than those of

[1] See above, p. 264.

[2] There is, *semble*, no such corresponding general inviolability of the consular premises, nor are such premises *extra-territorial* in the sense that consuls may there exercise police powers, exclusive of the local authorities, over the citizens of their State. Thus, in 1948, in the *Kasenkina Case* in the United States, where a Russian woman, presumably detained by Soviet consular officers, jumped to the street from the window of a room in the Soviet Consulate, the United States Government insisted on the position that consular premises were subject to local police control in a proper case; cf. Preuss, *American Journal of International Law* (1949), Vol. 43, pp. 37–56. But see now the rule of inviolability of consular premises laid down in Article 31 of the Vienna Convention of 1963; this prohibits authorities of the receiving State from entering, without consent, only that part of the consular premises used exclusively for the work of the consular post, and provides that consent to enter may be assumed in case of fire or other disaster requiring prompt protective action.

diplomatic envoys, although in the Vienna Convention of April 24, 1963, referred to, *ante*, it was sought to extend to consuls *mutatis mutandis*, the majority of the rights, privileges, and immunities applying under the Vienna Convention on Diplomatic Relations of April 18, 1961, subject to adjustments in the case of honorary consuls. In that connection, it is significant that in recent years, both Great Britain[1] and the United States have negotiated standard consular Conventions or treaties with a number of States in order that the rights and privileges of consuls may be defined with more certainty, and placed on as wide and secure a basis as possible.

The modern tendency of States is to amalgamate their diplomatic and consular services, and it is a matter of frequent occurrence to find representatives of States occupying, interchangeably or concurrently,[2] diplomatic and consular posts. Under the impact of this tendency, the present differences between diplomatic and consular privileges may gradually be narrowed.

3.—Special Missions of a Non-Permanent Nature

In addition to their permanent diplomatic and consular representation, States are often obliged to send temporary missions to particular States to deal with a specific question or to perform a specific task, and such missions may be accredited, irrespective of whether in point of fact permanent diplomatic or consular relations are being maintained with the receiving State. Of course, it is fundamental that a special mission of this nature may be sent only with the consent of the State which is to receive it.

The rules governing the conduct and treatment of these special missions of a non-permanent character were the subject

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[1] Cf. the series of such consular treaties concluded by Great Britain with Norway, the United States, France, Switzerland, Greece, Mexico, Italy, the Federal Republic of Germany, and other States.

[2] See, e.g., *Engelke* v. *Musmann*, [1928] A.C. 433. Consular functions may be performed by a diplomatic mission; see Article 3 paragraph 2 of the Vienna Convention on Diplomatic Relations, *supra*. Similarly, diplomatic functions may be carried out by a Consular Officer (not necessarily a head of the post) in a State, where the sending State has no diplomatic mission, and with the consent of the receiving State; see Article 17 of the Vienna Convention of 1963.

of a Convention on Special Missions adopted by the United Nations General Assembly on December 8, 1969, and opened for signature on December 16, 1969. The Convention was based on the final set of draft articles prepared in 1967 by the International Law Commission, which had had the subject under consideration since 1958.[1]

The Convention is largely modelled on provisions of the Vienna Convention on Diplomatic Relations of 1961, while there has also been some borrowing from the text of the Vienna Convention on Consular Relations of 1963. No distinction was made by the Convention between special missions of a technical nature and those of a political character, and its provisions apply also to the so-called " high level " special missions, that is missions led by heads of State or Cabinet Ministers, subject however to the special recognition of the privileged status of the leader of the mission in such a case. Privileges and immunities are conferred upon the members of special missions to an extent similar to that accorded to permanent diplomatic missions, the justification being that the like privileges and immunities are essential for the regular and efficient performance of the tasks and responsibilities of special missions (see seventh recital of the preamble to the Convention).

The Convention on Special Missions of 1969 contains, *inter alia,* the following provisions which differentiate it from the Vienna Convention on Diplomatic Relations of 1961, while at the same time reflecting differences between the nature of special missions, on the one hand, and that of permanent diplomatic missions, on the other hand:—(*a*) Two or more States may each send a special mission at the same time to another State in order to deal together with a question of common interest to all of them (Article 6). (*b*) Before appointing members of a special mission, the sending State must inform the receiving State of the size of the mission, and of the names and designations of its members (Article 8). (*c*) The seat of the mission is to be in a locality agreed by the States concerned, or,

[1] For text of draft articles and commentary thereon, see *Report* of the Commission on the Work of its Nineteenth Session (1967).

in the absence of agreement, where the Ministry of Foreign Affairs of the host State is situated, and there may be more than one seat (Article 17). (*d*) Only such freedom of movement and travel is allowed as is necessary for the performance of the functions of the special mission (Article 27; contrast Article 26 of the Vienna Convention). (*e*) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person sought to be sued is not within the scope of immunity from the civil and administrative jurisdiction of the host State (Article 31 paragraph 2 (*d*)). (*f*) Immunities are allowable to a mission representative in transit through a third State only if that State has been informed beforehand of the proposed transit, and has raised no objection (Article 42 paragraph 4).

4.—Other Categories of Representatives and Agents

Representatives and Observers Accredited in Relation to International Organisations

The increasing establishment of permanent missions and delegations accredited in relation to international organisations prompted the United Nations General Assembly in 1958 to invite the International Law Commission to consider the subject of the relations between States and inter-governmental international organisations. As a result of the Commission's labours at its sessions in 1968, 1969, 1970, and 1971[1] a composite set of draft articles was prepared dealing with the conduct and treatment of:—(*a*) permanent missions to international organisation; (*b*) permanent observer missions of non-member Governments to international organisations; and (*c*) delegations to organs of international organisations, and to conferences of States convened by or under the auspices of international organisations. These draft articles encompass *mutatis mutandis* much the same matters as dealt with by the

[1] For text of the principal draft articles and commentary thereon, see the *Reports* of the Commission on the Work of its Twentieth (1968), Twenty-first (1969), and Twenty-second (1970) Sessions.

Vienna Convention on Diplomatic Relations of 1961 and the Convention on Special Missions of 1969, and represent a substantial contribution to the whole *corpus* of diplomatic law, while serving to stabilise the practice as to these new classes of representatives and delegates. However, the contrary position of representatives of international organisations accredited to States was not dealt with, mainly because these representatives would of necessity be officials of the organisation concerned, and therefore their status would normally be covered by the appropriate rules and regulations of the organisation. Moreover, the draft articles do not purport to regulate the position of representatives or observers accredited to regional organisations or organs of, or conferences convened by these regional bodies; only general or universal international organisations are within the scope of the articles.

As was to be expected, the drafts are in numerous places based upon provisions of the Vienna Convention on Diplomatic Relations of 1961. Where, as a practical matter, the Vienna Convention cannot have application, the Convention has not been copied; for example, the rule has been adopted that States parties may freely appoint the members of missions or delegations (see draft Articles 10, 55, and 84).

Non-diplomatic Agents and Representatives

States may employ for various purposes agents, other than regularly accredited diplomatic envoys or consuls. These may be of a permanent character, such as Trade Commissioners[1] and officers of independent information or tourist services. No special rules of international law have developed with respect to such agents. Their rights and privileges may be the subject of specific bilateral arrangement, or simply a matter of courtesy. Normally, they may expect to be treated with consideration by receiving States.

[1] Independent representatives unlike the commercial counsellors or commercial *attachés* of permanent diplomatic missions.

Chapter 15

THE LAW AND PRACTICE AS TO TREATIES

1.—Nature and Functions of Treaties

Prior to 1969 the law of treaties consisted for the most part of customary rules of international law. These rules were to a large extent codified and reformulated in the Vienna Convention on the Law of Treaties, concluded on May 22, 1969 (referred to, *post*, in the present chapter as " the Vienna Convention "[1]). Apart from such codification, the Convention contained much that was new and that represented development of international law, while also a number of provisions resulted from the reconciliation of divergent views and practices. The Vienna Convention was not however intended as a complete code of treaty law, and in the preamble it is in fact affirmed that rules of customary international law will continue to govern questions not regulated by the provisions of the Convention.

A treaty may be defined, in accordance with the definition adopted in Article 2 of the Convention, as an agreement whereby two or more States establish or seek to establish a relationship between themselves governed by international law. So long as an agreement between States is attested, any kind of instrument or document, or any oral exchange between States involving undertakings may constitute a treaty, irrespective of the form or circumstances of its conclusion. Indeed, the term " treaty " may be regarded as *nomen generalissimum* in international law,[2] and can include an agreement between international organisations *inter se*, or between an inter-

[1] In the footnotes to this chapter, the Convention will also be referred to as " the Vienna Convention ", while the abbreviation " Draft Arts. I.L.C." will denote the Draft Articles on the law of treaties drawn up by the International Law Commission, and contained in Chapter II of its *Report* on the Work of its 18th Session in 1966 (these Draft Articles were used as a basic text by the Vienna Conference of 1968–1969 which drew up the Convention). For an analysis of the Vienna Convention and of its drafting history at the Conference, see R. D. Kearney and R. E. Dalton, " The Treaty on Treaties ", *American Journal of International Law*, Vol. 64 (1970), pp. 495–561.

[2] A League of Nations mandate was a " treaty "; *South West Africa Cases, Preliminary Objections*, I.C.J. Reports, 1962, 319, at p. 330.

national organisation on the one hand, and a State or States on the other, although it should be borne in mind that the provisions of the Vienna Convention do not apply to such other instruments, but are confined to treaties between States, concluded in a written form.[1]

At the same time, merely considering the treaty as an agreement without more is to over-simplify its functions and significance in the international domain. In point of fact, the treaty is the main instrument which the international community possesses for the purpose of initiating or developing international co-operation.[2] In national domestic law, the private citizen has a large variety of instruments from which to choose for executing some legal act or for attesting a transaction, for example, contracts, conveyances, leases, licences, settlements, acknowledgments, and so on, each specially adapted to the purpose in hand. In the international sphere, the treaty has to do duty for almost every kind of legal act,[3] or transaction, ranging from a mere bilateral bargain between States to such a fundamental measure as the multilateral constituent instrument of a major international organisation (e.g., the United Nations Charter of 1945).

[1] Article 3 of the Vienna Convention provides nevertheless that the fact that the Convention does not apply to agreements between States and non-State entities, or between non-State entities themselves, or to unwritten agreements is not to affect:—(*a*) the legal force of such agreements; (*b*) the application to them of any rules in the Convention to which they would be subject under international law apart from the Convention; and (*c*) the application of the Convention to the relations of States as between themselves under agreements to which non-State entities may also be parties.

[2] For treatments of the subject of treaties, see Rosenne, *The Law of Treaties* (1970); Greig, *International Law* (1970), pp. 356–395; Kaye Holloway, *Modern Trends in Treaty Law* (1967); Ingrid Detter, *Essays on the Law of Treaties* (1967). The United Nations publication, *Laws and Practices concerning the Conclusion of Treaties* (1953) is a valuable compilation of State practice, with a bibliography. For a selected bibliography on the law of treaties, see the Vienna Conference document, A/CONF.39/4.

[3] *Unilateral acts:* The difference between treaties proper and certain unilateral acts, commonly recognised in international practice, should be noted. As to unilateral acts, see Schwarzenberger, *International Law*, Vol. I (3rd Edition, 1957), at pp. 548–561, and *Manual of International Law* (5th Edition, 1967), at pp. 171–3, and Dr. E. Suy, *Les Actes juridiques unilatéraux en droit international public* (1962). These include acts of protest, notification, renunciation, acceptance, and recognition, and serve the following purposes, *inter alia*:—(*a*) assent to obligations; (*b*) cognition of situations; (*c*) declaration of policy; (*d*) notice to preserve rights; (*e*) reservation, in respect to a possible liability.

In nearly all cases, the object of a treaty is to impose binding obligations on the States who are parties to it. Many writers on the theory of international law have put the question —why do treaties have such binding force? Perhaps the only answer to this query is that international law declares that duly made treaties create binding obligations for the States parties. Certain theorists, for example, Anzilotti, have rested the binding force of treaties on the Latin maxim *pacta sunt servanda*, or in other words that States are bound to carry out in good faith the obligations they have assumed by treaty.[1] Once a State has bound itself by agreement in a treaty, it is not entitled to withdraw from its obligations without the consent of the other States parties. In 1871, Great Britain, France, Italy, Prussia, Russia, Austria, and Turkey subscribed to the following Declaration made at a Conference in London:—

> " That the Powers recognise it an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding ".

Treaties proper must be distinguished from a contract between a State and an alien citizen or corporation; although in ultimate analysis such a contract may raise questions of international concern between the contracting State and the State to which the citizen or corporation belongs, it is not a treaty, and is not subject to the rules of international law affecting treaties.[2]

One further point should be mentioned. The future law and practice of treaties will have to include rules relating to agreements on international matters made by international institutions, whether *inter se*, or with States, or perhaps even

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[1] Cf. Vienna Convention, 3rd recital of preamble (affirming that the principles of free consent, good faith, and *pacta sunt servanda* are " universally recognised "), and Article 26 (all treaties are binding on the parties thereto, and must be performed by them in good faith).

[2] See *Anglo-Iranian Oil Company Case* (*Jurisdiction*), I.C.J. Reports (1952), 93 at p. 112. As to what instruments are not treaties, see Myers, *American Journal of International Law* (1957), Vol. 51, pp. 596–605. A League of Nations mandate is a treaty; *South West Africa Cases, Preliminary Objections*, I.C.J. Reports, 1962, at pp. 319, 330.

with individuals. With the establishment of the United Nations and the " specialised agencies " (see Chapter 19, below), the number of such transactions is rapidly increasing.

2.—Forms and Terminology

In regard to the forms and terminology of modern treaties the present-day practice is far from systematic, and suffers from a lack of uniformity. This is due to several factors, principally the survival of old diplomatic traditions and forms not easily adaptable to the modern international life and to a reluctance on the part of States to standardise treaty usage.

The principal forms in which treaties are concluded are as follows:—

(i) Heads of States form. In this case the treaty is drafted as an agreement between Sovereigns or Heads of State (for example, the British Crown, the President of the United States) and the obligations are expressed to bind them as " High Contracting Parties ".[1] This form is not now frequently used, and is reserved for special cases of Conventions, for example, consular Conventions, and the more solemn kinds of treaties.

(ii) Inter-governmental form. The treaty is drafted as an agreement between Governments. The difference between this and the previous form is not a matter of substance; usually, however, the inter-governmental form is employed for technical or non-political agreements. One notable exception to this rule was the Anglo-Japanese Treaty of Alliance, 1902, which was expressed to be made between the Government of Great Britain and the Government of Japan as Contracting Parties.

(iii) Inter-State form. The treaty is drafted expressly or impliedly as an agreement between States. The signatories are then most often referred to as " the Parties " (see, e.g. the North Atlantic Security Treaty of April 4, 1949).

(iv) A treaty may be negotiated and signed as between Ministers of the respective countries concerned, generally the respective Ministers of Foreign Affairs.

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[1] As to this phrase, see *Philippson* v. *Imperial Airways, Ltd.*, [1939] A.C. 332.

(v) A treaty may be an inter-departmental agreement, concluded between representatives of particular Government Departments, for example, between representatives of the respective Customs Administrations of the countries concerned.

(vi) A treaty may be made between the actual political heads of the countries concerned, for example, the Munich Agreement of September, 1938, which was signed by the British and French Premiers, Mr. Chamberlain and M. Daladier, and by the German and Italian Leaders, Hitler and Mussolini.[1]

The form in which treaties are concluded does not in any way affect their binding character. To take an extreme illustration of this principle it is not even necessary that a treaty be in writing. An oral declaration in the nature of a promise made by the Minister of Foreign Affairs of one country on behalf of his country to the Minister of Foreign Affairs of another and in a matter within his competence and authority may be as binding as a formal written treaty.[2] International law does not as yet require established forms for treaties, and here content and substance are of more importance.[3]

Treaties go under a variety of names, some of which indicate a difference in procedure or a greater or a lesser degree of formality.[4] Thus besides the term " treaty " itself, the following titles have been given:— (1) *Convention.* (2) *Protocol.* (3) *Agreement.* (4) *Arrangement.* (5) *Procès-Verbal.* (6) *Statute.* (7) *Declaration.* (8) *Modus Vivendi.* (9) *Exchange of Notes (or of Letters).* (10) *Final Act.* (11) *General Act.* Each of these titles will be commented on in turn. As to the term " treaty " itself, this is given as a rule to formal agreements relative to peace, alliance, or the cession of territory, or some other fundamental matter.

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[1] To this list may be added military treaties made between opposing commanders-in-chief, e.g., the Korean Armistice Agreement of July 27, 1953. Another special case is that of a *Concordat*, i.e., an agreement between the Pope and a Head of State; see Oppenheim, *International Law*, Vol. I (8th Edition, 1955), p. 252, and Satow's *Guide to Diplomatic Practice* (4th Edition, 1957), pp. 343–344.

[2] See the decision of the Permanent Court of International Justice in the *Eastern Greenland Case*, Pub. P.C.I.J. (1933), Series A/B, No. 53.

[3] Cf. Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 898–900.

[4] See Myers, *American Journal of International Law* (1957), Vol. 51, pp. 574–605.

(1) Convention

This is the term ordinarily reserved for a proper formal instrument of a multilateral character. The term also includes the instruments adopted by the organs of international institutions, for example, by the International Labour Conference and the Assembly of the International Civil Aviation Organisation.[1]

(2) Protocol

This signifies an agreement less formal than a treaty or Convention proper and which is generally never in the Heads of State form. The term covers the following instruments:—

(*a*) An instrument subsidiary to a Convention, and drawn up by the same negotiators. Sometimes also called a Protocol of Signature, such a Protocol deals with ancillary matters such as the interpretation of particular clauses of the Convention, any supplementary provisions of a minor character, formal clauses not inserted in the Convention, or reservations by particular signatory States. Ratification of the Convention will normally *ipso facto* involve ratification of the Protocol.

(*b*) An ancillary instrument to a Convention, but of an independent character and operation and subject to independent ratification, for example, the Hague Protocols of 1930 on Statelessness, signed at the same time as the Hague Convention of 1930 on the Conflict of Nationality Laws.

(*c*) An altogether independent treaty.

(*d*) A record of certain understandings arrived at, more often called a *Procès-Verbal.*

(3) Agreement

This is an instrument less formal than a treaty or Convention proper, and generally not in Heads of State form. It is usually applied to agreements of more limited scope and with fewer parties than the ordinary Convention.[2] It is also employed

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[1] It is still sometimes used for a bilateral treaty; note, e.g., the Franco-Dutch General Convention on Social Security of January, 1950.

[2] *Partial Agreements:* The term "Partial Agreement" is used for an Agreement prepared and concluded within the framework of the Council of Europe, but between only a limited number of interested States.

for agreements of a technical or administrative character only, signed by the representatives of Government Departments, but not subject to ratification.

(4) Arrangement

The observations above as to Agreements apply here. It is more usually employed for a transaction of a provisional or temporary nature.

(5) Procès-Verbal

This term originally denoted the summary of the proceedings and conclusions of a diplomatic conference, but is now used as well to mean the record of the terms of some agreement reached between the parties; for example, the *Procès-Verbal* signed at Zurich in 1892 by the representatives of Italy and Switzerland to record their understanding of the provisions of the Treaty of Commerce between them. It is also used to record an exchange or deposit of ratifications, or for an administrative agreement of a purely minor character, or to effect a minor alteration to a Convention. It is generally not subject to ratification.

(6) Statute

(*a*) A collection of constituent rules relating to the functioning of an international institution, for example, the Statute of the International Court of Justice, 1945.

(*b*) A collection of rules laid down by international agreement as to the functioning under international supervision of a particular entity, for example, the Statute of the Sanjak of Alexandretta, 1937.[1]

(*c*) An accessory instrument to a Convention setting out certain regulations to be applied; for example, the Statute on Freedom of Transit annexed to the Convention on Freedom of Transit, Barcelona, 1921.

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[1] See the decision of the Permanent Court of International Justice on the *Interpretation of the Statute of Memel Territory*, Pub. P.C.I.J. (1932), Series A/B, No. 49, at p. 300, which shows that this type of statute must be interpreted in the same way as a treaty.

(7) Declaration

The term denotes:—

(*a*) A treaty proper, for example, the Declaration of Paris, 1856.

(*b*) An informal instrument appended to a treaty or Convention interpreting or explaining the provisions of the latter.

(*c*) An informal agreement with respect to a matter of minor importance.

(*d*) A resolution by a diplomatic conference, enunciating some principle or *desideratum* for observance by all States; for example, the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the Vienna Conference of 1968–1969 on the Law of Treaties.[1]

Declarations may or may not be subject to ratification.

(8) Modus Vivendi

A *modus vivendi* is an instrument recording an international agreement of a temporary or provisional nature intended to be replaced by an arrangement of a more permanent and detailed character. It is usually made in a most informal way,[2] and never requires ratification.

(9) Exchange of Notes (or of Letters)

An exchange of notes is an informal method, very frequently adopted in recent years,[3] whereby States subscribe to certain understandings or recognise certain obligations as binding them. Sometimes the exchange of notes is effected through

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[1] In addition the term "Declaration" can denote:—(i) A unilateral declaration of intent by a State; e.g., a declaration accepting the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2 of its Statute. (ii) Resolutions of the United Nations General Assembly, intended to affirm a significant principle; e.g., Declaration on the Rights of the Child, adopted in 1959.

[2] E.g., being made in the names of the negotiating plenipotentiaries only, or initialled without being signed.

[3] See Oppenheim, *International Law*, Vol. I (8th Edition, 1955), p. 907, and cf. Article 13 of the Vienna Convention (exchange of instruments constituting a treaty—consent to be bound is expressed by such exchange), and Satow's *Guide to Diplomatic Practice* (4th Edition, 1957), pp. 340–342.

the diplomatic or military representatives of the States concerned. Ratification is not usually required.

There have been also instances of multilateral exchanges of notes.

(10) Final Act

The Final Act is the title of the instrument which records the winding up of the proceedings of the Conference summoned to conclude a Convention (see, for example, the Final Act of the Vienna Conference of 1968–1969 on the Law of Treaties). It summarises the terms of reference of the Conference, and enumerates the States or Heads of States represented, the delegates who took part in the discussions, and the instruments adopted by the Conference. It also sets out resolutions, declarations, and recommendations adopted by the Conference which were not incorporated as provisions of the Convention. Sometimes it also contains interpretations of provisions in the formal instruments adopted by the Conference. The Final Act is signed but does not require ratification.

There have been several instances of a Final Act which was a real international treaty, for example, the Final Act of the Conference of Countries Exporting and Importing Wheat, signed at London in August, 1933.

(11) General Act

A General Act is really a treaty but may be of a formal or informal character. The title was used by the League of Nations in the case of the General Act for the Pacific Settlement of International Disputes adopted by the Assembly in 1928, of which a revised text was adopted by the United Nations General Assembly on April 28, 1949.[1]

[1] Other titles for treaty instruments, sometimes used, are:—*Accord; Act* (French equivalent—*Acte*) for a treaty laying down general rules of international law or setting up an international organ; *Aide-Mémoire*; *Articles*, or *Articles of Agreement* (e.g., Articles of Agreement of the International Monetary Fund, 1944); *Charter* and *Constitution* for the constituent instruments of international organisations; *Compact, Instrument, Memorandum, Memorandum of Agreement, Memorandum of Understanding*, and *Minute* or *Agreed Minutes* to record in a less formal manner some understanding or to deal with a minor procedural matter; *Note verbale; Pact*, to record some solemn obligation; and *Public Act* (similar to *Act*, above).

3.—Parties to Treaties

Generally only States which fulfil the requirements of statehood at international law, or international organisations can be parties to treaties.

Modern developments have made it almost impossible to apply this rule in all its strictness. Sometimes agreements of a technical character are made between the Government Departments of different States, being signed by representatives of these departments. Sometimes also Conventions will extend to the colonial territories of States.

As a general rule a treaty may not impose obligations or confer rights on third parties without their consent (Vienna Convention, Article 34), and, indeed, many treaties expressly declare that they are to be binding only on the parties. This general principle, which is expressed in the Latin maxim *pacta tertiis nec nocent nec prosunt*, finds support in the practice of States, in the decisions of international tribunals,[1] and now in the provisions of the Vienna Convention (see Articles 34–38). The exceptions to it are as follows:—

(*a*) Treaties under which the intention of the parties is to accord rights to third States, with their express or presumed assent, such as treaties effecting an international settlement or conferring an international status on ports, waterways, etc., may reach out to States non-parties. The best illustration of this is the Convention of 1856 between France, Great Britain, and Russia, concerning the non-fortification of the Aaland Islands. In 1920, after Sweden, a non-party, had insisted that the provisions of the Convention should be complied with, a League of Nations Committee of Jurists expressed the opinion that, though Sweden was a non-party and had no contractual rights, the Convention in fact created objective law, with benefits extending beyond the circle of the contracting parties. As the Permanent Court of International Justice has pointed out,[2] the operation of such a third-party right is not lightly

[1] For discussion, see Ingrid Detter, *Essays on the Law of Treaties* (1967), pp. 100–118; Joseph Gold, *The Fund and Non-Member State. Some Legal Effects* (IMF Pamphlet Series, No. 7); and commentary on Articles 30–32, Draft Arts. I.L.C. (this includes some useful references to the case-law).

[2] *Case of the Free Zones of Upper Savoy and Gex*, Pub. P.C.I.J. (1932), Series A/B, No. 46, at p. 147. These observations were, however, of the nature of *obiter dicta*.

to be presumed and much depends on the circumstances of each case. But if the parties intended to confer rights on a State which was not a party, this intention may be decisive. The test is " whether the States which have stipulated in favour of a third State meant to create an actual right which the latter has accepted as such ".

Article 36 of the Vienna Convention purports to declare a general principle covering the case of such treaties intended to confer third party rights. On the matter of third party assent, it lays down that such assent " shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides ". This can hardly be described as a model of vintage drafting, while also obscurity surrounds Article 37 paragraph 2, providing that such a third party right may not be revoked or modified by the parties " if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State ".

(*b*) Multilateral treaties declaratory of established customary international law will obviously apply to non-parties, but the true position is that non-parties are bound not by the treaty but by the customary rules, although the precise formulation of the rules in the treaty may be of significance. Also treaties, bilateral or otherwise, may by constituting elements in the formation of customary international law, come to bind third parties by virtue of the same principle (cf. Vienna Convention, Article 38).

(*c*) Multilateral treaties creating new rules of international law may bind non-parties in the same way as do all rules of international law,[1] or be *de facto* applied by them as standard-setting instruments.

(*d*) Certain multilateral Conventions which are intended to have universal operation, may provide in terms for their application to non-parties. Thus, the Geneva Drugs Convention of 1931 now replaced by the Single Convention on

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[1] See above, p. 45. Cf. the Briand-Kellogg Pact of 1928 for the Outlawry of War which under the Nuremberg Judgment of 1946 was regarded as creating general law for signatories and non-signatories alike.

Narcotic Drugs concluded at New York on March 30, 1961, enabled an international organ finally to determine the estimates for legitimate narcotic drug requirements of States, not parties to the Convention. Moreover, if a State non-party exceeded these estimates by obtaining or producing larger supplies of drugs, it became liable to an embargo on imports in the same way as States parties.[1]

(*e*) Article 35 of the Vienna Convention declares that an obligation arises for a third State from a treaty provision, if the parties to the treaty intend the provision to be the means of establishing the obligation, and the third State expressly accepts the obligation in writing. It is questionable whether this is a real exception; an arguable point is that the treaty itself in conjunction with the written acceptance of the obligation may constitute a composite tripartite arrangement, and such an interpretation seems to be supported by Article 37 paragraph 1, providing that the obligation may be revoked or modified only with the consent of the treaty parties and the third State " unless it is established that they had otherwise agreed ".

In the light of the impact of the above-mentioned Articles 34–38 of the Vienna Convention upon the admissibility of third party rights and obligations, the practical course for States not wishing, in any treaty concluded by them, to confer such rights or impose such obligations is to stipulate expressly against this result, while a non-party State, unwilling to be saddled with an external treaty obligation, should ensure that neither by its conduct nor by its declarations has it assented to the imposition of the obligation.

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[1] For the practice and procedure, see *Study of the Convention* published by the League of Nations (1937), Doc. C. 191, M.136, 1937, XI, pp. 183–7. Cf. also paragraph 6 of Article 2 of the United Nations Charter (enforcement of principles of Charter upon non-Members), and Article 32 (non-Members attending Security Council discussions). Cf. the position under certain provisions of the Articles of Agreement of the International Monetary Fund; Gold, *op. cit.*, pp. 40–2.

4.—Practice as to Conclusion and Entry into Force of Treaties

The various steps in the creation of obligations by treaty are:—

(1) The accrediting of persons who conduct negotiations on behalf of the contracting States.
(2) Negotiation and adoption.
(3) Authentication, signature and exchange of instruments.
(4) Ratification.
(5) Accessions and adhesions.
(6) Entry into force.
(7) Registration and publication.
(8) Application and enforcement.

We shall take each of these steps in turn.

(1) Accrediting of Negotiators ; Full Powers and Credentials

Once a State has decided to commence negotiations with another State or other States for a particular treaty, the first step is to appoint representatives to conduct the negotiations. It is clearly important that each representative should be properly accredited to the other and be equipped with the necessary authority proving not merely his status as an official envoy, but also his power to attend at and to participate in the negotiations, as well as to conclude and sign the final treaty, although, strictly speaking, a power to sign is unnecessary for the stage of negotiations. In practice a representative of a State is provided with a very formal instrument given either by the Head of State or by the Minister of Foreign Affairs showing his authority in these various regards. This instrument is called the Full Powers or *Pleins Pouvoirs*.[1] According to British practice, two kinds of Full Powers are issued to plenipotentiaries:—

(*a*) If the treaty to be negotiated is in the Heads of State

[1] See, as to the whole subject, Jones, *Full Powers and Ratification* (1946). Full Powers can authorise the representative to negotiate, adopt, or authenticate a treaty text, or to express a State's consent to be bound by a treaty, or to accomplish any other act with respect to a treaty (Vienna Convention, Article 2); possibly, for example, to terminate or denounce a treaty.

form, special Full Powers are prepared signed by the Sovereign and sealed with the Great Seal.

(*b*) If the treaty to be negotiated is in the inter-governmental or inter-State form, Government Full Powers are issued, signed by the Secretary of State for Foreign Affairs and bearing his official seal.

Full Powers are not necessary if it appears from the practice of the negotiating States that their intention was to consider the person concerned as representing the sending State, and to dispense with Full Powers (Vienna Convention, Article 7 paragraph 1 (*b*)). Nor are Full Powers normally issued for the signature of an agreement to be concluded between the departments of two Governments. This is rather a manifestation of the principle that the negotiating States concerned may evince an intention to dispense with Full Powers.

When bilateral treaties are concluded, each representative exhibits his Full Powers to the other. Sometimes an actual exchange of these documents is effected, in other cases only an exchange of certified copies takes place. Practice in this matter is far from settled.

In the case of diplomatic Conferences summoned to conclude a multilateral instrument, a different procedure is followed. At the beginning of the proceedings a Committee of Full Powers is appointed to report generally to the Conference on the nature of the Full Powers which each representative at the Conference possesses.[1] The delegates hand in their Full Powers to the Secretary of the Committee of Full Powers. It may be, for instance, that Full Powers possessed by a particular delegate authorise him to negotiate but give him no power to sign. In that case the Committee reports the fact to the Conference and the delegate is specifically requested to obtain from his Government the necessary authority to sign. In practice, Committees of Full Powers do not, as a rule, insist on the presentation of formal instruments of Full

[1] Under Article 7 paragraph 2 (*c*) of the Vienna Convention, representatives accredited to an international conference, or to an international organisation or one of its organs, for the purpose of adopting a treaty text in that conference, organisation, or organ, are considered as representing their sending State, without the necessity of producing Full Powers.

Powers, but sometimes temporarily accept as credentials far less formal documents such as telegrams or letters emanating from Prime Ministers, Ministers for Foreign Affairs, or Permanent Delegates to the United Nations.[1]

In the case of the International Labour Conference, Full Powers are generally not given to the various Government, employers' and workers' delegates of each State represented. As a rule credentials are issued by the Government authorising delegates to the Conference merely to attend it, but of course giving them no power to agree to or to conclude or to sign Conventions adopted by the Conference, since these Conventions are not signed by delegates but merely authenticated by the signatures of the President of the Conference and the Director-General of the International Labour Office, and since the Conference adopts a text in a different manner from diplomatic Conferences.

Acts relating to the conclusion of a treaty performed by a person who has either not produced appropriate Full Powers or who, in the absence of Full Powers, has not been considered as representing his sending State, are without legal effect unless subsequently confirmed by that State (Vienna Convention, Article 8).

(2) Negotiation and Adoption

Negotiations concerning a treaty are conducted either through *Pourparlers* in the case of bilateral treaties or by a diplomatic Conference, the more usual procedure when a multilateral treaty is to be adopted. In both cases the delegates remain in touch with their Governments, they have with them preliminary instructions which are not communicated to the other parties, and at any stage they may consult their Governments and, if necessary, obtain fresh instructions. As a

[1] Heads of State, Heads of Government, and Ministers for Foreign Affairs, negotiating in person, do not need Full Powers, but are treated as representing their State for the purpose of performing all acts relating to the conclusion of a treaty, and the same applies to the head of a diplomatic mission for the purpose of adopting a treaty between the sending and the receiving State (Vienna Convention, Article 7, paragraph 2 (*a*) and (*b*).

matter of general practice, before appending their signature to the final text of the treaty, delegates do obtain fresh instructions to sign the instrument whether with or without reservations.

The procedure at diplomatic Conferences runs to a standard pattern. Apart from Steering Committees, Legal and Drafting Committees are appointed at an early stage to receive and review the draft provisions proposed by the various delegations. Usually, too, the Conference appoints a prominent delegate to act as rapporteur in order to assist the Conference in its deliberations. Besides the formal public sessions of the Conference, many parleys are conducted in the " corridors ", in hotel rooms, and at special dinners and functions. The results of these appear in due course in the decisions reached by the Conference.

Article 9 paragraph 2 of the Vienna Convention provides that the adoption of a treaty text at an international conference is to take place by the vote of two-thirds of the States present and voting, unless by the same majority these States decide to apply a different rule.

It should be mentioned that in respect of certain subjects at least, the procedure of adoption of multilateral instruments by diplomatic Conferences has been replaced by the method of their adoption by the organs of international institutions; for example, by—among others—the United Nations General Assembly, the World Health Assembly, and the Assembly of the International Civil Aviation Organisation. The Conventions adopted by any such Assembly are opened for signature or acceptance by Member or non-Member States.

A novel procedure was adopted in regard to the Convention of March 18, 1965, for the Settlement of Investment Disputes between States and Nationals of Other States. The Executive Directors of the International Bank for Reconstruction and Development (World Bank) prepared the final text with the preliminary assistance of a Legal Committee representing 61 member Governments of the Bank, and submitted it to Governments for signature, subject to ratification, acceptance or approval.

(3) Authentication, Signature and Exchange of Instruments

When the final draft of the treaty has been agreed upon, the instrument is ready for signature. The text may be made public for a certain period before signature, as in the case of the North Atlantic Security Treaty, made public on March 18, 1949, and signed at Washington on April 4, 1949. The act of signature is usually a most formal matter, even in the case of bilateral treaties. As to multilateral Conventions, signature is generally effected at a formal closing session (*séance de clôture*) in the course of which each delegate steps up to a table and signs on behalf of the Head of State or Government by whom he was appointed.

Unless there is an agreement to dispense with signature, this is essential for a treaty, principally because it serves to authenticate the text. The rule, as stated in Article 10 of the Vienna Convention, is that the text may be authenticated by such procedure as is laid down in the treaty itself, or as is agreed to by the negotiating States, or in the absence of such agreed procedure, by signature, signature *ad referendum* (as to which, see p. 415, *post*), initialling,[1] or by incorporation in the Final Act[2] of the conference. In practice, also, the text of an instrument may be authenticated by the resolution of an international organisation. If a treaty is signed, it is important that the signature should be made by each of the delegates at the same time and place, and in the presence of each other. Furthermore, the date of the treaty is usually taken to be the date on which it was signed.

Sometimes not merely a delegate but a Head of State will sign a treaty. Thus, in 1919, Woodrow Wilson, as President of the United States, signed the Treaty of Versailles, the

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[1] In which case, formal signature of an instrument in proper form, takes place later; e.g., the Security Treaty between Australia, New Zealand, and the United States (ANZUS), initialled at Washington on July 12, 1951, and signed at San Francisco on September 1, 1951. Other cases of initialling occur where a representative, without authority to sign or acting generally without instructions, prefers not to sign a text. In special circumstances, an initialling may be intended to operate as a signature; and cf. Vienna Convention, Article 12.

[2] See p. 405, *ante*.

preamble reciting that he acted " in his own name and by his own proper authority ".

As mentioned above, the Conventions adopted by the International Labour Conference are not signed by the delegates but are simply authenticated by the signatures of the President of the Conference and the Director-General of the International Labour Office. There have also been cases of instruments adopted by international organs, which are accepted or acceded to by States, without signature.

It is a common practice to open a Convention for signature by certain States until a certain date after the date of the formal session of signature. Generally, this period does not exceed nine months. The object is to obtain as many parties to the Convention as possible, but inasmuch as new signatories can only be allowed with the consent of the original signatories, a special clause to this effect must be inserted in the Convention. A current practice is to open a Convention for signature to all members of the United Nations and the specialised agencies, to all parties to the Statute of the International Court of Justice, and to any other State invited by the General Assembly. During the period mentioned, each State may sign at any time, but after the expiration of the period no further signatures are allowed and a non-signatory State desiring to become a party must accede or adhere to the Convention but cannot ratify, inasmuch as it has not signed the instrument. In the case of the nuclear weapons test ban treaty of 1963 referred to *ante*,[1] the instrument was opened for the signature of all States (see Article III).

A further expedient has been, by the so-called *acceptance formula clause*, to open an instrument for an indefinite time for:—(*a*) signature, without reservation as to acceptance; (*b*) signature subject to, and followed by later acceptance; and (*c*) acceptance *simpliciter*, leaving States free to become bound by any one of these three methods. The term " acceptance ", used in this clause, has crept into recent treaty terminology to denote the act of becoming a party to a treaty by

[1] See p. 191.

adherence of any kind, in accordance with a State's municipal constitutional law.[1] The principal object of the clause was indeed to meet difficulties which might confront a potential State party under its municipal constitutional rules relative to treaty approval. Some States did not wish to use the term " ratification ", as this might imply an obligation to submit a treaty to the Legislature for approval, or to go through some undesired constitutional procedure.

Effect of Signature

The effect of signature of a treaty depends on whether or not the treaty is subject to ratification, acceptance, or approval.

If the treaty is subject to ratification, acceptance, or approval, signature means no more than that the delegates have agreed upon a text and are willing to accept it and refer it to their Governments for such action as those Governments may choose to take in regard to the acceptance or rejection of the treaty. It may also indicate an intention on the part of a Government to make a fresh examination of the question dealt with by the treaty with a view to putting the treaty into force.[2] In the absence of an express term to that effect, there is no binding obligation on a signatory State to submit the treaty to the national legislature for action or otherwise. On the other hand, it is laid down in the Vienna Convention that, where a treaty is subject to ratification, acceptance, or approval, signatory States are under an obligation of good faith to refrain from acts calculated to defeat the object of the treaty until

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[1] On the meaning of " acceptance ", see Yuen-Li Liang, *American Journal of International Law* (1950), Vol. 44, pp. 342 *et seq.* It means in effect a decision to become definitively bound, in accordance with a State's municipal constitutional rules. As to the term " approval ", see commentary on Article 11, Draft Arts. I.L.C.

[2] The common practice of signature *ad referendum* generally denotes that the signatory State is unable at the time to accept definitively the negotiated terms expressed in the treaty. It has also been interpreted as indicating that the plenipotentiary concerned had no definite instructions to sign, and no time to consult his Government. If signature *ad referendum* be confirmed by the State concerned, the result is a full signature of the treaty; cf. Vienna Convention, Article 12.

they have made their intention clear of not becoming parties (see Article 18[1]).

Where a treaty is subject to ratification, acceptance, or approval, it is sometimes expressly stipulated in the treaty or in some related exchange of notes that, pending ratification, acceptance, or approval, the instrument is to operate on a provisional basis as from the date of signature, as with the Japan-Australia Trade Treaty of July 6, 1957.

If the treaty is not subject to ratification, acceptance, or approval, or is silent on this point, the better opinion is that, in the absence of contrary provision, the instrument is binding as from signature. The ground for this opinion is that it has become an almost invariable practice where a treaty is to be ratified, accepted, or approved, to insert a clause making provision to this effect, and where such provision is absent, the treaty may be presumed to operate on signature. Some treaties may by their express provisions operate from the date of signature, for example, the Anglo-Japanese Treaty of Alliance of 1902, and Agreements concluded within the framework of the Council of Europe, which are expressed to be signed without reservation in respect to ratification. Also many treaties relating to minor or technical matters, generally bearing the titles " Agreement ", " Arrangement " or " *Procès-Verbal* ", are simply signed but not ratified, and operate as from the date signature is appended. Indeed if there is direct evidence of intention to be bound by signature alone, as e.g. in the terms of the Full Powers, this is sufficient to bind the States concerned without more. Article 12 of the Vienna Convention upholds the autonomous right of the negotiating States so to agree, expressly or impliedly, that they shall be bound by signature alone, or by initialling treated as equivalent to signature, or by signature *ad referendum* (see pp. 415, n. 2, *ante*) confirmed by the sending State.

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[1] Under this article, also, a State which has expressed a consent to be bound by a treaty, is similarly obliged to refrain from such acts, pending the entry into force of the treaty, and provided that such entry into force is not unduly delayed.

Exchange of Instruments

Where a treaty is constituted by instruments exchanged by representatives of the parties, such exchange may result in the parties becoming bound by the treaty if:—(*a*) the instruments provide that the exchange is to have this effect; or (*b*) it can otherwise be shown that the parties were agreed that this would be the effect of such exchange (Vienna Convention, Article 13).

Sealing

Treaties and Conventions are nearly always sealed, although this is not the case with the less formal types of international agreements. Sealing appears now to have lost its prior importance, and is not necessary either for the authentication or the validity of the treaty. Formerly, with the exception of notarial attestation for special instruments, it was however the only recognised mode of authenticating the text of a treaty.

(4) Ratification

The next stage is that the delegates who signed the treaty or Convention refer it back to their Governments for approval, if such further act of confirmation be expressly or impliedly necessary.

In theory, ratification is the approval by the Head of State or the Government of the signature appended to the treaty by the duly appointed plenipotentiaries. In modern practice, however, it has come to possess more significance than a simple act of confirmation, being deemed to represent the formal declaration by a State of its consent to be bound by a treaty. So in Article 2 of the Vienna Convention, ratification was defined to mean " the international act . . . whereby a State establishes on the international plane its consent to be bound by a treaty ". Consistently with this, ratification is not held to have retroactive effect, so as to make the treaty obligatory from the date of signature.

At one time, ratification was regarded as so necessary that without it a treaty should be deemed ineffective. This point was referred to by Lord Stowell.[1]

[1] See *The Eliza Ann* (1813), 1 Dods. 244, at p. 248.

> " According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form; *for the instrument, in point of legal efficacy, is imperfect without it* ".

According to Judge J. B. Moore in the *Mavrommatis Palestine Concessions Case*[1] the doctrine that treaties may be regarded as operative before they have been ratified is " obsolete, and lingers only as an echo from the past ".[2]

These judicial observations apply with less force and cogency at the present time, when more than two-thirds of currently registered treaties make no provision whatever for ratification, and when most treaties make it quite clear whether or not signature, or signature subject to ratification, acceptance, etc. is the method chosen by the States concerned. The more acceptable view today is that it is purely a matter of the intention of the parties whether a treaty does or does not require ratification as a condition of its binding operation. Consistently, Article 14 of the Vienna Convention provides that the consent of a State to be bound by a treaty is expressed by ratification if:—(*a*) the treaty so expressly provides; or (*b*) the negotiating States otherwise agree that ratification is necessary; or (*c*) the treaty has been signed subject to ratification; or (*d*) an intention to sign subject to ratification appears from the Full Powers or was expressed during negotiations.

The practice of ratification rests on the following rational grounds:—

(*a*) States are entitled to have an opportunity of re-examining and reviewing instruments signed by their delegates before undertaking the obligations therein specified.

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[1] Pub. P.C.I.J. (1924), Series A, No. 2, at p. 57.

[2] In modern practice, the express or implied waiver of ratification is so common that, today, the more tenable view is that ratification is not required unless expressly stipulated. Ratification is, of course, unnecessary if the treaty provides that parties may be bound by signature only, or if the treaty be signed by Heads of State in person.

(*b*) By reason of its sovereignty, a State is entitled to withdraw from participation in any treaty should it so desire.

(*c*) Often a treaty calls for amendments or adjustments in municipal law. The period between signature and ratification enables States to pass the necessary legislation or obtain the necessary parliamentary approvals, so that they may thereupon proceed to ratification. This consideration is important in the case of Federal States, where, if legislation to carry into effect treaty provisions falls within the powers of the member units of the Federation, these may have to be consulted by the central Government before it can ratify.

(*d*) There is also the democratic principle that the Government should consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed.

Ratification and Municipal Constitutional Law

The development of constitutional systems of government under which various organs other than the Head of State are given a share in the treaty-making power has increased the importance of ratification.[1] At the same time in each country the procedure followed in this regard differs. For instance, often States will insist on parliamentary approval or confirmation of a treaty although the treaty expressly provides that it operates as from signature, whereas other States follow the provisions of the treaty and regard it as binding them without further steps being taken.

In British practice there is no rule of law requiring all treaties to be approved by Parliament prior to ratification. It is customary to submit certain treaties to Parliament for approval,[2] for example, treaties of alliance, and ratification is only effected after this approval is given. Theoretically, however, the Crown is constitutionally free to ratify any treaty without the consent of Parliament. By reason of their subject-matter some treaties necessitate the intervention of Parliament,

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[1] See as to the subject of ratification, Jones, *Full Powers and Ratification* (1946), and Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 903–918.

[2] See p. 89, *ante*.

for example, treaties derogating from the private rights of citizens, treaties imposing a charge on public funds, etc. In practice the text of every treaty subject to ratification is, as soon as possible after signature, laid before Parliament for a period of at least twenty-one days before ratification.[1]

Usually the ratification is an act executed only by the Head of State, but in the case of treaties of lesser importance the Government itself or the Minister for Foreign Affairs may effect the ratification. The document of ratification is generally a highly formal instrument, notwithstanding that international law neither prescribes nor insists on any degree of formality for such instruments.

Some treaties make signature subject to "acceptance"[2] or "approval"; these terms may then denote a simplified form of ratification. In fact, in Article 2 of the Vienna Convention, "acceptance" and "approval" have received the same definition as ratification, while the provisions of Article 14 as to when ratification imports consent to be bound by a treaty apply *mutatis mutandis* to acceptance and approval.

Absence of Duty to Ratify

The power of refusing ratification is deemed to be inherent in State sovereignty, and accordingly at international law there is neither a legal nor a moral duty to ratify a treaty. Furthermore, there is no obligation other than one of ordinary courtesy to convey to other States concerned a statement of the reasons for refusing to ratify.

In the case of multilateral "law-making" treaties, including the Conventions of the International Labour Organisation, the delays of States in ratifying or their unexpected withholding of ratifications have caused much concern and raised serious problems. The practical value of unratified Conventions scarcely calls for comment. The principal causes of delay were acutely investigated and reported on by a Committee appointed by the League of Nations to consider the matter.[3]

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[1] See p. 89, n. 2, *ante*.
[2] See above, pp. 414-416.
[3] See *Report* of the Committee, League of Nations Doc. A.10, 1930, V.

To borrow from the study made by this Committee the causes may be briefly summarised as:—(*a*) the complicated machinery of modern government involving protracted administrative work before the decision to ratify or accede; (*b*) the absence of thorough preparatory work for treaties leading to defects which entitle States to withhold or delay ratification; (*c*) the shortage of parliamentary time in countries where constitutional practice requires submission of the instrument to the Legislature; (*d*) serious difficulties disclosed by the instrument only after signature and calling for prolonged examination; (*e*) the necessity for new national legislation or the need for increased expenditure as a result; (*f*) lack of interest by States. The International Labour Office has over a period of years developed a specialised technique for supervising the ratification of Conventions and their application by municipal law, partly through a special Committee[1] which regularly deals with the matter, partly through the work of special sections of the Office. The delays in ratification may explain the recent tendency in treaty practice to dispense with any such requirement.

Exchange or Deposit of Ratifications

Unless the treaty itself otherwise provides, an instrument of ratification has no effect in finally establishing consent to be bound by the treaty until the exchange or deposit, as the case may be, of ratifications, or at least until some notice of ratification is given to the other State or States concerned, or to the depositary of the treaty, if so agreed (see Vienna Convention, Article 16). The same rule applies to an instrument of acceptance or approval.

In the case of bilateral treaties, ratifications are exchanged by the States parties concerned and each instrument is filed in the archives of the Treaty Department of each State's Foreign Office. Usually a *procès-verbal* is drawn up to record and certify the exchange.

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[1] The Committee of Experts on the Application of Conventions.

The method of exchange is not appropriate for the ratification of multilateral treaties. Such a treaty usually provides for the deposit of all ratifications in a central headquarters such as the Foreign Office of the State where the treaty was signed. Before the Second World War, ratifications of Conventions adopted under the auspices of the League of Nations were deposited in the League Secretariat, and the Secretary-General used to notify all States concerned of the receipt of ratifications. The Secretariat of the United Nations now carries out these Chancery functions.[1] In the case of the nuclear weapons test ban treaty of 1963 referred to *ante*,[2] the treaty was to be deposited in the archives of each of the three original signatories, the U.S.S.R., the U.S.A., and the U.K.

(5) Accessions and Adhesions

In practice, when a State has not signed a treaty it can only accede or adhere to it. According to present practice, a non-signatory State may accede or adhere even before the treaty enters into force.[3] Some writers profess to make a distinction between accession and adhesion. Thus it is sometimes said that accession involves being party to the whole treaty by full and entire acceptance of all its provisions precluding reservations to any clause, whereas adhesion may be an acceptance of part only of the treaty. Again, it is maintained by some that accession involves participation in the treaty with the same status as the original signatories, whereas adhesion connotes merely approval of the principles of the treaty. These suggested distinctions are not generally supported by the practice of States.

