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INTRODUCTION

The purpose of this DA Pamphlet is not to make each of its readers an expert in the field of international law. This publication has been written with the expectation that the military attorneys making use of it will be provided with a basic understanding of the legal system governing the international community. International law is an area of jurisprudence which challenges. It quite often fails to provide concise "textbook answers" to problems which reach a degree of complexity far greater than that found in any other legal system. Entrusted with the task of regulating the conduct of international sovereign entities, it is a legal framework which develops on a daily basis. Its successes go largely unnoticed, while its failures gain almost instantaneous notoriety and condemnation. It is a jurisprudential system particularly unsuited for complacent personalities and regimented minds. Hopefully, military attorneys will not view the often evident imprecision of international law as a fatal weakness but as an opportunity afforded its practitioner to develop an efficient and viable legal system. Constructive criticism and the ability to apply concepts and rules to practical international legal problems must be based on a working knowledge of the subject matter. The achievement of this end underlies the purpose of this publication.

The term "he" (and its derivatives) used in this pamphlet is generic and, except where contraindicated, should be considered as applying to both male and female.

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THE LAW OF PEACE

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CHAPTER 1
NATURE, SOURCES AND EVIDENCE OF INTERNATIONAL LAW: THE TRADITIONAL AND CONTEMPORARY VIEWS

Section I. THE TRADITIONAL VIEW OF THE NATURE OF INTERNATIONAL LAW

1-1. A Multifaceted Jurisprudence. *a.* If asked to "define" international law, a law professor would most probably articulate this classic definition: "International law consists of those rules and regulations which bind nation states in their relations with each other." [1] Although academically and theoretically correct, this definition nevertheless fails to provide the military attorney with any practical insight into the distinctive areas of international jurisprudence, the interrelationship of these areas, and the sources and evidences of these rules and regulations. The purpose of this chapter will be to provide this insight. Additionally, the views of evolving and socialist states on international law will be examined in some detail.

b. Far from being simply an amorphous collection of vague concepts and principles, international law is comprised of distinct component parts. As such, it is a body of law which has evolved out of the experiences and the necessities of situations that have involved members of the world community over the years. International law exists because it is to the benefit of all states that some sort of order govern their international dealings. There may be disagreement among them as to what law applies to a given situation, but there is no disagreement as to the fact that some set of rules is necessary. In the absence of a world government, these rules are made by the states themselves. States are, therefore, the ultimate drafters of international law. The composition of this law can best be explained by a careful analysis of the following chart.

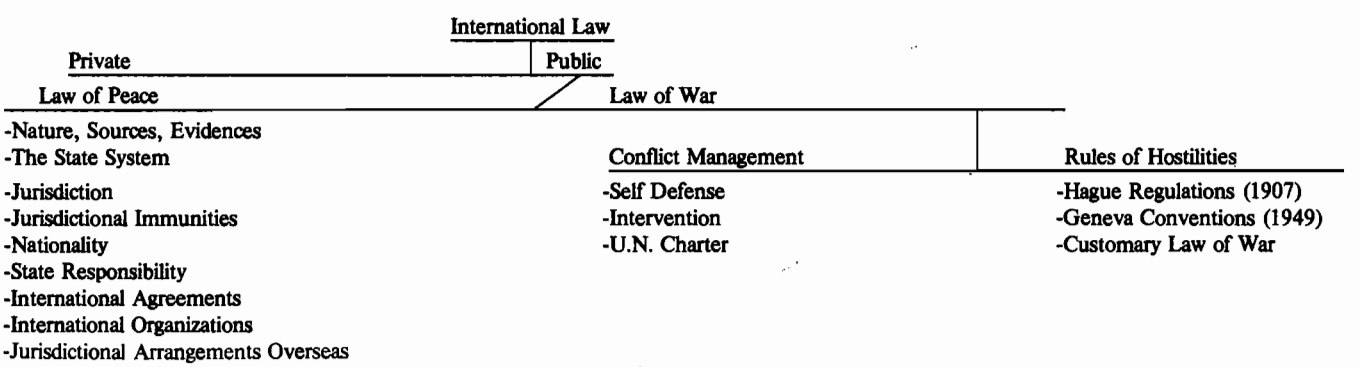

Figure 1.

c. Initially, it is important to distinguish between the private and public sectors of international law. In the former, private practitioners will be direct participants in legal matters of a primarily commercial nature. Private international law thus consists of subject matter generally found in law school courses dealing with Conflict of Laws, International Business Transactions, and other related areas. Typical items of private international law concern would be questions of international tax, franchising, patents, and incorporation. Interesting in nature, this is not, however, the area of international law of principal concern to the military attorney. [2] It is the public sector of international law in which the military lawyer may often find himself an active participant. Accordingly, it is essential that the various elements of this aspect of international jurisprudence be fully understood. Traditionally, public international law has been viewed as operative *only* among nation states. That is, only states are to be considered true subjects of the law. Private citizens and corporate personalities are simply objects of international norms, with the former generally becoming involved in international legal matters only by serving as representatives of nation states. [3]

d. For purposes of study and analysis, public international law has generally been divided into two distinct areas—The Law of Peace and The Law of War (Use of Force).

(1) *The Law of War.* It is helpful to divide this latter area of jurisprudence into distinct portions: Conflict Man-

1. *G. Hackworth, Digest of International Law* 1 (1940). *See also W. Bishop, International Law* 3 (3d ed. 1971); *H. Kelsen, Principles of International Law* 201 (1952).

2. As a legal adviser to one of the armed services, the military attorney will be primarily concerned with providing legal advice to an integral element of the United States Government. Accordingly, international legal problems which arise will seldom be matters of a purely private nature. There does exist, however, a growing feeling that the traditional distinction between private and public international law must be eliminated, due to the ever increasing interrelationship between these two areas of jurisprudence. *See W. Friedmann, The Changing Structure of International Law* 70 (1964).

3. *C. Fenwick, International Law* 32-33 (4th ed. 1965). The reader should be aware, however, that many jurists now question the applicability of this traditional view of international law to the legal realities of the latter twentieth century. These individuals argue that private citizens, some international organizations, and even various corporate entities should be considered subjects of public international law. This contention has gathered strong support, especially in the rapidly developing area of human rights.

agement and the Rules of Hostilities. The Conflict Management aspects of the Law of War consist of those legal concepts and principles developed for the purpose of eliminating or substantially reducing conflict within the international community. Of primary concern here are specific provisions of the U.N. Charter and the concepts of self-defense and intervention. [4] If these norms, for one reason or another, fail to prevent the occurrence of conflict, the other aspect of the Law of War then comes into play—the Rules of Hostilities. Of major importance here are the 1907 Hague Regulations and the 1949 Geneva Conventions, those treaty rules and regulations applicable to the actual conduct of combat and the concurrent humanitarian safeguards. [5] The customary Law of War may sometimes be looked to in areas where no codified concepts have been formulated. Publications dealing with the Law of War available to the military attorney include DA Pam 27-161-2, *International Law, Volume II* (1962); DA Pam 27-1, *Treaties Governing Land Warfare* (1956); and FM 27-10, *The Law of Land Warfare* (1956). [6]

(2) *The Law of Peace.* As the second major area of public international law, this generally comprises 75 to 90 percent of the content of most international law courses taught in law and graduate schools. Often viewed by many military attorneys as a "nice to know—but hardly relevant" aspect of their professional responsibilities, the various elements of this area of international jurisprudence provide the basic framework upon which both the Law of War and international jurisdictional arrangements are based. [7] It is this framework of the law with which this publication deals. Each of the chapters contained herein will focus on one of the elements of the Law of Peace shown in figure 1 above. [8]

e. The purpose of this brief analysis of the interrelationship of the various aspects of international law has been to alert the reader to the fact that sound legal advice on international legal matters is dependent on the attorney's appreciation of the broad range of international legal norms. A working knowledge of the Law of Peace is the first step in this learning process.

1-2. The Original Development of International Law. *a. The Peace of Westphalia.* International law is basically a product of Western European civilization. [9] Being a law between sovereign states, international jurisprudence did not, indeed could not, arise until the modern nation-state system came into existence. The birth of this system is conveniently ascribed to the Peace of Westphalia of 1648, by which the Thirty Years' War was concluded. [10] It was, in a sense, the constitution for the states that, almost to this day, comprise the map of Europe. [11]

b. International law did not develop gradually. It arose rather suddenly to fill a definite need created by the fairly abrupt change in the composition of European political society which resulted from the Thirty Years' War. This is not to say, however, that earlier ages did not contribute significantly to the formulation of international law. Early jurists in the field drew heavily on the practice of prior civilizations where rules regulated the existing intercommunity relations. [12] Major contributions toward establishing a viable system of international norms were made by the Hebrews, Greeks, Romans, and several individuals in the Middle Ages. [13]

1-3. The Theories and Schools of International Law in the State System. *a.* Theories. Following the disintegration of the Holy Roman Empire, but prior to the Peace of Westphalia, the Renaissance widened man's intellectual horizon and the discovery of the New World stimulated the imagination of philosophers as well as of explorers. Vitoria, a Spanish theologian whose lectures were published in 1557 after his death, sought to apply the principles of international morality to the problems of the native races of the Western Hemisphere. In another and earlier treatise he formulated, in clearer terms than had

4. For a brief but well reasoned discussion of these basic Conflict management concepts, *see* J. McHugh, *Forcible Self-Help in International Law, Naval War College Review*, Nov-Dec, 1972, at 61.

5. Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat, 2277, T.S. No. 539, 2 *Malloy, Treaties* 2269; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

6. These are only a few of the publications dealing with the Law of War available to the military attorney. Materials specifically designed to assist in the teaching of the Hague and Geneva Conventions are also available.

7. International jurisdictional arrangements are an aspect of public international law of particular importance to the military attorney. These arrangements speak to the jurisdiction to be exercised over military forces stationed overseas and generally occur in the form of Status of Forces Agreements, Military Assistance Advisory Group (MAAG) Agreements, and Military Mission Agreements. This subject will be dealt with in detail in chapters 4 and 5, *infra.*

8. *See* page 1-1, *supra.*

9. This fact has had a great impact on the contemporary view of the socialist and evolving states toward international law. *See* section III, p. 1-13, *infra.*

10. The Thirty Years' War, beginning in 1618, was a confused struggle of religious and political objectives. Beginning as a domestic struggle between over 350 individual German states, the war rapidly engulfed, for a variety of reasons, the major states of Europe. Finally, when the participants had exhausted their resources, the war was terminated by the Peace of Westphalia of 1648. This agreement consisted of the two treaties of Osnabruck and Munster, to which all of the leading Christian states of Europe were parties.

11. *C. Eagleton, International Government* 5 (3d ed. 1957); *C. Fenwick, International Law* 14-15 (4th ed. 1965).

12. *J. Brierly, The Law of Nations* 1-2 (6th ed. 1963).