The term " accession " has also been applied to acceptance by a State of a treaty or Convention after the prescribed number of ratifications for its entry into force have been

[1] As at the end of 1968, the Secretary-General was exercising depositary functions in respect of 184 treaties (*Year Book of the United Nations*, 1968, p. 851). For his practice as depositary, see *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*. The Vienna Convention contains provisions setting out the functions of a depositary of a treaty (see Articles 76–80).

[2] See p. 191.

[3] See commentary on Article 12, Draft Arts. I.L.C.

deposited. Thus, assuming ten ratifications are necessary for entry into force, and ten have been deposited, subsequent ratifications or acceptances would be termed " accessions ". The use of the term " accession " in this sense is not generally approved. In fact, in Article 2 of the Vienna Convention, " accession " has received the same definition as " ratification ", while under Article 15 accession imports consent to be bound by a treaty in the same way *mutatis mutandis* as under Article 14 dealing with ratification (see p. 418, *ante*). Similarly, also unless the treaty otherwise provides, an instrument of accession does not finally establish such consent, until exchange or deposit, or notice thereof to the contracting States, or to the depositary, if so agreed (Vienna Convention, Article 16).

No precise form is prescribed by international law for an instrument of accession, although generally it is in the same form as an instrument of ratification. A simple notification of intention to participate in a treaty may be sufficient.

Strictly speaking, States which have not signed a treaty can in theory accede only with the consent of all the States which are already parties to the instrument. The *ratio* of this rule is that the States parties are entitled to know and approve of all other parties to a treaty binding them, so that the equilibrium of rights and obligations created by the treaty is not disturbed. Usually, therefore, States accede to a treaty in virtue of a special accession clause, enabling them to accede after the final date for signature of the treaty, and prescribing the procedure for deposit of accessions.

(6) Entry into Force

The entry into force of a treaty depends upon its provisions, or upon what the contracting States have otherwise agreed (Vienna Convention, Article 24 paragraph 1). As already mentioned, many treaties become operative on the date of their signature, but where ratification, acceptance, or approval is necessary, the general rule of international law is that the treaty concerned comes into force only after the exchange or

deposit of ratifications, acceptances, or approvals by all the States signatories. Multilateral treaties now usually make entry into force dependent on the deposit of a prescribed number of ratifications and like consents to be bound—usually from six to about twenty.[1] Sometimes, however, a precise date for entry into force is fixed without regard to the number of ratifications received. Sometimes, also, the treaty is to come into operation only on the happening of a certain event; for example, even after its ratification by all States signatories, the Locarno Treaty of Mutual Guarantee of 1925 was to enter into force only after Germany's admission to the League of Nations (see Article 10).

As to States parties desiring to ratify, accept, approve, or accede, it is usually provided that the treaty or Convention will enter into force for each such State on the date of deposit of the appropriate instrument of consent to be bound, or within a fixed time—usually ninety days—after such deposit.[2] Sometimes also it is specified that the treaty will not be operative for a particular State until after the necessary legislation has been passed by it.

Another frequently adopted expedient is that of the provisional or *de facto* application of a treaty, pending its *de jure* entry into force, as for example in the case of the Protocol of February 8, 1965, adding a new Part IV to the General Agreement on Tariffs and Trade (GATT) of October 30, 1947. This method of provisional application is recognised by the Vienna Convention (see Article 25).

(7) Registration and Publication

The United Nations Charter, 1945, provides by Article 102 that all treaties and international agreements entered into by

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[1] In the case of the Genocide Convention adopted by the United Nations General Assembly in 1948, the prescribed number was twenty. In the absence of such a prescribed number of consents to be bound, a treaty enters into force only when all negotiating States are shown to have consented to be bound (Vienna Convention, Article 24, paragraph 2).

[2] In principle, the act of deposit is sufficient without notification to other States concerned; cf. commentary on Article 13, Draft Arts. I.L.C.

Members of the United Nations Organisation shall " as soon as possible " be registered with the Secretariat of the Organisation and be published by it. No party to a treaty or agreement not registered in this way " may invoke that treaty or agreement before any organ of the United Nations ". This means that a State party to such an unregistered treaty or agreement cannot rely upon it in proceedings before the International Court of Justice or in meetings of the General Assembly or Security Council. Apparently the provision does not invalidate an unregistered treaty, or prevent such a treaty from being invoked before bodies or Courts other than United Nations organs.

The object of Article 102 was to prevent the practice of secret agreements between States, and to make it possible for the people of democratic States to repudiate such treaties when publicly disclosed.

It has been suggested that Article 102 gives Member States a discretion in deciding whether or not to register treaties, and, by electing not to register, voluntarily to incur the penalty of unenforceability of the instrument, but the better view, adopted by the Sixth Committee (Legal) of the United Nations General Assembly in 1947, is that it imposes a binding obligation to effect registration.

The following points may be briefly referred to:—(*a*) In the interim period pending registration " as soon as possible ", the unregistered treaty can be relied upon before the Court or any United Nations organ, subject presumably to an undertaking to register. (*b*) Notwithstanding a failure to register " as soon as possible ", the lapse can be cured by subsequent registration. (*c*) Although, in principle, the functions of the Secretariat are purely ministerial, and it cannot reject an illegal treaty for registration, *semble*, an instrument obviously on the face of it, neither a treaty nor an international agreement, ought to be refused registration. (*d*) Under a direction from the General Assembly, the Secretariat receives for filing and recording (as distinct from registration and publication), instruments entered into before the date of coming into force of the Charter, and instruments transmitted by non-Member

States,[1] but in substance this process amounts to voluntary registration. (*e*) Certified statements as to changes in the parties, or the terms, scope, and application of registered treaties, are also received for registration.[1]

The duty of publication[2] by the Secretariat is performed by publishing the instruments concerned in the *United Nations Treaty Series* (cf. the former *League of Nations Treaty Series*), together with lists from time to time of ratifications, acceptances, etc. A failure to publish does not render the instrument unenforceable (see terms of Article 102).

Instruments that have been lodged with the Secretariat, include treaties or agreements made by or with the specialised agencies of the United Nations, trusteeship agreements, declarations accepting compulsory jurisdiction of the International Court of Justice, and even unilateral engagements of an international character, such as the Egyptian Declaration of April 24, 1957, regarding the future use of the Suez Canal.

Certain international organisations other than the United Nations have their own system of registration, etc., for treaties related to such organisations.

(8) Application and Enforcement

The final stage of the treaty-making process is the actual incorporation, where necessary, of the treaty provisions in the municipal law of the States parties, and the application by such States of these provisions, and, also, any required administration and supervision by international organs. In practice, vigilant " follow-up " work is needed to ensure that States parties do actually apply instruments binding them. Some international organs (for example, the International Labour Organisation with its Committee of Experts on the Application

[1] See the Regulations adopted by the General Assembly on December 14, 1946, as amended on December 12, 1950; these Regulations enable a certificate of registration of a treaty to be issued, and also permit the filing and recording (as distinct from registration) of agreements entered into by the United Nations and its specialised agencies (for text, see *Report* of the International Law Commission, for 1962, Annex, pp. 37–38). Article 80 of the Vienna Convention provides that treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

[2] Under municipal law, treaties are often required to be promulgated or published officially.

of Conventions and Recommendations, and its tripartite Conference Committee on the application of these instruments) have special Committees to discharge this function, work which may be supplemented by the sending of official visiting missions. One innovation has been the drawing up of special model codes for the legislative application of Conventions.

Structure of Conventions and Treaties

The principal parts of Conventions or treaties in their usual order are:—

(1) The preamble or preliminary recitals, setting out the names of the parties (Heads of State, States, or Governments), the purpose for which the instrument was concluded, the " resolve " of the parties to enter into it, and the names and designations of the plenipotentiaries.

(2) The substantive clauses, sometimes known as the " dispositive provisions ".

(3) The formal (or final) clauses or " clauses protocolaires "[1] dealing with technical or formal points or matters relative to the application or entry into force of the instrument. The usual such clauses relate separately to the following:—(i) The date of the instrument. (ii) The mode of acceptance (signature, accession, etc.). (iii) Opening of the instrument for signature. (iv) Entry into force. (v) Duration. (vi) Denunciation by the parties. (vii) Application by municipal legislation. (viii) Application to territories, etc.[2] (ix) Languages in which the instrument is drafted. (x) Settlement of disputes. (xi) Amendment or revision. (xii) Registration. (xiii) Custody of the original instrument.

(4) Formal attestation or acknowledgment of signature, and of the date and place of signature.

(5) Signature by the plenipotentiaries.

[1] See *Handbook of Final Clauses*, prepared by Legal Department of United Nations Secretariat, August, 1951, and the document on standard final clauses, A/CONF.39/L. 1, prepared for the Vienna Conference of 1968–1969 on the Law of Treaties. In 1962, the Committee of Ministers of the Council of Europe adopted texts of model final clauses of Agreements and Conventions.

[2] For the British practice regarding this so-called " Territories " Clause, see the United Nations publication, *Laws and Practices Concerning the Conclusion of Treaties* (1953), at pp. 122–124. In the light of the subject-matter and purpose of a treaty, a Territories Clause may be dispensed with; see e.g., the Convention of 1962 on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.

5.—Reservations[1]

A State may often wish to sign or ratify or otherwise consent to be bound by a treaty in such manner that certain provisions of the treaty do not bind it, or apply to it subject to modifications. This can be effected principally by:—(1) express provision in the treaty itself; or (2) by agreement between the contracting States; or (3) by a reservation duly made.

Where a State wishes to become bound by a specific part only of a treaty, its consent to be so bound can be effective only if this is permitted by the treaty or is otherwise agreed to by the contracting States; and where a treaty allows a contracting State to become partially bound by exercising a choice between differing provisions, the consent must make clear to which provisions it relates (Vienna Convention, Article 17).

A reservation is defined in Article 2 of the Vienna Convention as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State. For example, a reservation may stipulate for exemption from one or more provisions of the treaty, or the modification of these provisions or of their effect, or the interpretation of the provisions in a particular way. A declaration by a signatory as to how the treaty will be applied, which does not vary the obligations of that signatory *vis-à-vis* other signatories, is not however a true reservation.[2]

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[1] See commentary on Articles 16–20, Draft Arts. I.L.C. for the 1966 views of the International Law Commission upon the subject.

[2] See *Power Authority of State of New York* v. *Federal Power Commission* (1957), 247 F.(2d) 538. In 1959, the Assembly of the Inter-Governmental Maritime Consultative Organisation (IMCO) agreed that India's acceptance of the Convention of March 6, 1948, establishing the Organisation, subject to her right to adopt measures aimed solely at developing her maritime industries, was not a reservation but a declaration of policy. A similar problem arose in IMCO concerning Cuba's declaration in 1964 and 1965 in connection with Cuba's acceptance of the same Convention, that it would not consider itself bound by the Convention if IMCO made recommendations at variance with Cuban domestic law. There was a division of opinion among IMCO members whether the Cuban declaration was a statement of policy, or an impermissible reservation.

Like the power of withholding ratification, the privilege of making reservations is regarded as an incident of the sovereignty and perfect equality of States. It is felt preferable that States which cannot accept certain provisions should participate in the treaty, even if only in a limited way, rather than that they should be excluded altogether from participation. Where there is agreement on the basic provisions of a Convention, a certain diversity of obligation in respect of the less important provisions is regarded, subject to some limits, as permissible.

The effect of a reservation is to modify the provisions of the treaty to which the reservation relates, to the extent of that reservation, in the reserving State's relations with other parties, but leaving intact the treaty relations of non-reserving States *inter se*. This applies also to relations between a reserving State and a State objecting to the reservation, provided it has not opposed the entry into force of the treaty between it and the reserving State (Vienna Convention, Article 21).

In principle, a State making a reservation can do so only with the consent of other contracting States; otherwise the whole object of the treaty might be impaired. Sometimes, the intention to make reservations is announced at some session or other of the Conference and the reservations are then and there agreed to by the delegates, but in principle such an "embryo" reservation should be confirmed in the subsequent signature, ratification, acceptance, approval or accession,[1] or at least in the formal minutes of the proceedings. If a State wishes to ratify or otherwise consent to be bound, subject to a reservation, it should inquire of the other States parties whether they assent to the reservation; and in certain circumstances the assent may be inferred.[2] The practice of making reservations has, however, become so common that States have tended to ignore the requirement of obtaining the assent of other States parties; thus reservations have frequently

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[1] Cf. Vienna Convention, Article 23, paragraph 2.

[2] For the purposes of Article 20 of the Vienna Convention, a contracting State is deemed to have accepted a reservation, if it has raised no objection within 12 months of notification, or by the date of its expression of consent to be bound by the treaty, whichever is later (see Article 20, paragraph 5).

been made at the time of signature without being announced during the deliberations of the Conference, or at the time or ratification or accession without previous consultation of inquiry of States which have signed or ratified the treaty.

The form in which reservations have been recorded has varied; sometimes they are inserted in a Protocol of Signature annexed to the Convention concerned, sometimes in the Final Act, sometimes they are specified in an exchange of notes, sometimes they are made by transcription under or above the signature for the State making them, and sometimes merely by declaration at the Conference recorded in the minutes (or *procès-verbal*) of the proceedings.

The Vienna Convention (see Article 23) laid it down that reservations, and acceptance of, or objections to reservations, must be in writing and be duly communicated; also reservations made when signing a treaty subject to ratification, acceptance, or approval, must be confirmed in the subsequent instrument of ratification, acceptance, or approval.

Because of the special character of the Conventions of the International Labour Organisation, it is recognised that these instruments are incapable of being ratified subject to reservations. They may, however, in certain circumstances be conditionally ratified.[1]

It is generally accepted that reservations expressly or impliedly prohibited by the terms of a treaty are inadmissible,[2] while those expressly or impliedly authorised, are effective. The Vienna Convention provides that a reservation " expressly " authorised by a treaty does not require subsequent assent by other contracting States, unless the treaty so provides (Article 20, paragraph 1).

With the increase in the number of multilateral Conventions the unchecked practice of making reservations to multilateral instruments has created a disturbing problem. Obviously an

[1] Also, a State ratifying a Labour Convention may couple its ratification with explanations of any limitations upon the manner in which it intends to execute the Convention; and the provisions in the Convention may be drawn so as to allow certain States some latitude in fulfilling their obligations; see *International Labour Code*, 1951, Vol. I (1952), pp. xcix–ci and *Coventions and Recommendations Adopted by the I.L. Conference 1919–1966* (1966), p. VIII.

[2] E.g., if the treaty authorises specified reservations which do not include the reservation in question.

excessive number of reservations tends to throw out of gear the operation of a multilateral treaty. Also, States are never sure that later, when ratifying, another State may not make a reservation which originally would have deterred them from entering into the treaty. Various solutions of the difficulty have been adopted from time to time, in order to secure a maximum number of parties to multilateral Conventions. According to the solution resorted to by the Inter-American States, a signatory desiring to make reservations is not precluded from becoming a party to the Convention, but the Convention is deemed not to be in force between such " reserving " State and any State objecting to the reservations.

If a limited number of negotiating States be involved, and it is clear from the object and purpose of the treaty that the application of the treaty in its entirety is an essential condition of the consent of each State to be bound by the treaty, the admissibility of the reservations will depend upon unanimous acceptance (Vienna Convention, Article 20, paragraph 2).

Also, if the reservation is one to the constituent instrument of an international organisation, *prima facie*, acceptance by a competent organ of that institution is required, unless there is express provision to the contrary (Vienna Convention, Article 20, paragraph 3).

Where these rules do not apply, a reserving State may become party to the treaty *vis-à-vis* a State accepting the reservation, while an objection to the reservation does not preclude the treaty coming into force between the objecting and the reserving State, unless the objecting State opposes this (Vienna Convention, Article 20, paragraph 4).

In 1949–1950, the problem of maximum participation in a multilateral treaty arose in relation to objections taken to reservations of parties to the Genocide Convention, 1948. The questions of:—(*a*) the admissibility and (*b*) the effect of such reservations, and (*c*) the rights of States to object thereto, were submitted for Advisory Opinion to the International Court of Justice. The Court's views[1] (being the views of the

[1] See *Advisory Opinion on Reservations to the Genocide Convention*, I.C.J. Reports (1951), pp. 15 *et seq.*

majority) may be summarised as follows: (*a*) *Admissibility of reservations.*—Reservations are allowable notwithstanding the absence of a provision in the Convention permitting them. There need not necessarily be an express assent by other interested States to the making of reservations; such assent may be by implication, particularly in the case of certain multilateral Conventions, where clauses are adopted by majority vote of the drafting Conference. If a reservation is *compatible*,[1] objectively, with the nature and purpose of a Convention, a State making it may be regarded as fully a party to the instrument; this test of compatibility is consistent with the principle that the Convention should have as universal an operation as possible, and with the principle of " integrity " of the instrument. (*b*) *Effect of reservations.*—The same test of compatibility applies; therefore, if a State rightly objects that a reservation is incompatible with the Convention, it may legitimately consider that the reserving State is not a party thereto. (*c*) *States entitled to object to reservations.*—A State entitled to sign or accept a Convention, but which has not done so, cannot validly object to reservations; nor is an objection by a signatory State, which has not ratified the instrument, effective until its ratification.

This Advisory Opinion could not be said to have solved all problems in this connection; it appeared to confer too extensive a liberty to make reservations. The objective test of compatibility also bore hardly on signatory States which might not have signed the instrument if they had subjectively realised that certain drastic reservations would be made by other States. It was significant that the International Law Commission which at the request of the General Assembly also studied the problem in 1951[2] did not follow the Court in the test of compatibility, but stressed the necessity for consent to reservations, adopting the view that it might be more important to maintain the " integrity " of a Convention than to aim at its widest possible

[1] According to the International Law Commission, where the treaty concerned is the Constitution of an international organisation, this question of compatibility should be determined by a competent organ of that organisation; see *Report* for 1962, at p. 21 and cf. Vienna Convention, Article 20 paragraph 3.

[2] *Report* of the Commission on the work of its Third session (1951), pp. 5–7.

acceptance. The Commission also suggested the insertion of express provisions in Conventions dealing with the admissibility or non-admissibility of reservations, and the effect of such reservations when made.[1] However, the General Assembly in its Resolution of January 12, 1952, recommended to States that they should be guided by the Court's Advisory Opinion. Also, the general increase in the number of new States since 1952 emphasised the desirability of maximum participation by such potential parties to Conventions, and therefore of greater permissibility of reservations, as against a possible risk that the integrity of a Convention may be impaired by a more liberal admission of reservations.[2] In the Vienna Convention (see Article 19), the test of compatibility with the object and purpose of the treaty was adopted, subject naturally to the principles otherwise governing admissibility of reservations.

Various expedients have been tried in order to overcome the complications caused by reservations. One method has at least the merit of stark simplicity, that is, to provide by a special clause in the Convention that no reservations at all are permissible (see, e.g., Article 39 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on October 7, 1952), or none with regard to certain important provisions (e.g. no reservations were allowed as to Articles 1 to 3 of the Geneva Convention on the Continental Shelf of April 29, 1958). Other formulae allow special kinds of reservations only. These methods of providing for inadmissibility of reservations are recognised by the Vienna Convention (see Article 19) as valid and effective. One clause

[1] As to the attitude to be adopted by the United Nations Secretariat as depositary of reservations made by States, see the General Assembly Resolution of January 12, 1952, to the effect that a depositary should in regard to future multilateral conventions maintain a neutral attitude, merely passing on documents to the interested States, leaving them to decide whether or not reservations are objectionable. This has been reaffirmed in a later Resolution of December 7, 1959, showing that the directive applies to Conventions concluded before, as well as after January 12, 1952.

[2] This is a consideration which influenced the International Law Commission in 1966; see commentary on Articles 16–17, Draft Arts. I.L.C. The Commission preferred a " flexible " system under which it is for each State individually to decide whether to accept a reservation and treat the reserving State as a party, and did not adopt the " collegiate " system (reserving State a party only if a given proportion of other States concerned accept reservation).

now regularly inserted in Conventions permits States to make reservations excluding the application of the Convention to their territories. Another method is to specify certain admissible reservations in a clause in the Convention, and to limit the choice of any parties desiring to make reservations to these. Probably the best method in the circumstances is to insert a clause providing that the States parties to the Convention are to be consulted as to all reservations intended to be made, with presumed acceptance in default of reply within a fixed period; but if objections are lodged against the reservations, the State desiring to make them should be given the alternative of ratifying or not ratifying without reservations.[1]

It should be observed however that no method can be safely followed in the future by contracting States wishing to make, accept, or object to reservations, without carefully considering the impact upon the particular treaty concerned of the provisions as to reservations in Articles 19–23 of the Vienna Convention, referred to above.

6.—Revision and Amendment of Treaties

The terms " revision ", " amendment ", and " modification " are in current use to denote the process of altering the provisions of treaties. In the Vienna Convention (see Part IV) the words " amendment " and " modification " were used.

The term " revision " frequently carries some political significance, being employed by States claiming that unjust or unequal treaties should be reviewed, and final dispositions of territory or frontiers adjusted. Such a re-examination, directed to the peaceful change of situations formerly accepted as final, may be a " revision " in the widest sense of the term, but is not treaty revision as ordinarily understood, that is to say the alteration of treaty provisions imposing continuing obligations. For this reason, the words " amendment " and " modification " are perhaps preferable to denote such an alteration.

[1] Note the method used in the Convention concerning Customs Facilities for Touring, of June 4, 1954 (see Article 20; reservations made before signing of Final Act admissible if accepted by a majority of the Conference, and recorded in the Final Act, while reservations made after signing of Final Act not admitted if objected to by one-third of the parties to the Convention).

The most usual way of ensuring reconciliation of the provisions of treaties with changing conditions is through amendment clauses inserted in the treaties themselves, thus giving effect to the basic principle that a treaty may be amended by agreement of the parties (cf. Vienna Convention, Article 39). These clauses attempt to fix beforehand the particularities of the procedure for amendment. They generally provide that such procedure may be initiated at the request of one or a number of parties, or through some authoritative international organ. Then, usually, the move for amendment must be endorsed by the States parties to the Convention and is carried out by a Conference of these States at a subsequent time. According to the clauses, the exact time at which the amendment may be made falls broadly speaking into four classes:—(*a*) at any time; (*b*) after the expiration of a prescribed period dating from the entry into force of the Convention; (*c*) periodically, at the expiration of prescribed periods; and, (*d*) combinations of one or more of the preceding classes. Generally, unanimity is required for the adoption of the amendments, but the trend since 1945 is towards allowing amendment of multilateral Conventions by a majority, if this is in the interests of the international community. The main difficulty has been in getting the parties to proceed promptly to ratification of the proposed modification. This has led to the use of certain expedients to obviate ratification. Sometimes the changes are treated as being of minor importance only, and are effected not under the procedure of the amendment clause, but by means of a *Procès-Verbal*, Protocol, or other administrative instrument opened to signature, which is regarded as sufficient.[1]

Sometimes, it is expressly provided in the Convention that certain amendments may be carried out upon the recommendation of an international organ, which may or may not require endorsement—purely here an administrative act—of the contracting parties.

[1] See, for example, the *Procès-Verbal* of June, 1936, for amending Article 5 of the Geneva Drugs Convention, 1931. In some cases, non-ratifying parties have been given an option of withdrawing from the Convention, or are treated as non-parties if they do not ratify within a specific time.

The Vienna Convention purports in Articles 40–41 to lay down certain principles governing the procedure and effect of the amendment of multilateral treaties, such as the principles that proposals for amendment must be notified to all contracting States, that all such States are entitled to participate in the process of amendment, that every State entitled to adhere to the original treaty has a right to become party to the amending treaty, and that two or more parties may, subject to the provisions of the treaty itself and subject to giving due notice to other parties, conclude an agreement to modify the treaty as between themselves alone.

United Nations Charter and the Re-examination of Treaties

Article 14 of the United Nations Charter authorises the General Assembly " to recommend measures for the peaceful adjustment of any situation . . . which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations " (i.e., the provisions of Articles 1 and 2). It has been maintained that Article 14 empowers the General Assembly to initiate a process of peaceful change through the readjustment of final settlements (e.g., of territory or frontiers) under treaties, since the word " situations " is capable of referring to " situations " both under executed and under executory treaties. However, even assuming this to be the correct interpretation of Article 14, the General Assembly could not take any binding action in the direction of the peaceful change of treaty settlements,[1] as its powers in this connection are recommendatory only.

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[1] Apart from this provision in the Charter, it is claimed that the Vienna Convention provides, to some extent, machinery of peaceful change of situations under treaties, inasmuch as it enables States, which maintain that a treaty has been invalidated by *jus cogens* or terminated by fundamental change of circumstances, to have disputes concerning such claims of invalidity or termination of a treaty to be submitted to a process of judicial settlement, arbitration, or conciliation (see pp. 440, 443, *post*).

7.—Inconsistent Treaties; and Validity and Duration of Treaties

Inconsistent Treaties

Some difficulty surrounds the question of the applicability of a treaty which is inconsistent with the terms of an earlier treaty.[1] The matter resolves itself essentially into one of reconciliation of the obligations of the parties to both treaties.

If one of the treaties concerned specifies that it is subject to, or that it is not to be considered as incompatible with an earlier or subsequent treaty, the provisions of this latter treaty should prevail (Vienna Convention, Article 30 paragraph 2). Otherwise, as between parties to an earlier treaty who are also parties to the later treaty, the earlier treaty governs only to the extent that it is compatible with the later treaty (Article 30 paragraph 3). Moreover, as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties is to apply.

It may be also that different considerations are applicable to bilateral treaties or treaty-contracts, on the one hand, and to multilateral Conventions, on the other hand. In the case of conflicting multilateral Conventions, if the earlier Convention does not in definite terms prohibit the later Convention and if such later instrument is in the interests of the internationa community,[2] or prescribes general rules of conduct, the later Convention should not be held inapplicable, notwithstanding that it derogates substantially from the earlier Convention and that it has not been entered into by all of the parties to the other instrument. Where the point turns on the construction of ambiguous treaty provisions, there is a presumption of non-conflict. Much may depend on whether there is or is not real incompatibility, and on the intention of the parties to both instruments; the two instruments may validly co-exist, if one

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[1] Cf. for general discussion, Aufricht, *Cornell Law Quarterly*, Vol. 37 (1952), at pp. 684 *et seq.*, and see also commentary on Article 26, Draft Arts. I.L.C.

[2] This proviso is in accordance with the practice after the last war, as to the revision or modification of pre-war Conventions, so far as this was effected without the consent of all parties to the earlier instruments.

may be regarded as an annex to the other, facultatively imposing wider or stricter obligations at the election of the parties concerned (as in the case of the co-existence of the Geneva Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, and the penal repression provisions of the Single Narcotic Drugs Convention signed at New York on March 30, 1961).

The United Nations Charter contains its own rule of inconsistency; under Article 103, the obligations of Member States under the Charter are to prevail in the event of conflict between the Charter and their obligations under other international instruments.

The Validity of Treaties[1]

The invalidation of treaties on grounds analogous to those applicable in the domestic law of contracts, namely, contractual incapacity, absence of consent due to mistake or fraud or duress, and illegality, has been the subject of much doctrinal speculation, some of which is both inconclusive and controversial. However, a significant attempt to formulate general principles in this area, capable of obtaining general acceptance, was made in the Vienna Convention which dealt with the following six grounds of invalidity of treaties:—(1) Treaty-making incapacity. (2) Error. (3) Fraud. (4) Corruption. (5) Coercion. (6) Conflict with a norm of *jus cogens*.

(1) *Treaty-making incapacity*.—Under Article 46 of the Vienna Convention a State may not rely on the fact that its representative exceeded his treaty-making powers under internal law unless such excess of authority was:—(*a*) " manifest ", i.e., objectively evident to the other negotiating State acting in accordance with normal practice and in good faith; and (*b*) concerned a rule of internal law of fundamental importance. Article 47 deals with the case where a representative's authority is subject to a specific limitation in point of

[1] See Greig, *International Law* (1970), pp. 367–372; Oppenheim, *International Law*, Vol. I (8th Edition, 1955), pp. 887–893.

fact; excess of authority is then not sufficient to invalidate that representative's action unless the specific restriction on his authority was notified beforehand to the other negotiating States.

(2) *Error.*—A State is entitled to rely upon error as a ground of invalidity of a treaty if the error be one as to a fact or situation assumed by the State concerned to exist at the time when the treaty was concluded, and which formed an essential basis of its consent to the treaty.[1] This ground is not open to the State if it contributed to the error by its own conduct, or the circumstances were such as to put it upon notice of a possible error, or the error related only to the wording of the text of the treaty (Vienna Convention, Article 48).

(3) *Fraud.*—This ground of invalidity applies where the State relying upon it has been induced by the fraudulent conduct of another negotiating State to enter into the treaty (Vienna Convention, Article 49). Fraud itself is not defined in the Vienna Convention, and there is a recognised lack of international precedents as to what constitutes fraudulent conduct.

(4) *Corruption.*—If a State's consent to a treaty has been procured through the corruption of its representative, directly or indirectly by another negotiating State, the former State is entitled to claim that the treaty is invalid (Vienna Convention, Article 50).

(5) *Coercion.*—This ground is satisfied if:—(*a*) a State's consent to a treaty has been procured by the coercion of its representative through acts or threats directed against him; (*b*) the conclusion of the treaty has been procured by the threat or use of force in violation of the principles of international law embodied in the United Nations Charter[2] (see Vienna Convention, Articles 51–52).

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[1] Almost all the recorded instances of attempts to invalidate treaties on the ground of error have concerned geographical errors, and most of them related to errors in maps. See cases referred to in Greig, *International Law* (1970), pp. 371–372; and cf. *American Journal of International Law*, Vol. 64 (1970), pp. 529–530.

[2] See, in particular, Article 2 paragraph 4 of the Charter.

(6) *Conflict with a norm of* jus cogens.—A treaty is void if at the time of its conclusion it conflicts with a norm of *jus cogens* (as to *jus cogens*, see pp. 59–61, *ante*).

The right to invalidate a treaty on the ground of treaty-making incapacity, error, fraud, or corruption is lost if subsequently the State expressly agrees that the treaty is valid or remains in force, or its conduct is such as to lead to the inference of acquiescence in the continued validity or application of the treaty (Vienna Convention, Article 45).

A State relying upon the above-mentioned grounds of invalidity must notify other parties of its claim so that the procedure laid down in Articles 65–66 may be followed. This may ultimately lead to a process of judicial settlement, arbitration, or conciliation with reference to any disputed claim.

Termination of Treaties

Treaties may be terminated by:—(1) operation of law; or (2) act or acts of the States parties.

(1) Termination of Treaties by Operation of Law

(i) Extinction of either party to a bilateral treaty, or of the entire subject-matter of a treaty may discharge the instrument.[1] In connection with the former case, questions of State succession may arise where the territory of the extinguished State comes under the sovereignty of another State.[2]

(ii) Treaties may cease to operate upon the outbreak of war between the parties. In some instances suspension of the treaty, rather than actual termination, may be the result of such a war. The matter is discussed in a later chapter.[3]

(iii) Except in the case of provisions for the protection of the human person contained in treaties of a humanitarian character, a material breach of a bilateral treaty by one party entitles the

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[1] See Hackworth, *Digest of International Law* (1940–1943), Vol. V, at pp. 297 *et seq.*

[2] See pp. 320–324, *ante*.

[3] See Chapter 17, pp. 508–509, *post*.

other to terminate the treaty or to suspend its operation, while a material breach of a multilateral treaty by one party may, according to the circumstances, result in its termination as between all parties, or as between the defaulting State and other parties, or as between the defaulting State and a party specially affected by the breach (Vienna Convention, Article 60).[1]

(iv) Impossibility of performance of the treaty due to the permanent disappearance or destruction of an object indispensable for the execution of the treaty will result in termination, but not if the impossibility is due to a breach of the treaty itself, or of any other international obligation committed by the party which seeks to terminate the treaty upon the ground of such impossibility (Vienna Convention, Article 61). Case (i) above may be regarded in a sense as an instance of impossibility of performance.

(v) Treaties may be discharged as a result of what is traditionally known as the *rebus sic stantibus* doctrine, although there is a current trend to dispense with the appellation " *rebus sic stantibus* ". According to this doctrine, a fundamental change in the state of facts which existed at the time the treaty was concluded may be invoked as a ground for terminating the treaty, or for withdrawing from it. It is also put that there is necessarily an implied term or clause in the treaty—the *clausula rebus sic stantibus*—to the effect that the treaty obligations subsist only so long as the essential circumstances remain unchanged. However, in its Report on the work of its 1966 (18th) Session, the International Law Commission rejected the theory of an implied term, preferring to base the doctrine of fundamental change upon grounds of equity and justice, and even to discard the words *rebus sic stantibus* as carrying undesired implications.

The matter is now dealt with in Article 62 of the Vienna

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[1] See Advisory Opinion of June 21, 1971, of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), where the Court upheld the view that the failure of South Africa to comply with its obligation, as Mandatory Power in South West Africa, to submit to supervision by United Nations organs, resulted in the termination of its mandate, and therefore of its authority to administer the Territory; see I.C.J. Reports (1971), 16, at pp. 47–48.

Convention under the heading " fundamental change of circumstances." The text of this article is as follows:—

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) if the treaty establishes a boundary; or

(*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

It will be observed that paragraph 1 of this article of the Vienna Convention involves a combination of two tests, the subjective test, on the one hand, that the parties to the treaty should have envisaged the continuance of the circumstances surrounding its conclusion as a decisive motivating factor in entering into the treaty,[1] and the objective test, on the other hand, that the change must be so fundamental as radically to alter the obligations of the parties. The article excludes reliance on mere onerousness of treaty obligations, felt by a party at a period later than the date of the conclusion of the

[1] A view favoured by the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and Gax*, Pub. P.C.I.J. (1932), Series A/B, No. 46.

treaty, as of itself sufficient ground for a claim to be released from the treaty. There is no requirement that the fundamental change must occur only after a certain period of time, and this is in accordance with the current realities of international affairs, as cataclysmic changes can occur on the international scene even within months. Also the article does not preclude parties to a treaty from expressly stipulating what fundamental changes will entitle them to withdraw from the treaty.[1]

A party invoking this ground of fundamental change must give notice under Articles 65–66 of the Vienna Convention to the other parties of its claim that the treaty has been terminated, stating its reasons, so as to set in motion the procedure laid down in these articles. In other words, there is no automatic termination of a treaty as a result of the doctrine of fundamental change.

(vi) A treaty specifically concluded for a fixed period of time terminates upon the expiration of that period.

(vii) If successive denunciations (see below as to the meaning of " denunciation ") of a multilateral treaty reduce the number of States parties to less than the number prescribed by the treaty for its entry into force, the treaty may cease to operate if this be expressly or impliedly provided; otherwise a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its coming into force (Vienna Convention, Article 55).

(viii) Article 64 of the Vienna Convention provides that if a new peremptory norm of *jus cogens* (see p. 59, *ante*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. This is a controversial provision, and in the light of the opposition that it encountered at the Vienna Conference of 1968–1969 which drew up the

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[1] See, e.g., Article IV of the Nuclear Weapons Test Ban Treaty of 1963 referred to, p. 191, *ante*, entitling a party to withdraw if it decides that " extraordinary events " related to the subject-matter of the Treaty have jeopardised its " supreme interests ".

Convention, cannot be said to contain a universally accepted rule of international law. One major objection to it is that no treaty can be safely entered into without being exposed to the hazard of subsequent invalidation by reason of some unanticipated future development in the higher governing principles of international law. Nor, *semble*, can parties by any provision now made in a treaty, agree to exclude such a hazard, for such an exclusionary provision would presumably itself be invalidated by the force of *jus cogens*.

(2) Termination of Treaties by Act or Acts of the Parties

(i) The termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty, or at any time by consent of all the parties after consultation *inter se* (Vienna Convention, Article 54). A treaty will also be considered as terminated if all the parties to it conclude a subsequent treaty relating to the same subject-matter, and it appears from this later treaty or otherwise that the parties intended that the matter be governed by that treaty, or that the provisions of this later treaty are so far incompatible with those of the earlier treaty that the two instruments cannot be applied at the same time (Vienna Convention, Article 59).

(ii) When a State party wishes to withdraw from a treaty, it usually does so by notice of termination, or by act of denunciation. The term " denunciation " denotes the notification by a State to other States parties that it intends to withdraw from the treaty. Ordinarily, the treaty itself provides for denunciation, or the State concerned may, with the consent of other parties, have reserved a right of denunciation. In the absence of such provision, denunciation and withdrawal are not admissible, and all the other parties must as a rule consent to the denunciation or withdrawal, unless it is established that the parties intended to admit the possibility of denunciation or withdrawal, or a right of denunciation or withdrawal may be implied by the nature of the treaty (Vienna Convention, Article 56). The practical difficulty with regard to denunciation or withdrawal by a State is the possibility of embarrassment to

the other States parties wishing to continue their participation in the treaty, by disturbing the general equilibrium of rights and obligations which originally made the treaty possible.

In practice, multilateral Conventions contain a special clause allowing denunciation after the expiration of a certain period of time from the date of entry into force of the Convention. This clause may provide that a denunciation will not take effect until a certain time (e.g., one year) after it is given.

Suspension of Operation of Treaties

The operation of a treaty may be suspended, in regard to either all parties or a particular party:—(*a*) in conformity with the provisions of the treaty[1]; or (*b*) at any time by the consent of all parties after consultation (Vienna Convention, Article 57); or (*c*) through the conclusion of a subsequent treaty, if this be the intention of the parties (Vienna Convention, Article 59). Subject to the provisions of the treaty concerned, and its object and purpose, two or more parties to a multilateral treaty may suspend its operation as between themselves alone (Article 58).

8.—Interpretation of Treaties

Agencies of Interpretation

These agencies of interpretation may be Courts such as:—(*a*) the International Court of Justice; and (*b*) the Court of Justice of the three European Communities,[2] which has jurisdiction to interpret the Treaties of April 18, 1951 and March 25, 1957 establishing these three Communities. Treaties are also interpreted by international technical organs, such as the International Labour Office[3] and the various organs of the United

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[1] In regard to the suspension clauses in International Labour Conventions, see E. A. Landy, *The Effectiveness of International Supervision. Thirty Years of I.L.O. Experience* (1966), pp. 147–150.

[2] The European Coal and Steel Community, the European Economic Community (Common Market), and the European Atomic Energy Community (EURATOM).

[3] For the Office's interpretations of Labour Conventions, see *The International Labour Code, 1951* (1952), and the I.L.O. *Official Bulletin*.

Nations,[1] and by the Executive Directors and Board of Governors of the International Monetary Fund.[2] Other expedients may be resorted to; for example, reference of the point to an *ad hoc* Committee of Jurists.

Instruments of Interpretation

Diplomatic Conferences which adopt a treaty are only too conscious themselves of drafting defects. To avoid any difficulties arising out of the construction of particular clauses or Articles, an instrument such as a Protocol, or *Procès-Verbal*, or Final Act is often annexed to the main Convention containing a detailed interpretation or explanation of the doubtful provisions.

Multilingual Treaties

Treaties are often drafted in two or more languages. Multilateral Conventions, including Conventions of the International Labour Organisation, are usually concluded in two languages—English and French—and it is provided that both texts shall be authoritative.[3] In some instances it is declared that the English or French text as the case may be shall prevail in the event of a conflict. The United Nations Charter, 1945, was drawn up in five languages—Chinese, French, Russian, English and Spanish—and it was provided by Article 111 that the five texts were to be " equally authentic ".[4]

Article 33 of the Vienna Convention provides:—(*a*) that

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[1] It was recognised at the San Francisco Conference which in 1945 drew up the United Nations Charter that each organ of the United Nations would have largely to do its own interpretative work; see *Report* of the Rapporteur of Committee IV/2 of the Conference, pp. 7–8.

[2] Under Article XVIII of the Articles of Agreement of the International Monetary Fund; see Hexner, *American Journal of International Law* (1959), Vol. 53, pp. 341–370.

[3] This means that, generally speaking, the two texts may be read in conjunction in order to ascertain the meaning of the Convention. Also, in the event of discrepancies, *prima facie*, the least extensive interpretation should be adopted. Where the treaty is silent as to the equivalence of the two texts, possibly greater weight should be given to the language in which the instrument was first drawn up. But see now Vienna Convention, Article 33.

[4] For rules of interpretation of multi-lingual treaties, see Article 29, Draft Arts. I.L.C., commentary, pp. 108–113.

if a treaty is authenticated in several languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that one particular text is to prevail in case of divergence; (*b*) that the terms of the treaty are presumed to have the same meaning in each text; (*c*) that a construction may be given which best reconciles the texts having regard to the object and purpose of the treaty.

General Principles of Treaty Interpretation

Numerous rules, canons, and principles have been laid down by international tribunals, and by writers to be used as tools in the interpretation of treaties, and to serve as useful, indeed necessary, guidelines to the drafting of treaty provisions. These rules, canons, and principles, although sometimes invested with the sanctity of dogmas, are not absolute formulae, but are in every sense relative—relative to the particular text, and to the particular problem that is in question. To some extent, like presumptions in the law of evidence, their weight may depend on the cumulative application of several, rather than the application of one singly.

The following is a summary of the more general principles[1]:—

(1) *Grammatical interpretation, and the intention of the parties.*—Words and phrases are in the first instance to be construed according to their plain and natural meaning.[2] However, if the grammatical interpretation would result in an absurdity, or in marked inconsistency with other portions of

[1] For references to the various authorities on which the above summary is based, see Hudson, *The Permanent Court of International Justice*, 1920–1942, pp. 640–661; Hyde, *American Journal of International Law* (1930), Vol. 24, pp. 1–19; J. F. Hogg, " International Court: Rules of Treaty Interpretation ", *Minnesota Law Review*, Vol. 43 (1958–1959), pp. 369–441, and Vol. 44 (1959–1960), pp. 5–73; I. Tammelo, *Treaty Interpretation and Practical Reason* (1967); commentary on Draft Arts. I.L.C., Articles 27–29.

[2] This principle was reaffirmed by the International Court of Justice in the *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation*, I.C.J. Reports (1960), 150 (words " largest ship-owning nations " in Article 28 of the Convention of March 6, 1948, establishing the Organisation, held to mean the countries with the largest figures of registered tonnage, without regard to questions of the real national ownership). Under the Vienna Convention, Article 31, paragraph 1, a treaty is to be interpreted in good faith " in accordance with the ordinary meaning to be given " to its terms in their context and in the light of its object and purpose.

the treaty, or would clearly go beyond the intention of the parties, it should not be adopted.

The related rules concerning the intention of the parties proceed from the capital principle that it is to the intention of the parties at the time the instrument was concluded, and in particular the meaning attached by them to words and phrases at the time, that primary regard must be paid. Hence, it is legitimate to consider what was the " purpose " or " plan " of the parties in negotiating the treaty.[1] Nor should a treaty be interpreted so as to restrict unduly the rights intended to be protected by it.[2] What must be ascertained is the *ostensible* intention of the parties, as disclosed in the four corners of the actual text; only in exceptional circumstances is it permissible to investigate other material to discover this intention. Moreover, a special meaning must be given to a particular term, if it is established that the parties so intended (Vienna Convention, Article 31, paragraph 4).

(2) *Object and Context of Treaty.*—If particular words and phrases in a treaty are doubtful, their construction should be governed by the general object of the treaty, and by the context. Article 31 paragraph 1 of the Vienna Convention lays down that a treaty should be interpreted by reference to its " object " and " purpose ". The context need not necessarily be the whole of the treaty, but the particular portion in which the doubtful word or phrase occurs. However, for the purposes of interpretation, it can include the preamble and annexes to the treaty, and related agreements or instruments made in connection with the conclusion of the treaty (Vienna Convention, Article 31 paragraph 2).

(3) *Reasonableness and Consistency.*—Treaties should, it is held, be given an interpretation in which the reasonable meaning of words and phrases is preferred, and in which a consistent meaning is given to different portions of the instrument. In accordance with the principle of consistency, treaties should be interpreted in the light of existing international law.

[1] The International Court of Justice had recourse to the " purpose " of the treaty in the *Case Concerning the Application of the Convention of* 1902 *Governing the Guardianship of Infants* (Netherlands-Sweden), I.C.J. Reports (1958), 55.

[2] See *Kolovrat* v. *Oregon* (1961), 366 U.S. 187.

Also applying both reasonableness and consistency, since it is to be assumed that States entering into a treaty are as a rule unwilling to limit their sovereignty save in the most express terms, ambiguous provisions should be given a meaning which is the least restrictive upon a party's sovereignty, or which casts the least onerous obligations; and in the event of a conflict between a general and a special provision in a treaty, the special provisions should control the general (cf. the municipal law maxim, *lex specialis derogat generali*), unless the general stipulation is clearly intended to be overriding.

(4) *The Principle of Effectiveness.*—This principle, particularly stressed by the Permanent Court of International Justice, requires that the treaty should be given an interpretation which " on the whole " will render the treaty " most effective and useful ",[1] in other words, enabling the provisions of the treaty to work and to have their appropriate effects. This principle is of particular importance in the construction of multilateral Conventions, containing the constituent rules of international organisations.[2] It does not, however, warrant an interpretation which works a revision of a Convention, or any result contrary to the letter and spirit of treaties.[3]

(5) *Recourse to Extrinsic Material.*—Normally, the interpreting tribunal is limited to the context of the treaty. However, the following may be resorted to, provided that clear words are not thereby contradicted:—(*a*) Past history, and historical usages relevant to the treaty. (*b*) Preparatory work (*travaux préparatoires*), i.e., preliminary drafts, records of Conference discussions, draft amendments, etc. This may be taken into account where normal interpretation leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Vienna Convention,

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[1] See commentary on Article 27, Draft Arts. I.L.C.

[2] See, e.g., *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949), p. 174, for an illustration of the application of this principle, in order to enable an international organisation to function more effectively.

[3] See *South West Africa Cases*, 2*nd Phase*, I.C.J. Reports, 1966, 6, at p. 48.

Article 32), and more particularly to confirm a conclusion reached by normal methods of construction.[1] Merely abortive proposals, or secret or confidential negotiatory documents will not be so used, nor will preparatory work be given weight against a State party which did not participate in the negotiations, unless the records of such preparatory work have been published. (*c*) Interpretative Protocols, Resolutions, and Committee Reports, setting out agreed interpretations. Unless these form part of the treaty[2], they will be treated as on the same level as preparatory work, subject to certain of such documents having greater weight than others, according to circumstances. (*d*) A subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Vienna Convention, Article 31 paragraph 3). (*e*) Subsequent conduct of the States parties, as evidencing the intention of the parties and their conception of the treaty, although a subsequent interpretation adopted by them is binding only if it can be regarded as a new supplementary agreement. Under the Vienna Convention (see Article 31 paragraph 3), a subsequent practice in the application of the treaty, establishing agreement regarding its interpretation, may be assimilated to such a supplementary agreement. (*f*) Other treaties, *in pari materia*, in case of doubt.

Disputes Clause

It is now a general practice to insert a disputes clause in multilateral Conventions providing for methods of settling disputes arising as to the interpretation or application of the Convention. The alternative methods usually specified are negotiation between the parties, arbitration, conciliation, or judicial settlement.

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[1] *Ibid.*, at pp. 43–44.

[2] Cf. the *Ambatielos Case*, I.C.J. Reports (1952), pp. 28 *et seq.*, showing that a declaration subscribed to by parties who contemporaneously drew up a treaty, may be part of such treaty; and that the conduct of the parties may be looked to in this connection to ascertain whether the declaration was so regarded.

PART 5

DISPUTES AND HOSTILE RELATIONS (INCLUDING WAR AND NEUTRALITY)

CHAPTER 16

INTERNATIONAL DISPUTES

1.—GENERAL

THE expression "international disputes" covers not only disputes between States as such, but also other cases that have come within the ambit of international regulation, being certain categories of disputes between States on the one hand, and individuals, bodies corporate, and non-State entities on the other.[1]

The present chapter is, however, mainly concerned with disputes between States, and these may range from minor differences scarcely causing a ripple on the international surface to the other extreme of situations of prolonged friction and tension between countries, attaining such a pitch as to menace peace and security.

To settle international disputes as early as possible, and in a manner fair and just to the parties involved, has been a long-standing aim of international law, and the rules and procedure in this connection are partly a matter of custom or practice, and partly due to a number of important law-making Conventions such as the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes and the United Nations Charter drawn up at San Francisco in 1945. One of the principal objects of the latter Charter in setting up the United Nations Organisation was indeed to facilitate the

[1] E.g., investment disputes between capital-receiving States and private foreign investors, the settlement of which is provided for under the Convention of March 18, 1965, for the Settlement of Investment Disputes between States and Nationals of Other States (Convention applies to legal disputes only).

peaceful settlement of differences between States. This also had been the purpose of the League of Nations during the period of its activities between two World Wars.

Broadly speaking, the methods of settling international disputes fall into two categories:—

(1) Peaceful means of settlement, that is, where the parties are agreeable to finding an amicable solution.

(2) Forcible or coercive means of settlement, that is, where a solution is found and imposed by force.

Each class will be discussed in turn.

2.—Peaceful or Amicable Means of Settlement[1]

The peaceful or amicable methods of settling international disputes are divisible into the following:—

(*a*) Arbitration.
(*b*) Judicial settlement.
(*c*) Negotiation, good offices, mediation, conciliation, or inquiry.
(*d*) Settlement under the auspices of the United Nations Organisation.

This classification does not mean that these processes remain in rigidly separate compartments, each appropriate for resolving one particular class of dispute. The position is otherwise in practice. For example, the flexible machinery established by the Convention of March 18, 1965, for the Settlement of Investment Disputes between States and the Nationals of Other States consists of an International Centre for the Settlement of Investment Disputes, at Washington, with facilities for the arbitration and conciliation of investment disputes,[2] and provision for Panels of Arbitrators and Conciliators. Again the model body of rules drawn up in February, 1962, by the Bureau of the Permanent Court of Arbitration, The Hague (see *post*), for cases where the Bureau has made available its premises and facilities for settling disputes, one only of the

[1] See *passim* the *Report* of a Study Group on the Peaceful Settlement of International Disputes (David Davies Memorial Institute of International Studies, London, 1966).

[2] The Convention applies to legal disputes only.

parties involved being a State, allows a dispute to be submitted to a sequence, first of conciliation, and then of arbitration, in the event that a conciliation commission reports that conciliation has failed (see section III).

(a) Arbitration[1]

Ordinarily, arbitration denotes exactly the same procedure as in municipal law, namely the reference of a dispute to certain persons called arbitrators, freely chosen by the parties, who make an award without being bound to pay strict regard to legal considerations. Experience of international practice has shown, however, that many disputes involving purely legal issues are referred to arbitrators for settlement on a legal basis. Moreover, in the various treaties by which it has been agreed that disputes should be submitted to arbitration, frequently in addition to being directed to make their award according to justice or equity or *ex aequo et bono*, arbitral tribunals have been specially instructed to apply international law. A common formula in the nineteenth century was the direction to give a decision " in accordance with the principles of international law and the practice and jurisprudence of similar tribunals of the highest authority ".

Arbitration is an institution of great antiquity (see Chapter 1, *ante*), but its recent modern history is recognised as dating from the Jay Treaty of 1794 between the United States and Great Britain, providing for the establishment of three joint mixed commissions to settle certain differences which could not otherwise be disposed of in the course of the negotiation of the Treaty. Although these commissions were not strictly speaking organs of third party adjudication, two of the three performed successfully, and the result was to stimulate a fresh interest in the process of arbitration which had fallen into desuetude for about two centuries. A further impetus to arbitration was given by the *Alabama Claims Award* of 1872 between the

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[1] For a general treatise on the subject, see J. L. Simpson and H. Fox. *International Arbitration. Law and Practice* (1959).

United States and Great Britain. According to Judge Manly O. Hudson[1]:—

> " The success of the *Alabama Claims Arbitration* stimulated a remarkable activity in the field of international arbitration. In the three decades following 1872, arbitral tribunals functioned with considerable success in almost a hundred cases; Great Britain took part in some thirty arbitrations, and the United States in twenty; European States were parties in some sixty, and Latin American States in about fifty cases ".

Clauses providing for the submission of disputes to arbitration were also frequently inserted in treaties, particularly " law-making " Conventions, and to quote Judge Manly O. Hudson again,[2] " arbitration thus became the handmaiden of international legislation " inasmuch as disputes concerning the interpretation or application of the provisions of Conventions could be submitted to it for solution. Also a number of arbitration treaties for the settlement of defined classes of disputes between the States parties were concluded.

A most important step was taken in 1899 when the Hague Conference not only codified the law as to arbitration but also laid the foundations of the Permanent Court of Arbitration. The Hague Conference of 1907 completed the work of the 1899 Conference. The Permanent Court of Arbitration is an institution of a peculiar character. It is neither " permanent " nor is it a " Court ". The members of the " Court " are appointed by States which are parties to one or both of the Conventions adopted by the Hague Conferences. Each State may appoint four persons with qualifications in international law, and all the persons so appointed constitute a panel of competent lawyers from whom arbitrators are appointed as the need arises. Thus the members of the Permanent Court of Arbitration never meet as a tribunal.[3]

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[1] Hudson, *International Tribunals* (1944), at p. 5.
[2] Hudson, *International Tribunals* (1944), at p. 6.
[3] For list of present members, see the Report of the Administrative Council of the Court for 1970 (1971), pp. 10, *et seq.*

> " Their sole function . . . is to be available for service as members of tribunals which may be created when they are invited to undertake such service ".[1]

When a dispute arises which two States desire to submit to arbitration by the Permanent Court of Arbitration, the following procedure applies:—Each State appoints two arbitrators, of whom one only may be its national or chosen from among the persons nominated by it as members of the Court panel. These arbitrators then choose an umpire who is merely a presiding member of the arbitral tribunal. The award is given by majority vote. Each tribunal so created will act pursuant to a special *compromis* or arbitration agreement, specifying the subject of the dispute and the time allowed for appointing the members of the tribunal, and defining the tribunal's jurisdiction, the procedure to be followed, and the rules of law and the principles according to which its decision is to be given. The Permanent Court of Arbitration itself has no specific jurisdiction as such. Approximately twenty arbitral tribunals have been appointed under this system since its foundation, and several important awards have been given, including those in the *Pious Fund Case* of 1902 between the United States and Mexico, the *Muscat Dhows Case* of 1905 between Great Britain and France, the *North Atlantic Coast Fisheries Case* of 1910 between the United States and Great Britain, and the *Savarkar Case of* 1911 between Great Britain and France. In practice, a small number of specially experienced members of the Court panel have been repeatedly selected for duty as arbitrators, a practice that has obvious advantages.

Notwithstanding its obvious defects—as Judge Manly O. Hudson says it was hardly more than " a method and a procedure "[2]—the Permanent Court of Arbitration was a relative success, and in the early years of this century influenced a more frequent recourse to arbitration as a method of settling international disputes, while it may be said to have

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[1] Hudson, *op. cit.*, at p. 159.
[2] Hudson, *op. cit.*, at p. 8.

moulded the modern law and practice of arbitration. This was reflected, too, in the great number of arbitration treaties, both multilateral and bilateral, and of special *ad hoc* submission agreements, concluded before and after the First World War.

Following on the First World War, several important arbitral tribunals were set up. Among these may be mentioned the several Mexican Claims Commissions which adjudicated the claims of six different States against Mexico on behalf of their subjects, and the Mixed Arbitral Tribunals set up in Europe to deal with various claims arising out of the territorial redistribution effected by the Treaty of Versailles, 1919.[1]

Arbitration is essentially a consensual procedure. States cannot be compelled to arbitrate unless they agree to do so, either generally and in advance, or *ad hoc* in regard to a specific dispute. Their consent even governs the nature of the tribunal established.

The structure of arbitral tribunals has accordingly in practice revealed anomalies. Sometimes a single arbitrator has adjudicated a dispute, at other times a joint commission of members appointed by the States in dispute, and very frequently a mixed commission has been created, composed of nominees of the respective States in dispute and of an additional member selected in some other way. The nominees of a State are usually its own nationals; sometimes they are treated as representing it and being under its control—a practice which is in many ways objectionable.

Disputes submitted to arbitration are of the most varied character. Arbitral tribunals have dealt with disputes primarily involving legal issues as well as disputes turning on questions of fact and requiring some appreciation of the merits of the controversy. As a rule such tribunals have not declined to deal with a matter either on the ground that no recognised legal rules were applicable[2] or on the ground that political aspects were involved. For this reason the distinction

[1] A number of arbitral tribunals were also established after the Second World War; among them are the Arbitral Tribunal on German External Debts set up under the Agreement on German External Debts of February 27, 1953.

[2] I.e., they have not in practice made a finding of *non liquet*; see above, p. 37.

frequently drawn by writers on international law between "justiciable" and "non-justiciable" disputes is a little difficult to understand and does not appear to have much practical value.[1] Inasmuch, however, as by special clauses in their arbitration treaties, States often exclude from arbitration disputes affecting their "vital interests", or concerning only matters of "domestic jurisdiction", such reserved disputes may in a sense be "non-justiciable", and open only to the procedure of conciliation. An illustration is the clause in the Anglo-French Arbitration Treaty of 1903 whereby the two States bound themselves not to arbitrate disputes which "affect the vital interests, the independence, or the honour" of the parties. A more intelligible distinction is that between legal and non-legal disputes (see, e.g., Article 36 of the United Nations Charter).

There will always be a place for arbitration in the relations between States. Arbitral procedure is more appropriate than judicial settlement for technical disputes, and less expensive, while, if necessary, arbitrations can be conducted without publicity, even to the extent that parties can agree that awards be not published. Moreover, the general principles governing the practice and powers of arbitral tribunals are fairly well recognised.[2] Lastly, arbitral procedure is flexible enough to

[1] Writers seem generally agreed on the point, however, that a dispute in which one of the parties is in effect demanding a change in the rules of international law, is "non-justiciable". Other criteria of non-justiciability, which have been relied upon, include the following:—(1) the dispute relates to a conflict of interests, as distinct from a conflict between parties as to their respective rights (the test of justiciability in the Locarno Treaties of 1925); (2) application of the rules of international law governing the dispute would lead to inequality or injustice; (3) the dispute, while justiciable in law, is not so in fact, because for political reasons neither of the disputant States could undertake to comply with an unfavourable adjudication.

[2] In 1953, the International Law Commission submitted a Draft Convention on Arbitral Procedure, which not only codified the law of international arbitration, but also endeavoured to overcome certain existing defects in procedure, e.g. disagreements between States as to whether a certain dispute was subject to arbitration, inability to establish the tribunal, failure to agree on the terms of the *compromis*, powers of the arbitral tribunal, and revision of awards. Deadlocks on the first two matters were, according to the Draft, to be broken by recourse to the International Court of Justice. For the text of the Draft and commentary thereon, see *Report* of the Commission on the Work of its Fifth Session (1953). The General Assembly did not accede to the

(*Continued*)

be combined with the fact-finding processes which are availed of in the case of negotiation, good offices, mediation, conciliation, and inquiry.[1]

(b) Judicial Settlement

By judicial settlement is meant a settlement brought about by a properly constituted international judicial tribunal, applying rules of law.

The only general organ[2] of judicial settlement at present available in the international community is the International Court of Justice[3] at The Hague, which succeeded to and preserves continuity with the Permanent Court of International Justice. The essential difference between the Court, on the one hand, and an arbitral tribunal, on the other hand, can be seen by reference to the following points:—(1) The Court is a permanently constituted tribunal, governed by a Statute and its own body of rules of procedure, binding on all parties having recourse to the Court. (2) It possesses a permanent registry, performing all the necessary functions of receiving documents for filing, recording, and authentication, general Court services, and acting as a channel of communication with Government and other bodies. (3) Proceedings are public, while in due course the pleadings, and records of the hearings and judgments are published. (4) In principle, the Court is accessible to all States for the judicial settlement of all cases which States may be able to refer to it, and of all matters specially provided for in

Commission's view that a Convention should be concluded on the basis of the Draft, and in 1958, the Commission adopted a set of model Draft Articles on Arbitral Procedure, which could be used by States as they thought fit when entering into agreements for arbitration, bilateral or multilateral, or when submitting particular disputes to arbitration *ad hoc* by *compromis.* For the text of the model Draft Articles and commentary thereon, see *Report* of the Commission on the Work of its Tenth Session (1958).

[1] E.g., in the *Argentina-Chile Boundary Arbitration* (1965–6), the arbitral tribunal caused a field mission to be sent to the disputed area for the purpose of aerial photographic surveys, and mixed ground-air reconnaissance of the territory.

[2] As distinct from a regional judicial tribunal, such as the Court of Justice of the European Communities under the Treaties of April 18, 1951, and of March 25, 1957.

[3] The standard authoritative treaties on the Court are S. Rosenne, *The Law and Practice of the International Court* (2 vols., 1965), and M. Dubisson, *La Cour Internationale de Justice* (1964).

treaties and Conventions in force. (5) Article 38[1] of its Statute specifically sets out the different forms of law which the Court is to apply in cases and matters brought before it, without prejudice to the power of the Court to decide a case *ex aequo et bono* if the parties agree to that course. (6) The membership of the Court is representative of the greater part of the international community, and of the principal legal systems, to an extent that is not the case with any other tribunal. (7) In the result, it is possible for the Court to develop a consistent practice in its proceedings, and to maintain a certain continuity of outlook to a degree that is not feasible with *ad hoc* tribunals.

The International Court of Justice was established pursuant to Chapter XIV (Articles 92–96) of the United Nations Charter drawn up at San Francisco in 1945. Article 92 of the Charter declares that the Court is " the principal organ of the United Nations ", and provides that the Court is to function in accordance with a Statute, forming " an integral part " of the Charter. By contrast, the Court's predecessor, the Permanent Court of International Justice, was not an organ of the League of Nations, although in some measure linked to the League. Inasmuch as the International Court of Justice is firmly anchored in the system of the United Nations, member States are just as much bound to the Court as to any other principal organ of the United Nations, while reciprocal duties of co-operation with each other bind the Court and United Nations organs. Also the Court is bound by the Purposes and Principles of the United Nations as these are expressed in Articles 1 and 2 of the Charter, and because the Court's Statute is annexed to the Charter and is an integral part of it, the context of the Charter is a controlling factor in the interpretation of the provisions of the Statute.

The Statute contains the basic rules concerning the constitution, jurisdiction, and procedure of the Court, and is supplemented by two sets of rules adopted by the Court pursuant to its rule-framing powers under Article 30 of the Statute:—(*a*) The Rules of Court adopted on May 6, 1946, and

[1] See pp. 34–56, *ante*, for discussion of this article.

based on the corresponding Rules of the Permanent Court of 1936. These contain not only rules of procedure, but also rules governing the working of the Court and of the Registry. (*b*) The Resolution of July 5, 1968 concerning the Court's internal judicial practice. This sets out the practice to be followed by the Court in respect to exchanges of views between the judges regarding particular points, after the termination of the written proceedings, and before the commencement of the oral hearing, and in respect to the Court's deliberations in private after the conclusion of the oral hearing, with a view to reaching its decision, and the preparation of the judgment. Since 1967, the Rules of Court have been undergoing a process of revision with the object of bringing these more in line with modern conditions, and in order to simplify procedure.

It can be seen that procedural rules are to be found both in the Statute and in the Rules of Court. Broadly speaking, the difference in nature between the content of the two instruments is that the Statute is basically more important for the Court itself, while the Rules of Court are basically more important for the parties appearing before the Court. Moreover, the Statute is of higher legal sanctity than the Rules of Court; being part of the Charter, it cannot, unlike the Rules of Court, be amended directly by the Judges themselves.[1]

All Members of the United Nations are *ipso facto* parties to the Statute, but other States may become parties to it, on conditions to be laid down in each case by the United Nations General Assembly upon the recommendation of the Security Council (Article 93 of the Charter). The conditions laid down in this connection have, up to the present, been the same for each case, namely, acceptance of the provisions of the Statute, acceptance of the obligations under Article 94[2] of the United Nations Charter, and an undertaking to contribute to the

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[1] However, under Article 70 of the Statute, the Court is entitled to propose amendments thereto. The Court exercised this power for the first time in 1969 when it proposed amendments enabling the General Assembly, upon the recommendation of the Court, to approve a place other than The Hague as the seat of the Court; see *I.C.J. Yearbook* 1969–1970, p. 113.

[2] See below, p. 468.

expenses of the Court, and were contained in the General Assembly's Resolution of December 11, 1946.

The Court consists of fifteen Judges. Candidates for membership of the Court are nominated by the national groups of the panel of the Permanent Court of Arbitration.[1] From this list of nominees, the General Assembly and Security Council, voting independently, elect the members of the Court, an absolute majority in both the Assembly and the Council being required for election.[2] Not only are the highest legal qualifications requisite under the Statute for election to the Court but also appointments are made with due regard to ensuring that the Judges elected represent " the main forms of civilisation " and the " . . . principal legal systems of the world " (Article 9 of the Statute). The first elections were held in 1946.

Jurisdiction of International Court of Justice

The Court is open:—(*a*) to the States (Members or Non-Members of the United Nations) parties to the Statute; and (*b*) to other States on conditions to be laid down by the United Nations Security Council, subject to the special provisions contained in treaties in force, and such conditions are not to place the parties in a position of inequality before the Court (Article 35 of the Statute).[3]

The Court's jurisdiction is twofold:—(*a*) to decide contentious cases; (*b*) to give advisory opinions. Both functions are judicial functions.

Contentious Jurisdiction

In contentious cases, in principle, the exercise of the Court's jurisdiction is conditional on the consent of the parties to the

[1] See above, pp. 454–455.

[2] Non-Members of the United Nations, parties to the Statute of the Court, may participate in the elections of Judges by the General Assembly in accordance with the conditions laid down in the General Assembly Resolution of October 8, 1948.

[3] The conditions as laid down by the Security Council in a Resolution of October 15, 1946, were that such States should deposit with the Court's Registrar a declaration accepting the Court's jurisdiction in accordance with the Charter and Statute and Rules of Court, undertaking to comply in good faith with the Court's decisions, and to accept the obligations under Article 94 of the Charter (see below, p. 468).

dispute. Under Article 36, paragraph 1, of the Statute, the Court has jurisdiction over all cases which the parties refer to it; such reference would normally be made by the notification of a special agreement known as a *compromis*. The provision in Article 36, paragraph 1, is not to be taken as meaning that the Court has jurisdiction only if the proceedings are initiated through a joint reference of the dispute by the contesting parties. A unilateral reference of a dispute to the Court by one party, without a prior special agreement, will be sufficient if the other party or parties to the dispute consent to the reference, then or subsequently. It is enough if there is a voluntary submission to jurisdiction (i.e., the principle of *forum prorogatum*), and such assent is not required to be given before the proceedings are instituted, or to be expressed in any particular form.[1] If, however, there is no consent, and no submission by the other party to the dispute, the case must be removed from the Court's list.[2] Nor can the Court decide on the merits of a case in the absence of a materially interested State.[3]

Only States may be parties in cases before the Court, but the Court is empowered to obtain or request information from public international organisations relevant to these cases, or such organisations may furnish this information on their own initiative (see Article 34 of the Court's Statute). Moreover, the Court has been given jurisdiction under the Statutes of the Administrative Tribunals[4] of the United Nations and of the International Labour Organisation (ILO) to determine by advisory opinion whether judgments of these tribunals have

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[1] *Corfu Channel Case* (*Preliminary Objection*), I.C.J. Reports (1948), pp. 15 *et seq.* Assent by conduct can scarcely be inferred where the respondent State consistently denies that the Court has jurisdiction; see *Anglo-Iranian Oil Company Case* (*Jurisdiction*), I.C.J. Reports (1952) 93, at p. 114.

[2] E.g., the Court made such orders for removal in 1956 in respect of the British references of disputes with Argentina and Chile concerning Antarctica, both Argentina and Chile denying jurisdiction; see I.C.J. Reports (1956) 12 and 15. There have been other instances subsequent thereto, including the United States application in 1958 against the Soviet Union relative to the aerial incident of September 4, 1954; see I.C.J. Reports (1958), 158.

[3] See *Case of Monetary Gold removed from Rome in* 1943, I.C.J. Reports (1954), 19.

[4] These tribunals have jurisdiction to deal with complaints by officials of breaches of the terms of their appointment, etc.

been vitiated by fundamental errors in procedure, etc., and in that connection upon requests for an advisory opinion by the international organisations concerned, may take into account written observations and information forwarded on behalf of individuals, i.e. the officials as to whom the judgments have been given.[1] Should individuals apply to the Court with the object of obtaining a decision on questions at issue between them and their own or other Governments, the practice is for the Registrar of the Court to inform such applicants that under Article 34 of the Statute only States may be parties in cases before the Court; while if entities other than individuals seek to bring proceedings, the Registrar may refer the matter to the Court in private meeting, if he be uncertain as to the status of the complainant entity.[2]

The Court has compulsory jurisdiction where:—

(1) The parties concerned are bound by treaties or Conventions in which they have agreed that the Court should have jurisdiction over certain categories of disputes. Among the instruments providing for reference of questions or disputes to the Court are numerous bilateral Air Services Agreements, Treaties of Commerce and Economic Co-operation, Consular Conventions, the Peace Treaty with Japan signed at San Francisco on September 8, 1951 (see Article 22), and the European Convention for the Peaceful Settlement of Disputes concluded at Strasbourg on April 29, 1957.[3] To preserve continuity with the work of the Permanent Court of International Justice, the Statute further stipulates (see Article 37) that whenever a treaty or convention in force provides for reference of a matter to the

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[1] See Advisory Opinion on *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific, and Cultural Organisation* (*UNESCO*), I.C.J. Reports (1956), 77.

[2] This course was followed in 1966–1967 with regard to an application instituting proceedings, submitted by the Mohawk nation of the Grand River; see *I.C.J. Yearbook*, 1966–1967, p. 88.

[3] For a list of such instruments, see *Yearbook* 1969–1970 of the International Court of Justice, pp. 81–93.

Permanent Court, the matter is to be referred to the International Court of Justice.

(2) The parties concerned are bound by declarations made under the so-called " Optional Clause "—paragraph 2 of Article 36 of the Statute. This clause appeared in the former Statute, in substantially the same terms as in the present Statute. It now provides that the parties to the Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement " in relation to any other State accepting the same obligation ", the jurisdiction of the Court in *all* legal disputes concerning:—

(*a*) the interpretation of a treaty;
(*b*) any question of international law;
(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) the nature or extent of the reparation to be made for the breach of an international obligation.

These declarations may be made:—(i) unconditionally; or (ii) on condition of reciprocity on the part of several or certain States; or (iii) for a certain time only. According as such declarations are made, and providing that the dispute is of a legal character and that it falls within the categories specified, the Court's jurisdiction becomes compulsory. The Court is empowered to decide whether a particular dispute is or is not one of the kind mentioned in the " Optional Clause ".[1]

To preserve continuity, as before, with the Permanent Court, Article 36 paragraph 5 of the Statute provides that declarations made under the " Optional Clause " in the earlier Statute are deemed, as between parties to the Statute, to be acceptances of the compulsory jurisdiction of the present Court for the period which they still have to run, and in accordance with their terms. This provision has been the subject of interpretation by the present Court. According to its decision in the *Case Concerning the Aerial Incident of July* 27, 1955 (*Preliminary*

[1] See paragraph 6 of Article 36 of the Statute, providing that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Objections)[1] such former declarations are only transferable if made by States parties to the present Statute who were represented at the San Francisco Conference which drew up that Statute,[2] and a former declaration made by any other State party to the Statute lapsed in 1946 when the Permanent Court of International Justice ceased to exist, and on that account. However, under the Court's decision in the *Preah Vihear Temple Case* (*Preliminary Objections*)[3] a declaration made after 1946 by any such other State, purporting to renew a declaration under the " Optional Clause " in the earlier Statute, is none the less valid as a declaration under the present Statute, because owing to the dissolution of the Permanent Court, it could have no application except in relation to the present Court.

At the San Francisco Conference, some delegations had urged that the Statute should provide for some compulsory jurisdiction of the Court over legal disputes, but others hoped that this result could be practically obtained through more widespread acceptance of the " Optional Clause ". This expectation has not been fulfilled to date.

The majority of the present declarations in force[4] are subject to a condition of reciprocity. Many of them also include reservations, excluding certain kinds of disputes from compulsory jurisdiction. The reservations as to jurisdiction are to some extent standardised, covering *inter alia* the exclusion of:—(i) past disputes, or disputes relating to prior situations or facts; (ii) disputes for which other methods of settlement are available; (iii) disputes as to questions within the domestic or national jurisdiction of the declaring State; (iv) disputes arising out of war or hostilities; and (v) disputes between

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[1] I.C.J. Reports (1959), 127. The parties were Israel and Bulgaria.

[2] There are nine such States (namely Colombia, Dominican Republic, El Salvador, Haiti, Luxembourg, New Zealand, Nicaragua, Panama, and Uruguay), who have not made new declarations, and whose declarations under the earlier Statute apply in relation to the present Court.

[3] I.C.J. Reports (1961), 17.

[4] As at July 1, 1971, 47 declarations were in force. For the text of each of these declarations, with the exception of Austria's declaration lodged on May 19, 1971, see *Yearbook* 1969–70 of the International Court of Justice, pp. 50–80.

member States of the British Commonwealth. Too many of the reservations are, however, merely escape clauses or consciously designed loopholes. Such a system of " optional " compulsory jurisdiction verges on absurdity.

A case of a specially contentious reservation is the so-called " automatic " or " self-judging " form of reservation contained in proviso (*b*) to the American declaration of August 14, 1946, reserving " disputes with regard to matters essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America* ". The validity of this reservation, more generally known as the " Connally amendment ", has been questioned.[1]

A number of points affecting the operation of the " Optional Clause " have been settled by decisions of the present Court:— (*a*) Where a declaration, subject to a condition of reciprocity, has been made by a State, and another State seeks to invoke compulsory jurisdiction against it, the respondent State is entitled to resist the exercise of jurisdiction by the Court by taking advantage of any wider reservations, including the " automatic " or " self-judging " form of reservation, made by the claimant State in its declaration.[2] Jurisdiction is conferred upon the Court only to the extent to which the two declarations coincide at their narrowest. But this bilateral effect does not apply in favour of a respondent State except on the basis of wider reservations actually contained in the claimant State's declaration; the fact that the claimant State would, if proceedings had been taken in the Court against it by the respondent State, have been entitled to resist jurisdiction, on the ground of a wide reservation in the respondent State's declaration, is not sufficient to bring into play the bilateral principle.[3] (*b*) If

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[1] On the ground that it is incompatible with the power of the Court under Article 36 paragraph 6 (mentioned *supra*) of its Statute to settle disputes as to its jurisdiction, and on the further ground that the reservation of such a discretion is inconsistent with any proper acceptance, within the meaning of Article 36 paragraph 2, of compulsory jurisdiction.

[2] See the *Norwegian Loans Case*, I.C.J. Reports (1957), 9. Because of this decision, certain States which had made " automatic " reservations, withdrew these.

[3] See the *Interhandel Case* (*Preliminary Objections*), I.C.J. Reports (1959), 6.

a dispute between States relates to matters exclusively within the domestic jurisdiction of the respondent State, it is not within the category of " legal disputes " referred to in Article 36 paragraph 2.[1] (*c*) A declaration made almost immediately before and for the purpose of an application to the Court is not invalid, nor an abuse of the process of the Court.[2] (*d*) If a matter has properly come before the Court under Article 36 paragraph 2, the Court's jurisdiction is not divested by the unilateral act of the respondent State in terminating its declaration in whole or in part.[3]

Before the decision of the International Court of Justice in the *Corfu Channel Case* (*Preliminary Objection*),[4] it was thought that a third category of compulsory jurisdiction existed, namely where under Article 36 of the United Nations Charter, the Security Council recommended the parties to a dispute to refer their case to the Court, particularly as in paragraph 3 of that Article the Council is virtually enjoined, where the dispute is of a legal character to recommend submission to the Court. In the International Court's decision, however, seven Judges expressed the view that this Article did not create a new class of compulsory jurisdiction, and the same interpretation apparently applies to a decision of the Security Council under Article 33 " calling upon " the parties to adjust their differences by judicial settlement.

Where the Court has compulsory jurisdiction, the normal method of initiating proceedings is by a unilateral written application addressed to the Registrar, indicating the subject of the dispute, and the other party or parties. The Registrar thereupon communicates the application to the other party or parties, and notifies all members of the United Nations and any other States entitled to appear before the Court (Article 40 of the Statute).

[1] See the *Right of Passage over Indian Territory Case* (*Preliminary Objections*), I.C.J. Reports (1957), 125 at 133–134, and Briggs, *American Journal of International Law* (1959), Vol. 53 at pp. 305–306.

[2] See the *Right of Passage Case*, *supra*. This is covered by the United Kingdom reservation, excluding a dispute in which a State has so acted, or where it has deposited or ratified a declaration less than 12 months prior to the filing of its application bringing the dispute before the Court.

[3] See the *Right of Passage Case*, *supra*, n. 1.

[4] I.C.J. Reports (1948), at pp. 15 *et seq.*

The effect of the exercise of compulsory jurisdiction by the Court is clarified by the provisions of Article 94 of the United Nations Charter. Under this Article, each Member of the United Nations undertakes to comply with the decision of the Court in any case to which it is a party. Further, if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may make recommendations or decide upon measures to be taken to give effect to the judgment, and these may be dictated by considerations unlike those which condition processes of execution in domestic legal systems. There are no provisions whereby the Court may enforce its decisions, and this of course represents a serious weakness.

The procedure in contentious cases is partly written, partly oral. The written proceedings of the Court consist of communicating to it memorials, counter-memorials, replies and rejoinders, and papers and documents in support. The oral proceedings consist of the hearing by the Court of witnesses, and experts, and of agents, counsel, or advocates who may represent the States concerned. The hearings are public unless the Court decides otherwise or the parties demand that the public be not admitted. The *South West Africa Cases* confirmed that claimants in the same interest may be joined together, that the parties can call witnesses or experts to testify personally, and that the Court itself may put questions to the parties and witnesses, but that the Court has some area of discretion in deciding whether to accede to a request for a view or inspection *in loco* (*semble*, also if the view is requested by consent of all parties).

The Court may indicate under Article 41 of its Statute any *interim* measures necessary to preserve the respective rights of the parties, notice of which has to be given forthwith to the parties and to the Security Council.[1]

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[1] *Semble*, such interim measures of protection may be ordered even though it is claimed that the Court has no jurisdiction in the dispute between the parties; cf. the interim order for such measures made by the Court on July 5, 1951, in the *Anglo-Iranian Oil Company Case*.

Preliminary objections may be taken, e.g. to the jurisdiction of the Court, or by way of a plea that the matter belongs to the exclusive domestic jurisdiction of the respondent State,[1] or that the stage of a dispute between the parties has not arisen.[2] Where the preliminary objections raise matters which require fuller investigation, or which are wrapped up with the issues and evidence that may be tendered thereon, the Court will not decide upon them in the first instance, but will join them to the merits of the case.[3] It was the Court's majority view in the *South West Africa Cases, Second Phase* (1966)[4] that a decision on a preliminary objection, even of a somewhat like point, can never bind the Court where the question resolves itself into one founded on the merits, after all arguments have been presented.

All questions are decided by a majority of the Judges present; and if the voting is equal, the President has a casting vote. The legal effect of the Court's judgment is set out in Articles 59-61. The Court's decision has no binding force except between the parties and in respect of the particular case (Article 59). The judgment is " final and without appeal " (Article 60) but a revision may be applied for on the ground of the discovery of a new " decisive factor ", provided that application is made within six months of such discovery and not later than ten years from the date of the judgment (Article 61). Unless otherwise decided by the Court, each party bears its own costs.

According to recent judgments of the Court, there are *semble* some essential limitations on the exercise of its judicial functions in the contentious jurisdiction, and on the rights of States to advance a claim in that jurisdiction.

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[1] An international dispute as to the applicability of treaty provisions or of rules of customary international law, is not a matter within the domestic jurisdiction of parties to the dispute; see *Interhandel Case* (*Preliminary Objections*), I.C.J. Reports (1959), 6.

[2] A legal dispute within the meaning of Article 36 paragraph 2 may be sufficiently inferred from diplomatic exchanges, without the necessity that it should have reached a stage of precise legal definition; see the *Right of Passage over Indian Territory Case* (*Preliminary Objections*), I.C.J. Reports (1957), 125. Diplomatic exchanges can include debates in United Nations organs as part of the normal process of diplomacy; *South West Africa Cases, Preliminary Objections*, I.C.J. Reports, 1962, 319.

[3] See the *Right of Passage Case*, *supra*, and *South-West Africa Cases, Preliminary Objections*, I.C.J. Reports, (1962), 319.

[4] I.C.J. Reports, (1966), 6, at pp. 18, 36, 37.

First, as the *Northern Cameroons Case* shows,[1] an adjudication by the Court must deal concretely with an actual controversy involving a conflict of legal rights or interests as between the parties; it is not for the Court to give abstract rulings, *inter partes*, to provide some basis for political decisions, if its findings do not bear upon actual legal relationships. Otherwise, it might be acting virtually as a " moot Court ". The correlative aspect is that the parties cannot be treated as mutually aggrieved to the extent of a " dispute " if there is a mere difference of opinion between them, in the absence of a concrete disagreement over matters substantively affecting their legal rights or interests.

Second, and more controversially, the Court decided by a majority in the *South West Africa Cases, Second Phase*[2] that the claimant States, Ethiopia and Liberia, had failed to establish a legal right or interest appertaining to them in the subject-matter of their claims which, therefore, should be rejected. This question was treated as one of an antecedent character, but nevertheless bearing upon the merits.

Advisory Opinions

As to advisory opinions, the General Assembly and the Security Council of the United Nations Organisation may request such opinions from the Court. Other organs of the United Nations and the " specialised agencies " may, if authorised by the General Assembly, request the Court to give advisory opinions on legal questions arising within the scope of their activities.[3] Advisory opinions can only be sought on legal questions, concrete or abstract, and in giving

[1] I.C.J. Reports (1963), 15, especially at pp. 33–34, 37–38; and see excellent article on the case by D. H. N. Johnson, *International and Comparative Law Quarterly*, Vol. 13 (1964), pp. 1143–1192. The case is useful also as confirming the Court's powers to make a declaratory judgment in an appropriate case.

[2] I.C.J. Reports (1966), 6, at pp. 18, 51. The Court also affirmed that it could take account of moral principles only so far as manifested in legal form (*ibid.*, p. 34), and that it was not a legislative body, its duty being to apply, not to make the law (*ibid.*, p. 48). The absence of legal standing of the claimant States was attributed, *inter alia*, to the exclusive, institutional responsibility of League of Nations organs for supervising the fulfilment of the terms of mandates.

[3] The Economic and Social Council, the Trusteeship Council, and the various specialised agencies have been so authorised.

them the Court would of course be exercising a judicial function. An advisory opinion is no more than it purports to be; it lacks the binding force of a judgment in contentious cases, even for the organisation or organ which has requested it, although of course such organisation or organ may choose to treat it as of the nature of a compulsory ruling. Nor does the Court have powers of judicial review or of appeal in respect to any decisions of such organisation or organ, for example by way of setting these aside, although it may incidentally in the course of an advisory opinion pronounce upon the question of the validity of a particular decision.[1] So far as States are concerned, they may by treaty or agreement undertake in advance to be bound by advisory opinions on certain questions (see, for example, Section 30 of the Convention on the Privileges and Immunities of the United Nations, 1946, and Section 32 of the Convention on the Privileges and Immunities of the Specialised Agencies, 1947). Also, in the absence of any such provisions, advisory opinions will have strong persuasive authority.

The procedure in the case of advisory opinions is that a written request must be laid before the Court containing an exact statement of the question on which an opinion is sought, and accompanied by all documents likely to throw light on the question. This is a formal and indispensable requirement for the exercise of jurisdiction by the Court to give an advisory opinion. The Registrar then notifies all States entitled to appear before the Court. He also notifies any State or international organisation, thought likely to be able to furnish information on the subject, that the Court will receive written or oral statements. States and international organisations presenting written or oral statements may comment on those made by other States and organisations. The advisory opinion is delivered in open Court (see Article 67 of the Statute). Both under Article 68 of the Statute and in practice the Court's procedure has been closely assimilated to the procedure in the contentious jurisdiction.

[1] See Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), June 21, 1971, I.C.J. Reports, 1971, 16, at p. 45.

The Court also regards itself as under a duty to observe essential judicial limitations in its advisory opinion procedure, so that it will not exercise the jurisdiction if the main point on which an opinion is requested is decisive of a controversy between certain States, and any one of these States is not before the Court.[1] For to give an advisory opinion in such circumstances would be to adjudicate without the consent of one party. The interpretation of treaty provisions is essentially a judicial task, and the Court will not reject a request for an opinion on such a question, although it be claimed that such question and such request are of a political nature.[2] In any event, the Court will not decline to give an advisory opinion, because it is maintained that in respect to such opinion the Court had been, or might be subjected to political pressure.[3]

The Court has, *semble*, also a discretion to refuse to give an advisory opinion upon other grounds, for example, that the question submitted involves other than legal aspects, or is embarrassing. The Court has held, however, that the circumstance that the Executive Board of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) was alone entitled to seek an advisory opinion as to whether a

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[1] See the *Advisory Opinion on the Status of Eastern Carelia*, Pub. P.C.I.J. (1923), Series B, No. 5 at 27–29. But this does not prevent the Court dealing by advisory opinion with a legal question, the solution of which may clarify a factor in a dispute between States or between a State and an international institution, without affecting the substance of the dispute, or the solution of which may provide guidance for an international organ in matters of the procedure under, or the effect to be given to a multilateral Convention, notwithstanding that one of the States concerned is not before the Court or has not consented; see the Advisory Opinions of the present Court on the *Interpretation of the Peace Treaties*, I.C.J. Reports (1950), 65, 221, and on *Reservations to the Genocide Convention*, I.C.J. Reports 1951, 15. Similarly, the Court is not debarred from acceding to a request by a United Nations organ for legal advice on the consequences of decisions of that organ, notwithstanding that in order to give an answer, the Court may have to pronounce on legal questions upon which there is a divergence of views between a particular Member State, on the one hand, and the United Nations, on the other hand; see Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), June 21, 1971, I.C.J. Reports, 1971, 16, at pp. 23–25.

[2] See *Advisory Opinion on Certain Expenses of the United Nations* (*Article 17, paragraph 2 of the Charter*), I.C.J. Reports (1962), 151.

[3] Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), June 21, 1971; see I.C.J. Reports, 1971, 16, at p. 23.

decision of the Administrative Tribunal of the International Labour Organisation (ILO) upon a staff claim was vitiated by a fundamental error in procedure, etc., and that no equivalent right of challenge was given to complainant officials, was not, because of such inequality, a reason for not complying with a request for an advisory opinion on such a question.[1]

As we have already seen above,[2] the Court applies international law, but Article 38 of its Statute expressly enables it to decide a case *ex aequo et bono* if the parties concerned agree to this course. This means that the Court can give a decision on objective grounds of fairness and justice without being bound exclusively by rules of law. The Court will adopt this course only if so directed by the parties in the most explicit terms.[3] Presumably the Court could not be required to undertake, *ex aequo et bono,* functions which were strictly speaking of a legislative character. This consensual *ex aequo et bono* jurisdiction must, however, be distinguished from the Court's inherent power, as a Court of justice, to apply equitable principles.[4]

There are other points of importance concerning the Court. Nine Judges form a quorum. If the parties so request, the Court may sit in Chambers. Chambers of three or more Judges may be formed for dealing with particular categories of cases, for example, labour cases and cases relating to transit and communications, and annually a Chamber of five Judges is formed to hear and determine cases by summary procedure. The principle of national Judges applies under the present

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[1] See *Advisory Opinion on Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, I.C.J. Reports (1956), 77.

[2] See above, pp. 34–56, 459.

[3] See *Case of the Free Zones of Upper Savoy and Gex*, Pub. P.C.I.J. (1930), Series A, No. 24, at p. 10, and Series A/B No. 46 (1932) at p. 161.

[4] See discussion in the *North Sea Continental Shelf Cases*, I.C.J. Reports, 1969, 3, at pp. 48–9. In the *Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Second Phase)*, I.C.J. Reports, 1970, 3 (see paragraphs 92–101 of the judgment), the Court declined to accept the proposition that, by virtue of equitable principles, the national State of shareholders of a company, incorporated in another State, was entitled to espouse a claim by shareholders for loss suffered through injury done to the company.

Statute (Article 31). Judges of the nationality of parties before the Court retain their right to sit in the case; if the Court includes a Judge of the nationality of one party, any other party may choose a person to sit as Judge, and if the Court does not include Judges of the nationality of the parties, each of the parties may proceed to appoint as Judge a person of its nationality.

It must be admitted that although both the Permanent Court of International Justice, and the International Court of Justice disposed of a substantial number of contentious matters and of requests for an advisory opinion, States generally showed marked reluctance to bring before these Courts matters of vital concern, or to accept compulsory adjudication in such matters. It is significant, also, that States have been unwilling to avail themselves of the clauses in the very large number of bilateral and multilateral treaties,[1] providing for reference of disputes to the former, or to the present Court.

Pessimism, on this account, as to the limited scope of judicial settlement in the international community, is to some extent mitigated by the fact that both Courts adjudicated many questions raising important points of law, or difficult problems of treaty interpretation. Some of these judgments or opinions arose out of important political disputes which came before the League of Nations Council, or before the United Nations Security Council; e.g. the Permanent Court's Advisory Opinions on the *Frontier between Turkey and Iraq*,[2] on the *Customs Régime between Germany and Austria*,[3] and on the *Nationality Decrees in Tunis and Morocco*,[4] and the International Court's judgment in the *Corfu Channel Case* (*Merits*).[5] Nor can it be denied that both Courts made substantial contributions to the development and methodology of international

[1] For a list of such instruments affecting the present Court, see its *Yearbook*, 1969–1970, pp. 81–93.

[2] Pub. P.C.I.J. (1925), Series B, No. 12.

[3] Pub. P.C.I.J. (1931), Series A/B, No. 41.

[4] Pub. P.C.I.J. (1923), Series B, No. 4. The Court ruled that questions of nationality cease to belong to the domain of exclusive domestic jurisdiction if issues of treaty interpretation are incidentally involved, or if a State purports to exercise jurisdiction in matters of nationality in a protectorate.

[5] I.C.J. Reports (1949), 4.

law.[1] So far as the present Court is concerned, reference need only be made to the Advisory Opinions on *Conditions of Membership in the United Nations*[2] and on *Reparation for Injuries Suffered in the Service of the United Nations*,[3] and to the judgments in the *Fisheries Case*,[4] the *Nottebohm Case* (*Second Phase*),[5] and the *Minquiers and Ecrehos Case*,[6] and other cases referred to, in their appropriate place, in the present book. The role permitted to international adjudication may be a modest one, but it is at present indispensable, particularly for clarifying on the judicial level those issues which can be resolved according to international law.

Then there should be mentioned the possibility, as illustrated in the *Case Concerning the Arbitral Award of the King of Spain*,[7] of using the International Court of Justice for the judicial review or revision of international arbitral awards on the ground that the arbitral tribunal exceeded its jurisdiction, committed a fundamental error in procedure, etc. The International Law Commission favoured general recourse to the Court for this purpose.[8] At present, however, any such challenge to an arbitral award is only possible by special agreement between the parties, or if the matter can be brought under the compulsory jurisdiction of the Court.

Finally not to be overlooked is the key role which the President of the Court plays in so far as he is called upon to appoint arbitrators, umpires, and members of Commissions[9]—to this extent, he performs indispensable services in the field of peaceful settlement of disputes.

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[1] See for an evaluation of the work of the International Court of Justice, Leo Gross *American Journal of International Law* (1962), Vol. 56, pp. 33–62.

[2] Referred to below, pp. 598–599.

[3] Referred to below, p. 564.

[4] Referred to above, pp. 216–217.

[5] Referred to above, p. 340.

[6] Referred to above, p. 176.

[7] See I.C.J. Reports (1960), 192. In this case, the Court negatived the existence of any excess of jurisdiction, or error.

[8] In the draft model Articles on Arbitral Procedure, referred to above, p. 457, n. 2.

[9] As to the functions of the President, see study by Sir Percy Spender (President, 1964–1967), *Australian Year Book of International Law*, 1965, pp. 9–22.

(c) Negotiation, good offices, mediation, conciliation, or inquiry

Negotiation, good offices, mediation, conciliation, and inquiry are methods of settlement less formal than either judicial settlement or arbitration.

Little need be said concerning negotiation except that it frequently proceeds in conjunction with good offices or mediation, although reference should be made to the recent trend of providing, by international instrument or arrangement, legal frameworks for two processes of *consultation* and *communication*, without which in some circumstances negotiation cannot proceed. Illustrations of the former are the provisions for consultation in the Australia–New Zealand Free Trade Agreement of August 31, 1965, and of the latter, the United States–Soviet Memorandum of Understanding, Geneva, June 20, 1963 for a direct communication link—the so-called " hot line "—between Washington and Moscow in case of crisis.

Both good offices and mediation are methods of settlement in which, usually, a friendly third State assists in bringing about an amicable solution of the dispute.[1] But the party tendering good offices or mediating may also, in certain cases, be an individual or an international organ (cf. the tender of good offices by the United Nations Security Council in 1947 in the dispute between the Netherlands and the Republic of Indonesia). The distinction between good offices and mediation is to a large extent a matter of degree. In the case of good offices, a third party tenders its services in order to bring the disputing parties together, and to suggest (in general terms) the making of a settlement, without itself actually participating in the negotiations or conducting an exhaustive inquiry into the various aspects of the dispute. Hence, once the parties have been brought together for the purpose of working out a solution of their controversies, strictly speaking the State or party tendering good offices has no further active duties to perform (see Article X of the Pact of Bogotá, i.e. the Inter-American Treaty on Pacific Settlement of April 30, 1948). In the case

[1] See Part II of the Hague Convention of 1907 on the Pacific Settlement of International Disputes.

of mediation, on the other hand, the mediating party has a more active role, and participates in the negotiations and directs them in such a way that a peaceful solution may be reached, although any suggestions made by it are of no binding effect upon the parties.[1] The initiative of the Soviet Government at the end of 1965 and early in 1966 in bringing representatives of India and Pakistan together at Tashkent to settle the conflict between them, and in creating a propitious atmosphere, for a settlement, seems to have lain somewhere between good offices and mediation.

The scope of both good offices and mediation is limited; there is a lack of any procedure in both methods for conducting a thorough investigation into the facts or the law. Hence, in the future, the greatest possibilities for both methods lie as steps preliminary or ancillary to the more specialised techniques of conciliation, of inquiry, and of settlement through the United Nations.

The term "conciliation" has both a broad and a narrow meaning. In its more general sense, it covers the great variety of methods whereby a dispute is amicably settled with the aid of other States or of impartial bodies of inquiry or advisory committees. In the narrow sense, "conciliation" signifies the reference of a dispute to a commission or committee to make a report with proposals to the parties for settlement, such proposals not being of a binding character. According to Judge Manly O. Hudson[2]:—

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[1] These meanings of good offices and mediation have not been strictly followed in United Nations practice. The United Nations Good Offices Committee in Indonesia appointed by the Security Council in 1947 had more extensive functions than good offices as such, e.g., reporting to the Security Council on, and making recommendations as to developments in Indonesia, 1947–48; the United Nations Mediator in Palestine in 1948 was entrusted with the duties of reporting on developments, of promoting the welfare of the inhabitants of Palestine, and of assuring the protection of the Holy Places; and the Good Offices Committee for the Korean hostilities appointed by the United Nations General Assembly in 1951 was expected not merely to bring about negotiations between the contending forces, but to propose means and methods for effecting a cessation of hostilities. Cf. also the case of the Good Offices Committee on South-West Africa, appointed in 1957 whose duty was not only to discuss a basis of agreement with the South African Government, but to report to the General Assembly.

[2] Hudson, *International Tribunals* (1944), p. 223.

> " Conciliation . . . is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposals formulated ".

The fact that the parties are perfectly free to decide whether or not to adopt the proposed terms of settlement distinguishes conciliation from arbitration.

Conciliation Commissions were provided for in the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes (see repectively Title III and Part III of these Conventions). Such Commissions could be set up by special agreement between the parties, and were to investigate and report on situations of fact with the proviso that the report in no way bound the parties to the dispute. The actual provisions in the Conventions avoid any words suggesting compulsion on the parties to accept a Commission's report. Similar commissions were also set up under a series of treaties negotiated by the United States in 1913 and the following years, known as the " Bryan Treaties ". More recent treaties providing for conciliation are the Brussels Treaty of March 17, 1948, and the Pact of Bogotá, p. 476, *ante*.

The value of Conciliation Commissions as such has been doubted by several authorities, but the procedure of conciliation itself proved most useful and important when employed by the League of Nations Council to settle international disputes. The Council's use of conciliation was extremely flexible; generally a small committee, or a person known as a rapporteur,[1] was appointed to make tactful investigations and suggest a method of composing the differences between the parties.[2] States do attach great value to the procedure of conciliation, as reflected in the provision made for it in the Convention of

[1] The United Nations General Assembly also favours this flexible procedure, and has made various recommendations in the matter of the appointment of rapporteurs and conciliators; see below, p. 602. Governments of a number of member States of the United Nations have designated members of a United Nations panel to serve on Commissions of conciliation and inquiry.

[2] There have been several instances of the use of conciliation, outside the United Nations, since the end of the Second World War. The Bureau of the Permanent Court of Arbitration makes its facilities available for the holding of Conciliation Commissions. Cf. also Article 47 of the Hague Convention, October 18, 1907, on the Pacific Settlement of International Disputes.

March 18, 1965, on the Settlement of Investment Disputes between States and Nationals of other States.

The object of an inquiry is, without making specific recommendations, to establish the facts, which may be in dispute, and thereby prepare the way for a negotiated adjustment.[1] Thus, frequently, in cases of disputed boundaries, a commission may be appointed to inquire into the historical and geographical facts which are subject of controversy and thus clarify the issues for a boundary agreement. Also, sometimes an expert committee is necessary to inquire into certain special facts for the purposes of preliminary elucidation.

Obviously one or more of the above methods—negotiation, good offices, mediation, conciliation, and inquiry—may be used in combination with the other or others.

Recently there have been fresh moves to improve processes of settlement, and render them even more flexible. The proposals have included the extension of fact-finding methods, and the creation of a fact-finding organ, or fact-finding centre.[2] On December 18, 1967, the United Nations General Assembly adopted a Resolution, upholding the usefulness of the method of impartial fact-finding as a mode of peaceful settlement, and in which it urged Member States to make more effective use of fact-finding methods, and requested the Secretary-General to prepare a register of experts whose services could be used by agreement for fact-finding in relation to a dispute. Subsequently, in accordance with the Resolution, nominations of experts were received for the purposes of the register (see Note by Secretary-General, Document A/7240). Existing facilities for fact-finding include also those provided by the Panel for Inquiry and Conciliation set up by the General Assembly in April, 1949.

Even wider initiatives have been supported by the United Kingdom and the United States in the General Assembly.

[1] An inquiry may necessitate the lodging of written documents similar to pleadings, such as memorials and counter-memorials, and oral proceedings, with the taking of evidence, as in the "*Red Crusader*" *Inquiry* (Great Britain–Denmark) conducted at The Hague in 1962; see *Report* of the 3-member Commission of inquiry, March 23, 1962.

[2] See *U.N. Juridical Yearbook*, 1964, pp. 166–174.

If these result in more effective processes, the suggestions are to be welcomed, but it is always to be remembered that further multiplication of organs may derogate from the value and significance of those which now exist.

(d) Settlement under Auspices of United Nations Organisation

As successor to the League of Nations, the United Nations Organisation, created in 1945, has taken over the bulk of the responsibility for adjusting international disputes. One of the fundamental objects of the Organisation is the peaceful settlement of differences between States, and by Article 2 of the United Nations Charter, Members of the Organisation have undertaken to settle their disputes by peaceful means and to refrain from threats of war or the use of force.

In this connection, important responsibilities devolve on the General Assembly and on the Security Council, corresponding to which wide powers are entrusted to both bodies. The General Assembly is given authority, subject to the peace enforcement powers of the Security Council, to recommend measures for the peaceful adjustment of any situation which is likely to impair general welfare or friendly relations among nations (see Article 14 of the Charter).