13. For an excellent analysis of the influence of earlier civilizations on the development of international law, *see A. Nussbaum, A Concise History of The Law of Nations* (2d ed. 1954).

yet been done, the principle that the nations of the world constituted a community, based both upon natural reason and upon social intercourse. [14] The Spanish Jesuit, Suarez, in a classic passage of his treatise published in 1612, insisted clearly that the states of the world, although independent in their national life, were nevertheless members of the human race and as such subject to a law of conduct: a law based, he maintained, chiefly upon natural reason, but also in part upon human custom. [15] The Italian jurist Gentili, professor of civil law at Oxford, published in 1598 a treatise, *De Jure belli libri tres*, in which, without discarding natural reason and natural law, he sought to find historical and legal precedents to regulate the conduct of nations. [16] The honor was reserved, however, to Hugo van Groot, better known as Grotius, to publish in 1625 a more formal treatise, *De jure belli et pacis*, which was the first to obtain a hearing outside the schools and which won for its author the accolade of "Father of International Law." [17] Grotius followed the classical tradition in making the natural law the basis of his system. The "natural law," as he defined it, was "the dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature." [18] Since nations formed a society similar in its nature to the community of citizens, they too were bound by the dictates of the natural law.

b. In addition to the natural law, Grotius recognized a "voluntary" law of nations based upon their free consent, either explicitly expressed in treaties and conventions or implicitly manifested by usages and customs. To this law he gave, the name *jus gentium.* [19] In so far as it conformed to the dictates of right reason, the voluntary law might be said to blend with the natural law and be the expression of it. Should there be a conflict between the two, the law of nature was to prevail as the fundamental law, the authority of which could not be contravened by the practice of nations. [20]

1-4. Schools. *a.* Largely under the influence of the great treatise of Grotius and stimulated by the growing intercourse between nations and the need for more specific rules of international conduct, the science of international law developed rapidly during the succeeding centuries. Three main tendencies (sometimes described as schools of thought) may be observed, which have led historians to classify the various writers into separate groups. The term "schools," however, suggests a greater unity than has actually existed within any of the several traditions. Some writers have sought to build up the theory of the law while others have laid chief stress upon the actual conduct of nations. A great middle group has insisted that the most practical approach to the law involved, of necessity, some theory of international ethics, thereby following in the footsteps of Grotius.

b. The Naturalists. The peculiar conception of the law of nature developed by the English philosopher Hobbes in his treatise on the *Great Leviathan*, published in 1651, had a far-reaching effect upon the science of international law. Man is antisocial, not social as in the Stoic and Christian tradition. Living in a state of nature in which he is "nasty and brutish," man is at war with every other man until at last, driven by the instinct of self-preservation, man is led to form a compact with other men and surrender his natural rights. The law of nature was thus divorced from theology. The divorce made it possible for states to assert their sovereignty in more absolute form; but at the same time it destroyed the conception of a higher law and made their conduct a matter to be determined by their own free agreement. While following in the tradition of Hobbes in divorcing the natural law from theology, Samuel Pufendorf, a university professor first at Heidelberg and later at Lund in Sweden, conceived a new natural law of his own. In a work published in 1672, *De jure naturae et gentium*, Pufendorf conceived of a state of nature whose fundamental law was the obligation of man to promote socialability with his fellow men; [21] whatever acts had that effect were laws of nature. The standard of international conduct was to be determined not by custom and treaty but by the natural law evidenced by the application of reason to international relations. Historians have placed Pufendorf at the head of the Philosophic or Pure Law of Nature School. However, others who have placed

14. *Francisco De Vitoria, De Indis Et De Iure Belli Relictiones* (text of 1696), in *The Classics of International Law* (J. Scott ed. 1917). For an appraisal of Vitoria's contribution, *see J. Scott, The Spanish Origin of International Law, pt. I: Francisco de Vitoria and his Law of Nations* (1934); *J. Scott, The Catholic Conception of International Law,* chap. 1 (1934); *H. Wright, Catholic Founders of Modern International Law* (1933); Trelles, *Francisco de Vitoria et l'ecole moderne du droit international,* 17 *Recueil Des Cours* 113-342 (1927).

15. The passage is quoted, in Latin, by *T. Walker, A History of The Law of Nations* 155-56 (1899); and in English by *Eppstein, The Catholic Tradition of The Law of Nations* 265 (1934). For a study of the influence of Suarez upon the development of international law, see C. Trelles, 43 *RECUEIL DES COURS* 389 (1933).

16. *Gentili, De Juri Belli Libri Tres* (1598), in *Classics of International Law* (1933). Other predecessors of Grotius include *Legnano, De Bello, De Represaliis Et De Duello, (circa* 1390); *Belli, De Re Militari Et Bello Tractatus,* (1563); *Ayala, De Jure Et Officiis Bellicis Et Disciplina Militari* (1582). For a recent critical study, *see* L. Erlich, *The Development of International Law as a Science,* 1 *Recueil Des Cours* 177 (1962).

17. A modern translation by *F. Kelsey, The Law of War and Peace,* appeared in the *Classics of International Law* series in 1925.

18. *Id.*, chap. I, § X. For an analysis of the work, *see T. Walker, History of the Law of Nations* 285 (1899).

19. *Id.*, § XIV. Vitoria appears to have used the term in the same sense a century earlier. The new usage was destined to become the accepted one, and in due time "law of nations" and "international law" came to be interchangeable.

20. *Id.*, Prolegomena, § 9.

21. *S. Pufendorf, De Jure Naturae Et Gentium* (1672), in *Classics of International Law* (J. Scott ed. 1934). An abridged edition of the larger work was prepared by Pufendorf himself under the title *De Officio Hominis Et Civis Juxta Legem Naturalem Libri Duo* (1682), in *Classics of International Law* (J. Scott ed. 1927).

chief emphasis upon the philosophical basis of international law, such as James Lorimer in his *Institutes of the Law of Nations*, have had ideas of their own as to the higher law from which international obligations are derived. [22]

c. The Grotians. Another group of writers, designated as "Grotians," have been said to "stand midway" between the Naturalists and the later group known as Positivists. However, Vattel, the leading writer of this school, was far from being true to Grotius either with respect to his concept of the natural law or to the conclusions which might be drawn from the natural law.

(1) Owing to the practical use made of his treatise by statesmen, the name of Emer de Vattel came to be better known in the world of international relations than that of Grotius himself. Recognizing the need of a new treatise on the law of nations, Vattel believed it more expedient to popularize a volume entitled *Jus gentium* which was published in 1749 by the German philosopher Wolff. However, in doing so, Vattel expressly rejected the concept which Wolff had advanced of a great republic or commonwealth of the nations, a world-state having authority over its component members. Instead, he preferred to relate international obligations to the theory of primitive society which had become the popular source of the rights and duties of individual men.

(2) Vattel began with a recognition of the state as a corporate person having an understanding and will of its own as well as obligations and rights. He then argued that:

> . . . . as men are subject to the law of nature, and as their union in civil society cannot exempt them from the obligation of observing those laws, the whole nation, whose common will is but the outcome of the united wills of the citizens, remains subject to the laws of nature and is bound to respect them in all its undertakings . . . . [23]

However, the law of nature could not be applied to nations without taking into account the changes called for by the fact that nations, not individuals, were the subjects of the law. It was this adaptation of the law of nature to nations which constituted what Vattel believed to be Wolff's contribution to a system of international law, and which constituted in turn Vattel's own contribution. [24]

(3) The system proposed by Vattel is elaborate and complex, but it is important because of the great influence exercised by him upon the subsequent development of international law. Few of the statesmen and jurists who quoted his authority in later years foresaw the consequences of his enthronement of the sovereignty and independence of states. Vattel marked the demise of the long-established distinction between a just and an unjust war. Each prince was to be allowed to be the judge of his own case, and the community was to accept his decision on the assumption that he knew what was best for his own interests. Thus, a liberty denied by the law of nature to individual citizens was reserved by Vattel to states, by taking into account the changes in the natural law when applied to them.

d. The Positivists. A third group of writers has been classified as Positivists, or the Positive School. It was to be expected that with the growing intercourse of states and the greater stability in international relations that followed the Peace of Westphalia there should be increased interest in the substantive body of international law. Bynkershoek, a Dutch publicist, writing between 1702 and 1737, substituted reason for the law of nature, and held that *reason* and *usage* constituted the two sources of international law. Permanent usage would appear to embody the dictates of reason, representing as it does the collective reason of successive generations and of various nations. In this way Bynkershoek was able to appeal directly to custom in support of certain claims, and he went so far as to assert that there was no law of nations except between those who voluntarily submitted to it by tacit agreement. [25] John Jacob Moser, a prolific German writer of the middle of the eighteenth century, pointed the way to the more modern concept of international law by concerning himself solely with the accumulation of treaties and usages which, in the form of precedents, gave a positive character to international law. This Positivist approach has become the predominant school of thought in the twentieth century.

Section II. SOURCES AND EVIDENCES OF INTERNATIONAL LAW

1-5. General. *a.* A brief examination of the various theories and schools generally associated with the jurisprudential development of international law is essential to its study. Though such an analysis will reveal a widespread agreement among states that rules are necessary in order to control and govern international conduct, a difference of opinion often results when attempts are made to articulate these rules and define the process through which they are formulated. Accordingly, it is essential that attention be focused on the very core of this controversy—the sources and evidences of international law.

b. When the Permanent Court of International Justice was established pursuant to Article 14 of the League of

22. The influence of Lorimer was significant. He was one of the few writers to foresee the need of international legislative, judicial, and executive institutions as essential conditions for the maintenance of peace. His conception of the moral basis of international law was in line with present-day conceptions of the inadequacy of the appeal to utilitarian motives.

23. *E. Vattel, Le Droit Des Gens* § 5 (1758).

24. The reader will note that Vattel's law of nature differs fundamentally from the Christian concept of natural law, founded not upon contract but upon the application of the law of God to human relations. *See supra* note 14.

25. *C. Bynkershoek, Quaestionum Juris Publici Libri Duo, Lib. I, Cap 10* (1737), in *Classics of International Law* (1930); *Bynkershoek, De Foro Legatorum, Cap.* III, § 10, and *Cap.* XIX, § 6, in *Classics of International Law* (1946).

Nations Covenant in 1920, [26] a major question for resolution was the law to be applied by the court in deciding matters that came before it and the authorities to be consulted in determining that law. This problem was answered in Article 38 of the statute creating the court. When this body was recognized as an organ of the United Nations, Article 38 of its statute was made an integral part of the statute of the International Court of Justice. [27] Article 38 in its present form provides as follows:

1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

By the inclusion of subparagraph 1d, Article 38 has introduced and combined in paragraph 1 the evidences of international law, together with the three sources listed in subparagraphs 1a, b, and c. A proper analysis of the law requires that a distinction be made between the former and the latter.

1-6. Sources of International Law. *a.* In general, international law is based on the common consent of states in the international community. Determination as to whether such consent exists in a particular case or situation is a question of fact. Thus, the three primary sources of international law are those channels through which a state might give its expressed or implied consent. These sources are international agreements (treaties), customary norms, and general principles of law common to all "civilized" states. Consent with regard to this latter source is more implied than expressed and is said to exist because states, having incorporated these principles into their domestic law, are deemed to have consented to their use as principles of international law. [28] Each of these sources merits separate discussion.

b. International agreements. Without question, international agreements now stand as the primary source of international law. [29] The subject of treaties is extensively dealt with in chapter 8. Thus, for the present discussion, it is sufficient to simply describe the role such agreements play as a source of international jurisprudence. A treaty may (1) declare, expand, or modify an existing rule of customary international law; (2) abrogate such a rule as between parties; or (3) provide a rule of law where none previously existed. Accordingly, treaties may take precedence over all other sources of international law in determining the international obligations of all signatory states. An often stated rule is that only states party to the agreement are bound by its terms; treaties cannot control the actions of nonparties. Many modern jurists and publicists contend that international agreements may also establish rules for nonparties in two ways. First, many treaties contain provisions that purport to merely codify existing rules of customary international law. These rules are followed by the contracting parties, not only because the rules are part of the treaty, but also because they would be considered as binding international law even in the absence of any treaty. Naturally, the greater the number of states party to the treaty, the more often the agreement will be recognized as binding and the more likely it will be universally accepted as declaratory of a rule of customary international law. [30] Secondly, nonparty states may have a strong incentive to follow the treaty practice of the states party to the agreement. There has been a substantial increase in the frequency and importance of agreements made not by two or three states as a matter of private business, but by a considerable proportion of states at large for the regulation of matters of general and permanent interest. Such acts are often the result of congresses or conferences held for that purpose, and they are framed to permit the subsequent concurrence of states not originally parties to the proceedings. [31] When all or most of the major powers have deliberately agreed to these rules, they will have a very great influence among even those states which have never expressly adopted them.

c. Custom. Until fairly recently, custom had been, quantitatively, the primary source of international law, a position now assumed by international agreements. Notwithstanding this fact, however, custom still exists as an important and vital source of international jurisprudence. This results partially from the fact that it is through custom that treaties are interpreted. Of greater importance, however, is the fact that many of the legal concepts contained in such treaties can be considered as binding on even nonparties, *if* these agreements are deemed to be merely a codification of already existing customary international law. Given this fact, the lawmaking process of

26. For a brief account of its establishment *see 6 Hackworth, Digest of International Law* 67-68 (1943).

27. 59 Stat. 1031, T.S. No. 993. For a synopsis comparing the language of each of these statutes, *see I. Schwarzenberger, International Law* 573-588 (2d ed. 1949). The organization and activities of the International Court of Justice are discussed more fully in chapter 9, *infra*.

28. This consent is particularly evident in Article 38 of the Statute of the International Court of Justice. This authorizes the Court to resort to "general principles" in deciding disputes placed before it.

29. *W. Friedmann, O. Lissitzyn, & R. Pugh, International Law* 64-68 (1969), [hereinafter cited as *Friedmann*].

30. For recent references to international agreements as evidencing the state of customary international law *see* Letter from Secretary of State Rusk to Attorney General Kennedy (Jan. 15, 1963), *reprinted in Int'l Leg. Mat'ls* 527-528 (1963). For instance it is stated that the 1958 Convention on the Territorial Sea and the Contiguous Zone ". . . must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law of the subject at the present time." *Id.* at 528.

31. The 1949 Geneva Conventions resulted from an international conference of this nature. Similar diplomatic conferences are currently being held in order to supplement these international agreements.

custom remains a particularly significant source of international norms.