The more extensive powers, however, have been conferred on the Security Council in order that it should execute swiftly and decisively the policy of the United Nations. The Council acts, broadly speaking, in two kinds of disputes:—(i) disputes which may endanger international peace and security; (ii) cases of threats to the peace, or breaches of peace, or acts of aggression. In the former case, the Council, when necessary, may call on the parties to settle their disputes by the methods considered above, viz., arbitration, judicial settlement, negotiation, inquiry, mediation, and conciliation. Also the Council may at any stage recommend appropriate procedures or methods of adjustment for settling such disputes. In the latter case, (ii) above, the Council is empowered to make recommendations or decide what measures are to be taken to maintain or restore international peace and security, and it may call on the parties concerned to comply with certain

provisional measures. There is no restriction or qualification on the recommendations which the Council may make, or on the measures, final or provisional, which it may decide are necessary. It may propose a basis of settlement, it may appoint a commission of inquiry, it may authorise a reference to the International Court of Justice, and so on. Under Articles 41 to 47 of the Charter, the Security Council has also the right to give effect to its decisions not only by coercive measures such as economic sanctions, but also by the use of armed force as against States which decline to be bound by these decisions.[1]

With the exception of disputes of an exclusively legal character which are usually submitted to arbitration or judicial settlement, it is purely a matter of policy or expediency which of the above different methods is to be adopted for composing a particular difference between States. Certain treaties have endeavoured to define the kind of dispute which should be submitted to arbitration, judicial settlement, or conciliation, or the order in which recourse should be had to these methods, but experience has shown the dubious value of any such pre-established definitions or procedure. Any one method may be appropriate, and the greater the flexibility permitted, the more chance there is of an amicable solution.

The General Act for the Pacific Settlement of International Disputes adopted by the League of Nations Assembly in 1928 was a type of instrument in which a maximum of flexibility and freedom of choice was sought to be achieved.[2] It provided separate procedures, a procedure of conciliation (before Conciliation Commissions) for all disputes (Chapter I), a procedure of judicial settlement or arbitration for disputes of a legal character (Chapter II), and a procedure of arbitration for other disputes (Chapter III). States could accede to the General Act by accepting all or some of the procedures and

[1] See further below, Chapter 19 at pp. 609–619 for detailed treatment.

[2] The Pact of Bogotá of April 30, 1948 (Inter-American Treaty on Pacific Settlement), and the European Convention for the Peaceful Settlement of Disputes, concluded at Strasbourg on April 29, 1957, are illustrations of regional multilateral instruments with similarly detailed provisions for recourse to different procedures of settlement of disputes.

were also allowed to make certain defined reservations (for example, as to prior disputes, as to questions within the domestic jurisdiction, etc.). The General Act was acceded to by twenty-three States, only two of whom acceded to part of the instrument, but unfortunately the accessions to the General Act as a whole were made subject to material reservations. As a result, the practical influence of the instrument was negligible, and it was not invoked in any case before the Permanent Court of International Justice. A Revised General Act was adopted by the United Nations General Assembly on April 28, 1949, but it has not been acceded to by as many States as expected.

In this connection, there should be mentioned the problem of peaceful change or revision of treaties and the *status quo* which troubled publicists a good deal just before the Second World War. Many claimed that none of the above methods was suitable for settling " revisionist " disputes, and proposed the creation of an International Equity Tribunal which would adjudicate claims for peaceful change on a basis of fairness and justice. The powers which would have been conferred on such a tribunal appear now to be vested, although not in a very specific or concrete manner, in the United Nations.[1]

3.—Forcible or Coercive Means of Settlement

When States cannot agree to solve their disputes amicably a solution may have to be found and imposed by forcible means. The principal forcible modes of settlement are:—

(*a*) War and non-war armed action.
(*b*) Retorsion.
(*c*) Reprisals.
(*d*) Pacific blockade.
(*e*) Intervention.

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[1] See, e.g., Article 14 of the United Nations Charter empowering the General Assembly to " recommend measures for the peaceful adjustment of any situation " likely to impair general welfare or friendly relations among nations including situations resulting from a breach of the Charter.

(a) War and Non-War Armed Action

The whole purpose of war is to overwhelm the opponent State, and to impose terms of settlement which that State has no alternative but to obey. Armed action, which falls short of a state of war, has also been resorted to in recent years. War and non-war armed hostilities are discussed in detail in Chapter 17, below.

(b) Retorsion

Retorsion is the technical term for retaliation by a State against discourteous or inequitable acts of another State, such retaliation taking the form of unfriendly legitimate acts within the competence of the State whose dignity has been affronted; for example, severance of diplomatic relations, revocation of diplomatic privileges, or withdrawal of fiscal or tariff concessions.

So greatly has the practice as to retorsion varied that it is impossible to define precisely the conditions under which it is justified. At all events it need not be a retaliation in kind.

The legitimate use of retorsion by Member States of the United Nations has probably been affected by one or two provisions in the United Nations Charter. For example, under paragraph 3 of Article 2, Member States are to settle their disputes by peaceful means in such a way as not to " endanger " international peace and security, and justice. It is possible that an otherwise legitimate act of retorsion may in certain circumstances be such as to endanger international peace and security, and justice, in which event it would seemingly be illegal under the Charter.

(c) Reprisals

Reprisals are methods adopted by States for securing redress from another State by taking retaliatory measures. Formerly, the term was restricted to the seizure of property or persons, but in its modern acceptation connotes coercive measures adopted by one State against another for the purpose of settling some dispute brought about by the latter's illegal or

unjustified conduct. The distinction between reprisals and retorsion is that reprisals consist of acts which would generally otherwise be quite illegal whereas retorsion consists of retaliatory conduct to which no legal objection can be taken. Reprisals may assume various forms, for example, a boycott of the goods of a particular State,[1] an embargo, a naval demonstration,[2] or bombardment.

It is now generally established by international practice that a reprisal is only justified if the State against which it is directed has been guilty of conduct in the nature of an international delinquency. Moreover, a reprisal would not be justified if the delinquent State had not been previously requested to give satisfaction for the wrong done, or if the measures of reprisal were " excessive " in relation to the injury suffered.[3] There have been several vivid illustrations of purported reprisal action by States, for example the expulsion of Hungarians from Yugoslavia in 1935, in alleged retaliation for Hungarian responsibility for the murder of King Alexander of Yugoslavia at Marseilles, and the shelling of the Spanish port of Almeria by German warships in 1937, as reprisal for an alleged bombardment of the battleship *Deutschland* by a Spanish aircraft belonging to the Spanish Republican forces.

Some authorities hold that reprisals are only justified if their purpose is to bring about a satisfactory settlement of a dispute. Hence the principle referred to above that reprisals should not be resorted to unless and until negotiations for the purpose of securing redress from the delinquent State fail.

Strictly speaking, retaliatory acts between belligerent States in the course of a war are a different matter altogether from reprisals, although they also are termed " reprisals ". The object of such acts is generally to force an opponent State

[1] Unless used by way of justifiable reprisal, *semble*, a national boycott by one State of the goods of another may amount to an act of economic aggression in breach of international law. See Bouvé, *American Journal of International Law* (1934), Vol. 28, pp. 19 *et seq.*

[2] *Semble*, defensive naval or military demonstrations are permissible in defence to an armed attack, but subsequent forcible self-help for purposes of redress, added precautions, etc., is not; cf. *Corfu Channel (Merits) Case*, I.C.J. Reports, 1949, pp. 4, 35.

[3] See the *Naulilaa Case* (1928), *Recueil* of Decisions of the Mixed Arbitral Tribunals, Vol. 8, p. 409, at pp. 422–5.

to stop breaking the laws of war; as, for example, in 1939-1940, when Great Britain commenced the seizure of German exports on neutral vessels in retaliation for the unlawful sinking of merchant ships by German-sown naval magnetic mines.

As in the case of retorsion, the use of reprisals by Member States of the United Nations has been affected by the Charter. Not only is there paragraph 3 of Article 2 mentioned above in connection with retorsion, but there is also the provision in paragraph 4 of the same Article that Member States are to refrain 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. A reprisal, therefore, which consisted in the threat or the exercise of military force against another State in such a way as to prejudice its territorial integrity, or political independence, would presumably be illegal. Moreover under Article 33 the States parties to a dispute, the continuance of which is likely to endanger peace and security are " first of all " to seek a solution by negotiation, and other peaceful means. Thus a resort to force by way of retaliation would seemingly be excluded as illegal.

There have also been cases of international or collective reprisals.[1]

(d) Pacific Blockade

In time of war, the blockade of a belligerent State's ports is a very common naval operation. The pacific blockade, however, is a measure employed in time of peace. Sometimes

[1] By Resolution of May 18, 1951, during the course of the hostilities in Korea, the United Nations General Assembly recommended a collective embargo by States on the shipment of arms, ammunition and implements of war, items useful in their production, petroleum, and transportation materials to areas under the control of the Government of the People's Republic of China, and of the North Korean authorities. A number of member States of the United Nations acted upon this recommendation. Another case was the decision of the Ministers of Foreign Affairs of the American States at Punta del Este, Uruguay, in January, 1962, acting under the Inter-American Treaty of Reciprocal Assistance of September 2, 1947, to suspend trade with Cuba in arms and implements of war of every kind. It was alleged that Cuba was conducting subversive activity in America. Cuba challenged the validity of the decision on the ground that it was enforcement action taken without the authorisation of the Security Council under Chapter VII of the United Nations Charter, but this objection was denied.

classed as a reprisal, it is generally designed to coerce the State whose ports are blockaded into complying with a request for satisfaction by the blockading States. Some authorities have doubted its legality. If not now obsolete, its admissibility as a unilateral measure is questionable, in the light of the United Nations Charter.

The pacific blockade appears to have been first employed in 1827; since that date there have been about twenty instances of its employment. It was generally used by very powerful States, with naval forces, against weak States. Although for that reason liable to abuse, in the majority of cases it was employed by the Great Powers acting in concert for objects which were perhaps in the best interests of all concerned, for example, to end some disturbance, or to ensure the proper execution of treaties, or to prevent the outbreak of war, as in the case of the blockade of Greece in 1886 to secure the disarming of the Greek troops assembled near the frontiers and thus avoid a conflict with Turkey. From this standpoint the pacific blockade may be regarded as a recognised collective procedure for facilitating the settlement of differences between States. Indeed, the blockade is expressly mentioned in Article 42 of the United Nations Charter as one of the operations which the Security Council may initiate in order to " maintain or restore international peace and security ".

There are certain obvious advantages in the employment of the pacific blockade. It is a far less violent means of action than war, and is more elastic. On the other hand, it is more than an ordinary reprisal, and against any but the weak States who are usually subjected to it, might be deemed an act of war. It is perhaps a just comment on the institution of pacific blockade that the strong maritime powers who resort to it do so in order to avoid the burdens and inconveniences of war.

Most writers agree, and on the whole the British practice supports the view, that a blockading State has no right to seize ships of third States which endeavour to break a pacific blockade.[1] It follows also that third States are not duty bound

[1] The United States also consistently maintained that pacific blockades were not applicable to American vessels.

to respect such a blockade. The principle is that a blockading State can only operate against ships of other States if it has declared a belligerent blockade, that is, where actual war exists between the blockading and blockaded States and accordingly it becomes entitled to search neutral shipping. But by instituting merely a pacific blockade, the blockading State tacitly admits that the interests at stake were not sufficient to warrant the burdens and risks of war. On principle, therefore, in the absence of an actual war, the blockading State should not impose on third States the obligations and inconveniences of neutrality. In other words, a blockading State cannot simultaneously claim the benefits of peace and war.

The " selective " blockade or " quarantine " of Cuba by the United States in October, 1962, although instituted in peace-time, cannot be fitted within the traditional pattern of the pacific blockades of the nineteenth century. First, it was more than a blockade of the coast of a country as such. Its express purpose was to " interdict " the supply of certain weapons and equipment[1] to Cuba, in order to prevent the establishment or reinforcement of missile bases in Cuban territory, but not to preclude all entry or exit of goods to or from Cuba. Second, vessels of countries other than Cuba, en route to Cuba, were subject to search, and, if necessary, control by force, and could be directed to follow prescribed routes or avoid prohibited zones; but it was not in terms sought to render weapon-carrying vessels or their cargoes subject to capture for breach of the " interdiction ". Third, among other grounds, the President of the United States purported to proclaim the blockade pursuant to a recommendation of an international organisation, namely the Organisation of American States.[2]

Assuming that such a blockade is, in all the circumstances,

[1] In the Presidential Proclamation of October 24, 1962, instituting the blockade, these were listed as:—Surface-to-surface missiles; bomber aircraft; bombs, air-to-surface rockets and guided missiles; warheads of any of these weapons; mechanical or electronic equipment to support or operate these items; and other classes designated by the U.S. Secretary of Defence.

[2] Its Council, meeting as a provisional Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance of September 2, 1947, adopted on October 23, 1962, a Resolution recommending member States to take measures to ensure that Cuba should not receive military supplies, etc.

permitted by the United Nations Charter, nevertheless because of the very special geographical and other conditions, no general conclusions can be drawn from it as a precedent. If not permissible under the Charter, the effect of the " quarantine " in interfering with the freedom of the high seas raised serious issues as to its justification under customary international law.

(e) Intervention

The subject of intervention has been discussed above in Chapter 5.[1]

[1] See pp. 109–116.

Chapter 17

WAR, ARMED CONFLICTS, AND OTHER HOSTILE RELATIONS

1.—General

The hostilities in Korea, 1950–1953,[1] ending with the Armistice Agreement of July 27, 1953, the fighting in Indo-China, 1947–1954, and the conflict in and around the Suez Canal Zone involving Israel, Egypt, France, and Great Britain in 1956, finally confirmed a development in the practice of States which has to some extent revolutionised the basis of those rules of international law, traditionally grouped under the title, " the law of War ". For these were non-war armed conflicts. Further confirmation of this development was furnished by the hostilities in West Guinea between Indonesian and Dutch units in April-July, 1962, by the border fighting between India and the People's Republic of China in October-November, 1962, by the hostilities in the Congo, 1960-1963, and by the India-Pakistan armed conflict in September, 1965. None of these cases received general recognition as involving a state of war.

The conflict in Vietnam is a special case. In the early stages, the Vietnam hostilities could appropriately have been fitted into the category of non-war armed conflicts. Since the struggle escalated from about 1965 onwards into the dimensions of a major local war, this non-war characterisation had scarcely been possible. Indeed some of the participants expressly referred to it as a " war " (e.g., the United States President on April 30, 1971, in an address justifying the incursion into Cambodia, the Khmer Republic).[2] Opinions are divided on the point whether the Vietnam conflict can be

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[1] See below, pp. 616–617.

[2] The United States point of view, in justification of the incursion, was, *inter alia*, that as North Vietnam and the Vietcong had violated Cambodia's neutrality, the United States as a " belligerent " was entitled to protect her security by way of self-preservation.

correctly described as a civil war with heavy involvement of outside States, or an international war, or a *tertium quid* of an international conflict with some civil war characteristics.

The traditional rules hinged on the existence between such States as came under the operation of the rules, of a hostile relationship known as " war ", and war in its most generally understood sense was a contest between two or more States primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace. Hence we have the well-respected definition of " war " by Hall, judicially approved in *Driefontein Consolidated Gold Mines* v. *Janson*[1]:—

> " When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant."

The Korean hostilities involved an armed conflict, at first between the North Korean armies[2] on the one hand, and the South Korean Armies and armed forces of the United Nations Command on the other hand, without any declared status of war being involved. Yet this conflict was one on the scale of a war as normally understood, and made it necessary to bring into application many of the rules traditionally applicable as part of the law of war. Prior to the Korean conflict, there had been precedents of hostilities, not deemed to be of the nature of war, among which may be instanced:—(*a*) the Sino–Japanese hostilities in Manchuria, 1931–1932, and from 1937 onwards in China; (*b*) the Russo–Japanese hostilities at Changkufeng in 1938; and (*c*) the armed operations involving (ostensibly) Outer Mongolian and Inner Mongolian forces at Nomonhan in 1939. A later example of a non-war armed

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[1] [1900] 2 Q.B. 339, at p. 343.

[2] Later including armed forces described in the Armistice Agreement as the " Chinese People's Volunteers ".

conflict, the Suez Canal zone hostilities in October–November, 1956, was indeed the subject of the following comment by the British Lord Privy Seal (on November 1, 1956):—

> " Her Majesty's Government do not regard their present action as constituting war. . . There is no state of war, but there is a state of conflict."

Before the outbreak of the Korean conflict, in 1950, States had already to some extent foreseen the consummation of this development of non-war hostilities.[1] In 1945, at the San Francisco Conference on the United Nations Charter, the peace enforcement powers of the United Nations Security Council were made conditional, not on the existence of a recourse to war by a covenant breaking State as under Article 16 of the League of Nations Covenant, but on the fact of some " threat to the peace, breach of the peace, or act of aggression " (see Article 39 of the Charter). In 1949, the Conventions adopted by the Geneva Red Cross Conference dealing with prisoners of war, the sick and wounded in the field, and the protection of civilians were made applicable to any kind of " armed conflict " as well as to cases of war proper.[2]

The main reasons or conditions which have dictated this development of non-war hostilities are:—

(*a*) the desire of States to preclude any suggestion of breach of a treaty obligation not to go to war (e.g., the Briand-Kellogg General Treaty of 1928 for the Renunciation of War, under which the signatories renounced war as an instrument of national policy);

(*b*) to prevent non-contestant States from declaring their

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[1] The difference between the outbreak of war and the commencement of " non-war " hostilities was also recognised in the United Nations General Assembly Resolution of November 17, 1950, on " Duties of States in the Event of the Outbreak of Hostilities " (such duties being to avoid *war*, notwithstanding the commencement of an armed conflict). See also the Resolution of the General Assembly of December 16, 1969, on respect for human rights in armed conflicts, which refers to the necessity of applying the basic humanitarian principles " in all armed conflicts ".

[2] Cf. also the use of the expression " armed conflict " in Articles 44 and 45 of the Vienna Convention on Diplomatic Relations of April 18, 1961 (facilities to enable diplomatic envoys to leave, protection of legation premises, etc.).

neutrality and hampering the conduct of hostilities by restrictive neutrality regulations;

(*c*) to localise the conflict, and prevent it attaining the dimensions of a general war.

Hence there must now be distinguished:—

(1) A war proper between States.

(2) Armed conflicts or breaches of the peace, which are not of the character of war, and which are not necessarily confined to hostilities involving States only, but may include a struggle in which non-State entities participate.

The distinction does not mean that the second category of hostile relations involving States and non-State entities is less in need of regulation by international law than the first.

It is significant that coincidentally with the development of the second category, as illustrated by the Korean conflict,[1] the nature of war itself has become more distinctly clarified as a formal status of armed hostility, in which the intention of the parties, the so-called *animus belligerendi*, may be a decisive factor. Thus a state of war may be established between two or more States by a formal declaration of war, although active hostilities may never take place between them; indeed, it appears that of the fifty or more States which declared war during the Second World War, more than half did not actively engage their military or other forces against the enemy. Moreover the cessation of armed hostilities does not, according to modern practice, necessarily terminate a state of war.

The " status " theory of war was reflected in the anomalous position of Germany and Japan during the years immediately following their unconditional surrender in 1945 in accordance with the formula decided upon during the War by the Big Three —Great Britain, Russia, and the United States. Although both countries were deprived of all possible means of continuing war, and although their actual government was for a time carried on by the Allies, they continued to be legally at " war "

[1] See Green, *International Law Quarterly* (1951), Vol. 4, at pp. 462 *et seq.*, for discussion on the point whether the Korean conflict amounted to a " war ", and, by same writer, " Armed Conflict, War, and Self-Defence ", *Archiv des Völkerrechts* (1957), Vol. 6, 387–438.

with their conquerors. In 1947, in *R.* v. *Bottrill*, a certificate by the British Foreign Secretary that the state of war continued with Germany was deemed by the Court of Appeal to be binding on the Courts.[1] One object of prolonging this relationship of belligerency, if only technically, was no doubt to enable the machinery of occupation controls to be continued. The absence of peace settlements with either of these ex-enemy States was a further significant circumstance.

The definition of war given at the beginning of this chapter sets out that it is a contest *primarily* between the armed forces of States. The word " primarily " should be noted. As the Second World War demonstrated, a modern war may involve not merely the armed forces of belligerent States, but their entire populations. In the Second World War economic and financial pressure exerted by the belligerents on each other proved only less important and decisive than the actual armed hostilities. The wholesale use of propaganda and psychological warfare also played a role which became ultimately more decisive. Finally, to a far greater degree than combatants, civilians bore the brunt of air bombardment and the rigours of wartime food shortages.

The commercial or non-technical meaning of war is not necessarily identical with the international law meaning. Thus it was held by an English Court[2] that the word " war " in a charterparty applied to the " non-war " hostilities in China in 1937 between Chinese and Japanese forces. The word " peace " can similarly denote the termination of actual

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[1] [1947] K.B. 41, and cf. *In re Hourigan*, [1946], N.Z.L.R. 1. In the American case of *Ludecke* v. *Watkins* (1948), 335 U.S. 160, it was pointed out in Frankfurter, J.'s judgment that a status of war can survive hostilities. See also *International Law Quarterly* (1949), Vol. 2 at p. 697.

[2] *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.* (*No.* 2), [1938] 3 All E.R. 80; upheld on appeal, [1939] 2 K.B. 544. Cf. *Gugliormella* v. *Metropolitan Life Insurance Co.* (1954), 122 F. Supp. 246 (death in Korean hostilities 1950–1953 is the result of " an act of war "). Also the " war " represented by non-war hostilities ends with the termination of such hostilities; see *Shneiderman* v. *Metropolitan Casualty Co.* (1961), 220 N.Y.S. (2d) 947.

hostilities, notwithstanding the continuance of a formal state of war.[1]

The question whether there is a status of war, or only a condition of non-war hostilities, depends on:—(*a*) the dimensions of the conflict; (*b*) the intentions of the contestants; and (*c*) the attitudes and reactions of the non-contestants.

As to (*a*), merely localised or limited acts of force fall short of war.

As to (*b*), the intentions of the contestants are decisive if the conflict concerns them only, and does not affect other States. Hence, if there is a declaration of war, or in the absence of such a declaration, the contestants treat the conflict as a war, effect must be given to such intention; if, on the other hand, they are resolved to treat the fighting as of the nature of non-war hostilities, a state of war is excluded. An insoluble difficulty arises, however, if according to the attitude of one or more of the contestants, there be a state of war, whereas according to the other or others there is no war. Recent State practice (e.g., in the case of the India-Pakistan hostilities of September, 1965) is inconclusive on this point. *Prima facie,* a unilateral attitude of one contestant that it is at war is intended as notice of a claim of belligerent rights, with the expectation that third states will observe neutrality; while a unilateral denial of war operates as notice to the contrary.

As to (*c*), the policies of non-contestant States enter into account when the conflict impinges on their rights and interests. Assuming the hostilities are on a sufficiently extensive scale, the decision may be made to recognise belligerency,[2] or to make a declaration of neutrality, irrespective of the intentions of the contestants. A third State, adopting this course, would be subject to the risk of the exercise against it of belligerent rights by either contestant, whose right to do so could not then be challenged. A non-war status could none the less still apply in the relations of the contestants *inter se.*

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[1] See *Lee* v. *Madigan* (1959), 358 U.S. 228 (words " in time of peace " in Article 92 of the Articles of War).

[2] See above, pp. 165–167.

Rules of International Law governing " Non-War " Hostilities

Practice in the Korean conflict, 1950–1953, and the other conflicts mentioned above, revealed the tendency of States to apply most of the rules governing a war *stricto sensu* to non-war hostilities.[1] As already mentioned, the Geneva Red Cross Conventions of 1949 (for example, that relating to prisoners of war) were in their terms expressly applicable to a non-war armed conflict, while the Resolution adopted by the United Nations General Assembly on December 16, 1969, with regard to respect for human rights in armed conflicts, referred to the necessity of applying the basic humanitarian principles " in all armed conflicts ".

But every such armed conflict must vary in its special circumstances. It may be, for instance, that the States or non-State entities opposed to each other in hostilities have not made a complete severance of their diplomatic relations. Again, they may or may not seek to blockade each other's coasts. It cannot therefore be predicated of any future armed conflict, not involving a state of war, that the entirety of the laws of war automatically apply to it. Which rules of war apply, and to what extent they are applicable, must depend on the circumstances.

Moreover, in the case of a non-war armed conflict, as to which the United Nations Security Council is taking enforcement action, actual decisions or recommendations adopted by the Security Council under Articles 39 *et seq.* of the United Nations Charter, for the guidance of States engaged in the hostilities, may fill the place of rules of international law. Then one has to consider also the incidence of United Nations " peacekeeping operations ", which are referred to in Chapter 19, where recommendations of the General Assembly play a primary role.

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[1] The United Nations Command in the Korean conflict 1950–1953 declared its intention of observing the " laws of war ", and the Geneva Red Cross Conventions of 1949. These were also observed in the Vietnam conflict, to which of course the Geneva Conventions had application.

Other Hostile Relations

Between a state of peace, on the one hand, and of war or non-war hostilities, on the other hand, other gradations of hostile relations between States are possible, but have to a very limited extent only come within the ambit of international law. An example is the state of opposition—the so-called " cold war "—existing since 1946 between the Western and the Communist groups of States.[1] To a certain extent, this cold war has already reacted on international law; for instance, it has, on both sides, been considered to justify an unprecedented interference with diplomatic agents of opponent States, by procuring their defection and inducing the disclosure of confidential material, and to justify also rigid limitations on the freedom of diplomats. Moreover, the cold war has also been thought to necessitate the extensive use of hostile propaganda, directed by the members of one group against the members of the other group, notwithstanding that the diplomatic relations of the States concerned remain normal, while other unfriendly action, such as cessation of non-discrimination, has occurred.

One of the unprecedented elements in the cold war is the so-called " balance of terror ", which is nothing more or less than the precarious equilibrium between the United States and the Soviet Union in their possession and global deployment of nuclear and thermonuclear weapons, and missiles. A crucial question is to what extent this permits one of these States, purporting to act for purposes of self-defence, in the absence of an armed attack[2] on it, and without the authorisation of the United Nations Security Council, to take measures which would otherwise be a breach of international law. This issue lay behind the controversy over the legality of:—(*a*) the flight of the United States high-flying reconnaissance aircraft, the

[1] The " cold war " is not a war, for the purpose of determining who are enemy aliens; see decision of Supreme Court of Alabama in *Pilcher* v. *Dezso* (1955), *American Journal of International Law* (1955), Vol. 49, p. 417.

[2] Within the meaning of Article 51 of the United Nations Charter, permitting measures of self-defence against an armed attack, pending enforcement action by the Security Council to maintain international peace and security.

U-2, over Russian territory in 1960, when it was detected and shot down, and the pilot taken prisoner; and (*b*) the continued surveillance of Cuban territory by United States aircraft in October-November, 1962, for various purposes. It is simplifying things to reduce the matter to an issue of whether or not peace-time espionage is permissible. Under normal circumstances, it is a violation of international law for the Government aircraft of one State to enter the airspace of another without that State's consent. If, then, these flights be legal, the intensity of the cold war has wrought a fundamental change in the rules of international law.

A concept of a new kind made its appearance in the period 1963–1966 in the shape of Indonesia's " confrontation " of Malaysia, after the establishment of that new State in September, 1963. " Confrontation " involved action and policies to undermine the integrity and position of Malaysia. It was short-lived, being terminated by the signature on August 11, 1966 of an agreement of peace and co-operation (drawn up at Bangkok, signed at Djakarta).

Commencement of War or Hostilities

From time immemorial, State practices as to the commencement of a war have varied. Down to the sixteenth century, it was customary to notify an intended war by letters of defiance or by herald, but the practice fell into disuse. In the seventeenth century, Grotius was of the opinion that a declaration of war was necessary, but subsequently several wars were commenced without formal declaration. By the nineteenth century, however, it was taken for granted that some form of preliminary warning by declaration or ultimatum was necessary.

Many instances of State practice in the twentieth century have been inconsistent with the rule. In 1904, Japan commenced hostilities against Russia by a sudden and unexpected attack on units of the Russian fleet in Port Arthur. Japan justified her action on the ground that she had broken off negotiations with Russia and had notified the Russians that she reserved her right to take independent action to safeguard her interests.

The Port Arthur incident led to the rule laid down by the

Hague Convention III of 1907, relative to the Opening of Hostilities, according to which hostilities ought not to commence without previous explicit warning in the form of either:—(*a*) a declaration of war stating the grounds on which it was based, or (*b*) an ultimatum containing a conditional declaration of war. It was further provided that the existence of the state of war should be notified to neutral States without delay and should not take effect as regards them until after the receipt of the notification which might, however, be given by telegraph. Neutral States were not to plead absence of such notification in cases where it was established beyond question that they were in fact aware of a state of war.

Scant respect was paid to these rules in the period 1935–1945, during which hostilities were repeatedly begun without prior declaration.

Legal Regulation of Right to Resort to War, to Armed Conflict, and to the use of Force

In the field of international law, one of the most significant twentieth century developments has been the legal regulation of the former unregulated privilege of States to resort to war, or to engage in non-war hostilities, or to use force, and the development of the concept of collective security. The latter concept is essentially legal, as it imports the notion of a general interest of all States in the maintenance of peace, and the preservation of the territorial integrity and political independence of States, which have been the object of armed aggression. To quote Professor Bourquin[1]: " A collective organisation of security is not directed against one particular aggression, but against war considered as a common danger ".

The League of Nations Covenant (see Articles 12–15) placed primary emphasis on restricting the right of Member States to resort to war, *stricto sensu*, in breach of certain obligations connected with accepting the arbitration or judicial settlement of certain disputes (more particularly those " likely to lead to a rupture "), or the recommendations thereon of the League of Nations Council. But in a secondary sense, the Covenant

[1] *Collective Security* (edited, M. Bourquin, 1936), p. 162.

precluded also certain kinds of recourse to non-war hostilities; for example, in imposing an obligation upon States to seek arbitration or judicial settlement of disputes which might have entered the stage of active hostilities, and an obligation to respect and preserve as against external agression the territorial integrity and political independence of other Member States (see Article 10).

In 1928, under the Briand-Kellogg Pact (or, more precisely, the Paris General Treaty for the Renunciation of War), the States Parties agreed generally to renounce recourse to " war " for the solution of international controversies, and as an instrument of national policy. They also agreed not to seek the solution of disputes or conflicts between them except by " pacific means ", thus covering no doubt non-war hostilities.

In terms, the United Nations Charter of 1945 went much further than either of these two instruments, the primary emphasis on war *stricto sensu* having disappeared, while in its stead appeared the conception of " threats to the peace ", " breaches of the peace " and " acts of aggression ", covering both war and non-war armed conflicts. In Article 2, as already mentioned in Chapter 16,[1] the Member States agreed to settle their disputes by peaceful means so as not to endanger peace and security and justice, and to refrain from the threat or use of force[2] against the territorial integrity or political independence of any State. They also bound themselves to fulfil in good faith their obligations under the Charter, which include not only (*a*) the restriction that in the case of disputes likely to endanger peace and security, they shall seek a solution by the peaceful procedures set out in Articles 33–38; but also (*b*) the obligation to submit to the overriding peace enforcement functions of the Security Council, including the decisions and recommendations that the Council may deem fit to make concerning their hostile activities. This conception of *peace enforcement*, not pre-determined in specific obligations under the Charter, but to be translated *ad hoc* into binding decisions

[1] See above, pp. 480–482, and 483–485.

[2] *Meaning of " force ": Quaere*, whether this includes political, economic, and other forms of pressure or coercion, or use of irregular forces; *U.N. Juridical Yearbook*, 1964, pp. 79–83, 97–98.

or recommendations of the Security Council which must be accepted by States resorting to war or to hostilities, represented the most striking innovation of the Charter.

In this connection, two aspects are of particular importance:

(1) The aspect of a war or resort to hostilities, involving aggression.

(2) A resort to war or to hostilities which is in self-defence.

As to (1), apart from the power of the Security Council to control " acts of aggression " under Article 39 of the Charter, the judgments of the Nuremberg and Tokyo Tribunals confirmed the view that a war of aggression, or in violation of international treaties, is illegal. The Tribunals went further in also holding that the acts of " planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties " are international crimes engaging the individual responsibility of those committing the acts.[1] The Tribunals' views were based on the Briand-Kellogg Pact of 1928 (mentioned above), but international lawyers have questioned the soundness of the judgments in view of State practice prior to 1941.[2]

An effective system of collective security must provide safeguards against aggression.

The point of difficulty is to determine when a war is " aggressive " for the purpose of the Nuremberg principles, or when non-war hostilities may constitute " an act of aggression " for the purpose of the peace enforcement functions of the Security Council. If a State legitimately defends itself against attack by another (see below), it is not guilty of waging aggressive war, or of using aggressive force. But if a State attacks the territorial integrity or political independence of another State either in breach of treaty obligations, or without any justification and with the wilful purpose of destroying its

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[1] See Principle VI of the Draft Code of Offences against the Peace and Security of Mankind, drawn up by the International Law Commission.

[2] E.g., the United States Proclamation of neutrality in 1939 on the outbreak of war, professing amity with the belligerents; if the Tribunals were right, by such Proclamation the United States was in effect condoning the illegality of Germany's aggression against Poland.

victim, it is clearly guilty of aggression. In the period 1919–1939, a great number of bilateral treaties of non-aggression were concluded, and the draftsmen of these instruments were far from overcoming the formidable difficulties involved in the definition of aggression.[1]

The dilemma of definition has remained to this day, as is shown by the fact that the results of the labours of two Special Committees, appointed by the United Nations General Assembly in 1952 and 1954 respectively, to deal with the question of defining aggression proved to be almost negative, while a third Committee,[2] the Special Committee on the Question of Defining Aggression, set up by a Resolution adopted by the General Assembly on December 18, 1967, has again experienced difficulties in this connection and, as at the date of writing, has not yet completed its mandate, which was to proceed with a view to the preparation of an " adequate definition of aggression ". In its 1967 Resolution, the General Assembly referred to " a widespread conviction of the need to expedite the definition of aggression ", and the point was reiterated in the General Assembly's Resolution of November 25, 1970, dealing with the Report of the Special Committee on its session in 1970, and affirming " the urgency of bringing the work of the Special Committee to a successful conclusion and the desirability of achieving the definition of aggression as soon as possible ". The Special Committee completed a fourth session in February–March, 1971, and in the light of the progress so far achieved and the common desire of the members to continue their work, has recommended that the General Assembly invite it to resume its work in 1972.[3]

The Special Committee's work and discussions have ranged

[1] See, e.g., definition of " arrgession " in the Soviet Conventions of 1933 for the Definition of Aggression, Article II; Keith, *Speeches and Documents on International Affairs,* 1918–1937, Vol. I, pp. 281–282.

[2] In 1957, the General Assembly had established a Committee to study the comments of Governments in order to advise the Assembly when it would be appropriate to resume consideration of the question of defining aggression. This Committee held a number of meetings, including a session in April–May 1967, some six months before the above-mentioned General Assembly Resolution of December 18, 1967.

[3] See generally the *Report* of the Special Committee on its session February 1–March 5, 1971; text of its recommendation at p. 21.

over a wide field, and reflect some updating of the concept of aggression in the light of the experience of the last decade. Some weight of opinion both in the Special Committee and in the General Assembly favours a " mixed definition " of agression, in which a general descriptive formula would precede and condition an enumeration of specific acts of aggression, this list being by way of illustration rather than serving to cut down the general formula, and would be without prejudice to the overriding power of the United Nations Security Council to characterise as an act of aggression some form of action not corresponding to any of the enumerated items. Among the concepts considered for incorporation in the definition of aggression have been the following:—(*a*) direct aggression, that is conduct initiating or constituting the direct application of force (e.g. declaration of war, invasion, bombardment, and blockade); (*b*) indirect aggression, represented, inter alia, by the indirect use of force (e.g. the sending of mercenaries or saboteurs to another State, the encouragement there of subversive activities by irregular or volunteer bands, and the fomenting of civil strife in other countries); (*c*) priority, that is the significance to be attached to the first use of force; (*d*) capacity to commit aggression, namely whether the definition should embrace aggression committed by States only or be extended to cover aggression by other entities; (*e*) the legitimate use of force (e.g. by way of collective self-defence); (*f*) aggressive intent, representing a subjective test of aggression; (*g*) proportionality, involving a comparison of the degree of retaliation with the extent of force or threat of force responded to. One major difficulty in this regard is that each of the proposed component concepts raises its own problems of definition, none being so clear that precise limits can be drawn.

Notwithstanding the progress made by the present Special Committee, it remains questionable whether a complete definition is actually an attainable goal. Often, the matter is purely one for appreciation by an international body,[1] when tests or

[1] In the case of the Korean conflict in 1950, the Security Council determined that the action of the North Korean forces constituted a " breach of the peace " (see Resolution of June 25, 1950). However, the United Nations Commission in Korea in its report to the General Assembly on September 4, 1950, described this as an " act of aggression ".

criteria can be of more value than definitions. One useful test of aggression is a repeated refusal to seek a settlement by peaceful means.[1]

As to (2)—the right of self-defence—the Charter by Article 51 recognises an inherent right of individual and collective self-defence of Member States against *armed attack*, pending enforcement action by the Security Council, and reserving to the Security Council full authority in the matter. It appears that consistently with Article 51, the North Atlantic Powers could legitimately enter into their Regional Security Treaty of April 4, 1949, and create the machinery beforehand for collective self-defence should any one of their number be exposed to an armed attack.[2]

Qualified as it is by the reservation of ultimate authority in the Security Council, the right of self-defence conceded by Article 51 of the Charter differs in scope and extent from the right of self-defence under customary international law.[3] The latter right was more restricted than the right of self-preservation, normally understood, and allowed measures of defence or protection only in the case of an " instant, overwhelming " necessity, " leaving no choice of means, and no moment for deliberation ",[4] provided that the measures used were not unreasonable or excessive. Under Article 51 of the Charter, the right of self-defence is framed as one in terms of similar rights possessed by other States,[5] and subject to con-

[1] In 1951, the International Law Commission held it undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive. It favoured the view that the threat or use of force for any reason or purpose other than individual or collective self-defence, or in pursuance of a decision or recommendation of a competent United Nations organ was aggression; see *Report* on the Work of its Third Session (1951), pp. 8–10. For the best and most comprehensive treatment of the problem of the definition of aggression, and of other aspects of aggression, see Stone, *Aggression and World Order* (1958), which deals with the subject in its historical context to the end of 1957.

[2] For discussion of the consistency of the North Atlantic Security Pact with the Charter, see Beckett, *The North Atlantic Treaty, the Brussels Treaty, and the Charter of the United Nations* (1950).

[3] See Westlake, *International Law* (2nd Edition, 1910), Vol. I, pp. 309–317, for treatment of such right of self-defence.

[4] A test enunciated by Secretary of State Webster in regard to the " *Caroline* " *Case* (1837), as to which see Oppenheim, *International Law* (8th Edition, 1955), Vol. I, pp. 300–301.

[5] *Cf.*, Joan D. Tooke, *The Just War in Aquinas and Grotius* (1965), at p. 234.

ditions as to its continued exercise. A matter of current controversy is whether, under Article 51, nuclear and thermonuclear weapons can legitimately be used in self-defence against a non-nuclear armed attack. International lawyers are divided upon the answer to this crucial question, some holding that the use of nuclear and thermonuclear weapons is disproportionate[1] to the seriousness of the danger of a conventional attack, while others say that in some circumstances a country may be unable to defend itself adequately without recourse to its nuclear armoury. A more crucial point is the extent to which States involved in a nuclear " crisis " may resort to measures of self-defence, as did the United States when it proclaimed a " selective " blockade of Cuba during the Cuban missile crisis of 1962. Obviously, such a situation was beyond the contemplation of the draftsmen of Article 51 of the Charter.

Necessity of New Approach to Problem of Conflict Regulation

The impact of these problems of nuclear weapons, the blurring of questions of responsibility by the overriding purpose of restoring or maintaining peace and security, and the range and variety of methods of pressure and coercion that may be adopted by States to secure political ends have rendered it difficult to work always with traditional concepts such as the " threat or use of force ", " security ", " aggression ", and " self-defence ". For the new conditions, the United Nations Charter embodying these concepts, is sometimes an imperfect tool of conflict-regulation. A new approach is necessary if this difficulty is to be overcome.

2.—Effects of Outbreak of War and of Armed Conflicts

The outbreak of war, as such, has far-reaching effects on the relations between the opponent belligerent States.

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[1] *Proportionality and self-defence:* It is generally accepted that measures of self-defence should not be disproportionate to the weight and degree of an armed attack; this was seemingly recognised by the U.S. Government at the time of the Gulf of Tonkin incident, August, 1964, its armed action being officially described as a " limited and measured response fitted precisely to the attack that produced it ".

At the outset, it is necessary to know what persons or things are to be deemed of enemy character, as usually municipal legislation will prohibit trading and intercourse with the enemy, and provide for the seizure of enemy property.

The general rule of international law, as distinct from municipal law, is that States are free to enact such legislation upon the outbreak of war, and the same general rule must in principle apply in the case of non-war armed conflicts, subject to the qualification that where such a conflict comes under the peace enforcement jurisdiction of the United Nations Security Council, the States involved must abide by the Security Council's decisions or recommendations.

Under the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War, enemy nationals not under confinement or in prison may leave the territory of a State at war, unless the national interests of that State call for their detention (Article 35). They are entitled to bring the matter of refusal before a Court or administrative board of the detaining Power. The Convention contains provisions forbidding measures severer than house arrest or internment, and for the proper treatment of internees.

In the following pages, the principal municipal and international effects of *war* are broadly surveyed.

Not all these effects will necessarily apply in the case of a non-war armed conflict. State practice during the Korean conflict, 1950–1953, and the Suez Canal zone hostilities of 1956, revealed wide divergencies concerning State attitudes in this connection. It would seem from such practice that, in the event of a non-war armed conflict, the contesting States will not hold themselves bound to apply the same stringent rules as they would in the case of a war proper, and that, in particular, they will not necessarily to the same extent interrupt or suspend their diplomatic intercourse and their treaty relationships, but will make such adjustments as the special circumstances of the conflict require, and will—if necessary—follow the guidance of the United Nations Security Council and General Assembly through their decisions or recommendations.

Enemy Character in War

As to individuals, State practice varies on the test of enemy character. British and American Courts favour residence or domicile as against the Continental rule which generally determines enemy character according to nationality.[1] But as a result of exceptions grafted on these two tests, Anglo-American practice has tended to become assimilated to the Continental practice, and there is now little practical difference between them.

Hostile combatants, and subjects of an enemy State resident in enemy territory are invariably treated as enemy persons, and residence in territory subject to effective military occupation by the enemy is assimilated for this purpose to residence in enemy territory.[2] According to Anglo-American practice even neutrals residing or carrying on business in enemy territory are also deemed to be enemy persons, while on the other hand subjects of an enemy State resident in neutral territory are not deemed to have enemy character. However, by legislation adopted in two World Wars, the United States and Great Britain have made enemy influence or associations the test of enemy character, whether the persons concerned are resident in enemy or in neutral territory.

In the case of *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*,[3] the House of Lords adopted the test of enemy associations or enemy control for corporations carrying on business in an enemy country but not incorporated there, or corporations neither carrying on business nor incorporated there but incorporated in Great Britain itself or a neutral country. It was ruled that enemy character may be assumed by such a corporation if "its agents or the persons in *de facto* control of its affairs" are "resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies".

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[1] See leading case of *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, affirming the test of residence in enemy territory as determining enemy status.

[2] See *Sovfracht (V/O)* v. *Van Udens Scheepvaart*, [1943] A.C. 203.

[3] [1916] 2 A.C. 307.

This was an extremely stringent principle, and the decision has received a good deal of criticism. A company, incorporated in Great Britain, which acquires enemy character under the *Daimler* principle, is none the less not deemed to have its location in enemy territory; it is for all other purposes a British company, subject to British legislation, including regulations as to trading with the enemy.[1] Apart from the *Daimler* ruling, it is clear law that a corporation incorporated in an enemy country has enemy character.[2]

As regards ships, *prima facie* the enemy character of a ship is determined by its flag.[3] Enemy-owned vessels sailing under a neutral flag may assume enemy character and lose their neutral character if:—(*a*) they take part in hostilities under the orders of an enemy agent or are in enemy employment for the purpose of transporting troops, transmitting intelligence, etc., or (*b*) they resist legitimate exercise of the right of visit and capture. All goods found on such enemy ships are presumed to be enemy goods unless and until the contrary is proved by neutral owners.

As to goods generally, if the owners are of enemy character, the goods will be treated as enemy property. This broad principle was reflected in the various wartime Acts of countries of the British Commonwealth, prohibiting trading with the enemy and providing for the custody of enemy property.

Diplomatic Relations and War

On the outbreak of war, diplomatic relations between the belligerents cease. The Ambassadors or Ministers in the respective belligerent countries are handed their passports, and they and their staffs proceed home. Under Article 44 of the Vienna Convention of 1961 on Diplomatic Relations, the receiving State must grant facilities enabling such persons to leave at the earliest possible moment, placing at their disposal the necessary means of transport.

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[1] See *Kuenigl* v. *Donnersmarck*, [1955] 1 Q.B. 515.
[2] See *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484.
[3] On the "conclusive" nature of the enemy flag, see *Lever Brothers and Unilever N.V.* v. *H.M. Procurator General, The Unitas*, [1950] A.C. 536.

Treaties and War

The effect of war on existing treaties to which the belligerents are parties is, to quote Mr. Justice Cardozo, " one of the unsettled problems of the law ".[1] According to the older authorities, such treaties were annulled *ipso facto* between the belligerents as soon as war came. So sweeping a view is now discounted by the modern authorities, and is inconsistent with recent State practice according to which some treaties are considered as annulled, others are considered as remaining in force, and others are held to be merely suspended, and to be revived on the conclusion of peace.[2]

In the unsettled state of the law, it is difficult to spell out any consistent principle or uniformity of doctrine. To quote Mr. Justice Cardozo again, international law " does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact ". Two tests are applicable in this connection. The first is a subjective test of intention—did the signatories of the treaty intend that it should remain binding on the outbreak of war? The second is an objective test—is the execution of the treaty incompatible with the conduct of war ?

Applying these tests, and having regard to State practice and the views of modern authorities, we may sum up the position as follows:—

(1) Treaties between the belligerent States which presuppose the maintenance of common political action or good relations between them, for example, treaties of alliance, are abrogated.

(2) Treaties representing completed situations or intended to set up a permanent state of things, for example, treaties of cession or treaties fixing boundaries, are unaffected by war and continue in force.

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[1] See on the whole question his judgment in *Techt* v. *Hughes* (1920), 229 N.Y. 222. See also *Karnuth* v. *U.S.* (1929), 279 U.S. 231.

[2] *Semble*, belligerent States may even contract new treaties (through the auspices of neutral envoys) relevant to their belligerent relationships. The United States practice during the Second World War was contrary to any principle of automatic abrogation of treaties by war; see McIntyre *Legal Effect of World War II on Treaties of the United States* (1958).

(3) Treaties to which the belligerents are parties relating to the conduct of hostilities, for example, the Hague Conventions of 1899 and 1907 and other treaties prescribing rules of warfare, remain binding.

(4) Multilateral Conventions of the "law-making" type relating to health, drugs, protection of industrial property, etc., are not annulled on the outbreak of war but are either suspended, and revived on the termination of hostilities, or receive even in wartime a partial application.

(5) Sometimes express provisions are inserted in treaties to cover the position on the outbreak of war. For example, Article 38 of the Aerial Navigation Convention, 1919, provided that in case of war the Convention was not to affect the freedom of action of the contracting States either as belligerents or as neutrals, which meant that during war the obligations of the parties became suspended.[1]

(6) With regard to other classes of treaties, e.g., extradition treaties[2] in the absence of any clear expression of intention otherwise, *prima facie* these are suspended.

Where treaties are suspended during wartime, certain authorities claim they are not automatically revived when peace comes, but resume their operation only if the treaties of peace expressly so provide.[3] Practice is not very helpful on this point, but usually clauses are inserted in treaties of peace, or terminating a state of war, to remove any doubt as to which treaties continue in force.

Prohibition of Trading and Intercourse in War; Contracts

Trading and intercourse between the subjects of belligerent States cease on the outbreak of war, and usually special legislation is introduced to cover the matter. The details of

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[1] Cf. Article 89 of the International Civil Aviation Convention, 1944. It may also appear that, apart from express provision, it was the intention of the parties that the treaty should not operate in time of war, in which event effect will be given to that intention.

[2] See *Argento* v. *Horn* (1957), 241 F. (2d) 258. This case also shows that the parties may conduct themselves on the basis that a treaty is suspended.

[3] Cf. however, *Argento* v. *Horn*, *supra*.

State practice in this connection lie outside the scope of this book, but it can be said that international law gives belligerent States the very widest freedom in the enactment of municipal laws dealing with the subject.

Similarly with regard to contracts between the citizens of belligerent States, international law leaves States entirely free to annul, suspend, or permit such contracts on the outbreak of war. Consequently this is a matter primarily concerning municipal law, and will not be discussed in these pages. There is some uniformity of State practice in the matter, inasmuch as most States treat as void, executory contracts which may give aid to or add to the resources of the enemy, or necessitate intercourse or communication with enemy persons, although as regards executed contracts or liquidated debts, the tendency is not to abrogate, but to suspend the enforceability of such obligations until the state of war is terminated.[1]

Enemy Property in War

The effect of war on enemy property differs according as such enemy property is of a *public* nature (i.e., owned by the enemy State itself), or of a *private* nature (i.e., owned by private citizens of the enemy State).

(a) Enemy Public Property.—A belligerent State may confiscate movable property in its territory belonging to the enemy State. Where the enemy movable property is located in enemy territory under military occupation by the forces of that State, such property may be appropriated in so far as it is useful for local military purposes. Immovable property (i.e., real estate) in such territory may be used (for example, occupied or used to produce food or timber) but not acquired or disposed of.[2] Ships of war and other public vessels at sea belonging to

[1] See *Arab Bank, Ltd.* v. *Barclays Bank* (*Dominion, Colonial and Overseas*), [1953] 2 Q.B. 527, and [1954] A.C. 495, and *Bevan* v. *Bevan*, [1955] 2 Q.B. 227.

[2] It may also be destroyed, if it is of a military character (e.g., barracks, bridges, forts), and destruction is necessary in the interests of military operations (cf. Article 53 of the Geneva Convention, 1949, on the Protection of Civilian Persons in Time of War).

the enemy State may be seized and confiscated except those engaged in discovery and exploration, or in religious, scientific, or philanthropic missions or used for hospital duties.

(b) Enemy Private Property.—The general practice now of belligerent States is to sequestrate such property in their territory (i.e., seize it temporarily) rather than to confiscate it, leaving its subsequent disposal to be dealt with by the peace treaties. It is not certain whether there is a rule of international law prohibiting confiscation as such, and authorities are somewhat divided on the point. But private property in occupied territory must not be taken, or interfered with, unless it is of use for local military purposes,[1] for example, for goods and services necessary for the army of occupation; mere plunder is prohibited. In contrast to the substantial protection of enemy private property on land, enemy ships and enemy cargoes at sea are liable to confiscation. This does not apply to enemy goods on a neutral merchant vessel unless such goods are useful for warlike purposes, or unless they are seized as a reprisal of war for continuous breaches by the enemy of the rules of warfare.[2]

Combatants and Non-Combatants

Combatants are divided into two classes:—(*a*) lawful, and (*b*) unlawful. Lawful combatants may be killed or wounded in battle or captured and made prisoners of war. Certain categories of lawful combatants, for example, spies as defined in Article 29 of the Regulations annexed to the Hague Convention IV of 1907 on the Laws and Customs of War on Land, are subject to special risks or disabilities,[3] or specially severe

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[1] The occupant Power cannot seize property, such as stocks of petroleum, for the purposes not of the occupying army, but for its needs generally at home or abroad; see decision of Court of Appeal, Singapore, in *N. V. De Bataafsche Petroleum Maatschappij* v. *The War Damage Commission, American Journal of International Law* (1957), Vol. 51, p. 802.

[2] See Chapter 18, below at pp. 553–554, and 558.

[3] Espionage is not a breach of international law; see United States Army Field Manual on the Law of Land Warfare (1956), paragraph 77.

repressive measures if captured. Unlawful combatants are liable to capture and detention, and in addition to trial and punishment by military tribunals for their offences.[1] Citizens of, or persons owing allegiance to one belligerent State, and who have enlisted as members of the armed forces of the opposing belligerent, cannot claim the privileges of lawful combatants if they are subsequently captured by the former belligerent State.[2]

Traditionally international law maintains a distinction between combatants and non-combatants, inasmuch as non-combatants are not in principle to be wilfully attacked or injured. Certain classes of non-combatants, for example, merchant seamen, may however be captured and made prisoners of war. Nineteenth century official pronouncements affirmed that the only legitimate object of war was to weaken the *military* forces of the enemy. In 1863 the following passage appeared in United States Army General Orders:—

> " The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit ".

A valiant attempt to draw a distinct line between civilians and the armed forces was also made in the Hague Convention IV of 1907 on the Laws and Customs of War on Land and its annexed Regulations. Yet under the demands of military necessity in two World Wars, the distinction seems now to have become almost obliterated.

A learned author[3] has examined the present-day importance of the distinction under the heads of:—(i) artillery bombardment; (ii) naval bombardment; (iii) sieges; (iv) blockade; (v) contraband; and (vi) aerial bombardment, and has reached

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[1] See *Ex parte Quirin* (1942), 317 U.S. 1, at p. 31, and *Mohamed Ali* v. *Public Prosecutor*, [1969] 1 A.C. 430 (saboteurs attired in civilian clothes, and who are members of the regular armed forces of one belligerent, are not entitled to be treated as lawful combatants by the opposing belligerent, if captured).

[2] *Public Prosecutor* v. *Koi*, [1968] A.C. 829.

[3] See Nurick, *American Journal of International Law* (1945), Vol. 39, pp. 680 *et seq.*

the conclusion in essence that while non-combatants may not be the primary objects of these six operations of war, they are denied material protection from injury thereunder.

On the subject of aerial bombardment, the history of attempts to protect non-combatants has not been encouraging. The Hague Regulations of 1907 mentioned above (see Article 25) prohibited the attack or bombardment of undefended towns, villages, etc., by " any means whatever ", and this phrase was intended to cover aerial attacks. But during the First World War the rule laid down was not respected. In 1923 a Commission of Jurists at The Hague drew up a draft Code of Air Warfare, which did not come into force as a Convention, and which provided *inter alia* that bombardment was legitimate only when directed at specified military objectives such as military forces, works, and establishments, and arms factories, and was forbidden when bombardment could not take place without the indiscriminate bombardment of civilians. The Spanish Civil War of 1936–1938 showed that it was not sufficient merely to prohibit air attack on specified military objectives, and a Resolution of the League of Nations Assembly in 1938 recommended a subjective test that the intentional bombing of civilians should be illegal. But up to the stage of the outbreak of the Second World War, States had not definitely agreed on rules for the limitation of aerial bombardment.

During that War, the Axis Powers bombed civilians and civilian objectives, using explosive bombs, incendiary bombs, and directed projectiles. The Allies retaliated eventually with area and pattern bombing, and finally in 1945 with atom-bomb attacks on Nagasaki and Hiroshima, resulting in enormous civilian casualties. Whether regarded as legitimate reprisals or not, the Allied air bombardments were like the similar Axis attacks, directed at civilian morale. It would be unrealistic in the light of these events, not to consider that in modern total war civilian morale has become a true military objective. Indeed it is becoming more and more difficult in total war to define negatively what is *not* a military objective. Besides, the so-called civilian " work forces ", or " quasi-combatants ", that is to say those civilians employed in the manufacture of tools of

war, were considered to be targets as important as the armed forces proper.

An attempt was made in the Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War to shield certain classes of civilian non-combatants from the dangers and disadvantages applicable to combatants and non-combatants in a war or armed conflict. The Convention does not purport to protect all civilians,[1] but mainly aliens in the territory of a belligerent and the inhabitants of territory subject to military occupation, although other classes receive incidental protection under the provisions allowing the establishment of hospital, safety, and neutralised zones, and for insulating from the course of hostilities such persons as the sick and aged, children, expectant mothers and mothers of young children, wounded, and civilians performing non-military duties. Also in the Convention are provisions that civilian hospitals properly marked should be respected and not attacked.[2]

The very necessity of such detailed provisions as the Convention contains shows that little remains of the traditional distinction between combatants and non-combatants save the duty not to attack civilians in a wanton or unnecessary manner, or for a purpose unrelated to military operations, and to abstain from terrorisation.

In 1950, the International Committee of the Red Cross requested States to prohibit the use of atomic, and indiscriminate or so-called " blind " weapons. Subsequently it drew up a set of Draft Rules " to Limit the Risks Incurred by the Civilian Population in Time of War ", and which went much further. These Draft Rules were submitted to the 19th Conference of the Red Cross at New Delhi in 1957 and approved, but follow-up work with Governments did not lead to the conclusion of a new Convention. The question was raised again at the 20th Conference of the Red Cross at Vienna in 1965 which adopted a Resolution affirming four principles, three of which

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[1] For discussion of the Convention, see Draper, Hague *Recueil des Cours*, 1965, Vol. I, pp. 119–139.

[2] See Article 14 and following Articles.

declared that the right of a contestant to use means of injuring the enemy was not unlimited, that attacks against the civilian population as such were prohibited, and that the distinction between combatants and the civilian involved sparing the latter as much as possible. These principles were affirmed in a Resolution adopted by the United Nations General Assembly on December 19, 1968 in regard generally to the protection of human rights in armed conflicts.[1]

The legality of the atom-bomb attacks by the United States on Nagasaki and Hiroshima, referred to above, is questionable. They have been variously justified as:—(*a*) A reprisal, although the casualties inflicted were quite out of proportion to those caused by single instances of illegal air bombardments committed by the Axis Powers. (*b*) As terminating the war quickly and thereby saving both Allied and enemy lives, which would be equivalent to relying on the doctrine of military necessity. Neither ground is satisfactory as a matter of law.[2]

If there were objections to the original atom-bomb, these apply with greater force to the hydrogen bomb, and to the new highly developed nuclear and thermonuclear weapons. The dangers and uncontrollable hazards involved in such mass destruction weapons led to the conclusion of four treaties which are dealt with in other Chapters of this book, namely the Nuclear Weapons Test Ban Treaty of 1963, the Outer Space Treaty of 1967 (*inter alia,* banning nuclear weapons in outer space), the Nuclear Weapons Non-Proliferation Treaty of 1968, and the Treaty of 1971 Prohibiting the Emplacement

[1] In a further Resolution on the same subject adopted on December 16, 1969, the General Assembly requested the Secretary-General of the United Nations to give special attention in his study of the matter to the need for protection of the rights of civilians and combatants in struggles for self-determination and liberation, and to the better application of the existing Conventions and rules to these conflicts.

[2] Apart from the legality of the attack on civilians, the use of atom bombs could be questioned on the ground that they involved " poisonous " substances, viz., radio-active fall-out (see Article 23 of the Regulations annexed to the Hague Convention IV of 1907, mentioned above), or " uselessly " aggravated suffering within the meaning of the Declaration of St. Petersburg, 1868. Possibly, also, their use is subject to the prohibitions contained in the Geneva Gas and Bacteriological Warfare Protocol of 1925. In *Shimoda & Ors.* v. *The Japanese State* (1963), *Japanese Annual of International Law*, 1964, 212–252, the Tokyo District Court held that the attacks on Nagasaki and Hiroshima were contrary to international law.

of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor.[1]

3.—The " Laws of War "[2]

The " laws of war " consist of the limits set by international law within which the force required to overpower the enemy may be used, and the principles thereunder governing the treatment of individuals in the course of war and armed conflict. In the absence of such rules, the barbarism and brutality of war would have known no bounds. These laws and customs have arisen from the long-standing practices of belligerents; their history goes back to the Middle Ages when the influence of Christianity and of the spirit of chivalry of that epoch combined to restrict the excesses of belligerents. Under present rules such acts as the killing of civilians, the ill-treatment of prisoners of war, the military use of gas, and the sinking of merchant ships without securing the safety of the crew are unlawful.

Since the nineteenth century, the majority of the rules have ceased to be customary and are to be found in treaties and Conventions. Among the most important of these instruments are the Declaration of Paris, 1856, the Geneva Convention, 1864, the Declaration of St. Petersburg, 1868, the Hague Conventions of 1899 and 1907, the Geneva Gas and Bacteriological Warfare Protocol, 1925, the Submarine Rules Protocol, 1936, and the four Geneva Red Cross Conventions, 1949, namely, those dealing with prisoners of war, sick and wounded personnel of armies in the field and of forces at sea, and the protection of civilians, and which effected a far-reaching revision and codification of a major portion of the " laws of war ".

The essential purpose of these rules is not to provide a code governing the " game " of war, but for humanitarian reasons to reduce or limit the suffering of individuals, and to circum-

[1] As to these treaties, see respectively pp. 191, 194 (1963 Treaty), pp. 196–197 (1967 Treaty), pp. 311–312 (1968 Treaty), and pp. 235–236 (1971 Treaty).

[2] The International Law Commission of the United National favoured the discarding of this phrase; see *Report* on work of its First Session (1949), at p. 3. Perhaps these " laws " are more correctly termed the " rules governing the use of armed force and the treatment of individuals in the course of war and armed conflict ". They apply to all types of armed conflicts (see above, p. 491).

scribe the area within which the savagery of armed conflict is permissible. For this reason, they are sometimes known as the " humanitarian law of war ", or the rules of " humanitarian warfare ". True, these rules have been frequently and extensively violated, but without them the general brutality of warfare would have been completely unchecked. It would be unrealistic, in this connection, to overlook the impact of the so-called " push-button " warfare of the future, conducted by directed missiles, nuclear weapons, etc. This tendency to the depersonalisation of war, the very antithesis of its humanisation, constitutes a grave threat to the very existence of the " laws of war ".

In practice, the military manuals of the different States contain instructions to commanders in the field embodying the principal rules and customs of war.[1]

Inasmuch as the " laws of war " exist for the benefit of individuals, it would appear that in the case of an unlawful conflict, waged by an aggressor State, these rules nevertheless bind the State attacked and members of its armed forces in favour of the aggressor and its armed forces. However, the aggressor State may be penalised to the extent that, during the course of the conflict, neutral or non-contestant States may discriminate against it, or by reason of the fact that at the termination of hostilities it may have to bear reparations or to restore territory illegally acquired. The rules of course must apply as well to non-war armed conflicts (they have been recognised as applicable in the current Vietnam conflict).

The laws of war are binding not only on States as such, but on individuals, including members of the armed forces, Heads of States, Ministers, and officials.[2] They are also necessarily binding upon United Nations forces engaged in a military conflict, mainly because the United Nations is a subject of

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[1] Both the British and United States Manuals were revised after the end of the Second World War. Part III of the British Manual, dealing with the Law of War on Land appeared in 1958. The revised edition of the United States Army Field Manual on the Law of Land Warfare was published in 1956.

[2] See British Manual, Part III, *op. cit.*, paragraphs 1 and 632.

international law and bound by the entirety of its rules, of which the laws of war form part. There is also the consideration that if United Nations forces were not so bound, and became involved in operations against a State, the forces of the latter would be subject to the laws of war, but not United Nations forces.

Unless a treaty or customary rule of international law otherwise provides, military necessity does not justify a breach of the laws of war.[1]

Sanctions of Laws of War; War Crimes

While the laws of war are frequently violated, international law is not entirely without means of compelling States to observe them. One such method is the reprisal, although it is at best a crude and arbitrary form of redress.[2] Another sanction of the laws of war is the punishment both during and after hostilities of war criminals, following upon a proper trial.

In that connection, the trials of war criminals by Allied tribunals after the Second World War provided significant precedents.

First, there were the trials, 1945–1948, of the *major* war criminals at Nuremberg and Toyko respectively by the International Military Tribunals. These trials have been referred to in an earlier Chapter.[3] To consolidate the precedent represented by the trials, the International Law Commission of the United Nations prepared, in 1950, a Draft Code of Offences against the Peace and Security of Mankind, embodying the Nuremberg principles, and the General Assembly of the United Nations has been sponsoring, partly through the Commission and partly through a special Committee, the establishment of a permanent International Criminal Court to try persons guilty of such offences, and also of the offence of genocide. On November 26, 1968, the General Assembly

[1] See British Manual, Part III, *op. cit.*, paragraph 633, and United States Manual, *op. cit.*, paragraph 3.

[2] The Geneva Conventions of 1949 prohibit reprisals against the persons protected thereby (see, e.g., the prohibition of reprisals against prisoners of war in Article 13 of the Prisoners of War Convention).

[3] See above, pp. 66–68.

adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, obliging parties to abolish existing limitations on prosecution and punishment for such crimes, and to take measures otherwise to ensure their non-application.

Second, there were the trials by Allied Courts of offenders other than the Axis major war criminals. Such accused included:—(*a*) persons prominently involved in war conspiracies (for example, industrialists, financiers), who were indicted for the same crimes as the major war criminals, (*b*) members of the enemy forces and civilians charged with ordinary offences against the laws of war (i.e., ordinary war crimes), and (*c*) the so-called " quislings " or " collaborationists " guilty of treason. The variety and geographical range of the tribunals which tried the offenders were without precedent; these included national military tribunals, special tribunals constituted for the purpose (composed of professional judges or jurists),[1] the ordinary municipal civil Courts, and even international military tribunals, while the trial venues were located in Europe, Asia, Australia, and even in the South Pacific.

Prior to the trials, it had been recognised that a belligerent was entitled to punish for war crimes those members of the armed forces of its opponent who fell into its hands, or who had committed such crimes within its territorial jurisdiction. Not every violation of the rules of warfare is a war crime, and some jurists support the view that the term should be limited to acts condemned by the common conscience of mankind, by reason of their brutality, inhumanity, or wanton disregard of rights of property unrelated to reasonable military necessity. Some such conception of a war crime emerges from the decisions of the different tribunals, referred to above, a conception which has received a flexible application, as shown in the decisions that the following persons could be guilty of war crimes:—(*a*) Civilians, as well as members of the forces. (*b*) Persons not of enemy nationality, for example, those

[1] E.g., the special American tribunals which operated at Nuremberg under Allied Control Council Law No. 10 of December 20, 1945, promulgated by the Zone Commanders of Occupied Germany.

having enemy affiliations. (*c*) Persons guilty of a gross failure to control subordinates responsible for atrocities.[1]

It appears clearly established also by these trials (see, for example, the judgment of the Nuremberg Court) that orders by superiors, or obedience to national laws or regulations, do not constitute a defence, but may be urged in mitigation of punishment.[2] In 1921, in the case of the *Llandovery Castle*,[3] a German Court found the accused guilty of killing defenceless persons in lifeboats in the First World War, and rejected the plea of superior orders, stating that the plea was inadmissible if the order were " universally known to be against the law ", but that such order might be an extenuating circumstance. Probably Courts must take into account the state of the mind of the accused; if he believed that the order was lawful, this belief might be a defence, but not if the order were obviously illegal. So, just as in ordinary criminal law, the question of *mens rea* is important. As the Nuremberg Court pointed out, the true test is " whether moral choice was in fact possible " on the part of the individual ordered to commit the criminal act.[4]

One further sanction of the laws of war should not be overlooked. This is contained in Article 3 of the Hague Convention IV of 1907 providing that if a belligerent State violate any such laws, that State is to pay compensation, and to be responsible for all acts committed by persons forming part of its armed forces. Under this Article a substantial indemnity may be exacted when the treaty of peace is concluded.

Rules of Land, Sea, and Air Warfare

The principal rules as to land warfare[5] are set out in the Hague Convention IV of 1907 on the Laws and Customs of

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[1] See the *Yamashita Trial*, *War Crimes Trials Reports*, Vol. 4, pp. 1–96.

[2] This view is adopted by the British Manual, Part III, *op. cit.*, paragraph 627. Contrast the United States Manual, *op. cit.*, paragraph 509, under which the defence of superior orders may lie if the accused did not know and could not reasonably have been expected to know that the act ordered was unlawful.

[3] Annual Digest of Public International Law Cases, 1923–1924, Case No. 235.

[4] See *Official Record*, Vol. I. p. 224.

[5] For a comprehensive, modern treatise, see Greenspan, *The Modern Law of Land Warfare* (1959).

War on Land, and its annexed Regulations. These Regulations are sometimes for the sake of convenience referred to as the " Hague Rules " or " Hague Regulations ". They define the status of belligerents, i.e., those who will be treated as lawful combatants. Guerrilla troops and militia or volunteer corps like the British Home Guard in the Second World War are subject to the laws, rights, and duties of war if they satisfy four conditions, namely that they are properly commanded, have a fixed distinctive emblem recognisable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war. Where there are *levées en masse*, i.e., organised or spontaneous risings of the civilian population against the enemy, those called to arms by the authorities must fulfil the four conditions just mentioned in order to be respected as lawful combatants, whereas those spontaneously taking up arms on the approach of the enemy need only satisfy the two conditions of carrying arms openly, and respecting the laws and customs of war. The Geneva Prisoners of War Convention of 1949 (see Article 4) provides that the troops of organised resistance movements are entitled to be treated as prisoners of war if they satisfy the above-mentioned four conditions, and even if they operate in occupied territory.[1] No such privilege as regards operations in occupied territory is conceded to *levées en masse*.

The Hague Rules of 1907 also contained provisions relative to the treatment of prisoners of war. The humane treatment of these and other captives is now dealt with in the Geneva Convention of 1949, superseding a Geneva Convention of 1929, which itself replaced the Hague Rules. The 1949 Convention contains a code of provisions, more appropriate for twentieth century wars and armed conflicts than the earlier instruments.[2] Strict duties are imposed upon a Detaining Power of treating

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[1] Cf. the " Hostages Case " (*U.S.* v. *List and Others*, Case No. 7) tried at Nuremberg in 1947–1948, *War Crimes Trials Reports*, Vol. 8, pp. 39–92, where it was held that non-uniformed partisan troops operating in German-occupied territory in the last War were not entitled to the status of lawful combatants.

[2] For discussion, see Draper, Hague *Recueil des Cours*, 1965, Vol. I, pp. 101–118.

prisoners of war humanely, and there are special provisions for ensuring that they are not exposed to unnecessary brutality during the immediate aftermath of capture when their captors may attempt to procure information useful for the conduct of operations. On humanitarian grounds, it was also provided in the Convention that prisoners of war should be released and repatriated without delay after the cessation of active hostilities (see Articles 118–119). These stipulations were presumably based on the assumption that prisoners would desire to return to the homeland; in the course of the negotiations for a truce in the Korean conflict, 1951–1953, a new problem[1] emerged when the United Nations Command ascertained by the so-called " screening " of thousands of prisoners in its custody that, owing to fear of persecution, many were unwilling to be repatriated. Claims of humanity had to be weighed against the danger in the future of unscrupulous belligerents affecting to make spurious " screenings " of captives, and the possibility that, under pretext of political objections to repatriation, prisoners of war might be guilty of treason. A compromise, giving due emphasis to grounds of humanity, was reached in the Korean Armistice Agreement of July 27, 1953 (see Articles 36–58).[2]

The same Conference which adopted this Convention, also adopted in place of earlier instruments:—(*a*) A Convention on Wounded and Sick Members of the Armed Forces in the Field, containing detailed provisions requiring belligerents to protect wounded and sick personnel, and to respect the medical units and establishments normally caring for such personnel. (*b*) A Convention on Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, dealing with the cognate problem of wounded, sick, and shipwrecked personnel at sea, and pro-

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[1] See Mayda, *American Journal of International Law* (1953), Vol. 47, pp. 414 *et seq.*, for treatment of the problem.

[2] It is stated in the United States Manual, *op. cit.*, paragraph 199 that a Detaining Power may " in its discretion " lawfully grant asylum to prisoners of war who do not desire to be repatriated. In the case of the India–Pakistan conflict of 1965, Article VII of the Tashkent Declaration, January 10, 1966, for restoring peace, provided for repatriation of prisoners.

viding *mutatis mutandis* for similar duties of respect and protection. The latter Convention is notable for the important provisions relating to hospital ships, which drew upon the experience of the Second World War.[1]

Methods and means of combat and the conduct of hostilities are dealt with in Section II of the Hague Rules of 1907. Certain methods and means of war are forbidden, for example, the use of poisoned weapons, or arms or projectiles which would cause unnecessary suffering,[2] or the refusal of quarter. Ruses of war are permitted, but, according to general practice, not if tainted by treachery or perfidy, or if in breach of some agreement between the belligerents. As already mentioned, undefended towns are not subject to bombardment (Article 25). During the last War there were several declarations of " open cities " (for example, Paris in 1940, Manila in 1941, and Rome in 1943), a term which really corresponds to the expression " undefended towns " as used in the Hague Rules, with the additional feature that the city is quite open and free for entry by the attackers. Military objectives in an undefended city not so open and free for entry may be bombarded from the air. Attacking officers must give warning before commencing a bombardment of defended places, except in case of an assault, and must spare distinctly marked churches, hospitals, monuments, etc. Pillage is forbidden.

The rules of naval warfare[3] are contained partly in rules of customary international law, partly in the Declaration of Paris of 1856, partly in the Hague Conventions of 1907, Nos. VI, VII, VIII, IX (Naval Bombardment), X, XI, and XIII (Neutral Rights and Duties in Maritime War), and partly in the London

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[1] Of particular interest in both Conventions are the provisions relative to the use of the Red Cross emblem, and concerning the protection of medical aircraft. For a treatise on the four Conventions adopted by the Geneva Conference of 1949, see Draper *The Red Cross Conventions* (1958), and see the commentaries thereon of Jean S. Pictet, Director, International Committee of the Red Cross.

[2] It is difficult to reconcile with this prohibition the general practice of using flame-throwers and napalm bombs, as in the Second World War, and as in the Vietnam conflict.

[3] For a comprehensive, modern treatise, see Tucker *The Law of War and Neutrality at Sea* (1957).

Submarine Rules Protocol of 1936. In maritime warfare, belligerents are entitled to capture enemy vessels and enemy property. Surface ships, submarines, and aircraft engaged in sea warfare may destroy enemy merchant shipping provided that, except in the case of a persistent refusal to stop or resistance to search, the safety of the crew, passengers, and ship's papers must be definitely assured. Merchant ships are entitled to defend themselves against attacks at sight, not conforming to these rules. Privateering, i.e., the commissioning of private merchant vessels, is illegal (see Declaration of Paris, 1856). Merchant ships may be lawfully converted into warships, provided, according to British practice, that the conversion is effected in a home port, and not while the vessel is at sea or in a neutral port. Auxiliary vessels may be treated as being of a combatant character if they are part of the naval forces, being employed to assist naval operations.

Under the Hague Convention IX (Naval Bombardment), the naval bombardment of undefended ports, towns, etc., is prohibited unless the local authorities refuse to comply with a formal requisitioning demand for provisions and supplies. Otherwise, military works, military or naval establishments, and other military objectives may be attacked.

Floating mines must not be sown indiscriminately, and it is the duty of belligerents laying such mines not merely to take all possible precautions for the safety of peaceful navigation, but to notify the precise extent of minefields as soon as military considerations permit. Unfortunately the law as to mines is uncertain because of the weakness of the text of the Hague Convention VIII (Submarine Contact Mines), and because of the development of new types of mines and new kinds of minelaying methods.

As to the rules, if any, concerning aerial warfare, see above.[1]

There are no rules of international law prohibiting the use of psychological warfare, or forbidding the encouragement of defection or insurrection among the enemy civilian population.

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[1] At pp. 513–514.

Finally it should be mentioned that by the above-mentioned Geneva Protocol of 1925, gas and bacteriological warfare are prohibited (see also Draft Convention of the Commission of Disarmament, 1930),[1] and that by the International Convention for the Protection of Cultural Property in the event of Armed Conflict, signed at The Hague in May, 1954, measures of protection against the ravages of war are provided for works of art, monuments, and historic buildings.[2]

Law of Belligerent Occupation of Enemy Territory[3]

Belligerent occupation must be distinguished from two other stages in the conquest of enemy territory:—(*a*) invasion, a stage of military operations which may be extended until complete control is established; and (*b*) the complete transfer of sovereignty, either through subjugation followed by annexation, or by means of a treaty of cession. Occupation is established only by firm possession, or as Article 42 of the Hague Rules of 1907 says, only when the territory is " actually placed under the authority of the hostile army ".

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[1] *Quaere* whether this Protocol applies to the use of non-lethal tear gases; the latter have been employed in the Vietnam conflict. In 1966–1970, the application of the Geneva Protocol of 1925 came under close examination by the United Nations General Assembly, which in 1968 requested the Secretary-General of the United Nations to prepare a report on chemical and biological or bacteriological weapons, and the effects of their use. A report was prepared by a group of consultant experts, and issued by the Secretary-General on July 1, 1969. This contained a strong condemnation of such weapons, and led to a Resolution adopted by the General Assembly on December 16, 1969, declaring as contrary to the generally recognised rules of international law as embodied in the 1925 Protocol, the use in international armed conflicts of:—(*a*) chemical agents of warfare with direct toxic effects on man, animals, or plants; and (*b*) biological agents of warfare, intended to cause death or disease in man, animals or plants, and dependent for their effects on ability to multiply. A number of important military powers, however, either voted against the Resolution or abstained from voting. Some States contested the right of the General Assembly to interpret the Protocol, claiming that this was the sole prerogative of the parties to that instrument.

[2] *Defoliants:* As to the legality of attacks on other objectives, *quaere* whether jungle growth, plantations, and crops may be destroyed by defoliants or other chemical agents, even if these be used to safeguard military operations and personnel, or to prevent crops going to the enemy. From one point of view, the indiscriminateness of the damage renders such methods of destruction objectionable.

[3] A belligerent may also temporarily establish military government over territory of third States, liberated from enemy occupation.

The distinction from invasion is important, inasmuch as the occupant Power is subject to a number of rights and duties in respect to the population of the occupied territory. Important also is the point that belligerent occupation does not displace or transfer the sovereignty of the territory but involves the occupant Power in the exercise solely of military authority subject to international law. For this reason, occupation does not result in any change of nationality of the local citizens nor does it import any complete transfer of local allegiance from the former Government. Nor can occupied territory be annexed. The occupant Power's position is that of an interim military administration, which entitles it to obedience from the inhabitants so far as concerns the maintenance of public order, the safety of the occupying forces, and such laws or regulations as are necessary to administer the territory.

Lawful acts of the occupant Power will therefore normally be recognised when the occupation is terminated; but not unlawful acts (for example, the wholesale plunder of private property).

The rational basis of the international law as to belligerent occupation is that until subjugation is complete and the issue finally determined, the occupant Power's authority is of a provisional character only.

The status of Germany after the Second World War following on the unconditional surrender appears to have involved a stage intermediate between belligerent occupation and the complete transfer of sovereignty ((*b*) above). The four Allied Powers, Great Britain, France, Russia and the United States exercised supreme authority over Germany, and in the opinions of some writers, this could not be regarded as a belligerent occupation because of the destruction of the former Government, and the complete cessation of hostilities with the conquest of the country. Nor, since the occupying Powers were acting in their own interests, were they trustees in any substantive sense for the German people. At the same time, it should be pointed out that the Allied control system was expressly of a provisional character, not involving annexa-

tion, was predominantly military in form, and based on the continuance of the German State as such, and on the continuance also of a technical state of war. However, the question is now somewhat academic, except as a precedent for the future, owing to the establishment of separate West and East German Governments.[1]

The rights and duties of the occupant Power are conditioned primarily by the necessity for maintaining order, and for administering the resources of the territory to meet the needs of the inhabitants and the requirements of the occupying forces, and by the principle that the inhabitants of the occupied territory are not to be exploited. The rules with regard to public and private property in the occupied territory are referred to above.[2] The inhabitants must, subject only to military necessities, be allowed to continue their lawful occupations and religious customs, and must not be deported. Requisitions for supplies or services must be reasonable, and not involve the inhabitants in military operations against their own country. Contributions are not to be exacted unless ordinary taxes and dues are insufficient for the purposes of the administration. These and other rules are set out in Section III of the Hague Rules of 1907.

The provisions of the Hague Rules were supplemented by the Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War (see Part III, Section III, Articles 47–78). In the interests of the inhabitants[3] of occupied territory, and having regard to the experience of military occupations in two World Wars, numerous carefully defined duties were imposed upon occupying Powers by the Convention, duties qualified in certain particular cases by the requirements of internal security

[1] Distinguish also:—(1) The occupation of non-enemy territory in the interests of military operations; e.g., the Allied occupation of North Africa, 1942–3. (2) The occupation by Allies, temporarily, of the territory of another Allied State, which had been under military occupation by the enemy; e.g., the Allied occupation of Greece in 1944.

[2] See pp. 510–511.

[3] Cf. the reference to such persons as " protected persons ". The rights of the inhabitants under the Convention cannot be taken away by any governmental changes, or by agreement between the local authorities and the occupying Power, or by annexation (see Article 47).

and order, and by the necessities of military operations; among such duties are the obligations:—(*a*) Not to take hostages,[1] or impose collective penalties against the population for breaches of security or interference with the occupying forces by individual inhabitants; (*b*) not to transfer by force inhabitants, individually or *en masse*, to other territory or to deport them; (*c*) not to compel the inhabitants to engage in military operations or in work connected with such operations, other than for the needs of the occupying army; and (*d*) not to requisition food and medical supplies, so as to impinge upon the ordinary requirements of the civilian population. The Convention also imposes, subject to the same qualifications, a specific obligation to maintain the former Courts and status of Judges, and the former penal laws, and not to use coercion against Judges or public officials.

Neither the Hague Rules nor the Convention purport to deal with all the problems of an occupying Power. There are noticeable deficiencies in regard to economic and financial matters. For example, what are the duties of the occupying Power in regard to Banks, public finance, and the maintenance or use of the former currency or introduction of a new currency? *Semble*, here, the occupying Power must follow the principle of ensuring orderly government, which includes the proper safeguarding of the economic and financial structure, but excludes any attempt to obtain improperly any advantage at the expense of the inhabitants of the occupied territory.

Finally, as to the question of duties of obedience (if any) owed by the civilian population towards the occupying Power, it is clear that for conduct prejudicial to security and public order, for espionage, and for interference with military operations, inhabitants are subject to penalisation by the occupying Power. However, the notion of allegiance due by the inhabitants to the occupying Power was rejected by the Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War (see Articles 67–68). It appears that, in relation

[1] Thus negativing the decision in the " Hostages Case " (*U.S.* v. *List and Others*), p. 521, *ante*, that hostages may be executed in order to secure obedience of the local population.

to the population, the occupying Power may prohibit certain activities by the population in the occupied territory, subject to due public notice of what is prohibited, notwithstanding that it has occupied the territory concerned following upon an act of aggression which was a crime under international law.[1]

4.—Modes of Terminating War and Hostilities

State practice in the present century renders necessary a distinction between:—

(1) Modes of termination of the *status* of war.
(2) Modes of termination of hostilities which are continuing in a war *stricto sensu*, and of the hostilities in a non-war armed conflict.[2]

(1) Modes of Termination of the Status of War

The following are the principal ways of termination:—

(*a*) Simple cessation of hostilities by the belligerents without any definite understanding being reached between them. Illustrations are the wars between Sweden and Poland (1716), between France and Spain (1720), between Russia and Persia (1801), between France and Mexico (1867), and between Spain and Chile (1867). The disadvantage of this method is that it leaves the future relations of belligerents in doubt, and is not appropriate for modern conditions under which complicated questions of property, *matériel*, prisoners of war, and boundaries have to be resolved usually by treaty.

(*b*) Conquest followed by annexation. The governing principle here is that a country conquered and annexed ceases to exist at international law; hence there cannot be a state of war between it and the conqueror. It is not clear how far this principle now applies where the annexed State was vanquished in a war of gross aggression, illegal under international

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[1] Cf. the " Hostages Case " (*U.S.* v. *List and Others*), p. 521, *ante*.

[2] It may also be necessary to consider a *tertium quid*, namely the termination of hostile or unfriendly relationships; *e.g.*, the termination of a " confrontation ", as to which, note the agreement between Indonesia and Malaysia of peace and co-operation, August 11, 1966, referred to, p. 497, *ante*).

law.[1] For example, in the case of Ethiopia and Czechoslovakia, annexed in 1936 and 1939 by Italy and Germany respectively, the Allied Powers refused to recognise the territorial changes thus illegally brought about, but these were both cases where independence was restored within a reasonably short time.

(*c*) By peace treaty. This is the more usual method. A treaty of peace generally deals in detail with all outstanding questions concerning the relations of the belligerents, for example, evacuation of territory, repatriation of prisoners of war, indemnities, etc. On all points concerning property on which the treaty is silent, the principle *uti possidetis* ("as you possess, you shall continue to possess") applies, namely, that each State is entitled to retain such property as was actually in its possession or control at the date of cessation of hostilities. There also applies the *postliminium* principle, in the absence of express provision, to the rights of the parties other than to property; that is to say, that any prior condition and prior status are to be restored; hence, legal disabilities of former alien enemies are removed, diplomatic relations are reconstituted, etc.

(*d*) By armistice agreement, where the agreement although primarily intended to bring about a cessation of hostilities, operates subsequently as a result of its practical application by the parties *de facto* to terminate the status of war. This, it is believed, is largely a question of construction of the particular armistice agreement concerned.[2]

(*e*) By unilateral declaration of one or more of the victorious Powers, terminating a status of war.[3] This seemingly anomalous procedure was adopted by certain of the Allied Powers (including Great Britain and the United States) in 1947 and 1951 respectively towards Austria and the West German

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[1] See above, pp. 168–171.

[2] Cf. the view adopted by Israel, and denied by Egypt that its armistice agreement of 1949 with the four Arab States, Egypt, Lebanon, the Hashemite Kingdom of Jordan, and Syria, terminated the status of war; see Rosenne, *Israel's Armistice Agreement with the Arab States* (1951).

[3] See *Re Grotrian, Cox* v. *Grotrian*, [1955] Ch. 501, at p. 506; [1955] 1 All E.R. 788, at p. 791.

Republic, principally because of irreconcilable disagreement with the Soviet Union over procedure and principle in regard to the conclusion of peace treaties.

Municipal Law and the Termination of War.—The date of termination of a war, according to a particular State's municipal law is not necessarily the same as the date of the peace treaty, or the date of cessation of hostilities.[1] There is no rule of international law precluding the municipal law of any belligerent State from adopting a date different to that in the treaty, unless there be express contrary provision in the treaty itself.

(2) Modes of Termination of Hostilities

The following modes of terminating hostilities, as distinct from the status of war itself, are applicable to hostilities both in a war, and in a non-war conflict:—

(*a*) By armistice agreement. Strictly speaking, an armistice is but a temporary suspension of hostilities, and normally signifies that hostilities are to be resumed on the expiration of the armistice period. Armistices may be, on the one hand, *general*, when all armed operations are suspended; or on the other hand, *partial* or *local*, being then restricted to portions only of the armed forces engaged, or to particular areas only of the operational zones. One modern trend in regard to general armistices, however, is that they represent no mere temporary halting of hostilities, but a kind of *de facto* termination of war, which is confirmed by the final treaty of peace.[2] In the case of a non-war armed conflict, as, for example, the Korean conflict, 1950–1953, the armistice puts an end to the conflict, and it may also be that a final peaceful settlement is contemplated by the contending parties.[3]

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[1] See, e.g., *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, and *Ruffy-Arnell and Baumann Aviation Co.* v. *R.*, [1922] 1 K.B. 599, at pp. 611–612.

[2] As in the case of the general Armistice of November 11, 1918, in the First World War, which preceded the Treaty of Versailles, 1919.

[3] See, e.g., the references in the Preamble to the Korea Armistice Agreement of July 27, 1953, to " stopping the Korean conflict ", and to a " final peaceful settlement "; Article 62 also refers to the eventual supersession of the Agreement by an agreement for " a peaceful settlement at a political level ".

(*b*) Unconditional surrender or other forms of general capitulation, unaccompanied by any agreement or treaty, containing terms of peace. The formula of unconditional surrender was adopted by the Allies in the Second World War for the reasons, *inter alia*, that it was deemed impossible to negotiate with the Axis Governments, that it was necessary to preclude any suggestion of a betrayal of the enemy armed forces by civilian Governments, and to enable a process of re-education and democratisation of the enemy populations to be undertaken for a time under military controls, while a formal state of war continued.

(*c*) By a " Truce " so-called. The term has been used in United Nations practice (for example, the Truce established in Palestine in May–June, 1948, as a result of action by the Security Council). It probably indicates a less definitive cessation of hostilities than the term " Armistice ".[1]

(*d*) Cease-Fire. The term more frequently used for a cessation of hostilities on the order or request of the United Nations Security Council or other international organ is " cease-fire "; for example, the cease-fire ordered by the Security Council in December, 1948, on the occasion of the renewal of hostilities in Indonesia between the Netherlands and the Indonesian Republican forces, the cease-fire of October 13, 1961, between the United Nations Force in the Congo and the armed forces of Katanga,[2] and the cease-fire in the India–Pakistan conflict " demanded " by the Security Council in its resolution of September 20, 1965. The general effect of a cease-fire is to prohibit absolutely hostilities and operations within the area subject of the order or agreement, and during the period of time stipulated.

(*e*) Agreement of cessation or suspension[3] of hostilities;

[1] Rosenne, *op. cit.*, at pp. 24–28, suggests that a truce differs from an armistice in being a more limited method, since the armistice may involve positive provisions other than the mere suspension of hostilities, and affect third parties, which a truce usually does not.

[2] The termination of hostilities in Laos in 1962 was referred to as a " cease-fire " in Article 9 of the Protocol of July 23, 1962, to the Declaration on the Neutrality of Laos, of the same date.

[3] There was a suspension in May, 1965, in the case of the conflict in the Dominican Republic.

for example, the three Geneva Agreements of July 20, 1954, on the cessation of hostilities respectively in Vietnam, Laos, and Cambodia, which ended the fighting in Indo-China between Government and Viet Minh forces.

(*f*) By joint declaration of the restoration of normal, peaceful, and friendly relations between the contestants; e.g., the Tashkent Declaration, January 10, 1966, as to the India–Pakistan Conflict (this included terms as to withdrawal-lines of armies, and as to prisoners).[1]

General

One unsatisfactory feature of the Second World War and its aftermath has been the undue prolongation of the period between cessation of hostilities and the conclusion of a peace treaty.[2] This has left certain conquered States subject to an uncertain regime, intermediate between war and peace, a possibly recurrent situation for which some solution should be found by international law.

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[1] The terminology as to cessation of hostilities also includes a " pause " (i.e., a brief period of temporary cessation of particular kinds of operations, such as air bombardment), a " standstill " (this can cover not only a prohibition of hostilities, i.e., cease-fire, but also a cessation of all movement of armaments or personnel), and " de-escalation " (a diminution in the intensity, magnitude, and range of the hostilities).

[2] Although hostilities terminated in August, 1945, the Peace Treaty with Japan was not signed until September 8, 1951, and at the date of writing a peace treaty with Germany has not been concluded.

Chapter 18

NEUTRALITY AND QUASI-NEUTRALITY

1.—General

As indicated in the previous Chapter, hostile relations between States comprise not only (*a*) war in the traditional sense, but (*b*) non-war armed conflicts and breaches of the peace.

Corresponding to these two categories, there are two kinds of status of the parties outside the range of such hostile relations:—(*a*) the status of *neutrality* in a war proper; and (*b*) the status of non-participation by States or non-State entities in a non-war armed conflict. The latter status, (*b*), is sometimes (as in the case of the Korean conflict, 1950–1953) loosely referred to as neutrality,[1] but there are certain differences between it and neutrality proper. It is perhaps better to refer to it as *quasi-neutrality*.

Neutrality

In its popular sense, neutrality denotes the attitude of a State which is not at war with belligerents, and does not participate in the hostilities. In its technical sense, however, it is more than an attitude, and denotes a *legal status* of a special nature, involving a complex of rights, duties, and privileges at international law, which must be respected by belligerents and neutrals alike.[2] This status of neutrality has been the subject of a long and complicated development, at each stage of which the content of the status has varied with the nature of warfare, and with the conditions of political power in the international community of States.

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[1] See, e.g., the definition of States not participating in the Korean hostilities as " neutral nations ", in article 37 of the Korean Armistice Agreement of July 27, 1953, for the purposes of the appointment of a Neutral Nations Supervisory Commission.

[2] The international law status of neutrality should be distinguished from the *policy* of " neutralism " (see Chapter 5, above at p. 133). Yet to some extent neutralism or " non-alignment " may be regarded as an *ad hoc* unilaterally declared status (sometimes multilaterally as under Article III of the Charter of the Organisation of African Unity, May, 1963) of dissociation from the " cold war ", involving neither rights nor obligations.

Neutrality gradually developed out of bilateral treaties stipulating that neither party to the treaty should assist the enemies of the other if one party were engaged in war. It was realised that it was to the general convenience of belligerent States to prevent assistance being furnished to enemies. Originally such cases of neutrality were isolated and sporadic, and stopped far short of the notion of a general status. Certainly the idea that neutral duties devolved on all non-participants in a given war was a much later development. The term " neutrality " appeared as early as the seventeenth century, but no systematic doctrine emerged until the eighteenth century, when it was discussed by Bynkershoek and Vattel. By that date theory and practice united in acknowledging the right of independent States to hold aloof from war, and their duty in such case to be impartial as between the belligerents.

In the nineteenth century, neutrality developed much more extensively than in all its previous history. Most historians attribute this to the part played by the United States as a neutral in the Napoleonic Wars, when Great Britain was aligned against Napoleon and his Continental satellites. The United States Government refused to allow the equipping or arming of vessels in American territory on behalf of the belligerents, and it prevented the recruitment of American citizens for service in the belligerent forces. At the same time Great Britain was endeavouring to block neutral commerce with France, and many rules as to neutral and belligerent rights evolved as compromise solutions of a conflict of interests between the British and United States Governments. Also, during the years of the Napoleonic Wars, Lord Stowell presided over the British Prize Court, and the newly developing law as to neutral rights and duties owed much to his intellect and genius as a judicial legislator. Later in the century the American Civil War gave rise to several disputes on questions of neutrality between the legitimate United States Government and Great Britain. Out of these arose the famous *Alabama Claims Arbitration* of 1872, concerning the construction and fitting out in England of commerce-destroying vessels for the Confederate Navy. The United States Government alleged

a breach of neutrality in that the British Government had failed to exercise due care to prevent the equipping of the vessels, and their despatch to the Confederates, and a claim for damage suffered through the activities of the vessels (one of which was *The Alabama*) in the Civil War was sustained by the arbitrators.

Other important factors which favoured the development of neutrality in the nineteenth century were the permanent neutralisation of Belgium and Switzerland,[1] which supplied useful precedents for neutral rights and duties, and the general growth of great unified sovereign States. It was clearly to the interests of the latter to be able to maintain unrestricted commercial intercourse with belligerents without being drawn into war, as it was plainly to the interests of the belligerents to prevent assistance being given to their enemies by such powerful countries. Moreover, conditions were peculiarly favourable to neutrality inasmuch as the principal wars fought in the nineteenth century were wars of limited objectives, unlikely to embroil States other than the participants, so that there was little risk or threat to neutrals as long as they observed the rules. In these circumstances the generally recognised rules of neutrality, some of them embodied in instruments such as the Declaration of Paris, 1856, and in the Hague Convention of 1907, commanded the support of, as they corresponded to the interests of most States.

However, in the First World War (1914–1918)—which developed almost into " total war "—as in the Second World War (1939–1945), most of the recognised rules of neutrality proved quite out of date, could not be applied in many instances, and instead of assisting to maintain the impartiality of States, virtually forced them into the struggle (as in the case of the United States in 1917). In its turn the Second World War was convincing proof of the archaism of the nineteenth century conceptions of neutrality. Neutral status proved to be a condition no less hazardous than that of belligerency. One neutral State after another was " rolled up ", and the two most powerful neutrals—Russia and the United States—were each

[1] See above, pp. 132-135.

attacked without warning. It is plain that in the future neutrality can only operate within a limited and quite unpredictable field, and it is questionable whether it is in the general interest to preserve an institution of so uncertain a value.

The trend towards restriction of the scope of neutrality has been confirmed by a significant post-war development, namely, the conclusion of regional security treaties, such as the North Atlantic Security Pact of April 4, 1949, and the Pacific Security Pact of September 1, 1951,[1] in which the States Parties have voluntarily renounced *in futuro* a right of claiming neutrality in the event of a war in which their co-Parties to the treaties have been attacked, and instead will assist the States thus attacked. To these treaties, the United States, formerly the most influential neutral State in past wars and the most insistent on neutral rights, is a party.

Rational Basis of Neutrality

Neutrality is often justified by reference to the following considerations:—(1) that it serves to localise war; (2) that it discourages war; (3) that it enables States to keep out of war; (4) that it regularises international relations.

The Second World War conclusively demonstrated the fallacies of (1) and (2), inasmuch as the neutrality of States such as Norway, Denmark, Holland and Belgium proved an irresistible temptation to forcible invasion, and prevented more effective arrangements for their joint defence, with the consequence that these States were speedily overrun by superior German forces. The result was to increase Germany's power in Europe, to bring Italy into the war on Germany's side, and eventually to encourage Japan to precipitate hostilities in the Pacific. Thus, far from localising or discouraging war, the effect of neutrality was to transform a European struggle into a world conflict.

As to (3), it was virtually in defence of its neutrality that the United States entered the First World War on the side of France and Great Britain. Moreover, despite the care taken in the Second World War by Russia and the United States to preserve their neutrality, attacks by Germany and Japan,

[1] Between Australia, New Zealand, and the United States (ANZUS).

respectively, forced them into the War only two years after its outbreak in 1939.

As to (4), the experience of the League of Nations from 1920 to 1940 showed that the institution of neutrality is quite inconsistent with the maintenance in international relations of the rule of law. The unjustified reliance of States Members of the League on traditional notions of neutrality contributed towards preventing the League machinery from functioning on the outbreak of the Second World War.

Before this War began, a fundamental change had taken place in the attitude of most States towards the status of neutrality. Far from insisting on neutral rights or belligerent duties, States were now prepared to make all possible concessions to avoid any chance of a clash with the belligerents. The First World War had shown how a neutral State like the United States could be drawn into war in defence of its neutral rights, and no State wished to repeat that experience. States were determined if possible to keep out of a general war. In 1936–1937 this attitude was reflected in the non-intervention policy of France and Great Britain towards the Spanish Civil War.

This new attitude was particularly illustrated by the attitude of the United States in 1939–1940, before Germany overran and conquered Western Europe in the summer of 1940, and by its "Neutrality" law passed by Congress in 1937. The "Neutrality" Act of 1937 was a misnomer; it was really a measure to ensure no contacts between the United States and belligerents which could possibly involve her in war in defence of neutral rights.

After Germany's victories in Western Europe in June, 1940, the United States appeared to veer in an entirely opposite direction. Convinced that Germany's aim was world domination, the United States initiated a series of measures to aid Great Britain in the war against Germany and Italy which would have been unthinkable some twelve months previously. Whereas before she had been ready to renounce neutral rights, she paradoxically now appeared to show disregard for neutral duties, transferring destroyers to Great Britain, sending her arms, and ammunition, and patrolling dangerous sea-lanes.

In addition Congress passed the Lend-Lease Act of March, 1941, which made it possible to provision and equip the armed forces of Great Britain and her Allies. The legality of the Lend-Lease Act and of the other measures adopted by the United States before her entry into the Second World War was justified on three grounds at least:—(*a*) The breach by Germany and Italy of the Briand-Kellogg Pact of 1928 for the Outlawry of War, and the fact that these Powers were guilty of gross aggression against neutral States. (*b*) The principle of self-preservation as against Powers like Germany and Italy, which intended to show no respect for the rights of neutrals. There was the additional consideration here that if the United States had allowed Great Britain to be conquered, international law itself would not have survived. (*c*) The evidence of conspiracy on the part of the Axis Powers to launch an attack on the United States in the immediate future.

Moreover, after the United States became a belligerent, she showed little traditional regard for neutral rights. Together with Great Britain, she brought pressure to bear on European neutrals to withhold supplies from the Axis Powers. This pressure increased in measure as Allied victories removed any possibility of a threat to these neutrals from Germany, if they should cease to trade with Axis countries, until in 1944–1945 the American attitude was that neutral exports of vital products to Germany would not be countenanced.

Neutrality and the United Nations Charter

Member States of the United Nations have no absolute right of neutrality. By Article 41 of the United Nations Charter they may be under a duty to apply enforcement measures against a State or States engaged in war, if so called upon pursuant to a decision by the Security Council. Under paragraph 5 of Article 2 they are also bound to give every assistance to the United Nations in any action under the Charter, and to refrain from giving assistance to any State against which preventive or enforcement action is being taken by the Organisation.

Neutrality is not, however, completely abolished. Even where preventive or enforcement action is being taken by the United Nations Security Council, certain Member States may not be called upon to apply the measures decided upon by the Council or may receive special exemptions (see Articles 48 and 50). In this event their status is one of " qualified " neutrality inasmuch as they are bound not to assist the belligerent State against which enforcement measures are directed, and must also assist the Member States actually taking the measures (see Article 49). It seems also that where the " veto " is exercised by a permanent member of the Security Council so that no preventive or enforcement action is decided upon with reference to a war, in such case Member States may remain absolutely neutral towards the belligerents.

Commencement of Neutrality

Immediate notification of neutrality is desirable, and is regarded as necessary by most States. In the Second World War, immediately after its outbreak in September, 1939, almost all neutral States announced their neutrality at once and specifically communicated the fact to the belligerents. Certain of these States were then Members of the League of Nations, and the declarations of neutrality were regarded as necessary statements of intention not to be bound by the obligations of the League Covenant.