(1) Though custom is often viewed as a somewhat nebulous legal source, this need not be the case. Custom arises when a clear and continuous habit of doing certain actions has grown up under the conviction that these actions are, according to international law, obligatory. It is state practice accepted as law between states. [32] The two great difficulties with respect to the concept are generally considered to be difficulty of proof and the difficulty of determining at what stage custom can be said to have truly become authoritative law. Accordingly, it is helpful to view such a determination as a factual one. As in the case of most factual determinations, there are a number of criteria to be studied in order to resolve the issue. Judge Manley O. Hudson, former U.S. member of the International Court of Justice, has suggested the consideration of the following in determining the existence of customary rules of international law:

(a) Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

(b) Continuation or repetition of the practice over a considerable period of time;

(c) Conception that the practice is required by, or consistent with, prevailing international law;

(d) General acquiescence in the practice by other states. [33]

(2) As can be seen, the essence of customary international law lies not only in the existence and universal application of the custom but likewise in the fact that it is accepted as obligatory by the nation states of the world, or at least a substantial number of these states. Thus, it is the view of most international jurists that when a custom satisfying the definition in Article 38 of the I.C.J. Statute is established, it constitutes a general rule of international law which, with a single exception, applies to every state. This exception concerns the case of a state which, while the custom is in the process of formation, clearly and consistently registers its objection to the recognition of the practice as law. [34] In the *Anglo-Norwegian Fisheries* case, the Court, in rejecting the so-called ten-mile rule for bays, said: "In any event, the ten mile rule would appear to be inapplicable as against Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." [35] Even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru, which, far from having by its attitude adhered to it, has on the contrary repudiated it. [36]

(3) These pronouncements seem to indicate clearly that a customary rule may arise, notwithstanding the opposition of one state, or perhaps even a few states, provided that the necessary degree of acceptance is otherwise reached. Moreover, they also seem to indicate that the rule so created will not bind those states objecting to it. In other words, there appears to be no majority rule with respect to the formation of customary international law. Conversely, it clearly appears that if a custom becomes established as a general rule of international law, it will bind all states which have not opposed it whether or not these states played an active role in its formation. This means that in order to invoke a custom against a state, it is not necessary to specifically show the acceptance of the custom as law by the state. Acceptance of the custom will be presumed, thereby binding the state, unless it can show evidence of its actual opposition to the practice in question.

(4) In applying a customary rule, the Court may well refer to the practice, if any, of the parties to the litigation in regard to the custom. However, it has never treated evidence of their acceptance of the practice as a *sine qua non* when applying the custom to them. [37]

(5) One aspect of the legal basis of custom which is currently of particular importance is the position of the new states, with regard to existing customary rules of international jurisprudence. As will be shown in chapter 8, new states generally begin with a clean slate apropos treaties, although they very often assume many of the treaty obligations formerly applicable to them as territories. The suggestion has been made that this same approach should be taken with relation to customary international norms. [38] This suggestion has, quite naturally, proven to be most attractive to states evolving from colonial regimes. [39]

(6) An examination of several cases is helpful in demonstrating some factors which various courts considered in ruling upon the existence of customary rules of international jurisprudence.

(a) THE PAQUETE HABANA
THE LOLA
United States Supreme Court, 1900.
175 U.S. 677, 20 S. Ct. 290.

Mr. Justice Gray delivered the opinion of the court.

These are two appeals from decrees of the District Court of the United States for the Southern District of Florida, condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two-thirds of her catch, the other

32. *H. Kelsen, supra* note 1, at 307.

33. Quoted in *Friedmann, supra* note 29, at 36.

34. *C. Waldock, General Course in Public International Law* 49 (1962).

35. Anglo-Norwegian Fisheries Case, [1951] I.C.J. 131.

36. Colombian - Peruvian Asylum Case, [1950] I.C.J. 277.

37. *C. Waldock, supra* note 34, at 50.

38. Socialist publicists are the primary proponents of this suggestion. They are most critical of European and Western states attempting to "impose" norms of general international law upon the evolving states of Asia and Africa.

39. A more complete explanation of this Soviet approach toward customary international law occurs *infra* at paras. 1-12 *et seq.*

third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron, she had no knowledge of the existence of the war, or of any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

* * * *

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master, on behalf of himself and the other members of the crew, and her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. * * *

* * * *

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law notably in 2 Ortolan, Règles Internationales et Diplomatie de la Mer, (4th ed.) lib. 3, c. 2, pp. 51-56; in 4 Calvo, Droit International, (5th ed.) §§ 2367-2373; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemi, §§ 191-196; and in Hall, International Law, (4th ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our country and generally throughout the civilized world.

[The Court then proceeds to "trace the history of the rule" through an extensive examination of state practice, beginning with the issuance of orders by Henry IV to his admirals in 1403 and 1406.]

Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or by any other nation. And the Empire of Japan, (the last State admitted into the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention"—including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission." *Takahashi, International Law*, 11, 178.

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. For this purpose, 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 civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, 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. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

* * * *

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

* * * *

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson commanding the North Atlantic Squadron, to "immediately institute a blockade of the north Coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west." Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22, the President issued a proclamation, declaring that the United States had instituted and would maintain that blockade, "in pursuance of the law of the United States, and the law of nations applicable to such case." 30 Stat. 1769. And by the act of Congress of April 25, 1898, c. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. 364.

On April 26, 1898, the President issued another proclamation, which after reciting the existence of the war, as declared by Congress, contained this further recital: "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice." This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. 1770. But the proclamation clearly manifests the general policy of the Government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

* * * *

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case, Ordered, that the decree of the District Court be reversed, and the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

[Dissenting opinion of Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, omitted.] [40]

(*b*) In The *Scotia*, [41] the court dealt with the question whether international law required sailing vessels to carry colored lights instead of white ones. In this particular case, the court based its determination that such a rule did exist on the fact that numerous maritime states had imple-

[40]. The reader's attention is directed toward the fact that this case will also be referred to in connection with the discussion in chapter 2 regarding the relationship between international and U.S. law.

[41]. *The Scotia* [1801] 81 US 822 (14 Wallace 170).

mented domestic legislation to this effect and that other states had accepted this rule as binding customary international law. The court explained its decision as follows:

. . . . Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of maritime rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations . . . . And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, expressed or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including about all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part as least, and so far as relates to these vessels, the law of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extraterritorial 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. . . .

(c) NORTH SEA CONTINENTAL SHELF CASES
(Federal Republic of Germany v. Demark)
(Federal Republic of Germany v. Netherlands)
International Court of Justice, 1969.
[1969] I.C.J. Rep. 3, 8 Int'l Leg. Mat'ls 340 (1969).

[Denmark and the Netherlands contended that the boundaries between their respective areas of the continental shelf in the North Sea, on the one hand, and the area claimed by the Federal Republic of Germany, on the other, should be determined by the application of the principle of equidistance set forth in Article 6(1) of the Geneva Convention of 1958 on the Continental Shelf, 15 U.S.T. 471, 499 U.N.T.S. 311, which by January 1, 1969, had been ratified or acceded to by 39 states, but to which Germany was not a party. Article 6(1) of the Convention reads as follows:

> Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Holding, by a vote of 11 to 6, that Germany was not bound by the principle of equidistance, the Court said in part:]

* * * *

70. . . . [Denmark and the Netherlands argue] that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not likely to be regarded as having been attained.

72. It would in the first be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto*, the equidistance principle might be said to fulfill this requirement. Yet, in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. . . .

Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, . . . it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case, however, the court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That nonratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied. The reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964. . . . Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the

sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule or legal obligation is involved.

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. . . . [S]ome fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds, which deprive them of weight as precedents in the present context. . . .

76. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by nonparties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sine necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.
There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy convenience or tradition, and not by any sense of legal duty.

77. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case. . . . [T]he position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors. [42]

* * * *

(7) These three cases serve to demonstrate the role customary international law may play in international adjudication and several of the ways in which courts have relied upon this source of jurisprudence as a basis for their decisions. Its current importance and value must not be dismissed.

d. General principles of law. Where neither treaty, nor customary norms furnish a satisfactory rule of law, the applicable legal concepts must be deduced from the general principles of law recognized by "civilized" states. These general principles of law refer to the use of national law principles, common to all nations, in deciding questions of international law. This is comparable in scope to the use of the "law of peoples" by Roman authorities or the subsequent use of municipal Roman Law by medieval writers in developing the basic principles of international law. The principles of Roman law, even today, furnish the foundation for the national laws of most major world powers. General principles of law have performed a very necessary function by giving norms to international law which have matured in a more organized local society and which may furnish the means to resolve disputes submitted to international arbitration or adjudication. If there is no treaty or specific custom in point, a solution can be reached by the use of general principles. A court or commission cannot say "*non liquet.*" [43]

(1) What are these "general principles of law"? Conceivably, they may be general principles of private law [44] or concepts derived from natural law. [45] A listing of some of these observations applied by international courts and tribunals substantiates these observations. Such principles would include self-preservation, good faith, concept of responsibility, and those general principles of law that govern judicial proceedings, such as *res judicata,* burden of proof, and jurisdiction. [46]

(2) International arbitral tribunals have frequently employed general principles of law in deciding disputes between states. In a number of cases, for example, arbitrators found support in the municipal law principles of extinctive prescription, laches, and statutes of limitation for their rejection of claims on the basis that they had not been presented or pressed for an extended period of time. [47] In the *Russian Indemnity Case,* decided by a tribunal of the Permanent Court of Arbitration in 1912, Russia claimed interest on amounts due under a treaty of 1879 with the Ottoman Empire, which the latter had paid with considerable delay. The tribunal, invoking principles concerning the payment of interest on overdue debts which it found in the private law of European states, was of the opinion that the Ottoman Empire was under a duty to pay interest but held, also on the basis of analogies from private law, that Russia, by its previous failure to demand interest while pressing the Ottoman government for, and receiving payments of, the principal amount, had renounced its rights to claim interest. [48]

(3) Several post World War II war crimes trials, such as *In re List and Others,* indicate that a search of national laws will provide guidance in determining general principles of law. In the *List* case, the ten accused were high ranking officers in the German armed forces. They were charged with, *inter alia,* the responsibility for the execution and ill treatment without trial of a large number of hostages and prisoners in Greece, Yugoslavia, and Albania in reprisal for attacks by unknown persons against

42. North Sea Continental Shelf Cases, [1969] I.C.J. 27.

43. Schwarzenberger, *Foreword* to *B. Cheng, General Principles of International Law as Applied by International Courts and Tribunals* (1953).

44. *H. Lauterpacht, Private Law Sources and Analogies of International Law* 71 (1927).

45. "They [general principles] opened a new channel through which concepts of natural law could be received into international law." Schwarzenberger, *supra* note 43.

46. *B. Cheng, supra* note 43, at 44.

47. The Gentini Case (Italy v. Venezuela), Mixed Claims Commission of 1903, 10 U.N.R.I.A.A. 551.

48. Russian Indemnity Case, 11 U.N.R.I.A.A. 421.

German troops and installations. The tribunal said:

[1235] The tendency has been to apply the term "customs and practices accepted by civilized nations generally," as it is used in International Law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of Justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of International Law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified. There is convincing evidence that this not only is but has been the rule. . . . If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of [1236] justice and rights which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such. . . . [49]

e. The addition of a third source of law to article 38 was deliberate. Moreover, the debate in the course of drafting clearly indicates that the purpose of the third source of law was to give the Court a certain degree of flexibility in deciding disputes and to allow it to avoid, so far as possible, the problems of *non liquet.* The scope of the Court's authorization to apply "general principles" is still, however, the object of debate. [50] The rejection of "general principles of law" as a source of international jurisprudence by Soviet jurists has resulted in one of the most basic conflicts in the contemporary interpretation of international law. [51]

f. A study of the decisions rendered by the two World Courts indicates that the use by these tribunals of "general principles of law" has been limited. The main sphere in which these principles have been held to apply has been either the general principles of legal liability and of reparation for breaches of international obligations or the administration of international justice. For example, in the *Chorzow Factory* case, [52] the Permanent Court described the principle that a party cannot take advantage of its own wrong, as one ". . . generally accepted in the jurisprudence of international arbitration, as well as by municipal courts. . . ." Moreover, at a later stage in this same case, [53] the Court said that ". . . it is a general conception of law that every violation of an engagement involves an obligation to make reparation . . .," and it went on to speak in terms of restitution and damages. These pronouncements concern general principles of legal liability and of reparation for infringements of the rights of other states. The same is true of the Court's reference to "good faith" and "abuse of rights," [54] as it is also of the Court's frequent reliance on the principle of "estoppel" (*preclusion*) which played a particularly prominent part in the cases of the *Arbitral Award of the King of Spain* [55] and the *Temple of Preah Vihear.* [56] In the latter case the Court invoked still another general principle of liability, stating that ". . . it is an established rule of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error." [57]

g. As to the administration of justice, there are a number of references to "general principles of law" in connection with questions of jurisdiction, procedure, evidence or other aspects of the judicial process. Thus, speaking in the *Corfu Channel Case* [58] of circumstantial evidence, the International Court stated ". . . this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. . . ." The principle known as *res judicata,* which was actually mentioned by the authors of Article 38 of the Statute as an illustration of what they meant by a "general principle of law recognized by civilized nations," has more than once been referred to by the Court. A recent occasion was in the *United Nations Administrative Tribunal Case* [59] where the Court, in holding the U.N. General Assembly to be bound by the decisions of the Tribunal said "[A]ccording to a well-established and generally recognized principle of law, a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute." Again in the *I.L.O. Administrative Tribunal Case,* [60] the Court referred to the principle of the equality of the parties as a "generally accepted practice" and as a principle which "follows from the requirements of good administration of justice."

h. Other than in the two spheres of the law mentioned above, the Court has shown little interest in attempting to delineate and apply "general principles of law" to questions of international adjudication. Thus, this source of jurisprudence is generally looked to only as a last resort.

1-7. Evidences of International Law. *a.* Article 38(1)(d) of the Statute of the International Court of Justice states that the Court shall apply ". . . subject to the provisions of Article 59, [61] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. . . ." These, then, are the evidences of

49. United States v. List, XI *Trials of War Criminals Before The Nuernberg Military Tribunals* 1230-1317 (1950). This case is digested in *VIII Law Reports of Trials of War Criminals* 34-92 (1949). *See also* DA Pam 27-161-2, *II International Law* 232 (1962).

50. *See C. Waldock, supra* note 34, at 55-57 and *M. Srenson, Les Sources Du Droit International* 126-136 (1946).

51. An analysis of the Soviet approach toward "general principles of law" as a source of international law occurs *infra* at paras. 1-12 *et seq.*

52. Chorzow Factory Case, [1928] P.C.I.J. 31.

53. *Id.* at 29.

54. *E.g.*, Certain German Interests in Polish Upper Silesia, [1926] P.C.I.J. 30; The Free Zones Case [1930] P.C.I.J. 12; and Conditions of Admission to Membership in the United Nations, [1951] I.C.J. 142.

55. Arbitral Award of the King of Spain, [1960] I.C.J. 209, 213.

56. Temple of Preah Vihear Case, [1962] I.C.J. 23, 31-32. See the individual opinion of Judge Alfaro for a general account of the principle of estoppel in international law, *id.* at 39-51.

57. *Id.* at 26.

58. Corfu Channel Case, [1949] I.C.J. 18.

59. United Nations Administrative Tribunal Case, [1954] I.C.J. 53.

60. I.L.O. Administrative Tribunal Case, [1956] I.C.J. 85-86.

61. *Statute of The International Court of Justice,* Art. 38.

international jurisprudence—the means used to determine the content and extent of the law created by treaties, customs, and general principles. As previously noted, it is essential that they be distinguished from the latter in terms of form and purpose.

b. Judicial decisions. No rule requires that judicial precedent be followed in dealing with questions of international law. In other words, the principle of *stare decisis* does not apply to the International Court of Justice (I.C.J.), which is comprised of judges of many different nationalities—a majority of them representing civil law systems in which the principle, as such, is not recognized. A deeper reason for the inapplicability of any strict doctrine of precedent to international legal decisions is, however, the far more individual character of international judicial decisions. To a much greater extent than in municipal law, where the great majority of decisions concern typical situations, such as contracts for property, each dispute between states tends to have an individual character. Historical and political peculiarities and diplomatic actions often prevail over the generality of a legal principle. Moreover, the balance between various national outlooks and approaches is hardly ever the same in any two cases before the I.C.J., with its 15 judges of as many different nationalities.

(1) The strongly political character of many international issues accounts for the relatively small number of judicial decisions in comtemporary international law. Many issues that could be dealt with as legal matters, such as the status of Berlin, Kashmir, or the Suez Canel, are handled on a political basis. Nevertheless, in the great majority of international cases, there are legal issues of abiding significance, often intermingled with the particular facts and circumstances of the case but contributing to the gradual development of legal principles. Because the international community has no permanent legislative organs, and given the strongly individual characer of many international disputes, each international decision tends to have strong "law-making elements." Any decision by the I.C.J. or other international tribunal on such matters as boundary disputes or territorial waters "makes" law. This, then, is a further reason why it was necessary to restrict the binding force of the judgments of the Court, as Article 59 does, to the individual case. Any other approach would tend to be resented as an indirect restriction of state sovereignty. [62]

(2) Despite these restrictions and reservations, however, the persuasive authority of judgments rendered by the I.C.J. can be substantial. Judgments of the I.C.J.'s predecessor or, depending on the status of the arbitrators as well as the weight of the issue and the reasoning involved, of international arbitral tribunals and international commissions may also carry significant weight. Decisions of the courts play an important role in the development of customary law. They help to form international custom and show what the courts, national or international, have accepted as international law. The customary side of international jurisprudence has, like the common law, largely developed from case to case, and an increasing number of these cases have been submitted to international tribunals or have come before the "municipal" courts of various states.

(3) As noted, the decision of even an international tribunal, such as the International Court of Justice, with respect to an international law question is binding, technically, only on the parties to the dispute. [63] However, the decisions of such tribunals as the Permanent Court of Arbitration, the Permanent Court of International Justice, and the International Court of Justice do have a decided impact on the international community. The opinions of the latter two courts, if considered as mere evidence of the law, are almost conclusive evidence. Departures by the World Court from its prior holdings constitute an exception to the general rule. [64] Thus, a considerable body of "case law" is developing and international tribunals are giving more and more weight to their prior decisions.

1-8. Municipal Courts. The decisions of municipal courts on questions of international law are of great importance as precedents to the judges, lawyers, and students of the particular state of the court concerned. This is true even in those states where the principle of *stare decisis* technically has no legal application. Normally, the decision of a national court on a question of international law is binding in common law jurisdictions on the other courts subject to judicial review by the court rendering the decision. Moreover, a fairly unanimous body of cases from various national courts will usually furnish compelling criteria for the ascertainment of a "customary" rule of international law. This is particularly true of courts in the major countries. Such decisions are even more compelling when the decisions are against the interests of the country in which the court is sitting. The importance of the judicial opinions of national courts as compared to international tribunals should not be overlooked. Such decisions are entitled to much weight in determining the law in areas not decided by tribunals such as the I.C.J. As noted above, the cumulative effort of uniform decisions of municipal courts is the establishment of evidence of customary norms of international law.

1-9. Text Writers. *a.* Because of the relative paucity and vagueness of international legal rules, the place of the writer in international law has always been more important than in municipal legal systems. The basic systemization of international law is largely the work of publicists, from Grotius and Gentili onwards. In many cases of first

62. *Friedmann, supra* note 29, at 82-84.

63. "The decision of the court has no binding force except between the parties and in respect of that particular case." *Statute of The International Court of Justice*, Art. 59. *See also U.N. Charter* Art. 94, para. 1, which sets forth the established principle of international law that the decision of an international court is binding upon the parties.

64. *H. Lauterpacht, Development of International Law by The International Court* 20 (1958).

impression, only the opinions of writers can be referred to in support of one or the other of the opposing contentions of the parties. The extent to which writers are referred to as "subsidiary" authorities often varies according to the tradition of the court and the individual judge.

b. There has traditionally been judicial reluctance, more marked in the British jurisdictions than in the United States, to refer to writers. In the civilian system, reference to textbook writers and commentators is a normal practice, as a perusal of any collection of decisions of the German, Swiss, or other European Supreme Courts will show. A prominent example of reliance on writers in a common law court is the decision of the U.S. Supreme Court in the *Paquete Habana* case. Here, Justice Gray, in looking toward writers in an attempt to find a customary rule of international law, observed that since there was no treaty on the question before him,

> . . . [R]esort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, 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 speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. [65]

c. The courts have, however, been most careful not to confuse the writings of publicists with the law itself. In *West Rand Central Gold Mining Company v. The King,* the court commented on the role of text writers in developing international law. In speaking for the tribunal, C.J. Lord Alverstone stated:

> The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se,* than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, law. [66]

d. In the final analysis, the opinions of writers are only as authoritative as the evidence upon which they are based. However, such a conclusion does not adequately measure the influence exerted by publicists throughout the years. They have played a most significant role in the development of international law. Recently, it has been noted that the I.C.J. has had little occasion to rely upon the opinions of text writers, referring to them only in the most general of terms. One noted publicist has suggested a reason for this development:

> There is no doubt that the availability of official records of the practice of States and of collections of treaties has substantially reduced the necessity for recourse to writings of publicists as evidence of custom. Moreover, the divergence of view among writers on many subjects as well as apparent national bias may often render citations from them unhelpful. On the other hand, in cases—admittedly rare—in which it is possible to establish the existence of a unanimous or practically unanimous interpretation, on the part of writers, of governmental or judicial practice, reliance on such evidence may add to the weight of the Judgments and Opinions of the Court. [67]

It should be noted that municipal courts, arbitration tribunals, and civilian and military attorneys confronted with international legal problems still make frequent reference to the works of publicists.

1-10. Cases Decided *Ex Aequo et Bono.* *a.* There has been considerable discussion in international law as to whether "equity" is distinct from the law in the sense in which *ex aequo et bono* is used in Article 38, paragraph 2, of the Statute of the International Court of Justice. [68] This paragraph gives the court the power to decide a case *ex aequo et bono* (according to justice and fairness) if the parties agree thereto. In addition, the paragraph sets up a statutory and equitable standard which, although never used by the International Court of Justice in deciding a case, has been occasionally utilized by other international tribunals. [69]

b. The difference between equity and decisions made *ex aequo et bono* is not clear in the present state of international law. A license to render a decision *ex aequo et bono* permits a judge to decide a case in accordance with his conscience, uncontrolled by law or by equity. The term "equity" refers to general abstract principles of justice and fairness of universal validity (i.e., one should not be allowed to profit by one's own wrongful act). On the other hand, the term *ex aequo et bono* does not refer to any body of general rules and has meaning only with regard to a particular factual situation—that which would be a fair disposition of a particular case according to the judge. Accordingly, an international court, using either the sources of international law set forth in article 38 of the Statute of the International Court of Justice or general principles of international jurisprudence, cannot easily determine the exact role equity should play in its decisions. Nevertheless, even with these limitations, equity is still a possible source of international law and, as several cases demonstrates, [70] it is misleading to make a very sharp distinction between the concept of *ex aequo et bono* and equity, each of which is designed to achieve justice. Moreover, a decision rendered *ex aequo et bono* cannot be cited as evidence of international law, in that it was never intended that this law be the basis of such a decision. The fact that the I.C.J. has never turned to this concept is an indication of the minimal role it has played in the development of international legal norms.

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65. The Paquete Habana, 175 U.S. 677 (1900).

66. West Rand Central Gold Mining Company v. The King, [1905] 2 K. B. 391.

67. *H. Lauterpacht, supra* note 64, at 24.

68. *W. Friedmann, The Changing Structure of International Law* 197 (1964).

69. The Chaco Conflict (Bolivia v. Paraguay), 3 R. Int'l Arb. Awards. 1817 (1938), 33 AM. J. INT'L L. 180 (1939); Case of James Pugh, 3 R. Int'l Arb. Awards 1307; ANNUAL DIGEST, case 46 (1933-34).

70. Diversion of Water from the River Meuse, [1937] P.C.I.J. 70; Cayuga Indians Claim, 6 R. Int'l Arb. Awards 173 (1926).

c. These, then, are the sources and evidence of public international law. The importance of a proper appreciation and understanding of this subject matter cannot be overemphasized. It serves as the foundation upon which all of the various legal norms to be discussed are built and sustained.

Section III. CONTEMPORARY VIEWS OF INTERNATIONAL LAW

1-11. General. *a.* Discussion throughout this chapter has centered around what is often called the "traditional" approach toward international law. The basic concepts of such an approach are rooted in the ideas that states are the *only* true subjects of public international law and that existing international norms, as formulated through the years on the basis of the recognized sources and evidences of this jurisprudence, must be accepted as binding on all states in the world community. As are most of the fundamental principles of existing international law, these are concepts that are basically Western European and North American in origin and nature. They have been developed through the years by states possessed of a common heritage, economic goal, and political outlook. These shared characteristics have thus produced similar views on the part of these states as to what the law should be, the manner in which it should be developed, the problems with which it should deal, and those to whom it should be applied.

b. With the advent of the many newly evolved and socialist states on the world scene, this traditional view of international jurisprudence has been challenged. Discontented with many of the existing legal norms and convinced of the necessity for new approaches toward issues unfamiliar to states of the "old world," these states have tended to formulate their own views toward the various aspects of international law. Their views have had and will undoubtedly continue to have a significant impact on the international community and its jurisprudence. For this reason, it is imperative that the most important aspects of these views be briefly analyzed.