Quasi-Neutrality

States and non-State entities, not participating in a " non-war " armed conflict, have a status which yet remains to be defined by rules of international law.

If the events in the Korean conflict of 1950–1953 supply any guide, it is clear that there is no rigid or fixed status of quasi-neutrality as in the case of neutrality in a war proper, but that the nature of the status must depend on the special circumstances of the particular conflict concerned.

Moreover, where a " non-war " armed conflict is subject to the peace enforcement action of the Security Council of the

United Nations, or to United Nations " peacekeeping " (see Chapter 19, *post*), the status of a quasi-neutral, whether a Member State of the United Nations or not, is governed by the provisions of the United Nations Charter,[1] and by the terms of any decision or recommendation made by the Security Council under these provisions, or of any recommendations of the General Assembly as to such " peacekeeping ".

2.—Rights and Duties in General of (*a*) Neutrals, and (*b*) Quasi-Neutrals

(a) Rights and Duties in General of Neutral States

The status of neutrality involves rights and duties *inter se* of neutral States on the one hand, and of belligerent States on the other. Rights and duties here are *correlative*, that is to say, a right of a neutral State corresponds to a duty of a belligerent, and a right of a belligerent State to a duty of a neutral. From the standpoint of either the neutral or the belligerent State, also, the duties of these States may be classified as:—

(i) duties of abstention;
(ii) duties of prevention;
(iii) duties of acquiescence.

Applying this classification, the general duties of a neutral State may be described as follows:—

(i) *Abstention.*—The neutral State must give no assistance—direct or indirect—to either belligerent side; for example, it must not supply troops, or furnish or guarantee loans, or provide shelter for a belligerent's armed forces.

(ii) *Prevention.*—The neutral State is under a duty to prevent within its territory or jurisdiction such activities as the enlistment of troops for belligerent armies, preparations for hostilities by any belligerent, or warlike measures in its territory or territorial waters.

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[1] See Articles 39–51.

(iii) *Acquiescence.*—The neutral State must acquiesce in the acts of belligerent States with respect to the commerce of its nationals if they are duly warranted by the laws of war, for example, the seizure of vessels under its flag for the carriage of contraband, adjudications by Prize Courts, and so on.

Similarly, the duties of belligerent States may be summarised as:—

(i) *Abstention.*—A belligerent State must not commit warlike acts on neutral territory or enter into hostilities in neutral waters or in the airspace above neutral territory, nor may it interfere with the legitimate intercourse of neutrals with the enemy, nor may it use neutral territory or waters as a base for belligerent operations, or as a starting point for an expedition.

(ii) *Prevention.*—A belligerent State is duty bound to prevent the ill-treatment of neutral envoys or neutral subjects or injury to neutral property on enemy territory occupied by it.

(iii) *Acquiescence.*—A belligerent State must, for instance, acquiesce in internment by a neutral State of such members of its armed forces as take refuge in neutral territory, or in the granting of temporary asylum by neutral ports to hostile warships so that necessary repairs may be effected.

If a belligerent or a neutral State violates any one of such duties and the breach results in damage to the other, it is in general liable for the damage caused and must furnish pecuniary satisfaction to that State. In the *Alabama Claims Arbitration* (1872), the arbitrators awarded the United States a sum of 15,500,000 dollars in gold as indemnity in full satisfaction of all claims subject of the arbitration, arising out of Great Britain's failure to prevent the construction and fitting out of *The Alabama* and other commerce destroyers for use by the Confederates.

As regards the above-mentioned duties of prevention a neutral State is not an insurer for the performance of these duties, or, put another way, these duties are not absolute. The neutral State is bound only to use the means at its disposal in fulfilling its obligations; for example, if unable to prevent a much stronger State from violating its neutrality, it does not

become liable to the injured belligerent State for the non-performance of its duties.

With regard to the several duties of abstention of a belligerent State mentioned above, one or two important points should be mentioned. If a neutral State abstains from taking action against a belligerent violating neutral territory, etc., or if that neutral State is too weak to prevent such violation, then the opposing belligerent is entitled to intervene on the neutral territory, etc. Belligerent warships have a right of innocent passage through neutral territorial waters, but the right must not be abused. They may also, for the purpose of refuelling, repairs, etc., take refuge in neutral ports (although not more than three at the same time), and here, according to British practice, may only stay twenty-four hours after notice[1] from the neutral State, subject to an extension for sufficient reasons, for example, weather or urgent repairs. If the time-limit is exceeded, the ship and crew must be interned.

Reference should also be made to certain other rights and privileges of belligerent States. Their special rights in regard to neutral trade and neutral shipping are considered in the second part of this chapter. In addition to these, belligerents enjoy the so-called privilege of *angary*, i.e., of requisitioning any neutral ships or goods physically within their jurisdiction, but not brought there voluntarily, subject to the property being useful in war and being urgently required by them, and subject to the payment of full compensation.[2] Also, according to the practice in two World Wars belligerents are, it seems, entitled to notify war zones on the high seas, and to designate the safe routes of passage that may be taken by neutral vessels. Further, in the event of the enemy resorting to illegal warfare, belligerents may adopt reprisals (i.e., measures otherwise illegal at international law) irrespective of the fact that injury may thereby be done to neutrals, provided only, according to British practice, that such reprisals are justified by the circumstances

[1] It is the duty of the neutral State to give such notice as early as possible.

[2] If the goods are within the jurisdiction and have been brought there voluntarily, reasonable and not full compensation for requisitioning will be paid to the owner.

of the case and do not involve an unreasonable degree of inconvenience for neutrals.[1]

Neutrality does not exclude sympathy between a neutral State and a belligerent, provided that this sentiment does not take the active form of concrete assistance to that belligerent. Similarly, gifts or loans of money by private citizens of the neutral State to the belligerent or other similar transactions, or individual enlistments by such private citizens in that belligerent's armed forces are not prohibited by the rules of neutrality. Such impartiality as is required of neutrals is confined to the duties of abstention, prevention, and acquiescence mentioned above. This distinction between the neutral State and its citizens has obviously been affected by the increasing range of State controls over all private transactions, and over persons. Under the impact of these controls, the duties of a neutral State must necessarily become more strict so far as liberty of action by its citizens is concerned. For example, it is probably now the duty of a neutral State not to sanction the private export of arms and ammunition.

Unneutral Service[2]

Traditionally, the doctrine of *unneutral service* relates to the duties of neutral citizens in maritime warfare, and was regarded as an analogue of the doctrine of contraband. Confusion is due to this analogy, because it seemed to confine unneutral service to the *carriage* or *transport* by neutral vessels of persons and despatches, which assist one belligerent, and against which its opponent is empowered to take measures by confiscation and (if necessary) by destruction of the vessel.

It is, however, a doctrine much broader than this analogy suggests; nor in these days is it confined to ships at sea, but must include aircraft, which in time of war are commonly used

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[1] See *The Zamora*, [1916] 2 A.C. 77.

[2] For a modern discussion of the doctrine, see Stone, *Legal Controls of International Conflict* (1954) Chapter XVIII, and *Supplement* 1953–1958 (1959) pp. 892–893.

for the transport of persons[1] important to a belligerent's war effort. Summing up the doctrine of unneutral service, it may be laid down that it is the duty of the owners or persons in charge of a neutral vessel or aircraft not by any acts or conduct on their part to employ the vessel or aircraft for objects or purposes (other than carriage of contraband or breach of blockade[2]) which may advance the belligerent interests of one State and injure the same interests of the opponent. For such acts or conduct, a belligerent who is or may be injuriously affected thereby, may stop the vessel or aircraft, and remove therefrom the persons[3] improperly carried, and—in more serious cases—capture the vessel, and condemn it or certain portions of its cargo by proceeding before a Prize Court.[4]

The more usual guilty activities of unneutral service are transport of members of the enemy armed forces,[3] carriage of despatches to the enemy, taking a direct part in the hostilities, operating under charter to the enemy, and the transmission of intelligence in the interests of the enemy.

(b) Rights and Duties in General of Quasi-Neutrals

States and non-State entities which do not participate in " non-war " armed conflicts are not subject, it is clear, to the same stringent duties as neutral States in a war proper, nor have they rights against the contestants as plenary as the rights of neutrals.

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[1] During the Second World War, the refusal of the British authorities to grant " navicerts " or ship warrants (see below pp. 553–554) for particular neutral vessels, because of undesirable passengers or undesirable members of the crew, left little practical room for cases of unneutral service by the transport of persons important to the enemy's war effort; cf. Medlicott, *The Economic Blockade*, in the series "History of the Second World War, United Kingdom Civil Series" (edited, W. K. Hancock), Vol. I (1952) pp. 450–452, and Vol. II (1959) pp. 161 *et seq.*

[2] See below, in section 3 of this Chapter.

[3] The category of persons, the carriage of whom may involve an unneutral service, includes serving members of the armed forces, reservists subject to orders of mobilisation, and, *semble*, now, scientists important to the enemy's war effort.

[4] For the effect of Chapter III of the Declaration of London, 1909, in laying down different penal consequences according to the nature of the act of unneutral service, see Stone, *op. cit.*, Chapter XVIII, section IV.

Practice supplies, as yet, no conclusive guide as to the extent of the rights and duties involved.

However, the contestants and quasi-neutrals concerned may always agree as to the extent of their respective rights and duties, *inter se*. As to one special point, the right of quasi-neutrals to protect the lives and property of nationals, and to evacuate them, if necessary, seems not to be disputed by the great majority of States.

In the case of an armed conflict which is subject to the peace enforcement action of the United Nations Security Council, the rights and duties of quasi-neutrals whether Member States of the United Nations or not may be determined by decision or recommendation of the Security Council. The matter may also be governed by recommendations of the General Assembly, *e.g.*, so far as United Nations " peacekeeping " is concerned (see Chapter 19, *post*); these have permissive, although not binding force.

Mention should be made of paragraph 6 of Article 2 of the United Nations Charter, under which the Organisation is to ensure that non-Member States shall conform to the " Principles " laid down in the Article for the maintenance of peace and security; and one of such " Principles " (see paragraph 5) is to give the United Nations assistance in any action under the Charter, and to refrain from giving assistance to any State against which the United Nations is taking peace enforcement action.

3.—Economic Warfare and Blockade: Impact upon (*a*) Neutrals, and (*b*) Quasi-Neutrals

During the nineteenth century and until the advent of total war in 1914, and again in 1939, neutral trading and shipping relations with belligerents were regulated largely by the rules of *contraband* and *blockade*.

These rules were, in essence, rooted in a limited conception of the economic pressure which could be applied to weaken a belligerent's capacity for war, the main concern of a contestant

who resorted to contraband interception, or to blockade, being to interrupt the flow by sea of vital goods, which might help the enemy in its war effort. There was also an assumption underlying the rules that supplies from neutral States would always be channelled directly to coasts or ports of the particular enemy belligerent concerned and not by indirect routes.

However, in the course of the First World War, and again during the Second World War, Great Britain, for whom these Wars were life and death struggles, was obliged to challenge the validity of so limited a conception of economic pressure and of so fallacious an assumption, and accordingly departed from the traditional nineteenth century rules of contraband and blockade (see below). Besides the traditional system was ineffective to deal with stratagems such as the smuggling by neutral seamen of small contraband objects or articles, which might nevertheless be vital to the enemy war effort, and other forms of assistance to the enemy, for example, the transport of neutral technicians for employment in enemy war production.

Moreover, in the Second World War, Great Britain and then the United States (after its entry into the War) adopted far-reaching theories of economic warfare, which were carried into practical execution for the first time on a considerable scale. Under the new concept of economic warfare, economic pressure was not to be limited primarily to the traditional expedients of contraband interception and blockade, but was to be conducted by multifarious other methods and operations, in order effectively to weaken the enemy's economic and financial sinews, and therefore his ability to continue the struggle; for example, through such procedures as the use of " navicerts " (see below p. 553) to control " at source " exports from overseas neutral countries to enemy and European neutral territory, the pre-emption or so-called " preclusive purchase " of essential products or materials, the prevention or control of enemy exports, the withholding of credits to neutral suppliers and other forms of financial pressure, and the compulsory rationing of neutral States in essential products and materials so as not to allow an accumulation of excess commodities which might be exported to the enemy, or which might tempt the

enemy to invade these States. By 1944–1945, the Allies were able to go so far as to make European neutrals practically withhold all exports of essential products or materials to Germany.

Moreover, as the War progressed, the purpose was not merely to deny vital goods to the enemy and to ration neutrals, but to conserve all available supplies of scarce products for the Allies.

An almost unlimited range of techniques and expedients, not restricted to contraband and blockade controls, was adopted in the waging of this economic warfare, as is made plain in Professor Medlicott's searching survey[1] of this type of warfare during the Second World War.

If any conclusion is justified by the practice of the Second World War as examined in this survey, it is that in conducting economic warfare, a belligerent is now entitled under international law to subject neutrals to any kind of pressure or restriction necessary, either on the one hand to strengthen itself, or on the other hand to weaken the enemy economically and financially, provided:—(1) that the inconvenience to neutrals is, as far as possible, minimised; and (2) that the belligerent concerned stops short of causing actual grave injury to neutrals (for example, denying them the bare minimum of food and other necessaries).

The new concept of economic warfare, as thus put into practice, with its wide permissible limits, has by reflex action necessarily had the result, too, of removing a number of the qualifications upon the doctrines of contraband and blockade, which originated in the period when economic pressure in time of war was conceived in the narrowest of terms. It is perhaps not today seriously disputed that the modifications to these two doctrines, made in the course of two World Wars, will endure.

Accordingly, contraband and blockade as separate doctrines of the laws of war and neutrality, must now be treated as

[1] See *The Economic Blockade*, Vol. I (1952) and Vol. II (1959) in the series, " History of the Second World War, United Kingdom Civil Series " (edited, W. K. Hancock). Professor Medlicott makes it clear that the concept of economic warfare included attacks on the enemy's economy by sabotage behind the enemy front, and bombing of factories and communications; see Vol. II at pp. 630 *et seq.*

special topics within the larger field of economic warfare. It should not, however, be overlooked that in a special case, an operation of blockade may involve primarily naval or military aspects, rather than those of an economic character.

Although from time to time, new expedients of economic warfare were justified ostensibly on the ground of reprisals for violations of international law by the enemy,[1] practice throughout the Second World War showed that Allied belligerents did not rest the validity of economic warfare solely on this narrow basis.

Contraband

Contraband is the designation for such goods as the belligerents consider objectionable because they may assist the enemy in the conduct of war.

The importance of the conception of contraband is due to certain rules enunciated by the Declaration of Paris, 1856, which are now recognised to be part of international law. The effect of these may be stated as follows:—Belligerents may seize enemy contraband goods which are being carried to an enemy destination on neutral ships, or neutral contraband goods which are being carried to an enemy destination on enemy ships.[2] These rights of seizure are conceded by international law in view of the obvious necessity for belligerents, in the interests of self-preservation, to prevent the importation of articles which may strengthen the enemy.

A distinction is drawn between *absolute* and *relative* contraband. Articles clearly of a warlike or military character are considered to be absolute contraband; for example, arms of all kinds, military clothing, camp equipment, machinery for the manufacture of munitions, and gun-mountings. Articles useful for purposes of peace as well as of war are considered to be rela-

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[1] Note, e.g., the Reprisals Order-in-Council of July. 31, 1940, referred to below, p. 553.

[2] The same principles are presumably applicable to carriage by air in neutral or enemy *aircraft*, although there appears to be no reported Prize Court case as to the condemnation of aircraft on such grounds.

tive contraband, for example, food, fuel, field-glasses, railway rolling stock, and if intercepted on their way to the enemy Government or to the enemy forces are treated as absolute contraband and are liable to seizure by a hostile belligerent. It is doubtful if the distinction is now of any practical value.

Besides absolute and relative contraband, there is a third class of goods known as " free articles ", which must never be declared contraband, inasmuch as they are not susceptible to use in war; for example, chinaware and glass, soap, paint and colours, and fancy goods.

So far States have not reached general agreement on what articles fall within each of the three categories mentioned, except that by universal admission instruments of war or warlike materials are absolute contraband. Even jurists and Prize Court judges have seldom been in accord on the matter, and the practice of the States shows little uniformity and many anomalies.

An attempt was made by an instrument known as the Declaration of London, 1909, to draw up agreed lists of goods in the three classes, but the Declaration did not come into force for want of ratifications. Both in the First and Second World Wars the belligerents declared goods to be absolute or relative contraband which in the nineteenth century were universally acknowledged to be non-contraband. Thus almost overnight the pedantic opinions of text-writers, the carefully drafted clauses in treaties, and the weighty judgments of Lord Stowell and other Prize Court judges were relegated to a back store-room, while the belligerents were restrained only by considerations of policy and expediency from declaring every type of article and material to be contraband. The very extensive lists of contraband drawn up by Great Britain in both wars were eloquent testimony to the desuetude of former rules and usages. By the time of the Second World War, both by practice and according to British judicial decisions, the Declaration of London was regarded as devoid of any authority. The impact of " total war ", at first in 1914, and then with much greater effect in 1939, completely revolutionised the conditions of warfare. In view of the enormous range of

equipment required for modern war, of the much more advanced use of scientific weapons and instruments, and of the possible production of *ersatz* or substitute war materials, it could scarcely be predicated of any article or substance that it did not have a warlike use. For the sake of self-preservation, belligerents had necessarily to adapt themselves to these exigencies, and the old rules and usages as to contraband were disregarded by them when official lists of contraband covering every conceivable kind of article or material were drawn up.

Destination of Contraband ; Doctrine of Continuous Voyage or Continuous Transportation

Usually the simplest case of seizure of contraband is one in which the goods are clearly of hostile destination. A number of cases invariably arise in which the purpose of supplying the enemy is sought to be achieved more indirectly, as where citizens in a neutral State adjacent to enemy territory purchase contraband for resale to the enemy in order to avoid interception at sea.

In circumstances such as these the doctrine of continuous voyage or continuous transportation becomes applicable. This consists in treating an adventure which involves the carriage of goods in the first instance to a neutral port, and then to some ulterior and hostile destination as being for certain purposes one transportation only to an enemy destination, with all the consequences that would attach were the neutral port not interposed. Accordingly, if these goods are contraband, they are liable to seizure. The doctrine was expounded in classical terms by Lord Stowell in *The Maria*.[1]

In the American Civil War, the United States Supreme Court applied the doctrine systematically to nearly all cases of breach of blockade or of contraband. Furthermore, United States Courts took it upon themselves to draw presumptions as to hostile destination from all kinds of unexplained facts, for example, if the bill of lading were made out to order, or the manifest of cargo did not disclose the whole cargo, or a con-

[1] (1805), 5 Ch. Rob. 365.

signee were not named, or if the ship or cargo were consigned to a firm known to have acted as an enemy agent, or if there were a notorious trade in contraband between a neutral port and enemy territory.

Till 1909, it was nevertheless doubtful whether the doctrine was subject to general approval; at all events, it was not supported by a uniform practice. However, the Declaration of London, 1909, which as mentioned above did not come into force, laid it down that the doctrine applied to absolute contraband, but did not apply to conditional contraband except in a war against an enemy possessing no seaboard.

In the First World War, the doctrine received its fullest executive and judicial application by Great Britain. British Orders-in-Council enunciated the doctrine in the widest terms, going far beyond the terms of the Declaration of London, 1909. British Courts also applied the doctrine systematically to a large number of cases, and in *The Kim*[1] it was declared that:—

> ". . . the doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognised legal decisions, and with the views of a great body of modern jurists, and also with the practice of nations in recent maritime warfare ".

As illustrating the wide scope of the doctrine the following principles were accepted by British Courts:—(1) that contraband goods might be seized on their way to a neutral country if there existed an intention to forward them to an enemy destination after there undergoing a process of manufacture; (2) that, notwithstanding that the shippers of contraband goods might be innocent of any intention of an ultimate hostile destination, yet if on the consignees' side the goods were in fact purchased for delivery to the enemy they were liable to confiscation.

The Courts of other belligerents also accepted and applied the doctrine of continuous transportation.

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[1] [1915] P. 215, at 275.

In practice, the system of cargo and ship " navicerts ",[1] i.e. certificates given by a diplomatic or consular or other representative in a neutral country to a neutral shipper, testifying, as the case might be, that the cargo on board a neutral vessel was not liable to seizure as contraband, or that the voyage of a particular ship was innocent, left little room for the application of the doctrine of continuous transportation. " Navicerts " were first introduced by the Government of Queen Elizabeth in 1590, but were not used on a large scale in modern conditions of maritime warfare until 1916 when they were instituted by the Allies. " Navicerts " were again introduced on the outbreak of the Second World War in 1939. Vessels using " navicerts " were normally exempted from search, although there was no complete guarantee against interception or seizure, which might take place because of the discovery of fresh facts or because the destination of the cargo had become enemy occupied territory. A " navicert " might, of course, be refused on grounds which would not be sufficient to justify belligerent seizure of a ship or its cargo, and subsequent condemnation by a Prize Court (see below). For example, at certain stages of the war, " navicerts " were, temporarily, not granted for the consignment to neutral territory of commodities needed by the Allies, such as rubber and tin.

Originally the mere absence of a " navicert " was not in itself a ground for seizure or condemnation. However, after the occupation of France and the Low Countries by Germany in June, 1940, changed the whole circumstances of the Allied maritime blockade, Britain issued the Reprisals Order-in-Council (dated July 31, 1940), the effect of which was:—(*a*) that goods might become liable to seizure in the absence of a " navicert " to cover them; and (*b*) that there was a presumption that " unnavicerted " goods had an enemy destination. The Order did not make " navicerts " compulsory in every sense for neutral shippers, but it heightened the risk of interception and seizure of cargoes by putting the onus on the

[1] " Aircerts " and " mailcerts " for goods sent from neutral countries by air and mail, were also introduced.

shipper of establishing the innocence of the shipment. The legality of the Order was of course questioned, but it was justified as a legitimate act of reprisals[1] to simplify the blockade, and to put increased pressure on the enemy, and also possibly as a method of regulating neutral trade through a system of passes.[2]

Neutral vessels were also required to equip themselves with ship warrants, which were granted upon covenants, *inter alia*, not to engage in contraband trading, to search the ship for smuggled contraband, etc. In the absence of a ship warrant, " navicerts " might be refused, and bunkering and other facilities at Allied ports withheld.

By the system of " navicerts " and ship warrants, British authorities were able *inter alia* to police the smuggling of small contraband objects or articles,[3] the employment of undesirable seamen, and the transport of technicians who might assist the enemy war effort.

Consequences of Carriage of Contraband ; Condemnation by Prize Courts

Contraband is, in the circumstances mentioned above, liable to seizure, and under certain conditions even the vessel carrying the contraband cargo is liable to seizure. Seizure by a belligerent is admissible only in the open sea or in the belligerent's own territorial waters; seizure in neutral territorial waters would be a violation of neutrality.

According to British and Continental practice, the right of a belligerent State to seize contraband cargoes or vessels carrying them is not an absolute one but requires confirmation by the adjudication of a Prize Court established by that State.

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[1] The right of retaliation by a belligerent for a violation of international law by the enemy is a right of the belligerent, not a concession by the neutral. Cf. as to reprisals, as a justification for extensions of the doctrine of contraband, Medlicott, *op. cit.*, Vol. I at p. 9.

[2] The statistics 1943–1945 show that at least 25 per cent of applications for " navicerts " were refused.

[3] " Navicerts " were refused and ship warrants withdrawn if precautions were not taken by the shipping company and masters concerned to prevent such smuggling.

The origin of Prize Courts and of Prize Law goes back to the Middle Ages when there were frequent captures of piratical vessels. In England, for example, the Court of Admiralty would inquire into the authority of the captor and into the nationality of the captured vessel and of the owners of her goods. This practice was extended to captures made in time of war and it gradually became a recognised customary rule of international law that in time of war the maritime belligerents should be obliged to set up Courts to decide whether captures were lawful or not. These Courts were called Prize Courts. They are not international Courts but municipal Courts, although they apply international law largely. Every State is bound by international law to enact only such regulations, or statutes, to govern the operation of Prize Courts, as are in conformity with international law.

The structure of Prize Courts varies in different countries. In certain States, Prize Courts are mixed bodies consisting of Judges and administrative officials, but in the British Empire and the United States they are exclusively judicial tribunals.

If the Prize Court upholds the legitimacy of the seizure, the cargo or vessel is declared to be "good prize" and to be confiscated to the captor's State. The decree of condemnation is accompanied by an order for sale under which the purchaser acquires a title internationally valid. Thenceforward, what becomes of the prize is no concern of international law, but is solely a matter for municipal law to determine.

Seized ships or goods in the custody of the Prize Court pending a decision as to their condemnation or release, may be requisitioned subject to certain limitations, one of which is that there is a real issue to be tried as to the question of condemnation.

For the law and procedure followed in British Prize Courts the reader is referred to standard works, such as Colombos, *The Law of Prize*.

Blockade

The law as to blockade represents a further restriction on the freedom of neutral States to trade with belligerents.

A blockade occurs when a belligerent bars access to the enemy coast or part of it for the purpose of preventing ingress or egress of vessels or aircraft of all nations. The blockade is an act of war, and if duly carried out in accordance with the rules of warfare, is effective to deny freedom of passage to the shipping or aircraft of other States. Under the Declaration of Paris, 1856, which is declaratory of prior customary international law, a blockade is binding only if effective, and the effectiveness of a blockade is conditioned by the maintenance of such a force by the belligerent as is " sufficient really to prevent access to the enemy coast ".

Ships which break a blockade by entering or leaving the blockaded area are liable to seizure by the belligerent operating the blockade in the same way as contraband cargoes, and after capture must be sent to a port for adjudication on their character as lawful prize. Generally, the cargoes carried by such ships will also suffer condemnation by a Prize Court unless those who shipped the goods prove to the Court's satisfaction that the shipment was made before they knew or could have known of the blockade.

The practice of States varies greatly as to what is deemed to constitute a breach of blockade. For instance, practice is not uniform on the point whether a neutral vessel must have actual formal notice of the blockade. According to Anglo-American juristic opinion and practice, it is sufficient to establish presumptively that those in charge of the neutral vessel knew that a blockade had been established. The commander of a neutral vessel who sails for an enemy port knowing that it is blockaded at the beginning of the voyage ought to expect that it will be in the same state when he arrives in the vicinity of the port; and anything which can be proved to affect him with knowledge at the date of departure, for example, publication of a declaration of blockade, will render the vessel and its cargo liable to the penalties for breach of blockade. According to the French theory, the neutral vessel is not affected by presumptions as to continuance or cesser of blockade, but the commander of the vessel on approaching the blockaded area is entitled to individual warning from one of the blockading

squadrons, the fact of the notification being entered in the vessel's log-book with specific mention of the hour, date, and place of notification. It is only for subsequent attempts to enter the blockaded area that the neutral vessel is liable to seizure.

Apart from the matter of actual or constructive notice to neutral vessels, it is an established rule of international law that a blockade must be properly declared and notified to neutral States with a specific statement as to the date when the blockade begins and the geographical limits of the coastline to which access is barred. Secondly, in accordance with the rule of effectiveness, the blockade must be maintained by a sufficient and properly disposed force, rendering ingress or egress by other vessels a matter of material danger. This principle is supported by authoritative British judicial pronouncements. Thus Dr. Lushington declared in *The Franciska*[1] that:—

> ". . . (the blockaded place) must be watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, the force must be sufficient to render the capture of vessels attempting to go in or come out most probable ".

Similarly, Lord Chief Justice Cockburn stated in *Geipel* v. *Smith*[2]:—

> " In the eye of the law, a blockade is effective if the enemies, ships are in such numbers and position as to render running the blockade a matter of danger, although some vessels may succeed in getting through ".

The size of the blockading force and the distance at which it operates from the blockaded coast are alike immaterial, provided this test of danger to neutral vessels be satisfied. Thus in the Crimean War in 1854, a single British cruiser commanding the one navigable approach to the Russian port of Riga at a distance of one hundred and twenty miles was deemed sufficient to constitute a blockade of the port. United States judicial decisions and practice are to the same effect as the British authorities.

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[1] (1855), 2 Ecc., & Ad., 113 at 120.
[2] (1872), L.R. 7 Q.B. 404, at p. 410.

In the First World War, the British Navy enforced a " long-distance " blockade of Germany through ships and squadrons operating often more than one thousand miles from German ports. The objections raised to this type of blockade were that it extended across the approaches to the ports and coastline of neighbouring neutral countries and that it was in many respects ineffective. It was first instituted in 1915 as a reprisal for the German decision to attack British and Allied merchantmen in the waters surrounding the British Isles without regard for the personal safety of the passengers or crew. Under British Orders-in-Council, neutral vessels carrying goods of presumed enemy destination, origin, or ownership could be required to proceed to a British port to discharge their cargoes, and might be forbidden to move to a German port. If neutral vessels under colour of permission to proceed to a neutral port, sailed for a German port, they were liable to seizure and condemnation if subsequently caught. Such a blockade was probably not justified according to the rules followed in the nineteenth century, either as a retaliatory measure or as a blockade in the strict sense of that term. The British Government, however, justified the " long-distance " blockade of Germany by reference to the changed conditions of war, stating that a modern blockade could only be effective by covering commerce with the enemy passing through neutral ports.[1] The " long-distance " blockade was re-instituted in 1939 in the Second World War, and its rational justification[2] was likewise the necessity for waging " total " economic warfare against the enemy. In both wars, France took action similar to that of Great Britain. Without Great Britain's predominant naval power in relation to the enemy, the blockade could not have been enforced.

Belligerent Right of Visit and Search

Co-extensive with the right of seizing contraband or of capturing ships in breach of blockade, belligerents have by

[1] Medlicott, *op. cit.*, Vol. I at p. 4, has pointed out that the traditional blockade presupposed " naval action close to an enemy's coasts ", and had " little relevance to a war in which modern artillery, mines, and submarines made such action impossible, and in which the enemy was so placed geographically that he could use adjacent neutral ports as a channel for supplies ".

[2] Apart from the ground of reprisals for illegal enemy activities.

long established custom the right to visit and search neutral vessels on the high seas in order to determine the nature of the cargo and to check the destination and neutral character of the vessel. This right must be exercised so as to cause neutral vessels the least possible inconvenience. If suspicious circumstances are disclosed in the case of a particular neutral vessel,[1] that vessel may be taken into port for more extensive inquiry and if necessary for adjudication before a Prize Court.

Formerly the right of visit and search was qualified by severe restrictions, designed to protect neutrals from unnecessary or burdensome interference with their commerce. In both the First and Second World Wars, the exigencies of " total war " caused belligerents to disregard these limitations. Contrary to the rules that search should precede capture and that it should generally not go further than an examination of the ship's papers and crew and cursory inspection of the cargo, neutral vessels could be required to call at contraband-control bases,[2] or if intercepted on the high seas might be sent to port for thorough searching even in the absence of suspicious circumstances, considerable delays occurring while the vessels were so detained. On the British side, this practice of searching in port instead of on the high seas was justified on three main grounds:—(*a*) the growth in size of modern cargo vessels, rendering concealment easier and a thorough search more lengthy and difficult; (*b*) the danger from submarines while the search was being conducted; (*c*) the need for considering the circumstances of the shipment in conjunction with civilian authorities, for example, of the Ministry of Economic Warfare. Several international law purists criticised the British defence of the practice, but the overpowering circumstances which rendered the practice necessary could not be gainsaid.

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[1] There is a right to *detain*, in addition to visiting and searching, provided that there are reasonable grounds for suspicion, appearing in connection with the search; see *The Mim*, [1947] P. 115.

[2] See Medlicott, *op. cit.*, Vol. II at p. 154. Search would also include the examination of mail, and ascertaining whether any passengers possibly useful to the enemy, e.g. technicians, were being transported.

This inconvenience to neutral vessels could, for all practical purposes, be avoided by obtaining a " navicert ".[1]

Economic Warfare and Quasi-Neutrals

Generally speaking, in the absence of a specific agreement that belligerent rights shall be applicable to a non-war armed conflict, a contestant cannot, in regard to quasi-neutrals, resort to contraband interception or to blockade. Yet in the course of the India–Pakistan conflict, in September, 1966, measures closely resembling blockade were adopted, although not recognised as such by third States, save to the extent of making arrangements to overcome difficulties as to the passage of their shipping.[2]

However, apart from matters of contraband or blockade, contestants can have recourse to any means of economic pressure, notwithstanding that this may cause damage or inconvenience to quasi-neutrals, although there is possibly a duty to minimise the damage or inconvenience as far as possible.

Where the conflict is one subject to the peace enforcement jurisdiction of the United Nations Security Council, quasi-neutrals, whether Member States of the United Nations or not, must submit to any measures of economic warfare[3] decided by the Security Council, although if they find themselves affected by special economic problems arising out of the action taken by the Security Council, they may consult that body regarding a solution of such problems (see Article 50 of the United Nations Charter). United Nations " peacekeeping " operations (see Chapter 19, *post*), raise very different considerations, as here we are in the area primarily of General Assembly recommendations, which leave room for States to opt in, or out of support for economic measures in aid of " peacekeeping ".

[1] See above pp. 553–554.

[2] As to the coastal control operated by the French Government 1956–59 (of the nature of a quasi-blockade), with regard to the Algerian Conflict, see R. Pinto, Hague *Recueil des Cours*, 1965, Vol. I, pp. 546–548. In the course of the " incursion " into Cambodia (Khmer Republic) in May, 1970, United States and South Vietnamese warships cut off supply routes by sea to a stretch of the Cambodian coastline in what appeared to be a partial blockade; however, the existence of a blockade was officially denied.

[3] This could include the " complete or partial interruption of economic relations " (see Article 41 of the Charter).

PART 6

INTERNATIONAL INSTITUTIONS

CHAPTER 19

INTERNATIONAL INSTITUTIONS

1.—THEIR STATUS AND FUNCTIONS AS SUBJECTS OF INTERNATIONAL LAW

As we have seen in a previous chapter,[1] the subjects of international law include not only States, but international institutions such as the United Nations, the International Labour Organisation and similar bodies.[2] The word " institution " is here used in its widest sense as *nomen generalissimum* for the multiplicity of creations for associating States in common enterprises.

Although strictly speaking the structure and working of these bodies and associations are primarily the concern of that department of political science known as international organisation or administration, their activities none the less materially impinge upon the field of international law. It is important to see in what way they come within the range of international law or contribute towards its development.

In the first place, just as the functions of the modern State and the rights, duties, and powers of its instrumentalities are governed by a branch of municipal law called State con-

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[1] See Chapter 3, above, at pp. 70–71.

[2] The expansion in number, and range of duties of international organisations has been enormous since 1900. By 1950, there were, according to a United States official publication, *International Organisations in which the United States Participates* (1950), over 200 international bodies, of which about 60 could be described as major international institutions. Since 1950, the number has materially increased, and must continue to increase. See also *Treaties in Force. A List of Treaties, etc., of the United States in Force on January* 1, 1970 (Department of State, 1970), pp. 259–374, showing the constituent instruments of the major international organisations to which the United States Government is currently a party; this list affords some idea of the wide span of functions discharged by these bodies.

stitutional law, so international institutions are similarly conditioned by a body of rules that may well be described as international constitutional law. These international bodies having important duties to perform on behalf of the international community, whether of a world-wide or regional character, provide that community with its constitutional framework.

This constitutional structure does not follow precisely the same pattern as in the Constitutions of modern States, but there are significant analogies. For instance international institutions perform as organs of the international society a large number of functions which can be classified as executive, legislative, and judicial in the same manner as the functions of modern States. As to international executive functions, it is true that there is no central executive organ with the same degree of authority over the international community as any Government wields over a modern State, but the administrative powers that would have been vested in such a central international body if it had existed, are possessed cumulatively by and distributed over a number of international institutions, each with separate and different responsibilities; for example, the executive function of enforcing world peace belongs to the United Nations, the supervision of world labour conditions is a special power of the International Labour Organisation (ILO), and the improvement of world education and learning is a particular duty of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). If these individual responsibilities were discharged *in toto* by one instead of by several international bodies, the world would possess the organic counterpart of the executive in a modern State.

With regard to international legislative functions these are performed on a limited scale by several organs, including the United Nations General Assembly, the International Labour Conference, and the World Health Assembly. To a similarly restricted extent, international judicial functions are vested in the International Court of Justice, and can be vested in other international tribunals.

However, there is no such thing as a separation of powers under the Constitutions of most international institutions,

which may, through their organs,[1] exercise legislative or judicial, or quasi-legislative or quasi-judicial powers, in the same way as they carry out administrative or executive functions. Nor are certain international institutions executive organs in the strict sense, being merely consultative and advisory only.

Varied indeed may be the legal structure of these organisations; true corporate entities, collectivities of States functioning through organs taking decisions,[2] and loose associations meeting only in periodical conferences, sometimes largely hingeing on an element of continuity represented by a secretariat or secretarial Bureau.[3]

Besides, there are three important general points to be noted:—(1) The functions of certain international institutions may be directed primarily to inspiring co-operation between States, i.e., so-called "*promotional*" activities, and only in a secondary degree to the carrying out directly of any necessary duties, i.e., so-called "*operational*" activities. Thus the Food and Agriculture Organisation of the United Nations (FAO) and the World Health Organisation (WHO) are much more "promotional" than "operational" bodies. (2) Even so far as they are "operational", international institutions are as a rule empowered only to investigate or recommend, rather than to make binding decisions. (3) In most instances, international institutions are but little removed from an international conference, in the sense that any corporate or organic decision depends ultimately on a majority decision of the Member States, i.e., the agreement of the corporators.[4] Most international institutions are keyed not so much to the taking of

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[1] For instance, the Commission of the European Economic Community (Common Market) under the Treaty of Rome of March 25, 1957, establishing the Community, exercises at the same time, regulatory, quasi-judicial, and administrative powers.

[2] See classification in *South West Africa Cases, 2nd Phase*, I.C.J. Reports, 1966, 6, at p. 30.

[3] *E.g.*, the Hague Conference on Private International Law.

[4] It is a question of construction of the relevant instruments or treaties whether the corporators (*i.e.*, the member States) are entitled to exercise any powers appertaining to the institution, or whether this is a matter of organic or institutional action only; *South West Africa Cases, 2nd Phase*, I.C.J. Reports, 1966, 6, at p. 29.

binding executive decisions, as to the making of non-mandatory recommendations for the guidance of their organs, and of their member States.

Apart from the law and practice (based on their Constitutions and on general principles of international law) of such bodies, there is another direction in which international institutions may influence the development of international law. In the past, when States were almost exclusively the subjects of the law of nations, the traditional body of international law developed through custom, treaty, and arbitral decisions as the product of the relations of States *inter se*. But international institutions, as subjects of international law, can have relations not only between themselves, but also with other subjects, including States, so that in addition to the relations between States, we have the two following kinds of relations that can lead to the formation of new rules of international law:— (1) relations between States and international institutions; and (2) relations between international institutions themselves. Already there have been significant instances of rules evolving from these two relations. As to (1), relations between States and international institutions, in 1948, for example, there arose the question whether in respect of injuries suffered by its agents in Palestine (including the assassination of Count Folke Bernadotte, United Nations Mediator), the United Nations could claim compensation as against a *de jure* or *de facto* Government, even if not a Government of a Member State of the organisation, for the damage to itself through such injuries. Pursuant to a request for an advisory opinion on this point, the International Court of Justice decided in 1949 that the United Nations as an international institution was entitled to bring such a claim.[1] With regard to (2), relations of international institutions *inter se*, the practice of these bodies in concluding agreements with each other is materially affecting the rules of law and procedure concerning international transactions.

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[1] See *Advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949), 174.

That is quite apart, too, from the relations between international institutions and individuals, which, as in the case of relations between States and individuals, already foreshadow the growth of important new principles of international law. An illustration is to be found in the Advisory Opinion, just mentioned, of the International Court of Justice, where the Court had to consider whether the United Nations, in addition to suing for compensation for the damage to itself through injuries suffered by its agents, could also recover damages for the actual loss or harm caused to such agents, or to the persons (for example, relatives) entitled through them to compensation. In effect, the question was whether the United Nations could espouse the claims of its agents in the same way as States, under the rules of State responsibility for international delinquencies, can sponsor claims by their nationals. This involved reconciling the dual position of agents of the United Nations, as servants on the one hand of the Organisation, and as nationals on the other hand entitled to the diplomatic protection of their own States. The solution adopted by the majority of the Court was that the United Nations was entitled to bring such a claim, inasmuch as its right to do so was founded on the official status of its agents irrespective of their nationality, and was therefore not inconsistent with the agents' privilege of receiving diplomatic protection from their own States.[1]

One general consideration needs to be stressed. The true nature and purpose of present-day international institutions cannot be understood unless we realise that these bodies represent one kind of instrumentality whereby States are associated in a common purpose of improving human welfare.[2]

Finally reference should be made to the regional international institutions, the purposes of which are largely integrative and functional, such as the European Economic Community (EEC, the Common Market). These would require a study in themselves, to such an extent do they constitute

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[1] I.C.J. Reports (1949), at pp. 184–186.

[2] Indeed, the whole field of action of international institutions has become dominated in the last decade by the aspect of aid and technical assistance to less-developed countries.

novel precedents in the law of international organisations. Nor are they necessarily limited in their scope to the region or community which is being integrated; their ramifications may extend further through " association " Conventions, as, e.g., the Yaoundé Convention, July 20, 1963, associating the EEC with certain African States.

2.—General Legal Nature and Constitutional Structure

Functions and Legal Capacity

International institutions are defined by reference to their legal functions and responsibilities, each such institution having its own limited field of activity. The Constitutions of these bodies usually set out their purposes, objects, and powers in special clauses. For example, Article 1 of the United Nations Charter (signed June 26, 1945) defines the " Purposes " of the United Nations under four heads, of which two in particular are the maintenance of international peace and security, and the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Similarly the Constitutions of other international bodies, for example, of the International Labour Organisation (see Preamble and Article 1 referring to the " objects " of the Organisation), and of the Food and Agriculture Organisation of the United Nations (see Preamble and Article 1 referring to the Organisation's " Functions "), contain provisions defining their special objects and responsibilities.

The definition in each Constitution of the international body's particular field of activity is analogous to the " objects " clause in the memorandum of association of a limited company under British Companies legislation. In both cases, the corporate powers of the international institution on the one hand and of the limited company on the other, are determined by the statement of functions or objects. The analogy can be carried further inasmuch as the recent practice in the Constitutions of international organs of defining the " objects " in as general and comprehensive a manner as possible resembles

the present-day methods of company lawyers in drafting " objects " clauses in very wide terms to preclude any doubts later arising as to the legal capacity of the company concerned.

As international institutions are defined and limited by their constitutional powers, they differ basically from States as subjects of international law. In their case, problems such as those raised by the sovereignty or jurisdiction of States cannot arise, or at least cannot arise in the same way. Almost every activity is *prima facie* within the competence of a State under international law, whereas practically the opposite principle applies to an international organ, namely, that any function, not within the express terms of its Constitution, is *prima facie* outside its powers. As the International Court of Justice has said referring to the United Nations[1]:—

> " Whereas a State possesses the totality of international rights and duties recognised by international law, the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice ".

Thus no international body can legally overstep its constitutional powers. For example, the International Labour Organisation cannot constitutionally purport to exercise the peace enforcement functions of the United Nations Security Council, and order (say) a cease-fire in the event of hostilities between certain States.

Besides its express powers, an international organ may have under its Constitution such functions as " are conferred upon it by necessary implication as being essential to the performance of its duties ".[2] Thus in the Advisory Opinion mentioned above, the majority of the International Court of Justice held that by implication from its Charter, the United Nations had the power of exercising diplomatic protection over its agents, and could therefore sponsor claims on behalf of such agents against Governments for injuries received in the course of

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[1] I.C.J. Reports (1949), at p. 180.

[2] I.C.J. Reports (1949), at p. 182, following the Permanent Court on this point.

their official duties. In a later Advisory Opinion,[1] the Court held that the United Nations General Assembly had implied power to create a judicial or administrative tribunal, which might give judgments binding the General Assembly itself.

In relation to the corporate nature of international bodies, the question arises whether they possess legal personality:—(*a*) at international law; and (*b*) at municipal law.

In the case of the League of Nations, although the Covenant did not expressly confer juridical personality, the general view was that the League had both international and municipal legal personality. This was based partly on the principle that such personality was implicitly necessary for the efficient performance by the League of its functions, and partly on its practice in repeatedly acting as a corporate person, for example concluding agreements with the Swiss Government, taking over property and funds, etc.

The Constitution of the League's present successor—the United Nations—likewise contained no express provision as to legal personality, the draftsmen assuming that this was more or less implicit from the context of the Charter taken as a whole. It was however provided in Article 104 of the Charter that the United Nations should enjoy in the territory of each of its Members " such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes ". Subsequently in February, 1946, the United Nations General Assembly approved a Convention on the Privileges and Immunities of the United Nations which by Article 1 provided that the United Nations should possess " juridical personality " and have the capacity to contract, to

[1] See *Advisory Opinion on Effect of Awards made by the United Nations Administrative Tribunal*, I.C.J. Reports (1954), 47. The United Nations has, *semble*, also implied power:—(1) To undertake the temporary administration of territory, as part of a peaceful settlement of a dispute between two States, and with their consent; cf. the assumption of temporary administration of West New Guinea 1962–1963 by the United Nations Temporary Executive Authority (UNTEA) under the Indonesia–Netherlands Agreement of August 15, 1962. (2) To borrow money by way of bonds or other securities for its purposes under the Charter; cf. the General Assembly Resolution of December 20, 1961, authorising the issue of United Nations bonds to a total of 200 million dollars.

acquire and dispose of immovable and movable property, and to institute legal proceedings. The Convention was followed by legislation in several States, but according to the municipal law of certain countries,[1] under the Convention in conjunction with Article 104 of the Charter, the United Nations would probably be regarded as having legal personality even without such legislation. In this way, the municipal legal personality of the United Nations may be considered well-established. As to the organisation's international legal personality, the International Court of Justice in its Advisory Opinion mentioned above, on the right of the United Nations to claim compensation for injuries to its agents, decided that the United Nations is an international legal person, having such status even in its relations with non-Member States.[2]

Apart from the United Nations Charter, the Constitutions of other international institutions, both general and regional,[3] contain provisions similar to Article 104 of the Charter or to Article 1 of the Convention on the Privileges and Immunities of the United Nations (see, for example, Article 39 of the Constitution of the International Labour Organisation, Article XV (1) of the Constitution of the Food and Agriculture Organisation of the United Nations, and Article IV (1) of the Articles of Agreement of the International Monetary Fund). In accordance with the Advisory Opinion of the International Court of Justice, mentioned above, the majority of these institutions would be deemed to possess international legal personality. As to municipal legal personality, however, the various provisions in their Constitutions reflect no coherent doctrine as to how such personality is to be recognised at municipal law. For instance, Article 47 of the International Civil Aviation Convention of 1944, dealing with the legal capacity of the

[1] As to whether Article 104 is "self-executing" in the United States, see above, p. 92 n. 1.

[2] I.C.J. Reports (1949), pp. 179–180.

[3] See, as to the European Economic Community (Common Market) Articles 210–211 of the Treaty of Rome of March 25, 1957, establishing the Community.

International Civil Aviation Organisation (ICAO) provides that:—

> " The Organisation shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the Constitution and laws of the State concerned ".

This formula seems to leave States parties free to grant or withhold the privilege of legal personality if their municipal law so permits, whereas the corresponding provisions in most other Constitutions of international bodies bind States members fully to recognise such personality.

Classification

It is difficult to suggest a satisfactory classification of international institutions.

Classification of such bodies according to functions, for example as economic, political, social, etc., or even as judicial, legislative, and administrative, leads to difficulty owing to the overlapping of their responsibilities.

The possible distinction between:—(*a*) global or world-wide bodies, for example, the United Nations and the International Civil Aviation Organisation (ICAO), and (*b*) regional bodies, for example, the South Pacific Commission, and the Council of Europe, will become less important in time, because of the general tendency of global bodies to establish their own regional organs or regional associations.

A suggested distinction is that of international institutions into those which are *supra-national* and those which are not. A *supra-national* body is generally considered to be one which has power to take decisions, directly binding upon individuals, institutions, and enterprises, as well as upon the Governments of the States in which they are situated, and which they must carry out notwithstanding the wishes of such Governments. The European Coal and Steel Community, created by the Treaty of April 18, 1951, is regarded as such a supra-national body, inasmuch as it may exercise direct powers of this nature in regard to coal, iron, and steel in the territories of its Member

States. So also is the European Economic Community (Common Market), established by the Treaty of Rome of March 25, 1957. International bodies, not of the supra-national type, can only act, or execute decisions by or through Member States. The defect in this classification resides in the fact that the word " supra-national " is one which lends itself so easily to misunderstandings.

Then there is also the special category of international public corporations, controlled by Governments, as shareholders, or otherwise. These differ from the usual type of international organisations insofar as they are corporations governed by the municipal law of the place where their headquarters are situated, as well as by the Conventions establishing them. An illustration is the European Company for the Chemical Processing of Irradiated Fuels (EUROCHEMIC) established under the Convention of December 20, 1957.

Co-ordination of International Institutions

The draftsmen both of the League of Nations Covenant and of the United Nations Charter attempted to solve the problem of integrating international institutions and co-ordinating their working. Their purpose was a highly practical one, to ensure that these bodies should function as an organic whole, instead of as a group of dispersed and isolated agencies.

Under Article 24 of the Covenant, it was provided that there should be placed under the direction of the League all international bureaux already established by general treaties, provided that the parties to such treaties consented, as well as all such international bureaux and all commissions for the regulation of matters of international interest thereafter constituted. These provisions, for various reasons, resulted in only six international bodies, including the International Air Navigation Commission and the International Hydrographic Bureau being placed under the direction of the League. Of course, apart from these six institutions, there was co-ordination between the League of Nations and the International Labour Organisation up to the date of the League's dissolution by

reason of the following:—(i) organic connection, members of the League for example being *ipso facto* members of the International Labour Organisation; (ii) a common budget; (iii) the vesting of certain functions of the International Labour Organisation in the Secretary-General of the League, for example custody of the original texts of International Labour Conventions; and (iv) actual co-operation between the two bodies in investigating certain economic and social problems.

More concrete and detailed provisions for the co-ordination of international bodies were included in the United Nations Charter. Their effect may be summarised as follows:—(*a*) The international institutions described as " the various *specialised agencies*,[1] established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields ", were to be brought into relationship with the United Nations through agreements entered into between these institutions and the United Nations Economic and Social Council, such agreements to be approved by the United Nations General Assembly and by each such institution (Articles 57 and 63, paragraph 1, of the Charter). (*b*) The United Nations Economic and Social Council was empowered to co-ordinate the activities of the international institutions entering into such agreements through consultation with and recommendations made to them, and through recommendations made to the General Assembly and Member States of the United Nations (Article 63, paragraph 2). (*c*) The United Nations, through its organs, was to make further recommendations for co-ordinating the policies and activities of these institutions (Article 58). (*d*) Regular reports and observations thereon were to be obtained from these institutions through the Economic and Social Council in order mainly to ensure that they were giving effect to the

[1] It should be noted that the language of Article 57 seems somewhat narrower than the corresponding provisions of Article 24 of the League of Nations Covenant, and does not cover all organs carrying on any kind of international activity.

recommendations made to them (Article 64). (*e*) The Economic and Social Council was empowered to arrange for reciprocal representation between it and the " specialised agencies " at their respective meetings (Article 70).

Parallel provisions for co-ordination are also to be found in the Constitutions of other international bodies, both of the " specialised agencies " and of institutions not in this category, including provisions for relationship with the United Nations, for common personnel arrangements, and for common or mutual representation.[1]

Through the application in practice of these provisions the net of co-ordination has been cast not only wider, but deeper. The " specialised agencies "—the name applied to the bodies brought or to be brought into relationship with the United Nations—have become for all practical purposes major operating arms of the United Nations, or to use a striking phrase in one official report, its " specialised organisational tools ".[2] Further, through its Economic and Social Council, the United Nations has been able to make continuous scrutiny of the activities of the " specialised agencies " to ensure that they function with some kind of organic unity.

Co-ordination and co-operation are also provided for by inter-organisation agreements, consisting of:—(1) Relationship agreements between the United Nations and the specialised agencies under Articles 57 and 63 of the Charter. (2) Agreements between the specialised agencies themselves. (3) Agreements between a specialised agency and a regional organisation (for example, that between the International Labour Organisation and the Organisation of American

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[1] E.g., co-operative relations between the Organisation of American States (OAS) and the United Nations are provided for in the Charter of the former, and the Treaty of Rome of March 25, 1957, establishing the European Economic Community (Common Market) provides that the Community may conclude agreements with international organisations, creating an association for joint action, etc. (see Article 238).

[2] Report of President of the United States to Congress on the United Nations, 1948, p. 12. Although not a specialised agency, the International Atomic Energy Agency (IAEA) has also been brought into working relationship with the United Nations, and with specialised agencies having a particular interest in atomic energy, by special agreements with these institutions.

States). (4) Agreements between regional organisations. Category (1) of the relationship agreements between the United Nations and specialised agencies contain elaborate provisions in a more or less common form for:—(*a*) reciprocal representation at their respective meetings; (*b*) enabling United Nations organs and the specialised agencies to place items on each other's agenda: (*c*) the reciprocal exchange of information and documents; (*d*) uniformity of staff arrangements under common methods and procedure; (*e*) consideration by the specialised agencies of recommendations made to them by the United Nations and for reports by them on the action taken to give effect to these recommendations; (*f*) uniformity of financial and budget arrangements; (*g*) undertakings by each specialised agency to assist the United Nations General Assembly and Security Council in carrying out their decisions; and (*h*) obtaining Advisory Opinions from the International Court of Justice with regard to matters arising within the scope of the activities of each specialised agency.[1]

It is true that besides the bodies with which the United Nations has entered into relationship as specialised agencies, there are numerous other international institutions that have not been integrated into the one general system aimed at by the Charter. Where the definition of specialised agencies in Article 57 is wide enough to cover them, these outside international organs will no doubt in due course become the subject of relationship agreements with the United Nations.[2]

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[1] From time to time, also. the United Nations General Assembly and the Economic and Social Council have adopted resolutions designed to make co-ordination more effective, emphasising the necessity of avoiding duplication of effort, and calling for a greater concentration of effort on programmes demanding priority of effort, with particular reference, recently, to economic, social, and human rights activities.

[2] International, regional, and national *non-Governmental* organisations, also, may collaborate on a *consultative* basis with the Economic and Social Council under Article 71 of the United Nations Charter. The Council has granted to certain such bodies "consultative status" in categories I and II respectively. Those of category I status may propose items for inclusion in the provisional agenda of the Council and its commissions. The Council may, besides, consult *ad hoc* with certain non-Governmental bodies, not enjoying category I or category II status, but which are on the Council's Roster. All such bodies may send observers to meetings, and may consult with the United Nations Secretariat.

There is a committee of the Economic and Social Council known as the Committee on Negotiations with Inter-Governmental Agencies which, if necessary, can act upon the specific instructions of the Council, directing it to negotiate with specific international organisations determined by the Council.

The Economic and Social Council, with its Co-ordination Committee, has a primary responsibility by consultation and other action for maintaining co-ordination, particularly in the economic, social, and human rights fields. But there is also a special organ known as the Administrative Committee on Co-ordination, which was established pursuant to a resolution of the Council, composed of the Secretary-General of the United Nations, the executive heads of the specialised agencies, and the Director-General of the International Atomic Energy Agency (IAEA), with the following duties, *inter alia:*—The taking of appropriate measures to ensure the fullest and most effective implementation of the agreements between the United Nations and related agencies, the avoidance of duplication or overlapping of their respective activities, ensuring consultation on matters of common interest, the consideration of possibilities of concerted action, and the solution of inter-agency problems. The executive heads of the various programmes and separate organisations within the United Nations system also participate fully in the proceedings of the Administrative Committee on Co-ordination. Within the framework of this Committee, which is itself assisted by a Preparatory Committee, there are also inter-agency consultative committees, such as the Consultative Committee for Public Information, and technical working groups on different aspects. Aided by these organs,[1] the specialised agencies have followed the general practice of co-operating in common fields of activity. There is frequent inter-agency consultation, particularly as most specialised agencies have adopted rules providing for prior consultation before taking action in matters of common concern to each other.

[1] Other co-ordinating bodies are:—(*a*) The Advisory Committee on Administrative and Budgetary Questions appointed by the General Assembly. (*b*) The Inter-Agency Consultative Board. (*c*) The International Civil Service Advisory Board dealing with common administration policies. (*d*) The Joint Panel of External Auditors.

The specialised agencies are entitled to attend meetings of the Economic and Social Council and of its subsidiary organs, and to make statements at such meetings.

On August 3, 1962, the Economic and Social Council set up a Special Committee on Co-ordination with the following principal duties:—(*a*) to keep under review the activities of the United Nations family in the economic, social, human rights, and development fields, and to consider priority areas or projects related to the objectives of the United Nations Development Decade (for the period 1962–1972), and to submit recommendations on these matters to the Council; (*b*) to study the reports of the Administrative Committee on Co-ordination, appropriate reports of the United Nations organs, the annual reports of agencies in the United Nations family, and other relevant documents, and to submit its conclusions to the Council in the form of a concise statement of the issues and problems in the domain of co-ordination arising from these documents, which call for special attention by the Council. This Special Committee, whose name was changed in 1966 to that of the " Committee for Programme and Co-ordination " has held joint meetings with the Administrative Committee on Co-ordination and the Advisory Committee on Administrative and Budgetary Questions. By resolution of January 13, 1970, the Council reconstituted the Committee for Programme and Co-ordination to perform wider programming, reviewing, and co-ordinating functions as to the activities of the United Nations family in economic and social fields, and enlarged the Committee to a membership of twenty-one (formerly sixteen).

Organic Structure and Composition

The organic structure and composition of the specialised agencies and other international bodies vary in the case of each institution. Nevertheless, they have some features in common:—

(1) **Constitutional Seat or Headquarters.**—The Constitutions of international institutions usually fix the location of the headquarters, but this is sometimes left for later decision by the Member States.

(2) **Membership.**—The Constitution usually provides that original signatories may become members upon ratification or acceptance of the instrument, while other States may become members upon admission by a special majority vote of the competent organs of the particular international body concerned. Where a clause in a Constitution defines the conditions under which such other States may be admitted to membership, it is imperative, according to the International Court of Justice,[1] that such conditions be strictly adhered to. Under certain Constitutions of the specialised agencies (for example, the Constitution of the United Nations Educational, Scientific and Cultural Organisation, UNESCO) the privilege of admission to membership on acceptance of the Constitution is allowed to Member States of the United Nations. In the case of certain specialised agencies, too, for example, the World Health Organisation (WHO) and the International Telecommunication Union (ITU), territories or groups of territories may be admitted to " associate membership ", a status which entitles them to participation in the benefits of the organisation, without voting rights or the right to become member of an executive organ. Under the Constitution of the International Labour Organisation (ILO), territories may be represented at the International Labour Conference by or through advisers appointed to the delegation of the Member State responsible for the territory or territories concerned.

(3) **Conditions of Withdrawal by, or Expulsion and Suspension of, Members.**—There is no uniform or coherent practice in this matter. Most usually members are allowed to give a twelve months' written notice of intention to withdraw; but the provisions of the Constitutions vary as to the minimum period of time following admission to membership, when notice may be given; and as to whether the effectiveness of the notice depends upon the prior performance of financial or other obligations. As regards expulsion of members for failure to fulfil obligations, less value is attached to this as a disciplinary measure than before the last War; the modern tendency is to

[1] See I.C.J. Reports (1948), at pp. 61 *et seq.*

make no provision for expulsion, but to allow suspension of a member's privileges, including voting rights, for default in financial or other obligations, until these obligations are met.

(4) **Organs.**—Here, there is a necessary distinction between *principal organs*, and *regional* and *subsidiary organs*.

The standard *principal organs* consist of:—

(*a*) A policy-making body known usually as an " Assembly " or " Congress ", representative of all Member States, with power to supervise the working of the organisation, and to control its budget, and, more frequently, also with power to adopt Conventions and other measures, and to make recommendations for national legislation (for example, the Assembly of the World Health Organisation, WHO). Variations may occur in the frequency of sessions (varying from annual to quinquennial meetings), the number of delegates, the range of this organ's supervisory powers, and the authority which may be delegated to the smaller executive body (see below).

(*b*) A smaller executive body or council, usually elected by the policy-making organ from among the delegates to it, and representative of only a specific number of Member States. Sometimes it is required that the members of this body should be selected so as to be fairly representative of the States of most importance in the specialised field (aviation, shipping and maritime transport, and industrial production) in which the organisation is active; this is so, for instance, with the Council of the International Civil Aviation Organisation (ICAO), the Council of the Inter-Governmental Maritime Consultative Organisation (IMCO), and the Governing Body of the International Labour Organisation (ILO). In other instances, it is required that this body should be fairly representative of all geographical areas, as, for example, with the Executive Council of the Universal Postal Union (UPU). Or, also the members may be chosen from different States, but with primary emphasis on their personal or technical qualifications, as in the case of the Executive Board of the United Nations Educational, Scientific, and Cultural Organisation (UNESCO), and the Executive Committee of the World

Meterological Organisation (WMO). The degree of executive authority of this organ may vary from the level of supreme control in regard to the Member States over a particular subject matter (as in the case of the High Authority of the European Coal and Steel Community, under the Treaty of April 18, 1951), to the level of mere advice and recommendation as in the case of the Council of the Inter-Governmental Maritime Consultative Organisation (IMCO).

(*c*) A Secretariat or international civil service staff. Most constituent instruments of international organisations stipulate that the responsibilities of such staff shall be exclusively international in character, and that they are not to receive instructions from outside authorities. To reinforce this position, such instruments generally contain undertakings by the Member States to respect the international character of the responsibilities of the staff and not to seek to influence any of their nationals belonging to such staff in the discharge of their responsibilities.

As to the international position of members of Secretariats, a serious problem did arise in 1952 and subsequent years with regard to the question of " loyalty " investigations of officials by the Government of the country of which they were nationals. Although such personnel should abide by the laws of their country of nationality, particularly if the headquarters of the institution be situated in that country, it is open to question whether they should be liable to dismissal or other injurious consequences for refusing legitimately on grounds of privilege to answer questions by commissions of inquiry regarding their loyalty to their country, and their alleged involvement in subversive activities previously, or while engaged upon their international responsibilities.[1] These are matters which require definition by international Convention.

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[1] In November, 1952, the Secretary-General of the United Nations sought the opinion of a special committee of jurists on this question and related aspects. The opinion given, while emphasising the necessity for independence of the staff of the Secretariat, was none the less to the effect that a refusal to answer such questions on grounds of privilege created a suspicion of guilt

(*Continued*)

Regional and Subsidiary Organs.—These have been created with relative freedom, thus accentuating the tendency towards decentralisation in modern international institutions. Instances of this flexibility of approach are:—(1) Regional conferences, for example, of the International Labour Organisation (ILO), or regional councils, for example of the Food and Agriculture Organisation of the United Nations (FAO). (2) The appointment of advisory or consultative committees, either generally or for particular subjects (for example, the Consultative Committees of the International Telecommunication Union, ITU). (3) The establishment of so-called *functional* commissions or committees, dealing with specialised fields of action (for example, the Functional Commissions of the United Nations Economic and Social Council, and the special technical Commissions of the World Meteorological Organisation, WMO, dealing with aerology, aeronautical meteorology, etc.) (4) The Administrative Conferences of the International Telecommunication Union, ITU, at which the representatives of private operating agencies may attend. Another manifestation of this flexible devolution of powers is the formation of " working parties ", or of inner groups of States most competent collectively to deal with certain problems within the framework of the organisation; e.g., the " Group of Ten " in the International Monetary Fund, which has met to discuss, *inter alia*, questions of reserves and liquidity (the " Group of Ten " is composed of the United States, the United Kingdom, France, Canada, Sweden, Japan, Western Germany, the Netherlands, Belgium, and Italy, possessing 83 per cent of the monetary world reserves). Lastly, there are " programmes ", such as

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which, in a suitable case, ought to disentitle the employee to remain a Secretariat official. See *United Nations Bulletin* (1952), Vol. 13, pp. 601–3. This opinion was acted upon by the Secretary-General. The United Nations Administrative Tribunal did not, however, give full support to the committee's views; cf. its judgment in *Harris* v. *Secretary-General of the United Nations* (1953). The Administrative Tribunal of the International Labour Organisation held in several cases, that a refusal to answer loyalty interrogatories was not a sufficient ground for declining to renew the appointment of an official of the United Nations Educational Scientific and Cultural Organisation (UNESCO); see, e.g., its judgment in *Duberg's Case* (1955), referred to in another connection by the International Court of Justice in its advisory opinion on the judgments of this tribunal, I.C.J. Reports (1956) 77.

the current United Nations Development Programme, which may operate through a special organ.

(5) **Voting Rights.**—Voting by a majority of members has become the more usual requirement for the adoption of decisions, resolutions, etc., and it is seldom that unanimity is now prescribed. Special systems of " weighted " voting rights are applied in some instances (for example, by the International Bank for Reconstruction and Development, and the International Monetary Fund), the number of votes being calculated upon a scale depending on the amount of financial contributions, or actual shares of capital. To that extent, more recent voting procedure tends " to reflect the power and interests of the subscribing nations, with particular reference to the extent to which individual nations will be affected by the organisation's activities or relied upon to execute its decisions ".[1] For the more important decisions, for example, admission of members, or amendment of the Constitution, a two-thirds majority is the more usual rule. The special voting procedure in the United Nations Security Council is discussed below in this Chapter.[2]

(6) **Reports by Member States.**—The Constitutions of these bodies usually provide for the supervision of reports by Member States on the action taken in fulfilment of their obligations.

(7) **The adoption of Conventions and Recommendations for action by Member States.**—This is discussed below in the present Chapter.[3]

(8) **Budgetary Questions.**—The more usual constitutional provisions are that the Secretary-General or Director-General, or other executive head of the Secretariat, formulates the estimates of future expenditure, that these are reviewed and passed by the policy-making body, subject—in some cases—to intermediate examination by a budgetary committee of that body, and by the executive organ, and that the total amount is apportioned among the Member States in shares determined

[1] *Harvard Law Review* (1948), Vol. 61, at p. 1093, reviewing Koo, *Voting Procedures in International Political Organisations* (1947).
[2] At pp. 607–609.
[3] See below, pp. 586–587.

by the policy-making body. The control by the specialised agencies over financial and budgetary matters is subject to the supervisory and recommendatory powers of the United Nations General Assembly. These powers of the General Assembly are of the most general nature, extending not only to administrative expenses *stricto sensu*, but other expenditure in fulfilling the purposes of the United Nations, including costs incurred by the Secretary-General in connection with any authorised measures to maintain international peace and security,[1] and these may be apportioned among the Member States.[2]

3.—Privileges and Immunities

It is clear that to operate effectively and properly to discharge their functions, international institutions require certain privileges and immunities in each country where they may be located permanently or temporarily. Also the agents and servants, through whom such institutions must work, similarly require such privileges as are reasonably necessary for the performance of their duties. Moreover, in principle, the income and funds of such organisations should be protected from State fiscal impositions.

Obviously, this was a matter that needed to be dealt with by provisions in international Conventions. It could not be left merely for separate solution by the laws and practice of the States participating in each international institution. So far as the United Nations was concerned, it was provided in general terms in Article 105 of the Charter that the Organisation should enjoy in the territory of each Member State such privileges and immunities as were necessary for the fulfilment of its purposes, that representatives of Member States and officials of the Organisation should similarly enjoy such privileges and immunities as were necessary for the independent exercise of their functions in relation to the United Nations, and that the General Assembly might make recommendations or propose

[1] See Advisory Opinion on *Certain Expenses of the United Nations* (*Article* 17, *paragraph* 2 *of the Charter*), *I.C.J. Reports* (1962), 151.

[2] *Financial Support.* The funds of international institutions are provided principally by:—(*a*) contributions from the Member States, equal, or graduated according to population or economic position; (*b*) the earnings or profits of the institution itself.

Conventions for the detailed application of these general provisions. Similar stipulations on this subject were inserted in the various Constitutions of the " specialised agencies ", and in treaties and agreements relative to general and regional[1] international institutions, in some instances in a more specific and more detailed form.

In February, 1946, the General Assembly adopted a Convention on the Privileges and Immunities of the United Nations, providing principally for the following:—(i) immunity of the United Nations' property and assets from legal process except when waived; (ii) inviolability of the Organisation's premises and archives;[2] (iii) freedom from direct taxes and customs duties for its property and assets; (iv) equivalent treatment for its official communications to that accorded by Member States to any Government; (v) special privileges, including immunity from arrest, inviolability of documents, and freedom from aliens' registration for representatives of Member States on organs and conferences of the United Nations; (vi) special privileges for certain United Nations officials of high rank, including the status of diplomatic envoys for the Secretary-General and Assistant Secretaries-General, and special immunities for other officials, for example, from legal process for acts performed or words spoken in their official capacity, from taxation, and from national service obligations; (vii) a *laissez-passer* or special travel document for United Nations officials.

In November, 1947, the General Assembly adopted a Convention for the co-ordination of the privileges and immunities of the specialised agencies with those of the United Nations. This Convention contained similar standard provisions to those mentioned above as being contained in the Convention on the Privileges and Immunities of the United Nations, but it also consisted of separate draft annexes relating to each specialised agency, containing special provisions for privileges

[1] See, e.g., Articles 5–11 of the Agreement on the Status of the North Atlantic Treaty Organisation (NATO), National Representatives, and International Staff of September 20, 1951.

[2] Section 9 of the Agreement of 1947 with the United States for the Headquarters of the United Nations at New York provides for inviolability of the Headquarters area.

and immunities which needed to be made having regard to the particular nature of each specialised agency; for example, the draft annex as to the International Labour Organisation provided for the immunities to be extended to employers' and workers' members of the Governing Body, subject to waiver by the Governing Body itself. Each specialised agency was to be governed by the standard provisions, and was authorised to draw up, in accordance with its own constitutional procedure, a special annex of additional amended privileges based on the draft annex. Under certain of the " protocolary " provisions of the Convention, the full details of which need not concern us, Member States of each specialised agency undertook to apply the standard provisions of the Convention in conjunction with the special provisions of each annex when finally and properly drawn up. This seems a workmanlike, if complicated, solution of a difficult problem.

The related questions of the status of the headquarters (premises and territory) of the United Nations and of the specialised agencies[1] have been regulated by special agreements (including the agreement between the United Nations and the United States of 1947). These agreements reveal the following common general features:—(i) The local laws are to apply within the headquarters district, subject to the application of staff administrative regulations relative to the Secretariat. (ii) The premises and property of the organisation are to be immune from search, requisition, confiscation, etc., and any other form of interference by the local authorities. (iii) Local officials cannot enter except with the consent of the organisation. (iv) The local Government must use due diligence to protect the premises against outside disturbance and unauthorised entry. (v) The headquarters are exempt from local taxes or impositions, except charges for public utility services (for example, water rates). (vi) The organisation enjoys freedom of communication, with immunity from censorship.

Privileges and immunities wider than those provided in the

[1] The International Atomic Energy Agency (IAEA), at Vienna, which is not a specialised agency, entered into a Headquarters Agreement with the Austrian Government on March 1, 1958.

two Conventions (or in municipal legislation) may, as a matter of practice, be granted by States to an international institution. Also, the Constitution of an international institution may contain its own detailed code of provisions as to the privileges and immunities of the institution, and officials thereof (see, for example, the Articles of Agreement of the International Finance Corporation, of May 25, 1955, Article VI, sections 2–11). The matter may, too, be regulated by bilateral agreement (as for example the Agreement of November 27, 1961, between the United Nations and the Congo Republic relating to the privileges and immunities of the United Nations Operation in the Congo and that of February 27, 1964, between the United Nations and Yugoslavia for the 1965 World Population Conference).[1]

Generally speaking, as a study of the two Conventions and other instruments shows, the object in granting privileges and immunities to international institutions has been not to confer on them an exceptional rank or status of extra-territoriality, but to enable them to carry out their functions in an independent, impartial and efficient manner. The privileges and immunities are subject to waiver. It is left to the good sense of such international institutions to decide in the light of the justice of the case, and of possible prejudice to the organisation, when these should be pressed,[2] and to the practical discretion of States to determine how liberal the authorities should be in giving effect thereto.

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[1] Such bilateral agreements may even govern the privileges and immunities of a peacekeeping force; e.g., the U.N.-Cyprus Exchange of Letters, New York, March 31, 1964, as to the Force in Cyprus.

[2] See, e.g., Article V, Section 20, of the General Convention of 1946 on the Privileges and Immunities of the United Nations under which, in regard to officials, other than the Secretary-General, it is the latter's " right and *duty* " to waive immunity in any case where immunity would impede the course of justice, and can be waived without prejudice to the interests of the United Nations. Cf. the *Ranollo Case* (1946), 67 N.Y.S. (2d) 31 (chauffeur of the Secretary-General prosecuted for speeding while the Secretary-General was riding in the car concerned—defendant's immunity not pressed). For a case in which immunity from proceedings was allowed to China's representative accredited to the United Nations, see *Tsiang* v. *Tsiang* (1949), 86 N.Y.S. (2d) 556.

4.—Legislative Functions of International Institutions

There is no world legislature in being, but various kinds of legislative measures may be adopted by international institutions, and powers of promoting the preparation of Conventions are vested in the General Assembly, the Economic and Social Council, and the International Law Commission of the United Nations. Five of the specialised agencies are indeed largely regulative institutions, namely, the International Labour Organisation, the World Health Organisation, the International Civil Aviation Organisation, the International Telecommunication Union, and the Inter-Governmental Maritime Consultative Organisation. Mention may be made of the following special legislative techniques of these bodies:—(*a*) The adoption of regional Regulations or operating " Procedures " (for example, by regional meetings of the International Civil Aviation Organisation).[1] (*b*) The participation of non-governmental representatives in the legislative processes (for example, workers' and employers' delegates in the International Labour Conference, and private operating agencies at Administrative Conferences of the International Telecommunication Union). (*c*) Regulations (such as, e.g., the smallpox vaccination certificate regulations of 1956) adopted by the World Health Assembly, which come into force for all members, except those who " contract out ", i.e., give notice of rejection or reservations within a certain period. (*d*) The adoption of model regulations as an annex to a Final Act or other instrument; e.g., the International Regulations for Preventing Collisions at Sea, annexed to the Final Act of the 1960 London Conference for the Safety of Life at Sea.

This development has been accompanied by the emergence, parallel to that in municipal law, of the similar phenomena of:—(1) Delegated legislation; for example, the powers given to the Council of the International Civil Aviation Organisation to amend or extend the annexes to the International Civil

[1] The various legislative expedients employed within the framework of this Organisation are well analysed in Thomas Buergenthal's valuable book, *Law-Making in the International Civil Aviation Organisation* (1969).

Aviation Convention of December 7, 1944. A specially important case is that of the powers conferred upon the Council and the Commission of the European Economic Community (Common Market) to frame and promulgate Regulations, general in their scope, and directly binding upon the citizens and enterprises of Member States of the Community (see Article 189 of the Treaty of March 25, 1957, establishing the Community). In addition to Regulations there are the " directives ", binding States, receiving these, with regard to the end-result, but leaving them with some initiative in the matter of ways and means. (2) The making of *subordinate* law; for example, the adoption by the United Nations General Assembly of its own Rules of Procedure, and of the so-called " Administrative Instruments ", i.e., the Treaty Registration Regulations,[1] the Statute of the Administrative Tribunal, and the Staff Regulations.

5.—International Administrative Law

As in municipal law, not only administrative, but quasi-judicial functions have been conferred upon the organs of international institutions. In this connection, reference may be made, by way of illustration, to the number of quasi-judicial powers bestowed on the Commission of the European Economic Community (Common Market), e.g. to determine whether a measure of State aid granted by a Member State is incompatible with the Common Market, or is applied in an unfair manner (see Article 93 of the Treaty of March 25, 1957 establishing the Community).

In turn, this has made it necessary to provide for judicial review, that is to say, the exercise of a supervisory jurisdiction to ensure that such organs do not exceed their legal powers.

Thus, the Court of Justice of the European Communities has, under the Treaties of April 18, 1951, and of March 25, 1957, establishing respectively the European Coal and Steel Community and the European Economic Community (Common Market), jurisdiction to review the legality of acts or decisions of certain organs of the Communities on the grounds, *inter alia*, of lack of legal competence, procedural error, in-

[1] See above, p. 426 n. 1.

fringement of the Treaties or of any rule of law relating to their application, or abuse or misapplication of powers. This supervisory jurisdiction is not to apply to the conclusions upon questions of fact considered by these bodies.[1] Another example of such judicial review is the provision in the Statute of the Administrative Tribunal of the United Nations (which deals with complaints by United Nations staff concerning alleged breaches of the terms of their employment, etc.) enabling the International Court of Justice to determine by advisory opinion whether the Tribunal has exceeded its powers, or erred in law or procedure. The Administrative Tribunal of the United Nations and the similar Tribunal of the International Labour Organisation are themselves working illustrations of the vitality of international administrative law.

Mention may also be made of the powers given to the organs of some international institutions to determine questions concerning the interpretation or application of the constituent instrument of the institution; for example, the Council of the International Civil Aviation Organisation under Articles 84–86 of the International Civil Aviation Convention of December 7, 1944, and the Executive Directors and Board of Governors of the International Monetary Fund under Article XVIII of the Articles of Agreement of the Fund.

Finally, as in the municipal administrative domain, there has developed the practice whereby an organ of an international institution delegates an inquiry to a smaller Committee or other body; for example, complaints as to infringements of trade union rights come for preliminary examination before the Committee on Freedom of Association, on behalf of the Governing Body of the International Labour Organisation. This Committee is to some extent a quasi-judicial body.

6.—Quasi-Diplomatic and Treaty Relations of International Institutions

Not only is the accreditation of permanent missions by Member States to the United Nations and the specialised

[1] See generally Wall, *The Court of Justice of the European Communities* (1966), and Valentine, *The Court of Justice of the European Communities* (1965, 2 volumes).

agencies well-established, but there have already been instances of quasi-diplomatic appointments by United Nations organs, for example, the appointment in 1949 of a United Nations Commissioner to assist the inhabitants of Libya in attaining independent self-government, and the appointment in 1960 of a Special Representative of the Secretary-General in the Congo.[1] Apart from these cases, the United Nations and the related agencies under the provisions of their relationship agreements and inter-agency agreements for reciprocal representation and liaison, exchange and receive representatives from each other.

Treaty Relations

The Constitutions of certain international institutions expressly contemplate the exercise of a treaty-making power; for example, the United Nations Charter provides for the conclusion of trusteeship agreements, and of relationship agreements with the specialised agencies. Besides, international institutions must, as a matter of implication from their Constitutions, have such treaty-making power as is necessary for the performance of their functions. Wide treaty-making power has, in some instances, been conferred upon regional international institutions, e.g. the European Economic Community (Common Market), under Article 238 of the Treaty of Rome of March 25, 1957, establishing the Community.

At all events, a large number of international bodies have *de facto* entered into treaties, both *inter se* and with States and other entities. These instruments reveal a significant flexibility and simplicity, with but limited deference to Chancery traditions. In passing, reference may also be made to the absence from these agreements of the usual formal or " protocolary " clauses,[2] and to the analogy to ratification in the usual requirement in these instruments that the agreement

[1] Note also the case early in 1962 of the United Nations " liaison mission " which visited outposts in the Congo.

[2] See p. 427, *ante*.

concerned is to come into force only when " approved " by the policy-making body of the institution.

7.—Dissolution of International Institutions; and Succession to Rights, Duties and Functions

Dissolution

International institutions become dissolved:—(*a*) If created for a limited period only, upon the expiration of that period. (*b*) If of a transitional nature, upon the passing of the situation or the fulfilment of the purpose for which they were created. (*c*) By decision of the members, express or implied. It would seem that such decision need not necessarily be unanimous, but that it is sufficient as a practical matter if it be by a substantial majority, including the votes of the greater Powers. Thus, the League of Nations and the Permanent Court of International Justice were declared to be dissolved by Resolutions of the League of Nations Assembly in plenary session on April 18, 1946, without the individual assent of all Member States or of all parties to the Statute of the Court.[1] In the absence of any express contrary provision in the constituent instrument, there is implied power in the members or corporators of an international institution to dissolve it.

The *liquidation* of the assets and affairs of the dissolved organisation is another matter. Practice here supplies no guide. In the case of the League of Nations, there were special circumstances, inasmuch as all parties concerned desired to vest as much as possible of the assets upon dissolution in the United Nations and the specialised agencies.[2]

Succession and International Institutions

Where problems arise of the succession of one international institution to the rights, duties, etc., of another, the question

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[1] Note, also, that it was by a Protocol signed by delegates to the World Health Conference at New York on July 22, 1946, that the *Office International d'Hygiène Publique* was dissolved.

[2] See Myers, " Liquidation of League of Nations Functions ", *American Journal of International Law* (1948), Vol. 42, at pp. 320 *et seq.*

of the transmission of constitutional *functions*, in addition to the passing of rights and duties, is involved.[1]

First, it is essential that the successor institution shall expressly or impliedly have constitutional competence to take over the rights and functions of the predecessor. For example, Article 72 of the Constitution of the World Health Organisation enabled the Organisation to take over resources and obligations from bodies of cognate competence, and in virtue of that constitutional authority, the functions and assets of the Health Organisation of the League of Nations duly passed to the World Health Organisation.

Second, the successor institution cannot take over a function which does not lie within its constitutional competence, a principle which explains the non-passing, as a rule, of political functions. Thus in 1946 the Executive Committee of the Preparatory Commission of the United Nations advised against the transfer of the League's political functions to the United Nations, the political responsibilities of the two bodies being markedly dissimilar.[2] It may be mentioned, however, that the United Nations did take over from the League certain functions which it was desirable in the interests of the international community that it should possess, namely, the custody of treaties, the international control of narcotic drugs, the suppression of the traffic in women and children, and inquiries concerning the status of women.

A novel question of implied succession came before the International Court of Justice in 1950, and was dealt with in its *Advisory Opinion on the International Status of South-West Africa*.[3] From that Advisory Opinion, the principle emerges that where an international organ such as the League of Nations Permanent Mandates Commission, which is discharging certain functions in the international sphere, is

[1] The succession of an institution to the powers of another which has ceased to be, involves different considerations from the case of a reconstituted organisation. *Quaere*, whether the Organisation for Economic Co-operation and Development (OECD), which replaced the Organisation for European Economic Co-operation (OEEC), with wider geographical and other powers, was a case of " reconstitution ".

[2] See Myers, *loc. cit.*, at pp. 325–6.

[3] I.C.J. Reports (1950) 128.

dissolved, and the continued execution of those functions has not been provided for by treaty or otherwise, those functions may then automatically devolve upon an international organ, such as the Trusteeship Council of the United Nations, which is discharging cognate functions in regard to a similar field of activity.[1] The Court's view was, in fact, that in respect of the Mandated Territory of South-West Africa, although South Africa had not, as she was so entitled, accepted the supervision of the United Nations General Assembly and Trusteeship Council, these bodies could none the less discharge the similar functions of supervision of the extinct Mandates Commission.[2]

If the constituent instrument of the successor institution sets out the precise terms and conditions under which the functions of the predecessor devolve upon the new body, the question of succession is governed by these express provisions. No better illustration of this principle can be given than the present Statute of the International Court of Justice, successor to the Permanent Court of International Justice (see, e.g., Articles 36–37).

8.—The United Nations

The United Nations is a pivotal organ of world government, and the most important of all international institutions. As we have seen earlier in this chapter[3] through it are integrated those international bodies known as the " specialised agencies ", but this function of co-ordinating international organs by no means exhausts its responsibilities. It now has a membership of 130 States, making it for all practical purposes a universal organisation.

The true name of the Organisation is the " United Nations ",

[1] But this organ would not necessarily be bound by the *procedure* followed by its predecessor; see *Advisory Opinion on the Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, I.C.J. Reports (1956), 23 (General Assembly could authorise oral hearings of petitioners, notwithstanding contrary practice of Permanent Mandates Commission).

[2] There can be no succession of rights, from an international institution to individual member States where they did not possess previously the rights claimed to pass; *South West Africa Cases, 2nd Phase*, I.C.J. Reports, 1966, 6, at p. 35.

[3] See above, pp. 571–576.

although it is often referred to as the " United Nations Organisation " or " UNO ".

The United Nations may be simply defined as an organisation of independent States (130 in number, as mentioned above), which have accepted the obligations contained in the United Nations Charter signed at San Francisco on June 26, 1945. This definition needs to be amplified by considering the origins of the Charter and the nature of the machinery created under it.

Origins

The principles stated in the Charter were derived from the conceptions and plans of the wartime Allies, which first found expression in:—(*a*) The Atlantic Charter subscribed to by the President of the United States and the Prime Minister of Great Britain in August, 1941.[1] (*b*) The United Nations Declaration signed by twenty-six nations on New Year's Day, 1942, after Japan had opened hostilities in the Pacific. (*c*) The Moscow Declaration of October, 1943, issued by the Governments of the United States, Great Britain, the Soviet Union and China, recognising the need for establishing a general international organisation based on the principle of the sovereign equality of all peace-loving States, and open to membership of all States large or small, in order to maintain international peace and security.

In the late summer and early autumn of 1944, draft proposals for such an organisation were worked out at Dumbarton Oaks by representatives of these four Powers. Then at the Yalta Conference in February, 1945, of leaders of the Big Three—the United States, Great Britain, and the Soviet Union—the decision was taken, at a time when final victory against Germany was imminent, to call a general conference of about fifty nations to consider a Constitution based on the Dumbarton Oaks proposals. At Yalta, agreement was also reached on voting procedure and arrangements in the proposed Security Council of the new Organisation. Two months later, a Committee of Jurists representing forty-four countries met at

[1] For discussion of the Atlantic Charter, see Stone, *The Atlantic Charter* (1943).

Washington and drafted a Statute for the proposed International Court of Justice, which was to be an integral part of the proposed Organisation.

The Conference to consider the Dumbarton Oaks proposals held its discussions at San Francisco from April 25 to June 26, 1945, and succeeded in drawing up the present United Nations Charter, containing also the Statute of the International Court of Justice. The debates were by no means free of disagreements, particularly between the Four Sponsoring Powers—the United States, Great Britain, the Soviet Union and China—and the delegates of the so-called " middle " and " small " Powers over such matters as the " veto " in the Security Council, and the functions of the General Assembly. In the circumstances, it is remarkable that in the short space of two calendar months there should have emerged an instrument so detailed and comprehensive as the Charter.

It is of importance to notice the main differences between it and the Dumbarton Oaks drafts.[1] They are as follows:—(1) The principles and purposes of the United Nations were broadened in scope and the obligations of the Member States defined in more precise terms. (2) The powers of the General Assembly were extended. (3) The United Nations was given enlarged authority in the economic, social, cultural, and humanitarian fields. (4) Provisions were added to the Charter concerning the encouragement of human rights and fundamental freedoms. (5) Important modifications were made in the provisions as to regional arrangements and regional agencies. (6) The trusteeship provisions. (7) The Economic and Social Council was made a principal organ of the United Nations with far-reaching responsibilities in its particular sphere.

The United Nations came into being on October 24, 1945 (" United Nations Day "), on the Charter receiving the ratifications necessary to bring it into force, being those of China, France, the Soviet Union, Great Britain and the United States, and of a majority of the other signatories. The first

[1] See Evatt, *The United Nations* (1948), at pp. 17 *et seq.*

meeting of the General Assembly was held in London on January 10, 1946, while only three months later there took place the last session of the League of Nations Assembly for winding up the League as a going concern.

Differences between the United Nations and the League of Nations

The dissolution of the League of Nations should not obscure the fact that the United Nations Charter owes much to the League experience, and for its provisions drew heavily on the League's traditions, practice and machinery. Yet although the United Nations is successor to the League and in many ways patterned on it, there are fundamental differences between the two institutions which need to be noted:—

(*a*) The obligations of Member States of the United Nations are stated in the most general terms, for example, to settle disputes peacefully, to fulfil in good faith their obligations under the Charter, etc. The obligations of Member States of the League on the other hand were stated and defined in the League Covenant in the most specific manner, for example in the detailed procedures they bound themselves to follow in respect of the settlement of disputes without resorting to war (Articles 12, 13 and 15).

(*b*) In the United Nations there are, apart from the Secretariat, five principal organs, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the International Court of Justice, and the respective spheres of each organ are carefully defined so as to prevent overlapping. In the League, there were, apart from the Secretariat, two principal organs only, the Assembly and the Council, and each was able to deal " with any matter within the sphere of action of the League or affecting the peace of the world " (Articles 3 and 4 of the Covenant).

(*c*) More emphasis is given in the Charter than in the League Covenant to economic, social, cultural and humanitarian matters.

(*d*) There are substantial differences between the " sanctions "

provisions in Article 16 of the League Covenant and the provisions for " preventive " and " enforcement action " in Chapter VII of the Charter. The United Nations (through the Security Council) is not limited in taking " enforcement action ", as was the League of Nations to situations where Member States have gone to war in breach of their covenants and obligations under the Charter; it can take such action if there is merely a threat to the peace, or if a breach of the peace or an act of aggression has been committed. Moreover, the Members of the United Nations have bound themselves in advance to provide armed forces on terms to be agreed with the Security Council, and the Security Council is to be advised and assisted by a Military Staff Committee in the direction of these forces. There were no similar stipulations in the League Covenant.

(*e*) Under the Charter, decisions are by majority vote, although in the Security Council, decisions, except on procedural matters, must have the concurrence of the five Great Powers, who are the permanent members. In the League all decisions of importance required unanimity. It would however be unfair to regard this contrast as unfavourable to the League, for not only:—(*a*) were there several exceptions to the rule of unanimity, including the provisions in Article 15 of the League Covenant that the votes of parties to a dispute were not to be counted when the League Council made its report and recommendations thereon, but (*b*) the effectiveness of the League Covenant depended on its observance by the Member States rather than on the organic decisions of League bodies, whereas under the United Nations Charter, the emphasis is on the organic decisions of bodies such as the Security Council, and less on the specific obligations of Member States.

" Purposes " and " Principles "

The " Purposes " of the United Nations are stated in Article 1 of the Charter from which it appears that the United Nations is primarily an organisation for maintaining peace and security, with the additional functions of developing friendly relations

among nations, of achieving international co-operation in economic, social, cultural and humanitarian matters, of developing respect for human rights and fundamental freedoms, and of providing a means for harmonising international action to attain these aims. It is questionable whether these general objectives, constituting the *raison d'être* of the Organisation, can be regarded as embodying rules of law, authorising its organs and Member States to take action not specifically provided for in the operative articles of the Charter.

Article 2 of the Charter also sets out certain " Principles ". Two of these " Principles " are laid down for organic observance by the United Nations itself, namely, that the basis of the United Nations shall be the sovereign equality of all its Members and that it shall not intervene (except where " enforcement action " is called for) in matters " essentially " within the domestic jurisdiction of any State. Four other " Principles " are set down for observance by Member States, namely, that they should fulfil their obligations under the Charter, settle their disputes by peaceful means, not threaten or use force against the territorial integrity or political independence of any State, and give assistance to the United Nations while denying such assistance to any State against which preventive or enforcement action is being taken.

Membership

The Members of the United Nations consist of:—(*a*) original Members; and (*b*) Members admitted in accordance with Article 4 of the Charter.

The original Members are those States which having participated in the San Francisco Conference of 1945 or having signed the United Nations Declaration on New Year's Day, 1942, sign and ratify the Charter.

As to Members other than the original Members, Article 4 of the Charter provides that membership is open to " all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations ", and that such admission will be effected by a decision of the General

Assembly upon the recommendation of the Security Council (this in effect means by at least a two-thirds vote of the General Assembly on the recommendation of at least nine Members of the Security Council including the five permanent Members).

In its Advisory Opinion on *Conditions of Membership in the United Nations* (1948),[1] the International Court of Justice by a majority held that Article 4 lays down five conditions by way of exhaustive enumeration, and not merely by way of illustration, namely, that any new applicant must:—(*a*) be a State; (*b*) be peace-loving; (*c*) accept the obligations of the Charter; (*d*) be able to carry out these obligations; and (*e*) be willing to do so. The Court also ruled that a State Member voting on the admission of a new State (whether on the Security Council recommendation or on the General Assembly decision) is not entitled to make its consent to the admission of an applicant dependent on the fulfilment of conditions other than those prescribed in Article 4, and in particular is not entitled to make such consent dependent on the admission of other applicants. In the Court's view a State Member must in voting have regard only to the qualifications of a candidate for admission as set out in Article 4, and not take into account extraneous political considerations.

Under present usage and procedure (see, for example, Rule 60 of the Rules of Procedure of the Security Council) the Security Council practically decides in the first instance on the application of a State for admission as a new Member, and by reason of the " veto " may fail to make an effective recommendation. The International Court of Justice has, however, ruled that the General Assembly cannot by its own decision admit a new Member State, where the Security Council has failed to make any recommendation as to admission to membership, favourable or otherwise.[2] The General Assembly remains, of course, always free to reject a candidate recommended by the Security Council.

In December, 1955, a remarkable expedient was adopted to

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[1] See I.C.J. Reports (1948), at pp. 61 *et seq.*
[2] See I.C.J. Reports (1950) 4.

overcome admission blockages in the Security Council. Sixteen States were admitted as new Members of the United Nations as the result of a so-called " package deal ", whereby one group of voting States made its affirmative vote for certain candidates conditional on an affirmative vote by another group for the remaining candidates. By a strained, if not utterly elastic construction of the Advisory Opinion, *supra*, on *Conditions of Membership in the United Nations* (1948), this " deal " was considered not to be inconsistent with the Court's opinion that a conditional consent to admission is not permitted by the Charter.

Articles 5–6 of the Charter deal with the suspension or expulsion of Member States, which is effected by a decision of the General Assembly on the recommendation of the Security Council. Members may be suspended from exercising the rights and privileges of membership if preventive or enforcement action is taken against them by the Security Council, or be expelled if they persistently violate the principles of the Charter.

Organs of the United Nations

The United Nations differs from the League of Nations in its *decentralised* character, the powers and functions under the Charter being distributed among six different major organs:— (1) The General Assembly. (2) The Security Council. (3) The Economic and Social Council. (4) The Trusteeship Council. (5) The International Court of Justice. (6) The Secretariat. Each organ has sharply defined spheres of action, and although in a sense the residue of authority is vested in the General Assembly, the latter's powers are mainly supervisory and recommendatory, so that possibly some particular field of international action may be outside the operational competence of the United Nations.

The General Assembly

The General Assembly is the only principal organ of the United Nations consisting of all Members, each Member

having only one vote, though allowed five representatives. It meets regularly once a year, but can meet in special session if summoned by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations, or at the request of one Member concurred in by a majority of the Members.

It is essentially a deliberative body, with powers of discussion, investigation, review, supervision and criticism in relation to the work of the United Nations as a whole (see Article 10 of the Charter), and of the various other organs of world government including the specialised agencies. Generally speaking, its powers are limited to making recommendations and not binding decisions, although it is empowered to take certain final decisions, for example, as to the budget or as to the admission, suspension or expulsion of Members. However, its recommendations, while not creating legal obligations, may operate with permissive force to *authorise* action by Member States.[1] Votes on " important " questions such as the election of the non-permanent members of the Security Council and other questions specifically enumerated in Article 18, paragraph 2, of the Charter are to be taken by a two-thirds majority; other questions, including the determination of additional " important " questions requiring a two-thirds majority vote, are to be dealt with by a simple majority vote. The five Great Powers, who are permanent members of the Security Council, have no right of " veto " as they do when voting in the Council.

The General Assembly's powers and functions consist of the following:—(i) powers of discussion and recommendation in relation to the maintenance of international peace and security; (ii) the direction and supervision of international economic and social co-operation; (iii) the supervision of the international trusteeship system; (iv) the consideration of information as to non-self-governing territories; (v) budgetary and financial powers whereby it has exclusive control over the

[1] It is, however, doubtful whether such recommendations could authorise independent international institutions, e.g., the International Bank for Reconstruction and Development (World Bank) to take action, which their competent organs had not duly decided upon.

finances of the United Nations; (vi) powers of admitting, suspending and expelling States Members (see above); (vii) powers in relation to the adoption of amendments to the Charter (see Articles 108–109); (viii) the election of members of other organs; (ix) the receipt and consideration of reports on the work of the United Nations; and (x) the adoption of international Conventions. But, as Article 10 of the Charter shows, its powers of discussion and recommendation are not limited to these matters.

Although the primary responsibility for the maintenance of peace and security belongs to the Security Council, the General Assembly is given in this connection certain facultative or permissive powers of consideration and recommendation. It " may consider " the general principles of co-operation in the maintenance of peace and security including the principles as to disarmament and armament regulation, and may make recommendations on the subject to the Member States or to the Security Council (Article 11, paragraph 1); it " may discuss " any specific questions relative to the maintenance of peace and security brought before it by a Member State or by the Security Council or by a non-Member and make recommendations thereon (Article 11, paragraph 2); it " may recommend " measures for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations (Article 14); and it " may call the attention " of the Security Council, as the body primarily responsible for enforcing peace, to any situation likely to endanger peace and security (Article 11, paragraph 3). There is one general restriction on these powers of recommendation, namely, that while, in the exercise of its functions under the Charter, the Security Council is actively dealing with any dispute or situation, the General Assembly—although it is not precluded from discussion—is not to make a recommendation in regard thereto unless the Security Council so requests (Article 12, paragraph 1). But to prevent important matters relating to peace and security from being " frozen " on the Security Council agenda and therefore from coming under the searchlight of General Assembly procedures, it is provided

that the Secretary-General is with the Security Council's consent to notify the General Assembly when such matters are being dealt with, and immediately the Security Council ceases to deal with them.

Within these limits, it is remarkable that in practice the General Assembly has been able to take a leading role in questions of international peace and security. It has discussed some of the leading political problems brought before the United Nations such as those relating to Palestine, Greece, Spain, Korea, Suez, and the Congo, and also taken concrete action with reference to them. For instance, in regard to Palestine, it appointed a Special Committee in 1947 to investigate the facts, and subsequently in 1948 appointed a Mediator to secure peace between the parties in strife, and later a Conciliation Commission. As mentioned below, it materially contributed to the settlement of the Suez Canal zone conflict in October–November, 1956, and in September, 1960, it authorised the continued maintenance in the Congo of a United Nations Force.

The stultifying result of the " veto " upon the work of the Security Council brought about a further significant development, under which the General Assembly impinged more and more upon the broad field of peace and security, to the extent of making general, and even specific, recommendations in this domain, although it could not of course compel compliance with these recommendations. Moreover, it came to be accepted that a matter might be removed from the agenda of the Security Council by a procedural vote, thus eliminating the use of the " veto " to preclude a matter from being brought before the General Assembly.

Illustrations of this important development are the following: (*a*) The recommendations made by the General Assembly in April, 1949, for setting up a panel of individuals to serve on commissions of inquiry and conciliation, and that the Security Council examine the desirability of using the procedure of rapporteurs or conciliators for disputes or situations brought

before the Council for action.[1] (*b*) The so-called " Uniting for Peace " General Assembly Resolution of November 3, 1950, providing for emergency special sessions at 24 hours' notice on the vote of any seven members of the Security Council, or of a majority of Member States, if the Security Council failed to act because of the " veto ", and pursuant to which there were set up a Peace Observation Commission, to observe and report on the situation in any area where international tension threatened international peace and security, and a Collective Measures Committee, to consider methods which might be used collectively to maintain and strengthen international peace and security. (*c*) The General Assembly recommendations on November 17, 1950, as to the appointment of a Permanent Commission of Good Offices. (*d*) The several General Assembly Resolutions relative to the situation in Korea, 1950–1953, including the Resolution of February 1, 1951, pursuant to which there was set up an Additional Measures Committee, composed of members of the Collective Measures Committee, which reported on measures of economic enforcement action to be taken. (*e*) The General Assembly's efforts in 1961,[2] leading to the establishment of an Eighteen-Nation Disarmament Committee,[3] to undertake negotiations for general and complete disarmament under international control.

The part played by the General Assembly in November, 1956, in effecting a cease-fire in the Suez Canal zone conflict, involving Israel, Egypt, France, and Great Britain, represents perhaps the high water mark of its work on peace and security. After Security Council action had proved impossible because of the " veto ", a special emergency session of the Assembly was convened for November 1, 1956, by a vote of seven members of the Security Council, in pursuance of the " Uniting for Peace " Resolution, mentioned above. At this session, the Assembly adopted Resolutions for a cease-fire by all contestants, and for the creation of a United Nations Emergency

[1] Approved, in effect, by the Security Council in May, 1950.

[2] Partly, it is true, in pursuance of Article 11, paragraph 1, referred to, p. 601, *ante*.