1-12. The Soviet View. *a.* The Soviet Union, principally as a consequence of further "nationalization" of its revolution, the normalization of its relations with other states, and its increasingly status quo orientation, has reconsidered its earlier refutation of international law and now manifests an intense interest in the propriety and legality of international relations. [71] Indeed, since 1956, the Soviet Union has made a concerted effort to demonstrate its dedication to the progressive development of international law and the strengthening of its role in international relations [72] and to win support for its formulation of peaceful coexistence as the progressive general international law of the present age. [73]

b. Primarily during the past three decades, the Soviet Union has developed a "new" international law—the law of peaceful coexistence—designed to provide legal support and maximum flexibility in formulating its foreign polity. As an aspect of Stalin's nationalization of the Revolution in the thirties, the Soviets discarded revolutionary approaches to the problems of international law and order and began to operate within the framework of conventional international law. [74] Soviet international legal specialists were thus called upon to provide a rationale of flexibility for policy makers caught between the demands of Soviet national objectives and the constraints of a capitalist international legal order. The technique for achieving flexibility was simple. The Soviet Union firmly supported the doctrine of positivism [75] and, in addition, claimed "... the right to reject or modify rules of law followed by the noncommunist states by the touchstone of the avowedly objective principles of peace, equality, justice, and liberty." [76] The rules of law acceptable to the Soviet Union on the latter basis were characterized as progressive. Thus, consent and unilateral characterizations of the progressive were the foundation of the Soviet attempt to deal with what was viewed as a hostile legal order. [77]

c. The Soviet Union now contends that the international legal order is no longer hostile, in that it has been influenced and shaped by the forces of world socialism. Nevertheless, *consent* and *unilateral characterization* (which are said to be the basic defenses against a hostile order) remain the essential elements of the new law of peaceful coexistence. The apparently new ingredient, "peaceful coexistence," is intended as a formulation of all that is progressive (i.e., socialist-inspired) in international law. The effort to secure its acceptance as the basic legal principle is an attempt to gain acquiescence in an "objective" standard that will actually facilitate unilateral characterization by the Soviet Union by providing a universally accepted "legal" basis for it. [78] Only in this way, it is said, can world order be achieved.

d. This desired world order, in the Soviet view, has two principal planes of operation and two contexts—relations with capitalist states, and relations within the socialist camp. The former, reflecting the Marxist teaching of class struggle, involves conflict between capitalist and socialist

71. *E. Mc Whinney, Peaceful Coexistence and Soviet-Western International Law* 52, 118 (1964).

72. The Soviets contend that the socialist and neutralist states of Asia, Africa, and Latin America are the prime movers and most active in this endeavor.

73. *See B. Ramundo, The (Soviet) Socialist Theory of International Law*, chs. 3-4 (1964).

74. *T. Taracouzio, The Soviet Union and International Law* 350-351 (1935).

75. Shapiro, *The Soviet Concept of International Law*, II *Y.B. of World Affairs* 272-310 (1948). *See id.* at 273, where it is said: "Soviet theorists accept as an axiom consent as the sole basis of the validity of international law ...."

76. Lissitzyn, *International Law in a Divided World*, 542 *Int'l Conciliation* 22, 23 (March 1963).

77. Shapiro, *supra* note 75, at 287.

78. Lissitzyn, *supra* note 76, at 19.

states. In this plane, the degree of world order desired would appear to be only that amount necessary to prevent mutual annihilation by a thermonuclear exchange. [79] In dealing with members of the socialist camp, however, a maximum of order is sought to achieve integration and the reduced importance of national boundaries which will produce a single socialist state, and, following that, a world communist society. Accordingly, the Soviet Union now considers the two fundamental principles of contemporary international law as being "peaceful coexistence" and "socialist internationalism." The former is said to be the basic principle regulating the international class struggle and relations between the capitalist and socialist camps, while the latter is viewed as the basis upon which members of the socialist "commonwealth of nations" achieve the fullest measure of cooperation and collaboration.

e. The current and specific task of Soviet international legal specialists is to achieve acceptance by the international community of this new law of peaceful coexistence and its basic component principles. [80] With this task in mind, Soviet jurists contend that the principles of peaceful coexistence are embodied in the Charter of the United Nations and have, therefore, become generally accepted principles of international law: for members of the United Nations, through their acceptance of the Charter, for nonmembers as a customary principle. [81] Moreover, to ensure the codification of the general principles of peaceful coexistence, these individuals insist that the Charter of the United Nations must serve as the general legislative framework:

> . . . every codification of the principles of international law, in whole or in part, is possible only on the basis of the Charter of the U.N. The further progressive development of contemporary international law at variance with the Charter of the U.N. as desired by Representatives of the imperialist states is unthinkable. [82]

f. The need for codification is rationalized on the general basis that the new international law ". . . is far from perfect and needs to be further developed . . ." in order to ". . . bring the content of the principles and rules of international law in line with contemporary social development . . ." (i.e., along the lines of consolidating peaceful coexistence). [83] Codification, whether of treaty or customary law, is considered beneficial, as it provides an opportunity for socialist and neutralist states to combine their efforts in furtherance of the development of international jurisprudence. [84]

g. In addition to the Charter of the United Nations, Resolutions of the General Assembly and multilateral declarations, agreements, and practices are offered as further evidence of the general acceptance of the principles of peaceful coexistence. [85] Similarly, the binding character of the principle of socialist internationalism is said to be based upon treaty as well as customary law. [86] Soviet commentaries note that multilateral declarations of the socialist states [87] have affirmed socialist internationalism to be the guiding principle in relations between socialist states, and the principle of socialist internationalism is reflected in all such relations, bilateral as well as multilateral. [88]

h. A recent commentary summarizes all of the foregoing discussion in a single terse statement: "Peaceful coexistence is an historical fact, an objective reality, the natural process of social development and the basic international legal norm." [89] Thus, peaceful coexistence is said to be ". . . the political basis of general international law, the development of which determines the possibilities of the development of general international law." [90] In essence, although the objective laws of social development are invoked, the focal point is the impermissibility of nuclear warfare. This produces the rather non-Marxist result that interdependence based upon technological advances in weaponry, rather than Marxism-Leninism, has dictated both the policy and law of coexistence.

1-13. Universality. *a.* Soviet international legal specialists formally recognize the universality of international law, that is, the concept of a single general international law binding on all states. [91] These specialists are confronted, however, with a dilemma in coping with the problem their acceptance of universality presents. The law of peaceful coexistence must be universal in the sense of binding all states to meet Soviet foreign policy needs in dealing with both capitalist and socialist states. However, it must also allow for different operational norms within the socialist camp. Given the difference in the nature of

79. The conclusion of the Limited Test Ban Treaty in 1963 and the recent participation by the Soviet Union in SALT talks reflect the depth of Soviet concern in this area.

80. Tunkin, *The Twenty-Second Congress of the CPSU and the Tasks of the Soviet Science of International Law*, I *Soviet Law and Government 10.* (1963). *See also* Trukhanousky, *Proletarian Internationalism and Peaceful Coexistence*, 8 *INT'L AFF.* 54-59 (1966).

81. B. Ramundo, *supra* note 73, at 30.

82. Chkhikvadze, *Voprosy Mezhdunarodnovo Prava Na XX Sessii General' noi Assamblei* [*Problems of International Law at the 20th Session of the General Assembly*], 3 *Sovetskoe Gosudarstvo I Pravo* [*Soviet State and Law*] [hereinafter cited as SGIP] 67-78 (1966).

83. Movchan, *O Znachenii Kodifikatsii Printsipov Mezhdunarodnovo Prava* [*On the Importance of the Codification of International Law*] 1 SGIP 46-55 (1965).

84. Movchan, *Kodifikatsiia Mezhdunarodnopravovykh Printsipov Mirnovo Sosushchestovovaniia* [*Codification of the International Legal Principles of Peaceful Coexistence*] *Sovetskii Ezhegodnik* 15-30 (1965).

85. *Mezhdunarodnoe Pravo* [*International Law*] 58-60 (D. Levin & G. Kaliuzhnaia ed. 1964).

86. *G. Tunkin, Voprosy Teorii Mezhdunarodnovo Prava* [*Problems of The Theory of International Law*] 313 (1962).

87. *See Declaration of the Twelve Communist Parties in Power* (November 1957) and *Declaration of Representatives of the Eighty-One Communist Parties* (November-December, 1960) in *The New Communist Manifesto* 169-182; 11-47 (D. Jacobs ed. 1962).

88. *Mezhdunarodnoe Pravo, supra* note 85, at 62-78.

89. *Zadorozhnyi, Mirnoe Sosushchestvovanie I Mezhdunarodnoe Pravo* [*Peaceful Coexistence and International Law*] 7 (1964).

90. *G. Tunkin, supra* note 86, at 7.

91. *E. Mc Whinney, supra* note 71, at 32.

the relationships desired among socialist states and between socialist and capitalist states, the Soviets feel a practical and ideological need to distinguish between these relationships. This desire to differentiate generates concern over whether such a fragmentation of the international legal order may result in a reduced area of operation for the law of peaceful coexistence. In short, this law must be fragmented in the Soviet interest without destroying the overall claim of universality. [92]

b. Confronted with a task of this nature, the Soviets have "amended" the concept of universality of the law of peaceful coexistence by stating that it is composed ". . . of socially different components, . . . general international law, the principles and norms which have a general democratic nature, and socialist principles and norms that have come into being or are coming into being in the relations between the countries of the world system of socialism." [93] Thus, in the Soviet view, contemporary international law is comprised of two basic principles which are mutually exclusive in their operation. These concepts, peaceful coexistence and socialist internationalism, regulate international relations between socialist and non-socialist states and among socialist states *inter se,* respectively. [94] Such a departure from universality is rationalized as follows:

> Socialist international law does not contradict general international law: rather, in reflecting the special nature of the relations between socialist states, it broadens and deepens the democratic character of general international law. [95]
>
> Socialist principles and norms relate to the principles and norms of general international law as a new and higher quality does to an older quality. While they incorporate positive factors and go further than the principles and norms of general international law is assuring friendly relations among states, the socialist principles and norms do not conflict with general international law. [96]
>
> . . . [T]he existence of principles of socialist internationalism and other socialist principles and norms in the relations between countries of the socialist system in no way contradict the needs of a general international law. [97]

c. Tunkin, the foremost Soviet international legal specialist, has introduced a changed concept of universality designed to meet the needs of the Soviets in this area.

> . . . [T]he basic principles of contemporary international law are binding and states cannot establish in their bilateral or regional multilateral relationships norms which would conflict with the basic principles.
>
> Nevertheless, states can create principles and norms binding upon a limited number of states, if these principles and norms do not conflict with the mentioned basic principles, especially if they go further than these principles of general international law in furthering friendly relations and securing the peace. Such are the international legal principles of socialist internationalism. [98]

1-14. Soviet Sources of International Law. *a.* The basic concepts of the Soviet view of international law having been reviewed, attention will now be focused on what the Soviet Union considers to be the true sources of this jurisprudence. The Soviet Union is a party to the Statute of the International Court of Justice and presumably is bound by the traditional sources of international law enumerated in Article 38: treaties, international custom, and general principles of law. Notwithstanding Article 38, however, there is, under the Soviet view, a single source of all international legal norms: the agreement of states. This view limits the formal sources of international law to treaties, where agreement of the parties is expressed, and to those customary principles which have been agreed to and, then, only as to states which have agreed and so long as they continue to agree. [99] Treaties are considered the principal source of international law, favored over customary norms because of the unambiguous character of the consent of the party states. [100] The broader coverage of Article 38 of the Statute of the I.C.J. is explained on the ground that it enumerates legal principles to be applied by the Court, and not the sources of international law. [101]

b. Treaties: The Charter of the United Nations. In the Soviet view, all treaties establish norms in the sense that binding obligations are created by the parties. If valid as international legal enactments, treaties may confirm existing law, develop it further, create new norms, or eliminate outdated ones. [102]

(1) The Soviets single out the Charter of the United Nations as the most important piece of international legislation because it embodies the principles of peaceful coexistence. This document is described as ". . . the charter of contemporary international law, its most important source." [103] Using the Charter as a point of departure, the Soviets are active proponents of codification as a means of implementing and developing the law of peaceful coexistence. The United Nations is expected to assist in and serve as the forum in this struggle for codification. [104]

(2) Bilateral agreements still appear to be preferred over multilateral treaties, presumably due to the greater influence and situational control inherent in the negotiation of the former. [105] There is, however, a growing appreciation of the compensating advantages of multilateral agreements, both within the socialist commonwealth and in dealing with capitalist states. As a result, Soviet treaty

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92. *B. Ramundo, Peaceful Coexistence* 19 (1967).
93. Lissitzyn, *supra* note 76, at 21-22.
94. *Id.*
95. *Mezhdunarodnoe Pravo, supra* note 85, at 9.
96. Tunkin, *supra* note 80, at 26. Tunkin's rationale reflects the dialectical approach to the process of legal development.
97. Ushakov and Meleshko, *Novyi Uchebnyi Kurs Mezhdunarodnovo Prava* [*The New Text on International Law*], 10 SGIP 154 (1964).
98. G. TUNKIN, *supra* note 86, at 325.
99. *Mezhdunarodnoe Pravo, supra* note 85, at 19. It is said that the key element in the binding nature of international custom is the consent of the state concerned.
100. *Id.* at 19 and 79.
101. *P. Lukin, Istochniki Mezhdunarodnovo Prava* [*Sources of International Law*] 52-55 (1960).
102. *G. Tunkin, supra* note 86, at 66-72.
103. Chkhikvadze, *supra* note 82, at 71.
104. *Mezhdunarodnoe Pravo* [*International Law*] 41 (F. Kozhernikov ed. 1964).
105. *E. Mc Whinney, supra* note 71, at 66-68.

practice has become more diversified and places greater emphasis upon multilateral agreements.

(3) In the Soviet view, contemporary international law is basically treaty law. [106] Preference for treaties as the principal formal source of international law reflects the Soviet Union's basic positivist approach and is an important element in its bid for Western acceptance of the law of peaceful coexistence. [107] The Soviets consider "law by treaty" as an extremely flexible and useful device for achieving minimum and maximum international legal goals; defending against a hostile order, in the first instance, or transforming the international order, in the second. For the former purposes, a claim of lack of consent constitutes a universally accepted, traditional bar to the enforcement of a challenged norm; for the latter, acceptance of the principles of peaceful coexistence in treaty form would provide a universally recognized legal basis for the new law. Thus, the Soviets claim, the Charter of the United Nations embodies the principles of coexistence.

(4) Soviet treaty practice generally follows that of the West, principally because the Soviet state had to accept the institution as a condition of membership in the international community. Indeed, the law of treaties was expected to serve as the "bridge between the traditional and revolutionary systems." [108] Where differences in the Soviet approach to treaties exist, they appear to be politically oriented and marked by purposeful ideology. [109]

c. Custom. In Soviet literature on international law, there is a conscious depreciation of the role of custom as a source of international law. Soviet writers reject as outdated the proposition that custom, rather than treaties, represents true international law. [110] This view is simply reflective of a decided preference for treaties as the principal source of international law.

(1) The objectionable feature of customary law from the Soviet point of view is the potential for loss of control in the creation of binding norms. For many years after the formation of the Soviet state, custom was rejected as a source of international law due to the need to protect itself against "hostile" customary law. However, the later recognition that custom can be useful as a source of international law, if properly controlled, has resulted in a Soviet acceptance of customary law, with qualifications designed to meet specific foreign policy needs.

(2) The Soviets have rejected the Western-supported doctrine that customary norms recognized as such by a considerable number of states are binding upon all as to do so would pose a danger to peaceful coexistence. To be effective, it is said that custom must be in accord with the *jus cogens* [111] and be accepted by the state which is to be bound. [112] As in the case of treaties, a departure from the *jus cogens* in customary law requires acceptance ". . . by the states of both systems . . . to be regarded as a universal customary rule of international law." [113] Moreover, the contention is made that the applicability of a customary rule is subject to continuing review to determine the extent to which it meets present-day requirements.

(3) The Soviet position on consent is based upon tacit agreement (i.e., that one state's acceptance or recognition of an international custom is deemed to constitute a tacit proposal to other states to regard the custom as a norm of international law). This acceptance by other states can be expressed or simply indicated by a course of conduct. Once accepted, the custom becomes a customary norm of international law, with the same force, effect, and weight as a treaty norm. [114] The extreme positivism of the Soviet position on this point is evidenced in the following:

> Customary international law may be changed or abolished either by treaty or by a new customary rule. In either case there is a new agreement between states. [115]
>
> Customary norms of international law being a result of agreement among states, the sphere of action of such norms is limited to the relations between the states which accepted these norms as norms of international law, i.e., the states participating in this tacit agreement. . . . As for the newly emerging states, they have the juridical right not to recognize this or that customary norm of international law. . . . The concept that customary norms of international law recognized as such by a large number of states are binding upon all states not only has no foundation in modern international law but is fraught with great danger. [116]

(4) Soviet commentaries reject the position of many Western jurists that the principle of "majority rule" applies in the formulation of customary norms as a ". . . crying contradiction to the basic generally recognized principle of modern international law, the principle of the equality of states. . . ." [117] In making this argument, the Soviets depict the socialist states and newly emerging countries of Asia and Africa as victims of Western at-

106. *Mezhdunarodnoe Pravo, supra* note 85, at 80.

107. *J. Triska and R. Slusser, The Theory, Law and Policy of Soviet Treaties* 9-29 (1962).

108. *Id.* at 28.

109. *Id.* at 172. *See* "The Soviet Law of Treaties," id. 34-172 for a detailed statement of Soviet treaty law. *See also Ramundo, supra* note 92, at 53-60.

110. *G. Tunkin, supra* note 86, at 104-105.

111. The concept of *jus cogens* continues to present problems in international law. There is no all-encompassing definition which is universally acceptable to the various member states of the international community. This problem of definition arises from the basic differences existing among the various state systems of jurisprudence. There can, of course, be no true consensus of the proper scope or application of *jus cogens* absent a working definition. For an informative discussion of the various meanings given to *jus cogens, see The Concept of Jus Cogens in Public International Law: Papers and Proceedings*, Geneva, 1967 (Report of a conference organized by the Carnegie Endownment for International Peace, Lagonissi [Greece], April 1966).

112. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 *Calif. L. Rev.* 428 (1961).

113. *E. Mc Whinney, supra* note 71, at 63-64, quoting Tunkin. It is said that the *jus cogens* of customary law cannot be rejected by individual states.

114. Tunkin, *supra* note 112, at 422-423.

115. *G. Tunkin, supra* note 86, at 103-104.

116. Tunkin, *supra* note 112, at 428-429.

117. *Id.* at 427.

tempts to impose international norms under the guise of customary law. [118] Accordingly, the Soviet approach toward customary law has had great appeal to African and Asian states.

d. General principles. Paragraph 1(c) of article 38 of the Statute of the I.C.J. authorizes the Court to apply "the general principles of law recognized by civilized nations" in deciding, in accordance with international law, the disputes submitted to it. Various meanings have been attributed to this article, with the Western view being that "general principles" are a true, if subsidiary, source of international law. [119] The general reluctance on the part of the Soviet Union to expand the competence and importance of international tribunals has resulted in its rejection of general principles as an independent source of international law.

(1) In the Soviet view, article 38 does not purport to establish general principles as a source of international law, nor to empower the I.C.J. to create law on the basis of such principles:

> In [Article 38] it is clearly stated that the Court decides disputes "on the basis of international law. . . ." The Court does not create international law, it applies it. [120]
>
> The majority of Soviet authors are of the view that paragraph 1(c) of Article 38 of the Statute of the International Court does not contemplate a special source of international law or a special method of creating norms of international law. The "general principles of law" can only be principles of international law. [121]

(2) The requirement that the court decide disputes "on the basis of international law" is viewed as support for the view that paragraph 1(c) of article 38 does not contemplate the application of domestic law, but only international law: [122]

> The International Court of Justice can in addition to international conventions and international customs apply "the general principles of law recognized by civilized nations" [Article 38(c), Statute of International Court]. Many of these principles are still of great importance for the development and affirmation of democratic rules of international law. They are realized either through the appropriate international treaties or through international custom and are in fact their generalization. Principles reflected neither in international treaties nor in international custom cannot be considered "general principles." [123]

(3) Additionally, the Soviets claim that general principles of domestic law [124] do not exist, despite formal similarities in the various legal systems; the laws of socialist and capitalist states have a different class basis and, as a consequence, potentially different substantive content:

> In the world there are states with two [different] social-economic systems and, as a consequence, two types of legal systems. The majority of the legal principles, despite their formal similarity, have, in some instances, different meanings in the legal systems of socialist and capitalist states. Therefore, it can be said with full justification that paragraph "c" of Article 38 of the Statute of the International Court of the U.N. was and remains for all intents and purposes a dead letter. [125]

(4) The Western interpretation that general principles include domestic legislation is dismissed by the Soviet Union as simply a Western attempt to impose the bourgeois system of law upon socialist states and the newly evolved countries of Africa and Asia. [126]

e. Soviet auxiliary "sources" of international law. Rather than speaking in terms of "evidences" of international law, Soviet jurists recognize the existence of auxiliary "sources" of international jurisprudence (e.g., resolutions of international organizations, decisions of international courts, and domestic legislation). These are more precisely described as auxiliary processes for the manifestation of the agreement of states (i.e., other than through treaties or the acceptance of custom): [127]

> There are also auxiliary processes (resolutions and decisions of international organizations, international courts, and courts of arbitration; national legislation; and the decisions of domestic courts) which are a definite stage in the process of the formation of norms but do not actually result in their formation. With rare exception, the process of norm formation in general international law takes the form of a treaty or an international custom. [128]

(1) With regard to resolutions of international organizations, it is said that ". . . resolutions of the General Assembly, adopted unanimously or by a two-thirds majority where that majority includes socialist and capitalist states . . . are binding on the members of the U.N. and, therefore, have juridical force." [129] This, it is argued, does not conflict with the view that the agreement of states is the sole source of international law, as such a resolution constitutes, at the very least, an oral agreement. [130]

(2) Soviet commentaries treat domestic law as an auxiliary source in the context of the general view that, to become normative as "general principles," domestic law must be agreed to by states:

> National legislation (for example, laws regarding state monopolies of foreign trade, etc.) exerts a great influence on the formation of Rules of International Law. But national legislation acquires the status of a source of International Law only when it is recognized as a Rule of International Law either through international treaty or through international custom. National legislation cannot therefore be considered as an independent source of International Law. [131]

The agreement of states is considered the key to the juridical effectiveness of international judicial decisions and legal treaties, i.e., "[a]bsent the agreement of states, deci-

118. *G. Tunkin, supra* note 86, at 103.

119. *H. Briggs, The Law of Nations* 48 (2d ed. 1952).

120. *G. Tunkin, supra* note 86, at 147-148. *See also* Kozhevnikov, *International Court at the Crossroads*, 36 *New Times* 3 (Sept. 7, 1966).

121. *Id.* at 152.

122. *Id.* at 155.

123. *Moscow: Foreign Languages Publishing House, International Law* 12 (n. d.).

124. *G. Tunkin, supra* note 86, at 155.

125. *P. Lukin, supra* note 101, at 100.

126. *G. Tunkin, supra* note 86, at 154.

127. *Id.* at 157.

128. *Id.* at 157-158.

129. Shurshalov, *review* of N.M. Minasian, *Sushchnost' Sovremennovo Mezhdunarodnovo Prava* [*The Essence of Contemporary International Law*], *5 SGIP* 159 (1964).

130. *Id.*

131. *International Law, supra* note 123, at 12-13.

sions of international courts, opinions of public organizations, and scientific writings cannot be sources of international law, although they may influence its application and interpretation." [132] This position is said to be confirmed by paragraph 1(d) of Article 38 of the Statute of the I.C.J.:

> Article 38(d) of the Statute of the International Court of Justice includes legal decisions as auxiliary means of determining Rules of International Law. A court, in particular the International Court, does not make law, but applies existing law. . . . [T]he International Court's application and interpretation of a legal Rule are binding only upon the parties to the given dispute and only concern the particular case in question. [133]

Nevertheless, it is conceded that decisions of the Court and treatises ". . . have a very great importance in stating the existence or lack at a given period of Rules of International Law." [134]

f. Central to the general Soviet approach to the sources of international law are the positivist insistence upon the agreement of states as the sole means of formulating international legal norms, and the concept of the law of peaceful coexistence as *jus cogens.* This approach permits resistance to "hostile" international legal principles on the basis of either the lack of Soviet, or, in the peaceful coexistence context, socialist consent, or of conflict with the principles of peaceful coexistence. The "agreement theory" is principally relied upon in defending against Western views that the "general principles" referred to in paragraph 1(c) of Article 38 of the Statute of the I.C.J. are, in addition to treaties and custom, a source of international law.

g. The purpose of the preceding discussion has been to give the reader a brief analysis of the Soviet view of international law. As each of the chapters which follow is discussed, it will be essential to bear in mind the different Soviet approach toward many of the legal concepts contained therein. Although largely self-serving, this approach is currently of primary importance, and, for reasons spoken to above, it has proven to be most attractive to, although not completely accepted by, evolving states throughout the world.