[3] This Committee commenced its meetings on March 14, 1962, at Geneva. Enlarged in 1969, it is now known as the Conference of the Committee on Disarmament (CCD).

Force[1] to guarantee peaceful conditions in the Suez area, with the ultimate consequence that peace and order were restored.

Another instance of significant General Assembly action, pursuant to the " Uniting for Peace " Resolution, occurred on September 19, 1960, when the General Assembly authorised the Secretary-General to continue to take vigorous action pursuant to the earlier Resolutions of the Security Council for United Nations military assistance to maintain law and order in the Congo.[2]

Reference may also be made to the creation by the General Assembly, in 1947, of an Interim Committee (the so-called " Little Assembly ") to assist it in its duties in relation to maintaining peace and security.[3] This Committee was made necessary by the fact that the General Assembly is under continual pressure at its annual sessions to dispose of a heavy agenda, and needs to make its own arrangements for keeping in touch with questions of peace and security. It was thought that through such a body as the Interim Committee, with a watching brief over all matters of peace and security and with the power to carry out special studies or inquiries, the General Assembly could effectively discharge its functions in relation to peace and security without detracting from the authority of the Security Council or intervening in the Council's work.

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[1] *United Nations Forces.* The respective powers of the Security Council and of the General Assembly to establish United Nations field forces are discussed by Sohn, *American Journal of International Law* (1958), Vol. 52, at pp. 229–240. Clearly, the Security Council may authorise the creation of an observer group force (as in Lebanon in 1958), e.g., to supervise a truce. It is, however, a matter of controversy whether either organ may establish forces in order to restore or maintain peace and security, in the absence of a valid decision of the Security Council to institute enforcement action under Chapter VII of the Charter; see below, pp. 617–618, as to the Security Council and the continuing Congo situation. See also Bowett, *United Nations Forces* (1964), and pp. 620–621, *post*, as to United Nations peacekeeping. Reference should be made also to the use of the Swedish Stand-by Disaster Relief Unit, made available through the United Nations pursuant to a tripartite agreement between that body, Peru, and Sweden, for rehabilitation work in Peru following the earthquake in May, 1970. What has been called " disaster preparedness " presumably falls within the international humanitarian powers of the United Nations (cf. Article 1, paragraph 3 of the Charter).

[2] See also below, pp. 617–618.

[3] Cf. Green " The Little Assembly ", in *The Year Book of World Affairs*, 1949, pp. 169 *et seq.*

The Interim Committee reported in 1947–1948 to the General Assembly on two important matters which it investigated:—(*a*) The adoption of practices and procedures designed to reduce difficulties due to the " veto " in the Security Council.[1] (*b*) Methods for promoting international co-operation in the political field.[2]

This Interim Committee is but one example of the decentralisation that the General Assembly did effect internally, to cope with its work. It has established Procedural Committees, Main Committees[3] which meet in connection with plenary sessions, Standing Committees (such as the Committee on Contributions, the Advisory Committee on Administrative and Budgetary Questions, and the Board of Auditors), and subsidiary bodies for important political and security matters, such as the Disarmament Commission,[4] subject to a duty of reporting to the Security Council.

The General Assembly is in addition given the mandatory power, as distinct from the facultative or permissive powers set out above, of initiating studies and making recommendations for the purpose of promoting international co-operation in the political field and of encouraging the progressive development of international law and its codification (see Article 13, paragraph 1, a).[5]

As to (ii), p. 600, the direction and supervision of international economic and social co-operation, the General Assembly

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[1] This report formed the basis of a General Assembly recommendation in April, 1949, that permanent members of the Security Council confer on the use of the " veto ", that they refrain from using it in certain specific cases, and that they treat certain questions as procedural.

[2] Including recommendations as to rapporteurs or conciliators in Security Council matters, and a panel of persons to serve on commissions of inquiry and conciliation, adopted by the Assembly; see above, pp. 478, 602.

[3] These are the First (Political and Security Questions), Special Political Committee (sharing the work of the First Committee), Second (Economic and Financial Questions), Third (Social, Humanitarian, and Cultural Questions), Fourth (Trusteeship and Non-Self-Governing Territories), Fifth (Administrative and Budgetary Questions), and Sixth (Legal Questions).

[4] Established on January 11, 1952, in replacement of the two former Commissions, the Atomic Energy Commission and the Commission for Conventional Armaments.

[5] In execution of this power, the General Assembly in 1947 established the International Law Commission.

exercises the powers and functions of the United Nations in this sphere (Articles 13 and 60), the Economic and Social Council being under its authority. As referred to above,[1] it also approves the " relationship agreements " negotiated by the Economic and Social Council with the " specialised agencies ", and is authorised to make recommendations for co-ordinating the work and policies of these agencies. In regard to (iii), the supervision of the international trusteeship system, the General Assembly's powers in this field have been dealt with in Chapter 5.

One of the General Assembly's most important functions is to elect members of other organs (see (viii), p. 601); thus it elects the ten non-permanent members of the Security Council (Article 23), the 27 members of the Economic and Social Council (Article 61), and by a system of parallel voting in conjunction with the Security Council, the fifteen Judges of the International Court of Justice. It also appoints the Secretary-General.

Finally, mention should be made of its international legislative functions (see (x), p. 601). Already it has approved and adopted the texts of several international Conventions, including the Conventions on the Privileges and Immunities of the United Nations, and of the Specialised Agencies of 1946 and 1947 respectively, and the Genocide Convention of 1948, while it took the final decision to summon the Geneva Conference on 1958 on the Law of the Sea, and the Vienna Conferences of 1961, 1963, and 1968–9 on Diplomatic Relations, Consular Relations, and the Law of Treaties, resulting in Conventions on these subjects.

The Security Council

The Security Council is a continuously functioning body, consisting of fifteen Member States; five are permanent and are named in the Charter, being China, France, the Soviet Union, Great Britain and the United States. Ten[2] non-per-

[1] See pp. 571–575.

[2] Formerly the number was six, but this was increased to ten under amendments to the Charter which came into force in 1965.

manent members are elected by the General Assembly for a term of two years, and in their election due regard is to be specially paid in the first instance to the contribution of Member States to the maintenance of peace and security, to the other purposes of the United Nations, and to equitable geographical distribution (Article 23). There are provisions for participation in the Security Council's discussions by States other than permanent and non-permanent members:—(*a*) any Member State of the United Nations may participate without vote in a discussion of any question brought before the Security Council if the Council considers the interests of that Member are specially affected (Article 31); (*b*) any such Member State or any non-Member State, if it is a party to a dispute being considered by the Security Council, is to be invited to participate without vote in the discussions concerning the dispute (Article 32).

Voting Procedure in the Security Council

The voting procedure in the Security Council requires special consideration. Each member of the Council has one vote. Decisions on procedural matters are to be made by an affirmative vote of nine members. Decisions on all other matters are to be made by an affirmative vote of nine members, including the concurring votes of the five permanent members. It is here that the so-called " veto " operates, as if a permanent member does not affirmatively vote in favour of a particular decision, that decision is blocked or " vetoed ", and fails legally to come into existence.

There are certain exceptions to the rigidity of the " veto " provisions, both under the Charter and in practice. Under the Charter, in connection with decisions concerning the pacific settlement of disputes, whether under Chapter VI or under Article 52, paragraph 3 (reference of a dispute to regional settlement), any permanent or non-permanent member, if a party to the particular dispute under consideration, must abstain from voting (Article 27, paragraph 3). The exception in practice is that the voluntary abstention of a permanent member from voting has consistently been interpreted as not

constituting a bar to the validity of a Security Council decision;[1] the legality of the practice was upheld by the International Court of Justice in the Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), in which it ruled that a Security Council Resolution of 1970 declaring illegal the continued presence of South Africa in South West Africa (Namibia) was not invalid by reason of the abstention from voting of two permanent members; see I.C.J. Reports, 1971, 16, at p. 22.

Since the inception of the Security Council, the permanent members' right of veto has been the subject of questionings. Such questionings were foreshadowed at the San Francisco Conference, and publicists and writers claimed that the original doubts have been justified inasmuch as the power of veto has been abused.[2] The central theory behind the right of veto is that since the permanent members as Great Powers naturally bear the main burden of responsibility for maintaining peace and security, no one permanent member should be compelled by a vote of the Security Council to follow a course of action with which it disagrees. In other words, the possibility of division among the Great Powers on particular questions of collective security was foreseen. At the San Francisco Conference, the Four Sponsoring Powers (Great Britain, the United States, Russia and China) issued a Joint Interpretative Statement pointing out that the veto should be retained as any steps going beyond mere discussion or procedural preliminaries might initiate a " chain of events " which in the end could or should require the Security Council to take enforcement action, and that such action must naturally attract the right of veto.[3] The same Statement added that the Great

[1] See Greig, *International Law* (1970), pp. 545–547. As to Portugal's claim that the Security Council Resolution of April 9, 1965, authorising the United Kingdom to take steps to prevent the arrival at Beira of vessels taking oil to the Rhodesian regime, was invalid because of the abstention from voting of two permanent members, see Cryer, *Australian Year Book of International Law*, 1966, at pp. 95–96.

[2] See Evatt. *The United Nations* (1948), at pp. 55 *et seq.*

[3] See *United Nations Documents*, 1941–45 (published 1946, by Royal Institute of International Affairs), at pp. 268–71, for text of the Statement.

Powers would not use their powers " wilfully " to obstruct the operations of the Security Council. Undoubtedly as the veto has been used, Security Council procedure has been stultified, and attempts have been made to find ways to liberalise the voting practice, while keeping within the limits of the principles justifying the veto. It is clear that the following are subject to the right of exercise of the veto:—(*a*) the actual decision whether a question to be put to the vote is one of procedure or of substance;[1] (*b*) any executive action; (*c*) a decision to carry out any wide investigation of a dispute. But the mere preliminary discussion of a subject, decisions on purely preliminary points, and the hearing of statements by a State party to a dispute would not be within the scope of the veto.[2] Perhaps it is well to remember also that the veto is not the main obstacle to the Security Council reaching its full stature as an organ for maintaining peace and security. Even if there were no veto, it is probable that some alternative methods of obstructing the Security Council's work would have been resorted to, leading to equal abuses and absurdities, or that, as occurred in the League of Nations, certain Powers might have quitted the Organisation.

Powers and Functions of the Security Council

The Security Council has been given primary responsibility under the Charter for maintaining peace and security, in order that as a smaller executive body with a permanent core of membership of the Great Powers, it can take effective decisions to ensure prompt action by the United Nations. Under Article 25 of the Charter, the Member States agree to abide by and to carry out the Security Council's decisions. Although

[1] The so-called " double veto " arises if a permanent member should veto such a decision. However, on at least one occasion, the " double veto " was ousted, the President of the Security Council ruling the matter to be procedural; see Stone, *Legal Controls of International Conflict* (1954), pp. 224–225 and *Supplement* 1953–1958 (1959), p. 870.

[2] On September 8, 1959, the President of the Security Council ruled (against protest by the representative of the Soviet Union) that the appointment of a sub-committee to examine statements concerning Laos, etc., being for the establishment of a subsidiary organ under Article 29 of the Charter, was a procedural matter. He also ruled that the draft Resolution to determine whether the question of this appointment was procedural, was not subject to the veto (thereby excluding the " double veto ").

the Security Council has primary responsibility for maintaining peace and security, this responsibility is not exclusive. The General Assembly has powers of discussion and recommendation in regard to the subject, and action may be taken under regional arrangements or by regional agencies (see Articles 52–53 of the Charter). Nor should it be forgotten that, generally speaking, action by the Security Council must be brought within the four corners of a particular Article or particular Articles in Chapters VI or VII of the Charter, and even then because of the " veto " or other voting disagreement no action may be decided upon. On the other hand, on one view, the Security Council has general overriding powers for maintaining peace and security, not limited to the specific express powers in Chapters VI or VII, as like other international organs, it has such implied powers as are necessary and requisite for the proper fulfilment of its functions.[1] If this view be correct, the Security Council could take action even on a matter which did not come within the express terms of Chapters VI or VII.[2]

The principal powers and functions of the Security Council relate to the following matters:—(i) the pacific settlement of international disputes; (ii) preventive or enforcement action to maintain peace and security; (iii) regional agencies and regional agreements; (iv) the control and supervision of trust territories classified as " strategic areas " (see Chapter 5 above); (v) the admission, suspension and expulsion of Members (see above); (vi) amendments to the Charter (see Articles 108–9); (vii) the election in conjunction with the General Assembly, of the fifteen Judges of the International Court of Justice.

In relation to (i) above, the pacific settlement of disputes, the powers of the Security Council as provided for in Chapter VI of the Charter are as follows:—

(*a*) The Security Council " shall when it deems necessary " call on the parties to a dispute, the continuance of which is likely to endanger peace and security, to settle that dispute by

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[1] Cf. Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports (1949), at p. 182.

[2] See also below p. 617, as to the Security Council and the Congo situation.

negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, action by regional agencies or under regional arrangements, or other peaceful means (Article 33).[1] But if the parties fail to settle it by these means—no time limit for such failure is indicated—whether at the request of the Security Council or otherwise, they must refer the dispute to the Security Council. Thereupon, if the Security Council deems that the continuance of the dispute is in fact likely to endanger peace and security it shall decide:—(1) whether to recommend " appropriate procedures or methods " of settlement, or (2) whether to recommend actual terms of settlement (Article 37).

(*b*) The Security Council may investigate not only any kind of dispute, but also " situations "[2] which are such that they may lead to international friction or give rise to a dispute, in order to determine whether the dispute or " situation " is likely to endanger peace and security (Article 34). This investigation is a preliminary to further action by the Security Council. Such disputes or " situations " may be investigated by the Security Council of its own motion, or be brought to its attention by Member States of the United Nations (whether parties or not to the dispute), or by non-Member States which are parties to the dispute (Article 35), or by the General Assembly (Article 11, paragraph 3), or by the Secretary-General under his power to bring to the Security Council's notice any " matter " which in his opinion threatens the maintenance of peace and security (Article 99).

(*c*) During the course of any dispute or situation, the continuance of which is likely to endanger peace and security, the Security Council may recommend " appropriate procedures or methods " of settlement. In general, legal disputes are to be referred to the International Court of Justice (Article 36).

(*d*) If all the parties to any such dispute so request, the Security Council may recommend terms of peaceful settlement (Article 38).

[1] Under Article 33, it is the duty of parties to such a dispute to seek a peaceful solution by these means.

[2] The words " which might lead to international friction or give rise to a dispute " in Article 34 qualify the word " situation ", and not the word " dispute "; see Hasluck, *Workshop of Security* (1948), at pp. 43–44.

There are several points in connection with the Security Council's powers of settling disputes that call for comment. First, its powers of calling upon the parties to settle disputes by peaceful means (Article 33) or of recommending procedures or methods of adjustment (Article 36) or of recommending terms of settlement (Articles 37 and 38) are recommendatory only, and limited to disputes which are likely to endanger peace and security. It has no such powers with regard to all disputes, although it may investigate any dispute to see if it is likely to endanger peace and security (Article 34). Whether, apart from Chapter VI of the Charter, it has any powers at all with regard to disputes in general is an open question. Secondly, a not very clear or happy distinction is drawn between " disputes " and " situations " (note that a " situation " is not mentioned in Article 27, paragraph 3, as to voting). The Security Council can under Article 34 investigate " situations " which may lead to international friction or give rise to a dispute to see if they are likely to endanger peace and security, but its only other express power with regard to a " situation " is the power under Article 36 of recommending procedures or methods of adjustment for a " situation " likely to endanger peace and security. Who determines whether the circumstances amount to a "dispute" or a " situation "? Sometimes " disputes " and " situations " overlap, and a " situation " may itself be in the nature of a " dispute ". Is this a matter for the Security Council to decide? On several occasions rulings as to the question have been given by the Chairman of the Security Council, although it has been suggested that whether a matter is a " dispute " or a " situation " depends on the terms of the complaint bringing it to the Security Council's notice.[1] Thirdly, what are the circumstances which

[1] Article 32 of the Charter, under which a non-member of the Security Council, party to a *dispute* under consideration by the Council, may be invited to participate in the discussion, does not apply to a " situation "; see Advisory Opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), June 21, 1971 (South Africa not invited to the discussion by the Council in 1970 of the " situation " in South West Africa; decision by Council that South Africa's continued presence there was illegal); see I.C.J. Reports, 1971, 16, at pp. 22–23.

constitute a "dispute"? Certain of the cases that have come before the Security Council are quite unlike text-book disputes, i.e., clear differences between States over a contested issue, being rather complaints over situations seemingly of remote concern to the complainant State (for example, the Ukrainian complaint in 1946 as to conditions in Greece). Generally speaking, the Security Council has determined what specific acts in regard to the settlement of disputes come within its powers under the Charter, as, for example, in the case of Trieste in 1946–7 when it accepted the responsibility of appointing a Governor.[1]

The more important responsibilities of the Security Council arise with reference to (ii), preventive or enforcement action under Chapter VII. The Security Council is empowered to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations or decide what enforcement measures are to be taken to maintain or restore peace and security (Article 39). It may call on the parties involved to comply with provisional measures, and take account of any failure to comply therewith (Article 40).

There are two kinds of enforcement action which can be decided by the Security Council:—(1) Measures not involving the use of armed force. The Security Council may call upon Member States to apply complete or partial interruption of economic relations, and of all means of communication, and to sever diplomatic relations. (2) Action by air, sea, or land forces where the measures under (1) are inadequate. This may involve a blockade of one of the parties concerned. The Security Council may decide whether the action necessary to carry out its enforcement decisions is to be taken by all or some Member States only, and to mitigate any possible hardships, Member States are to co-operate mutually in carrying out the Security Council decisions (Articles 48–49). Also, if any Member or non-Member is faced with special economic problems arising from carrying out the preventive or enforcement action decided upon, it has the right to consult the Council on these (Article 50).

[1] See Hasluck, *op. cit.*, at pp. 44–45.

These far-reaching powers of the Security Council have to be considered in conjunction with other provisions in Chapter VII of the Charter, namely, those providing for a Military Staff Committee composed of the Chiefs of Staff of the five permanent members, to advise and assist the Security Council on the military aspects of enforcement action (as well as on disarmament and armament regulation). In addition Article 43 provides for agreements between the Security Council and Member States as to the armed forces and other assistance they can make available for enforcement action; this provision so far as concerns the armed assistance, etc., to be furnished to the Security Council has not yet been carried into execution although the Military Staff Committee has been considering principles and methods in this connection. The result is that the Security Council has not yet the necessary concrete basis for acting in a decisive manner with the aid of Member States and the Military Staff Committee, as intended by the provisions of Chapter VII of the Charter. However, as shown below, this was deemed not to preclude it, in the case of the Korean conflict and of the Congo situation, from validly authorising measures, with a view to restoring or maintaining international peace and security.[1]

Although Member States of the United Nations are entitled to defend themselves individually or collectively against an armed attack, this right of self-defence is not to impair the primary authority and responsibility of the Security Council for enforcement action to maintain or restore peace (Article 51).[2]

In its Advisory Opinion of June 21, 1971, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*), the International Court of Justice ruled that the Security Council's primary authority

[1] See also *Advisory Opinion on Certain Expenses of the United Nations* (*Article* 17, *paragraph* 2 *of the Charter*) I.C.J. Reports (1962) 151.

[2] It was contended by Russia and certain other States that the North Atlantic Pact of 1949 was a violation of the Charter in that it permitted joint military action without the authority of the Security Council. In answer to this the signatories of the Pact stated that it was an agreement enabling the parties to co-ordinate beforehand plans for self-defence under Article 51. See also Beckett, *The North Atlantic Treaty, the Brussels Treaty, and the Charter of the United Nations* (1950).

and responsibility for maintaining peace entitled the Council to make a binding determination (as it did in a Resolution in 1970) that the continued presence of South Africa in the Territory of South West Africa was illegal because its mandate for the Territory had terminated through failure to comply with its obligation to submit to the supervision of United Nations organs; see I.C.J. Reports, 1971, 16, at p. 54.

The question may be asked—are there any legal or practical limitations on the Security Council's far-reaching powers under the Charter? Legal limitations are those in Articles 1 and 2 of the Charter concerning the " Purposes " and " Principles " of the United Nations; for example, the adjustment or settlement of international disputes that may lead to a breach of the peace is to be brought about by " peaceful means, and in conformity with the principles of justice and international law " (Article 1), and apart from enforcement action, the United Nations is not to intervene in matters " essentially within the domestic jurisdiction of any State " (Article 2). But even such legal limitations have to be adjusted to the circumstances; for instance the Security Council has in practice adopted the view that questions will cease to be " essentially " matters of domestic jurisdiction if in its opinion they raise issues of international concern transcending State boundaries.[1] As to practical limitations on its powers, in addition to the " veto ", there is the limitation that every decision depends on receiving the agreement of a proportion of the members.

Other important duties fall upon the Security Council under Chapter VIII of the Charter in connection with regional agencies and regional arrangements (see (iii) above).[2] It is to encourage the pacific settlement of local disputes by such means (Article 52), and where appropriate may use these

[1] Hasluck, *op. cit.*, pp. 56–57.

[2] The Soviet Union maintained that the North Atlantic Pact of 1949 was not a true regional agreement under Chapter VIII inasmuch as:—(*a*) it comprised States located in two continents, America and Europe; and (*b*) it did not relate to true regional questions. The United States Government declared that the Pact was no different from the inter-American Security Arrangements of 1945 (Mexico City), 1947 (Rio de Janeiro), and 1948 (Bogotá) which are consistent with Chapter VIII.

means for enforcement action under its authority. Generally speaking no enforcement action is to be taken by regional agencies or under regional arrangements without the authority of the Security Council except in regard to ex-enemy States. To preserve its primary authority, all action taken or intended to be taken under regional arrangements or by regional agencies to maintain peace and security is to be reported to the Security Council.

The Korean Conflict, the Congo and Rhodesian Situation, and the Security Council

The Korean conflict, 1950–1953, provided a significant testing-ground of the Security Council's effectiveness as a peace enforcement body. At the time that there occurred the crossing by North Korean troops into South Korean territory in June, 1950, the Soviet Union was absent from the Security Council, and the Nationalist Chinese Government, to whose credentials the Soviet Union objected, was represented on the Security Council. Hence the subsequent Security Council Resolutions, finding that a " breach of the peace " had been committed, recommending assistance to the South Korean authorities, and providing for a Unified United Nations Command under United States direction, were taken without the Soviet's Union's concurrence. The Resolutions did, however, receive the supporting vote of Nationalist China.

The Soviet Union challenged the validity of the Resolutions on the ground that any such vote thereon required her positive concurrence under the voting provisions of the Charter, and also the concurrence of the Government of the People's Republic of China, which was in its view the true legal Government. In reply to the Soviet Union's contention, it was maintained that for purposes of determining whether the Soviet Union had or had not concurred, an absence had necessarily to be disregarded in the same way as, in practice, an abstention from voting,[1] and that the Chinese Nationalist Government rightly represented China.

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[1] See above, p. 607.

The subsequent reappearance of the Soviet Union in the Security Council proved that United Nations intervention in the Korean hostilities had been made possible only by an unusual conjunction of circumstances—a situation favouring the non-exercise of the " veto ", the presence of American troops in Japan, and the possibility of appointing an American Staff in command of United Nations forces. Moreover, upon a close analysis of their terms, the Security Council Resolutions actually adopted were difficult to support as being a valid exercise of the powers conferred by Articles 39–43 of the Charter (*quaere*, e.g., whether the Security Council could make a " recommendation ",[1] as distinct from a decision, that Member States furnish armed assistance). For this reason, some writers have inclined to the view that the " United Nations " action in Korea was such in name only, but not in substance, and was nothing more than a voluntary, collective effort under United Nations licence to restore and maintain peace and security in that area.

In the case of the Congo situation, 1960–1964, the Security Council's action[2] was without precedent. It resulted in the despatch of a United Nations Force to the newly independent Congo, not by way specifically of enforcement action against a State under Chapter VII of the Charter, but as military assistance for the purpose of preserving law and order in relation to, and pending the withdrawal of Belgian troops, as called for by the Security Council's Resolutions. After the Belgian troops had been withdrawn, the United Nations Force was maintained in the Congo for the same purpose, and more particularly in order to prevent the occurrence of civil war and to reduce inter-tribal fighting. Primary responsibility for carrying out the Security Council's mandate fell upon the Secretary-General. The basis of the Security Council's action was primarily that the internal strife in the Congo might, in the absence of such action, deteriorate into a threat to inter-

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[1] See Stone *Legal Controls of International Conflict* (1954) at pp. 228 *et seq.*, and *Supplement* 1953–1958 (1959), pp. 870–871.

[2] By Resolutions of July 14, July 22, and August 9, 1960 (initial action).

national peace.[1] Thus, it would seem, although this is not undisputed, that the Security Council (as also the General Assembly[2]) may *authorise* measures with a view to maintaining international peace and security, notwithstanding that these measures do not strictly fall within the pattern of enforcement action under Chapter VII[3], and without the necessity of explicit adherence to the procedural requirements of the provisions in the Chapter.

However, in 1962–1963, the operations of the United Nations units in the Congo, involving the clearing of road blocks and the establishment of effective control in the Katanga area, assumed the character of veritable military enforcement measures; this action has been regarded by some commentators[4] as going beyond the scope of the role merely of " peace-keeping " and/or " policing ", which was thought to be envisaged by the earlier Security Council Resolutions. The Congo cannot be regarded as a very clear case of the interpretation and application of the provisions of Chapter VII of the Charter, and remains controversial.

In the case of the Rhodesian situation, in 1965 and following years, there were initially three important Security Council Resolutions directed against the Rhodesian regime, established by unilateral declaration of independence from the United Kingdom. There were two Resolutions, to begin with, for so-called " voluntary " sanctions of enforcement action, namely those Resolutions adopted in November, 1965 (of a general

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[1] Although this became controversial; some States objected that certain operations of the United Nations Force amounted to intervention in internal conflicts.

[2] In an emergency special session called under the " Uniting for Peace " Resolution, the General Assembly by a Resolution of September 19, 1960 in effect authorised the continuance of action under the Security Council's Resolutions.

[3] The expenses incurred] by the [Secretary-General] in taking such measures are expenses of the United Nations which may be apportioned among the Member States by the General Assembly under Article 17, paragraph 2 of the Charter; see Advisory Opinion on *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)* I.C.J. Reports (1962) 151.

[4] See article by Professor Leo Gross, " Domestic Jurisdiction, Enforcement Measures and the Congo ", *Australian Year Book of International Law*, 1965, 137, at pp. 155–157.

nature) and April, 1966 (more specific in character, and, *inter alia,* empowering the British Government to take steps " by the use of force if necessary " to prevent ships taking oil to ports from which it could be supplied or distributed to Rhodesia).[1] The third Resolution was that adopted in December, 1966 for selective " mandatory " sanctions[2] (although there was no specific provision for enforcement if a State failed to apply them); this was indeed the first time that mandatory enforcement action had been decided upon by the Security Council. The situation constituted by the self-declared independent regime was declared to be a threat to international peace and security;[3] there appears to be little doubt about the legitimacy of this determination, which was one that was within the province of the Security Council to make, although there can be arguments, as in the Korean case, with regard to the applicability of the terms of Articles 39–43 of the Charter. The vital point remains whether a situation, in a large sense within the domestic sphere, since it turned so much on the relationship of the new regime with the United Kingdom, is *stricto sensu* one within the ambit of Chapter VII of the Charter. There persists the uneasy thought that the gates are being opened wider than contemplated by those who originally drafted Chapter VII of the Charter; e.g., *quaere* whether parent governments can activate the Security Council to take enforcement action against insurgents, or whether a federal government could similarly approach the Council for measures to be taken against a unilaterally seceding State, where, of course, there are circumstances somewhat similar to the situation in Rhodesia.

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[1] This was indeed the first time that the Security Council had made such a grant of authority to a single United Nations member to take forcible action, which would otherwise be unlawful. See generally Cryer, " Legal Aspects of the *Joanna V* and *Manuela* Incidents, April 1966 ", *Australian Year Book of International Law,* 1966, pp. 97–98.

[2] These included prohibition of the import of certain products and commodities from Rhodesia, and action to prevent certain exports and transfers of funds to Rhodesia, and as well the supply of armaments, aircraft, and motor vehicles. The Resolution made specific reference to Articles 39 and 41 of the Charter.

[3] According to one view, this threat lay in the possibility of violent action by African States against Rhodesia, because of the treatment by the Rhodesian regime of the majority African population.

United Nations " Peacekeeping "

The word " peacekeeping " is not used in the United Nations Charter, yet in the last five years the " peacekeeping " concept has emerged to receive as much attention as any other current or projected programme of United Nations action. A Special Committee on Peace-Keeping Operations has met in pursuance of a General Assembly Resolution of February 18, 1965 for the making of " a comprehensive review of the whole question of peacekeeping operations in all their aspects ". The use of the word " peacekeeping " seems somewhat unfortunate. To be more precise, the issues involved are in what circumstances, in the absence of Security Council enforcement action, interposition forces, groups, or missions can be sent by the United Nations to areas of conflict, with functions related to the restoration or maintenance of peace, or the mitigation of deteriorating situations (e.g., for observation, truce supervision purposes, negotiation, restoring freedom of movement).[1] Clearly any such interposition, where the Security Council has made no determination, is dependent upon the consent of the States concerned, as to the locality where the force, etc., is to function, as to the importation of supplies, and as to contacts with the conflicting entities or forces. The Security Council has alone, under the Charter, executive responsibility to establish and operate a force compulsorily in the territory of a Member State. According to the Secretary-General of the United Nations, no peace keeping operation " could function or even exist without the continuing consent and co-operation of the host country " (see document S/7906, May 26, 1967). This was the principal justification for the withdrawal of the United Nations Emergency Force (UNEF) from Egyptian territory, prior to the Israeli-Arab hostilities of June 5–10, 1967, although for other reasons (e.g., the applicability of a " good faith "

[1] Illustrations are the U.N. Emergency Force in the Suez area, the U.N. Truce Supervision Organisation in Palestine, the U.N. Force in Cyprus, the U.N. Mission in the Dominican Republic (established in May, 1965), and the U.N. Military Observer Group in India and Pakistan. These would not exhaust the variety of the tasks which are contemplated by the protagonists of U.N. peacekeeping.

accord for the continued presence of UNEF), the withdrawal has been the subject of controversy.

There continues to be a deep division of opinion among Member States, resulting in two interdependent *impasses*, one legal, and the other practical. Some countries are adamant that peacekeeping must be confined within the scope of Security Council action under Chapter VII; others hold that the consensual character of peacekeeping enables authorisation by the General Assembly or by the Secretary-General, within the ambit of the wider purposes of the Charter. In any event, the practical aspect of reliable financing of peacekeeping, in the absence of readiness by all States to accept mandatory assessments of contributions, is one that must be solved, even if the controversy over the legal issue could be settled.

In the case of the peacekeeping forces in the Congo (ONUC) and in Cyprus (UNFICYP), entrusted with functions of maintaining law and order, difficulties were revealed with reference to the observance of two necessary restraints upon a peacekeeping force, namely, not to intervene in internal strife, and as far as possible not to apply force beyond the necessities of self-defence.

It can be seen that the peacekeeping concept is one beset with endemic problems and difficulties.

The Economic and Social Council

This organ, operating under the authority of the General Assembly, is concerned with promoting economic and social progress and better standards of human welfare as well as the observance of human rights and fundamental freedoms. The United Nations Charter recognises that progress in these fields is essential to maintain peaceful and friendly relations between nations. The Economic and Social Council is composed of twenty-seven[1] members elected by the General Assembly for three years and eligible for re-election. Representatives of any Member State or of the "specialised agencies" can participate in its discussions without vote.

[1] The former number was eighteen, increased to twenty-seven under amendments to the Charter which took effect in 1965.

Its particular role with respect to the co-ordination of the activities of the " specialised agencies " has already been discussed in this chapter. Besides this part of its activities, it initiates studies, surveys and reports on various economic, social, health, and related matters, and prepares draft Conventions for submission to the General Assembly on matters within the scope of its powers, and is empowered to call international conferences on these matters (Article 62 of the Charter). It has also played a primary part in the organisation of the programme of technical assistance for undeveloped countries. All decisions are taken by a majority of the members present and voting.

The Economic and Social Council's work is " sectionalised " through special Commissions of which four are regional economic commissions concerned with special problems in particular areas—Europe, Asia and the Far East, Africa, and Latin America; the others, the so-called " Functional Commissions ", deal with particular subjects such as Human Rights, Transport and Communications, Narcotic Drugs, Population, and Status of Women.

Of the three other principal organs of the United Nations, the Trusteeship Council and the International Court of Justice have been discussed above, in Chapters 5[1] and 16[2] respectively, and the Secretariat may now be referred to. The Secretariat consists of the administrative staff of the United Nations, and really represents an international civil service. Its chief administrative officer is the Secretary-General, who is appointed by the General Assembly on the recommendation of the Security Council.[3] The independent, international character of the Secretariat is specially safeguarded by the provisions of Articles 100–101 of the Charter, which are expressed to bind both Member States and officials of the Secretariat.[4]

[1] See above, pp. 126–130. [2] See above, pp. 458–475.

[3] For discussion of the role of the Secretary-General in carrying out the provisions of the Charter, and in giving effect to decisions of United Nations organs, see Stein " Mr. Hammarskjold, the Charter Law and the Future Role of the United Nations Secretary-General " *American Journal of International Law* (1962), Vol. 56, pp. 9–32.

[4] See above, p. 579, for a reference to the "loyalty" investigations of Secretariat officials.

9.—The International Labour Organisation and Other " Related Agencies "

The International Labour Organisation (ILO) was originally created under Part XIII of the Treaty of Versailles, 1919, but subsequently, to dissociate the Organisation as far as possible from the League of Nations and from the Treaty itself, this section of the Treaty was detached, and its clauses renumbered, and it emerged with the new title of the " Constitution of the International Labour Organisation ". This Constitution was amended in 1945, 1946, 1953, 1962 and 1964. Formerly the International Labour Organisation had some organic connection with the League of Nations but that was altered by the constitutional amendments of 1945 and 1946, and it is now a specialised agency brought into relationship with the United Nations by a special relationship agreement.

From the outset, the main object of the Organisation has been to promote international co-operation in the sphere of industry and labour so that economic competition between States or other like conditions shall not militate against the realisation of minimum as well as uniform labour standards throughout the world. The Organisation's efforts are principally directed to bringing the legislation and practice of each State into line with the most enlightened modern conceptions as to the treatment of labour, and with changing economic and social conditions in each such country. The idea of social justice underlying its work has been made more manifest in the amendments to the Constitution of 1945 and 1946, and was given particular solemn expression in the Declaration of Philadelphia adopted by the International Labour Conference in 1944 and annexed to the Constitution. That Declaration reaffirms the principles that labour is not a commodity, that freedom of expression and association are essential to international progress, and that poverty is a danger to prosperity, and it also recognises that the obligation of the Organisation is to further among nations world programmes designed to achieve full employment, higher standards of living, the provision of facilities for the training and transfer of labour, and the extension of social security measures.

The outstanding feature of the International Labour Organisation is its tripartite character, as it is representative in its organs of Governments, employers and employees.

The three main organs of the Organisation are:—(1) The International Labour Conference; (2) The Governing Body; (3) The International Labour Office.

The International Labour Conference is a policy-making and legislative body, being in effect a "world industrial Parliament". It consists of four representatives in respect of each Member State, two representing the Government and one each labour and management respectively in that country. Voting is by a two-thirds majority. The Conference promotes labour legislation in each State, by adopting:—(*a*) Recommendations; and (*b*) Conventions. A Recommendation enunciates principles to guide a State in drafting labour legislation or labour regulations, and for this reason has been termed a "standard-defining instrument".[1] States, however, are under no binding obligation to give effect to a Recommendation, although they are duty bound to bring it before the appropriate national legislative authority. A Convention is in the nature of a treaty, although it is adopted by the Conference and not signed by delegates of the Member States. Primarily, it is conceived as a model for domestic legislation. Member States are under an obligation to bring the Convention before the competent authorities for the enactment of legislation or other action (Article 19 of the Constitution). If a Member State obtains approval for a Convention, it is bound to ratify it, and thereupon assumes the obligation of applying its provisions. Also that Member State is bound to report annually on the measures it has taken to bring its legislation into accord with the Convention.

The Governing Body is more or less the executive organ of the Organisation. It has a similar tripartite character to that of the Conference, being composed of forty-eight members, twenty-four representing Governments (ten appointed by the ten States of chief industrial importance, and fourteen elected

[1] See *The International Labour Code* (edition of 1939), published by the International Labour Office, at p. xii.

by delegates of Governments to the Conference, other than the ten just mentioned), twelve representing management and elected by the employers' delegates to the Conference, and twelve representing labour and elected by the workers' delegates to the Conference. The Governing Body appoints the Director-General of the International Labour Office, and supervises the work of the Office and of the various Committees and Commissions.

The amendments of 1945 and 1946 to the Constitution were made principally with a view to strengthening the provisions for the application of Conventions adopted by the Conference, to make the Organisation completely independent of League of Nations machinery, and to enable it to co-operate more fully with the United Nations and other international institutions. This involved a thorough redrafting of Article 19 of the Constitution concerning the obligations of Member States with reference to Conventions and Recommendations, including the addition of an obligation for Member States to report from time to time on their relevant law and practice even where the competent authorities had not approved of the instruments submitted to them for approval and other action, and including also more specific provisions as to the application of these instruments within Federal States. Further by Article 19 of the Constitution, the term " Convention " was substituted for the former misleading term " Draft Convention ", and in Article 13 provision was made for the independent financing of the Organisation.

Besides Conventions and Recommendations, the Organisation has through its organs adopted less formal instruments to express its policies; for example, resolutions, conclusions, observations, and reports. Collectively all these instruments form an International Labour Code embodying world standards of labour policy. Other important features of the Organisation's machinery are the provisions in Articles 24–25 of the Constitution conferring on industrial associations of employers and workers the right to make a representation to the Governing Body that a Member State has failed to observe effectively a Convention binding it; several such representations have

been made. Then there is the procedure of complaint by Member States set out in Articles 26 to 34; this may lead to the appointment of a Commission of Inquiry and action against the State not fulfilling its obligations, to induce it to comply therewith.

The third organ of the International Labour Organisation, the International Labour Office, represents the administrative or civil service staff of the Organisation, discharging very similar functions to those of the United Nations Secretariat.

In the last decade, the International Labour Organisation has moved strongly into the field of technical assistance, manpower organisation, and productivity and management development.

The "Related Agencies"[1]

Besides the International Labour Organisation, there are the various "related agencies", each corresponding to certain aspects of world affairs demanding organic direction by a specialised international administrative body. Thus the Food and Agriculture Organisation of the United Nations (FAO) is concerned with improving living standards and the nutrition of peoples, and with promoting the increased production and more efficient distribution of food and agricultural products.[2]

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[1] The term "related agencies" is used to cover not only the specialised agencies, but an institution such as the International Atomic Energy Agency (IAEA), which is not a specialised agency, but which has a working relationship with the United Nations.

[2] Considerations of space have precluded a detailed treatment of each of the related agencies. However:—(*a*) The sections in the present Chapter dealing with the organic structure and composition of international institutions, their integration and co-ordination, etc., have been expanded in order to supply more detail as to the related agencies. (*b*) Much of the ground that would have been covered in separate detailed analyses of each body has already been included in the preceding portions of the Chapter. (*c*) There is contained in the readily available and inexpensive publication *Everyman's United Nations,* a concise treatment of each specialised agency, of the International Atomic Energy Agency (IAEA), and of the system of meetings of the Contracting Parties under the General Agreement on Tariffs and Trade (GATT) of October 30, 1947 to which a new Part IV (encouragement of development of the less-developed countries) was added in February, 1965. For more detailed information, the reader is referred to the *Yearbook of the United Nations* (latest edition, 1968), and to the Constitutions of the agencies related to the United Nations (see the *United Nations Treaty Series*). See also Oppenheim, *International Law,* Vol. I (8th edition, 1955), pp. 977–1029, D. W. Bowett, *The Law of International Institutions* (1963), and C. H. Alexandrowicz, *World Economic Agencies: Law and Practice* (1962).

The field of education, culture, knowledge and science is covered by the United Nations Educational Scientific and Cultural Organisation (UNESCO), the sphere of international air navigation and air transport by the International Civil Aviation Organisation (ICAO), international banking and economic and monetary matters by the International Bank for Reconstruction and Development, the International Monetary Fund, and the newly affiliated International Finance Corporation, international co-operation in matters of shipping, navigation, and maritime safety by the Inter-Governmental Maritime Consultative Organisation (IMCO), the organisation and improvement of postal services throughout the world by the Universal Postal Union (UPU), whose origins as an institution date back to 1874–5, and the peaceful uses of atomic energy by the International Atomic Energy Agency (IAEA), established in 1956. Other bodies are the International Telecommunication Union (ITU), the World Health Organisation (WHO), and the World Meteorological Organisation (WMO), whose titles indicate the particular functions they perform.

As to such related agencies, it may be said in conclusion that they have so far fulfilled two objects, implicit in their establishment:—(1) That, not only should they buttress and give vitality to the United Nations, but that they should draw strength from their association with the United Nations. (2) To involve the national authorities of different States into more direct and continuous association with the work of international institutions.

NOTE ON BIBLIOGRAPHY

THE following is intended as a brief note on the more important books and reference materials, mainly those in English.

Treatises

Six indispensable works are:—

(i) Oppenheim, *International Law*, Vol. I (Peace), 8th edition, 1955, and Vol. II (Disputes and War), 7th edition, 1952.
(ii) Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2nd revised edition, 1947, 3 volumes.
(iii) Stone, *Legal Controls of International Conflict* (1954), and *Supplement*, 1953–1958 (1959).
(iv) O'Connell, *International Law*, 2nd edition, 1971, 2 volumes.
(v) Greig, *International Law* (1970).
(vi) Sørensen (ed.), *Manual of Public International Law* (1968).

Among the works which are primarily cases-and-materials books, J.-G. Castel, *International Law, Chiefly as Interpreted and Applied in Canada* (Toronto. 1965) stands out as the best and most up to date book of this kind so far published. Also valuable are Green, *International Law Through the Cases* (3rd edition, 1970), Briggs, *The Law of Nations, Cases, Documents and Notes* (2nd edition, 1953), and Bishop, *International Law, Cases and Materials* (3rd edition, 1971).

In addition, the following are extremely useful for further reference:—

C. S. Rhyne, *International Law* (1971).
Kelsen, *Principles of International Law* (2nd edition, revised and edited by Robert W. Tucker, 1966).
Fenwick, *International Law* (4th edition, 1965).
Hall, *International Law* (8th edition, 1924).
Westlake, *International Law*, Vol. I (Peace), 2nd edition, 1910, and Vol. II (War), 2nd edition, 1913.
Wheaton, *Elements of International Law* (Dana edition, 1866). See also English editions (edited Keith), published 1929 and 1944.
Halleck, *International Law*, 4th English edition, 1908.

Other useful general works, in languages other than English[1], are the treatises of Pradier-Fodéré (French), Rousseau (3rd edition, 1965, French), Scelle (French), Sibert (French), Strupp (German), Cavaglieri (Italian), Balladore Pallieri (Italian), Guggenheim (Swiss), and Verdross (Austrian), the last-mentioned under the title *Völkerrecht* (5th revised edition, 1964, by the author, assisted by S. Verosta and K. Zemanek), being outstanding in the treatment of the theory of international law. A list of recently published French, German and Italian treatises is given at p. 117 of Clive Parry, *The Sources and Evidence of International Law* (1965), a book which should be consulted generally on the bibliography of international law; and see also for details of standard treatises, dictionaries,

[1] An excellent introductory work in French is Professor Dupuy's *Le Droit International* (2nd edition, Paris, 1966) in the "Que sais-je?" series.

bibliographies, and other materials, J. Robinson, *International Law and Organisation. General Sources of Information* (1967).

State Practice and the Practice of International Institutions

The most authoritative compilation as to British practice (although a number of volumes remain to be published) is the *British Digest of International Law*, edited by Clive Parry, with Judge Sir Gerald Fitzmaurice as Consulting Editor. See also *British and Foreign State Papers*, covering the period from 1812 onwards.

With regard to United States practice, there are three important compilations:—

Moore, *Digest of International Law* (1906), 8 volumes.
Hackworth, *Digest of International Law* (1940–1944), 8 volumes.
Marjorie M. Whiteman, *Digest of International Law*, the successor *Digest* to *Moore* and *Hackworth* (publication continuing).

See also *Foreign Relations of the United States, Diplomatic Papers* (formerly published under the earlier titles of *Papers Relating to Foreign Affairs*, and *Papers Relating to the Foreign Relations of the United States*) covering the period since 1861.

Two important collections of basic documents on United States foreign relations, embracing the period 1941–1955, are *A Decade of American Foreign Policy: Basic Documents*, 1941–1949, and *American Foreign Policy*, 1950–1955: *Basic Documents* (published by the Department of State). Volumes in this series for the year 1956 and following years have been issued under the title *American Foreign Policy: Current Documents*.

On French practice, there is the important compilation, Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public* (1962).

Schiffer, *Répertoire des Questions de Droit International Général posées devant la Société des Nations* (1942), is a compilation devoted to the practice of the League of Nations. As to the practice of the United Nations, see *Repertory of Practice of United Nations Organs*, in 5 volumes, with *Supplements*, and *Répertoire of Practice of the Security Council*, 1946–1951 (1954), with *Supplements*.

Treaties and Conventions

For the texts of modern or recent treaties and Conventions, reference should be made to the following official compilations:—(i) The British Treaty Series (from 1892 onwards). (ii) The League of Nations Treaty Series. (iii) The United Nations Treaty Series (published in pursuance of article 102 of the Charter).[1]

Hudson, *International Legislation*, published by the Carnegie Endowment for International Peace in 9 volumes, 1931–1950, and covering the period as from 1919, is an unofficial compilation of the more important

[1] Treaties and international agreements entered into by the United States, 1895–1949, are published in the *Statutes at Large;* from 1950 onwards in the compilation, *United States Treaties and Other International Agreements.*

multilateral treaties and Conventions concluded in this time. The texts of the older instruments are printed in such collections as those of Martens, Dumont, Hertslet, Malloy, and other compilers of treaties listed in Oppenheim, *supra*, Vol. I, at pp. 108–111, and are now being reprinted in *The Consolidated Treaty Series, 1648–1918* (annotated), edited by Clive Parry. See also Professor Parry's *Index of British Treaties, 1101–1958*. For the texts of International Labour Conventions, see *The International Labour Code*, 1951 (1952), 2 volumes, published by the International Labour Office, and *Conventions and Recommendations adopted by the I.L. Conference*, 1919–1966 (1966).

For a useful guide to compilations of treaties, for purposes of research, see Ervin H. Pollack, *Fundamentals of Legal Research* (1967), pp. 421–450.

Judicial and Arbitral Decisions

The decisions and opinions of the Permanent Court of International Justice and of the International Court of Justice are published in the official reports of these two Courts.

Hudson, *World Court Reports*, 4 volumes, 1934–1943, published also by the Carnegie Endowment for International Peace, is an unofficial collection in convenient form of the decisions and opinions of the Permanent Court.

See also generally as to the case-law of both Courts, E. Hambro, *The Case Law of the International Court*, Vols. I–V, and J. H. W. Verzijl, *The Jurisprudence of the World Court*, Vol. I (1922–1940), published 1965, and Vol. II (1947–1965), published 1966.

For the municipal judicial decisions of all countries on points of international law, from 1919 onwards, see the *Annual Digest of Public International Law Cases*, the title of which was changed in the 1933–1934 volume to the *Annual Digest and Reports of Public International Law Cases*, and which as from 1950 has been published annually under the title, *International Law Reports*. Decisions of British Courts are to be found in the collection, *British International Law Cases* (first volume published 1964).

The principal awards and adjudications of the Permanent Court of Arbitration are reprinted in Scott, *Hague Court Reports* (1916), a second series of which was published in 1932. Other collections of arbitral decisions are the *United Nations Reports of International Arbitral Awards*, Moore, *History and Digest of International Arbitrations to which the United States has been a party* (1898), 6 volumes, the same author's *International Adjudications Ancient and Modern* (1929–1936), and De la Pradelle and Politis, *Recueil des Arbitrages Internationaux*.

Schwarzenberger, *International Law*, Vol. I, *International Law as Applied by International Courts and Tribunals* (3rd edition, 1957), and Vol. II, *Law of Armed Conflict* (1968), is a valuable account of international law based on international judicial and arbitral decisions, illustrating the author's inductive approach to the subject.

General

Throughout this book, there are references in the footnotes to certain articles, treatises, and text-books, most of which are readily accessible,

and may be consulted for wider reading on each of the different branches of the subject.

The leading periodicals in English on international law are the *American Journal of International Law* (quarterly), the *International and Comparative Law Quarterly*, and the *Year Book of World Affairs* (London Institute of World Affairs; this *Year Book* deals with both international affairs and international law). These contain, in addition to articles and notes, the reproduction of the texts of international documents, accounts of British and American practice, and annotations and commentaries on significant judicial or arbitral decisions. Mention may also be made of the *Canadian Yearbook of International Law* (*Annuaire canadien de Droit international*) and of the *Australian Year Book of International Law*, which are newcomers from the Commonwealth to the field of the periodical literature of international law. An important annual publication in India is the *Indian Year Book of International Affairs*, the 1964 issue of which contained a number of historical studies.

Leading and important foreign periodical publications include the *Annuaire Français de Droit International* and *Revue Générale de Droit International* (French), the *Netherlands International Law Review*, the *Soviet Year-Book of International Law* (Soviet Association of International Law), and the *Japanese Annual of International Law*.

Current, continuing compilations of legal documentary materials include *International Legal Materials*, published bi-monthly (American Society of International Law), and the *United Nations Juridical Yearbook* (United Nations).

For useful general bibliographies, see Briggs, p. 628, *ante*, Schwarzenberger, p. 630, *ante*, Stone, p. 628, *ante*, Sohn, *Cases and Other Materials on World Law* (1950), O'Connell, and Verdross, p. 628, *ante*, the last-mentioned being particularly valuable for references to the Continental literature.

A select bibliography on the law and practice of treaties is contained in the United Nations publication, *Laws and Practices concerning the Conclusion of Treaties* (1953), at pp. 141–189.

In the *Yearbooks* of the International Court of Justice (the latest is the *Yearbook*, 1969–1970), there is much useful information concerning the Court, its adjudications, and its functions generally. Prior to the *Yearbook*, 1964–1965, these annual volumes contained an extensive bibliography of books, articles, and studies published concerning the Court, but the bibliographies are now being published separately in annual issues.

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