1-15. The Evolving States' View Toward International Law. *a.* The basic attitude of evolving states has been summarized as follows:

> Most African States tend to view present rules of international law primarily as a product of the practice of Western States and not necessarily reflecting the common interest of all states. They are unwilling to have their disputes settled by these standards but are prepared to have them settled by standards to which they have themselves agreed in new conventions. In this connection they regard the International Court of Justice as an institution so predominately filled with European judges that they cannot expect to receive a fair deal. [135]

This statement accurately reflects the prevailing attitude of most evolving states toward the great majority of currently existing international norms. For many years, these states have urged that public international law, in its present form, is a product of Western European and North American states and thus formulated on the concepts of colonialism, capitalism, and Christianity. Several reasons have been offered as the underlying basis for the above stated view. Some have suggested that such an attitude merely reflects the difference in the values associated with distinctive cultural traditions. However, this view has met with vigorous opposition, typified in this statement by Friedmann:

> An artificial inflation of cultural distinctiveness in the field of international relations and law is more than just a harmless exercise in hypocrisy and narcissism . . . It does no real service to the development of international law. [136]

b. As evidence of the fact that cultural differences play a minimal role in the evolving states' approach toward international law, attention is called to the impact European concepts have had on the judicial systems of these countries. It has been observed that, as most evolving states existed as part of a colonial Europe prior to the ascendancy of their own inherent cultures, there was little or no cultural resistance to European teachings and concepts. Accordingly, the cultures of the various evolving states currently reflect a significant number of European values. These countries still retain European educators, utilize European texts and employ European administrative techniques and procedures. Moreover, most of these states' municipal judicial systems are based almost entirely on either Franco-German (Civil Law) or Anglo-American (Common Law) systems of jurisprudence. [137]

c. Rather than cultural differences, the reason most generally [138] cited as the substantive basis for the current attitude of the evolving states toward international law is the significant degree of disparity which exists between the economic and social development of these states and that of the more developed and industrialized countries. There do exist, in fact, other factors which contribute to the attitude of evolving states toward current international norms. There is an inherent suspicion of developed states and "their law" as a result of long colonial experiences. Additionally, the generally united front shown by developed states when a challenge is posed to a "traditional concept of international law" tends to generate a uniformly adverse reaction on the part of the evolving countries. [139] However, it is the fact that these states are, more or less, at the same stage of economic development and consequent political weakness that brings most Latin American, Asian, and African states together in collective opposition to many of the current international legal

132. *Mezhdunarodnoe Pravo, supra* note 85, at 82.

133. *International Law, supra* note 123, at 13.

134. *Id.*

135. *Z. Cervenka, The Organization of African Unity and its Charter* 91 (1968).

136. *Friedmann, supra* note 68, at 324.

137. *T. Elias, Africa and The Development of International Law* 23 (1968).

138. It would be imprudent to identify a single cause for the current attitude of evolving states toward existing international law.

139. *O. Lissitzyn, International Law Today and Tomorrow* 102-105 (1965).

norms. In the words of L.C. Green:

> . . . the economically underdeveloped countries may indeed modify certain parts of the law of nations drastically. Principles of state responsibility, compensation for interference with the property and economic interests of foreign investors may undergo profound transformation as a result of this horizontal widening and the inclusion of groups of nations in different phases of development. This, however, is not caused by any inherently unique characteristic of Asian or African civilization as much as it is a product of a phrase of development through which many, if not all, nations pass at some time or another. [140]

d. As evidenced by the preceding discussion, a growing number of evolving states are of the belief that present rules and concepts of international law do not meet the needs of developing countries. Yet, these same states are quick to urge that their intent is not to reject international law as a whole:

> The underdeveloped nations today by no means reject the entire body of international law. On the contrary, they take a most active part in the work of many international organizations, including that of the International Law Commission. . . . The fact that they should strive to alter as many of the existing rules of international law that are deterimental to their state of development as possible is natural and in no way different from the entire history of international law. [141]

This basic conflict of interests between developed and evolving states presents one of the most difficult problems currently confronting the international community. Thus, in order to more fully appreciate the above stated attitude and interests of the latter countries, it is essential to focus attention on their views toward specific aspects of traditional international law.

1-16. Inequitable Features of the Traditional System of International Law. *a.* As noted above, the evolving states demand that traditional international norms be revised in order to respond to the needs of the entire international community, i.e., to be responsive to the new factual situation in which they must be applied:

> It is not the primary function of international law in the second half of the twentieth century to protect vested interests arising out of an international distribution of political and economic power which have irrevocably changed, but to adjust conflicting interests on a basis which contemporary opinion regards as sufficiently reasonable to be entitled to the organized support of a universal community. [142]

Evolving states maintain that the currently existing inequitable rules of international law should be revised in light of their present needs and thereby given a much more definable and objective legal character. If, they contend, this is not done, then they should be permitted to pick and choose among legal rules which were developed before they became fully independent states.

b. No attempt is made by evolving states to specifically identify each and every rule of traditional international law which they are reluctant to accept. [143] However, these countries are generally critical of three characteristic features of this law. [144]

(1) The traditional system of international law has been concerned primarily with creating immunities and establishing limits upon territorial authority. These concerns were simply a consequence of the increasing dependence of the world's developed states upon international trade and investment. Accordingly, the traditional rules of international law were designed to regulate the responsibility of the territorial sovereign toward alien interests and were formulated solely by those states which had common interests to be protected around the world. These rules of law are no longer applicable to the current world situation, as emerging states have a completely different set of interests to be protected and advanced.

(2) The traditional system of international law sanctioned the use of force as a legitimate means of achieving national policy goals. Thus, the powerful and developed states could legitimately resort to war in order to force their will and policies on weaker countries. Evolving states, unable to function as equal sovereigns in this environment, thus demand a specific and complete prohibition on all forms of unilateral use of force and the development of a more equitable legal procedure by which to settle international disputes. [145]

(3) The traditional system of international law was developed in the context of the 1885 Congress of Berlin, which sanctioned the division and colonialization of Africa, and the Congress of Vienna, which sanctioned the concept of "balance of power" and recognized the supremacy of the states which formed the Concert of Europe. [146] Accordingly, this system of law ignores the interests of the less developed, and therefore politically weak states of the world, and endorses the colonial system of domination. [147] This particular feature of the traditional international legal system has, quite naturally, aroused the hostility of former colonial states which have now

140. Green, *New States, Regionalism and International Law*, 5 *CAN. Y. B. INT'L L.* 119 (1967).

141. *Friedmann, supra* note 68, at 324.

142. *C. Jenks, The Common Law of Mankind* 85 (1958).

143. The task of identifying each and every rule of traditional international law which evolving states are reluctant to accept would be arduous, if not impossible, for a number of reasons. These states prefer to reject rules as they arise in specific cases of controversy, rather than creating a list of rules they find unacceptable. Secondly, it would be most difficult to specifically identify the traditional legal norms considered to be currently in force and universally binding. Finally, some evolving states may choose to accept certain traditional norms which other emerging countries reject out of hand. Acceptance or rejection is largely dependent upon the national interests of the state concerned.

144. Falk, *The International Legal Order*, 8 How. L. J. 145 (1962).

145. This demand has been met for the most part by the *U.N. Charter* and the specific prohibition against the unauthorized use of force contained therein. Evolving states are, nevertheless, sensitive to the traditional right of intervention, *i.e.*, intervening to either protect and evacuate one's nationals or in response to a request by a state engaged in a legitimate right of self-defense against external aggression.

146. Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38 (1961).

147. *B. Roling, International Law in an Expanded World* 69-74 (1960).

achieved an independent status.

c. As evidenced by these criticisms leveled at a large portion of current international norms, evolving states consider the continued existence and enforcement of the present international legal system to be a denial of the emergence of former colonial countries. As a result, developed states are said to still be able to impose their will upon weaker members of the world community. In the words of one spokesman, ". . . the rules now in force were established, not merely without reference to small states but against them, and were based almost entirely on the unequal relations between great powers and small states." [148]

1-17. Legal Basis of the Evolving States' Approach. *a.* Thus far, attention has been focused primarily on the policy objections of the evolving states toward traditional international law. These states also offer a legal basis for their claimed right to pick and choose among the traditional concepts of international law which most affect them. Initially, emerging countries contend that they had no opportunity to participate in the formulation of the currently existing traditional international norms. Under the colonial rule of European states from the 18th to the middle of the 20th century, they were unable either to oppose or to support traditional rules of international jurisprudence. With this in mind, these states call attention to the fact that international law is generally regarded to be consensual in nature, with its authority dependent upon its recognition and acceptance by those international entities which it seeks to bind and control. [149] This position regarding the necessity for consent is said to be specifically support by the Permanent Court of International Justice in the *S.S. Lotus Case.* In this decision, the tribunal declared:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these two coexisting independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed. [150]

b. In further support of this consent doctrine, George M. Abi Saab contends that the sociological school of thought which bases international obligations on the will of the community best accommodates the views and interests of the evolving states. As these states now form a large part of the international community, he urges that through their cooperative will they can make a substantial contribution to international law and that this is the moral basis upon which the current demands of these countries are made. [151] Additional support for the consensual basis of international law is found in the writings of several contemporary publicists. The views of these individuals are typified by the following:

> In doctrine, the retreat, since the latter part of the 19th century, from the law of nature ideas and the increasing acceptance, especially in this country, of theories basing the law upon consent of States, though in one way retrogressive and calculated to enhance the importance of State sovereignty, did, in another way, help to release the forces of change and development. [152]

1-18. Sources and Evidences of International Law: the Evolving States' View. *a.* Sources.

(1) Treaties. As does the Soviet Union, evolving states view international agreements as the most viable and acceptable source of international jurisprudence. Reasons given for such a view are the immediate availability of the texts of treaties for examination and the fact that these agreements are binding only upon those states which expressly consent to them. [153] Upon gaining their independence, colonial states generally assert the right to pick and choose those treaties to which they will succeed. [154] For the most part, these countries have chosen to succeed to the vast majority of treaty obligations incurred by their former colonial masters. [155] However, many of these states urge that the voluntary nature of their consent to assume these obligations, an element essential to the validity of such assumptions, is subject to debate. These countries contend that, in order to gain their final independence, they were forced to grant exclusive economic privileges and to sign unequal treaties of military alliance with their former colonial rulers. This, they contend, is the underlying basis for their strong support for the doctrine of *Rebus sic stantibus.* [156]

(2) Custom. Evolving states generally view customary international law as too vague and inadequate for the purposes of the expanded international community and focus attention on the fact that there exists considerable disagreement between publicists and courts as to the manner in which customary norms are formulated and defined. Nevertheless, the contention is made that the

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148. Statement of Luis Padilla Nervo, Mexican member of the I.L.C., before the International Law Commission, *1 INT'L L. COMM. Y.B.* 155 (1956).

149. Saab, *The Newly Independent States and the Rules of International Law*, 8 *HOW.* L. J. 102 (1962). See also, Castaneda, *supra* note 146, at 38.

150. Case of the S. S. "Lotus," [1927] P.C.I.J., ser A, No. 9.

151. Saab, *supra* note 149, at 102-103.

152. *R. Jennings, The Progress of International Law* 91 (1960).

153. This view conflicts, of course, with the Western European and North American states' approach toward the relationship between treaties and customary international law, *i.e.*, that treaties simply codifying customary norms are binding on even nonsignatory states. See *infra*, chap. 8.

154. Involved here is a specific aspect of international law known as "state succession." This generally refers to the transfer of territory from one state to another and may be viewed in terms of a change in sovereignty or in international status. See *infra*, chap. 7. State succession with regard to international agreements is analyzed in detail in *infra*, chap. 8.

155. *F. Okoye, International Law and The New African States* 46-48 (1972).

156. Saab, *supra* note 149, at 108. *Rebus sic stantibus* (changed circumstances) is a principle of treaty law which may serve as a legal basis for terminating or withdrawing from an international agreement. For a more complete analysis of this concept, see *infra*, chap. 8.

I.C.J. has consistently required that a party against whom a customary rule of law is invoked must both recognize and accept this international concept. In support of this assertion, reference is made to I.C.J. decisions:

> . . . when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every state. The reservation concerns the case of a state which, while the custom is in the process of formation unambiguously and persistently registers its objection to the recognition of the practice as law. [157]

Drawing support from such decisions, the evolving states are firm in their contention that they are not bound by customary rules of international law to which they had no opportunity to object. [158]

(3) General principles of law. The evolving states are united in their opposition to "general principles of law" as a legitimate source of international law. These countries contend that in addition to being vague and undefinable, these principles of law cannot be reasonably distinguished from customary rules of law. A spokesman of this view urges:

> While conventions can be easily distinguished from the two other sources of international law, the line of demarcation between custom and general principles of law recognized by civilized nations is often not very clear, since international custom or customary international law, understood in a broad sense, may include all that is unwritten in international law, *i.e.*, both custom and general principles of law. [159]

(4) In addition to their charge of ambiguity leveled against general principles of law, the evolving states challenge this source of jurisprudence on several other grounds. First, they contend that the utilization of these "general principles" as a source of a universal system of law vests constructive legislative power in a small number of developed states. This argument is based on the fact that the "general principles" spoken to in Article 38(1)(c) of the Statute of the I.C.J. have generally been interpreted as those municipal law concepts common to the Anglo-American and continental European legal systems. [160] Secondly, the phrase "recognized by *civilized nations*" contained in Article 38(1)(c) is uniformly resented by evolving states because of the implication contained therein they are, in fact, "uncivilized." Apart from the significant psychological harm done, these countries submit that this phrase discriminatorily excludes many sovereign states from full and effective participation in developing legal norms that will accommodate the interests of the entire international community. [161]

b. Evidences. The emerging countries contend that, though it would appear to be evident that the courts and publicists spoken to in Article 38(1)(d) of the Statute of the I.C.J. have no authority to make law but simply to identify and assert legal rules which have already acquired this status, this point is often overlooked. As a result, these "evidences" of existing international law are often viewed and cited as "law-making" authorities. [162] With this in mind, attention must be focused on the attitude of the evolving states toward both the I.C.J. and publicists.

(1) *The International Court of Justice.* [163] Of the more than sixty Asian and African member states of the United Nations, less than twenty have accepted the compulsory jurisdiction of the I.C.J. under the optional clause of its statute. [164] This would seemingly indicate a somewhat less than positive attitude toward the Court by these countries. Several reasons for this posture have been articulated. Some have viewed it in terms of inadequate, evolving state representation on the Court. [165] Some writers urge that emerging countries are simply not psychologically prepared to waive any of their newly won sovereignty by an acceptance of the Court's jurisdiction. [166] Still other publicists attribute the evolving states' attitude toward the I.C.J. to the existing status of substantive international law, contending that these states reject the Court's jurisdiction and authority because of the fact that this tribunal would merely apply "rules of law" which the former refuse to accept as either representative of their interests or binding. In the words of a leading spokesman, ". . . without the progressive development and the clear statement of the rules of international law, it is extremely difficult for the newly independent states to adhere to a system of compulsory jurisdiction." [167] In a reaffirmation of this view, Jorge Castaneda writes:

> . . . [W]illingness to arbitrate controversies signifies a willingness to submit to the application of the international rules that govern the subject matter of the dispute at any given time. It implies acceptance of the applicable substantive law. It would be valid to conclude the reason for their refusal lies in the fact that such countries are not willing to accept the application, in general, of a great many provisions of present international law, in the formulation of which their needs and interests were not taken into account, but rather on the contrary, were created by practice and in response to the needs of their probable adversaries. [168]

(2) *Publicists.* Evolving states generally tend to minimize the works of publicists as authoritative evidences of international law. Initially, these countries point

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157. "Anglo-Norwegian Fisheries Case," [1951] I.C.J. 131.

158. *See supra*, § 1-6 c.

159. *B. Cheng, General Principles of Law as Applied by International Courts and Tribunals* 23 (1953).

160. *Id.* at 24.

161. *T. Elias, supra* note 137, at 52.

162. *G. Damte, The Attitude of Emergent States Toward The Existing System of International Law* 34 (1974) [unpublished thesis presented to The Judge Advocate General's School, U.S. Army].

163. As noted in preceding pages, judicial decisions other than those of the I.C.J. are to be considered as evidence of existing international law. Emerging countries, however, generally refer to only I.C.J. decisions when speaking in terms of "Evidences" of international norms.

164. Anand, *Role of New Asian-African Countries in the Present International Legal Order*, 56 *AM. J. INT'L L.* 393 (1962). This refers to the Court's "compulsory jurisdiction" spoken to in Article 38(2) of the STATUTE OF THE I.C.J. A discussion of this and other aspects of the I.C.J. is found in *infra*, chap. 9.

165. *Id.*

166. *Id.* at 404.

167. Saab, *supra* note 149, at 116.

168. Castaneda, *supra* note 146, at 39.

out that the vast majority of publicists in the area of international law are nationals of developed European or North American states. Accordingly, these individuals seldom articulate the interests or attitudes of emerging states. [169] This assertion is often explained in terms of the fact that, as these writers obviously owe their allegiance to particular states of the world community, they will consequentially be deprived of true scholarly independence and objectivity.

c. As evidenced by the preceding discussion, evolving countries generally tend to regard international agreements as the only viable source of international jurisprudence and view evidences of this law as reflective solely of the developed states' interests. Moreover, even in terms of the authoritativeness of treaties, the former countries reserve the right to pick and choose among those treaty commitments entered into by their prior colonial rulers before they will agree to be bound. Although many regard this to be a "totally negative" approach demonstrated by emerging states toward currently existing principles of international law, these countries do have future goals to achieve in the international legal sector.

1-19. Future Objectives of the Evolving States. *a.* Today's emerging countries maintain that their aim is not to reject or to revise existing international legal norms simply for the sake of doing so. These states insist that current international law, far from being structured and rule productive, is anarchical in nature and fails to provide an adequate forum for equal and effective cooperation and competition among *all* states. This desire for a strengthened, but balanced, system of international jurisprudence professed by evolving countries has been summarized:

> [I]t would be a mistake to discount the often expressed concern of the less-developed nations for the strengthening and development of international law. Weak in material power, these nations must seek protection and assistance in international law and organization. . . . [T]he less developed countries will insist on having their voices heard in the formulation and development of the law. [170]

b. Having expressed a desire to participate in the development of a workable, responsible, and egalitarian system of international jurisprudence, evolving states have begun to seek the means and methods by which this goal might be achieved. In recent years, this search has centered on international organizations, particularly the United Nations General Assembly and its subsidiaries. [171]

(1) *The General Assembly.* The evolving countries are generally unanimous in their belief that the United Nations General Assembly provides the most appropriate forum for the expression of their views and desires. Accordingly, these countries urge that this organ be imbued with more responsibility and that the great weight of power be shifted from the Security Council to the General Assembly. This former body has long been charged with frustrating the development of the international community and negating the will of the majority by means of the veto power exercised by its five permanent members. [172] The increasing number of General Assembly resolutions are cited as clear evidence of the fact that the Assembly is, in reality, the legitimate and authoritative spokesman of the world community. [173] Moreover, a strong argument is made that, for want of better substitutes, these resolutions should be considered the most authoritative pronouncements of international legal norms. In the words of one spokesman:

> The United Nations is a very appropriate body to look to for indications of developments in international law, for international custom is to be deduced from the practice of states. . . . The existence of the United Nations, especially in light of its accelerated trend towards universality of membership since 1955, thus provides a very clear, very concentrated focal point of state practice. [174]

In support of this contention, emerging countries also call attention to the fact that past resolutions of the General Assembly have been accepted as having the force of law. A listing of such resolutions generally includes the 1950 Uniting for Peace Resolution, the 1945 GA Resolution on the Affirmation of the Nuernberg Tribunal, the 1945 GA Resolution concerning the Crime of Genocide, and the 1948 Universal Declaration of Human Rights. [175] There exists little doubt that the evolving states will continue to argue the "law making" power of the General Assembly.

(2) *The International Law Commission.* [176] Since the increase in the number of its member states from fifteen to twenty-one in 1961, the I.L.C., established under Article 13 of the United Nations Charter, has been viewed by the emerging countries as a most effective forum for the formulation of modern rules of international law. Seven Afro-Asian states now have representatives on the Commission, and the argument is increasingly made that the work of the I.L.C. is much more reflective of universally accepted legal norms than are decisions of the I.C.J. or the works of publicists:

> It must be remembered that in providing an opportunity for change and growth of the law, the Commission is in fact providing just those procedures of legislation of which the international community is so much in need. . . . Further, there is a great value in a procedure by which the rival interests of states must be expressed in a scientific framework and made to speak the language of law. [177]

1-20. Summary. Convinced that the major portion of

169. *T. Elias, supra* note 137, at 43.

170. *O. Lissitzyn, supra* note 139, at 102-105.

171. *Friedmann, supra* note 29, at 87.

172. Saab, *supra* note 149, at 105. See also, *Elias, supra* note 137, at 58.

173. See generally, *Friedmann, supra* note 29, at 86-99.

174. *R. Jennings, supra* note 152, at 31-32.

175. *C. Waldock, supra* note 34, at 49-53.

176. The I.L.C. is now comprised of twenty-five members "of recognized competence" in international law, elected by the General Assembly for a 5-year term. The Commission is tasked with studying the methods by which the General Assembly should encourage the progressive development of international law and its eventual codification. The members do not serve as representatives of their governments but as experts on international law. The Commission holds an annual 8- to 11- week session in Geneva. For a concise explanation of the I.L.C. and its work, see *C. Rhyne, International Law* 140-141 (1971).

177. *R. Jennings, supra* note 152, at 31-32.

currently existing international legal norms reflects only the interests of the developed Western European and North American states which formulated these rules, evolving states contend that they are justified in refuting most of these concepts. Unable to participate in the formulation of these rules and firm in their belief that their voluntary consent to these principles is essential to their valid application, these countries regard treaties as the only legitimate source of international jurisprudence. Yet, even with regard to this source of legal norms, the emerging countries reserve the right to pick and choose the treaty commitments undertaken by their former colonial rulers to which they must adhere. Buoyed by their vastly increased representation and resultant voting strength in the United Nations and its subsidiary commissions and agencies, evolving states are increasingly insistent that the United Nations General Assembly become the authoritative source of modern legal norms. The emerging countries will continue to become, on an ever increasing basis, a viable force in the formulation of public international law.

1-21. Conclusion. It has been the purpose of this chapter to acquaint the reader with the overall structure of international jurisprudence and the sources and evidences of its norms. A working knowledge of this subject matter, as well as some of the more contemporary views toward its content, serves as the nexus between all of the legal concepts and principles contained in the following chapters. Before proceeding to any discussion of the various areas of international law that follow, however, it is essential that the relationship between international and state (municipal) law be examined in some detail.

CHAPTER 2
THE RELATIONSHIP BETWEEN INTERNATIONAL AND STATE LAW

Section I. ON THE NATIONAL LEVEL

2-1. Dualism versus Monism. *a.* The relationship of international law to state (municipal) law, and particularly the fact that state courts often apply international law, has long troubled adherents of analytical jurisprudence. Moreover, the notion that only states, rather than individuals, are "subjects of international law" has been distasteful to jurists who have sought the vindication and protection of human rights in international law. Accordingly, there have developed two principal "schools" or approaches seeking to explain, in terms of traditional legal analysis, the relationship between international and state law: the dualist (or pluralist) and the monist. There are several versions of both approaches.

(1) In simplest terms, the dualists regard international law and state law as entirely separate legal systems which operate on different levels. They contend that international law can be applied by state courts only when it has been "transformed" or "incorporated" into state law and emphasize the international legal personality of states rather than individuals or other entities.

(2) The monists, on the other hand, regard international and state law as parts of a single legal system and find it easier to maintain that individuals have international legal personality. In a prevalent version of monism, state law is seen as ultimately deriving its validity from international law, which stands "higher" in a hierarchy of legal norms. [1]

b. Any attempt to explain the relationship between international and state law on the basis of either the dualistic or monist theory becomes somewhat theoretical and generally proves to be highly unsatisfactory to the military attorney. First, there is no complete agreement as to the definitive content of either theory. Secondly, the relationship of these two jurisprudential forms is of immediate interest to the practicing attorney only when a conflict between a rule of international and state law occurs. In this situation, a decision must be made as to which particular rule to apply. Viewed in realistic terms, the nature of this type of decision will generally depend upon whether the court rendering the decision is a state tribunal or an international body. This result flows from the fact that state courts must render decisions, even on questions of international law, in accordance with the laws of the countries in which they sit. Thus, state court decisions on matters of international jurisprudence will reflect the manner in which, and the degree to which, states have incorporated international norms into their domestic legal systems. In that this varies from state to state, the relationship between international and state laws, at the state level, will also vary. [2] Conversely, international tribunals, unrestricted by state laws, find it much easier to achieve a generally uniform application and interpretation of international law. Accordingly, it is essential that the military attorney be fully aware of the legal relationship which exists between his state's system of jurisprudence and public international law. With this in mind, attention will be focused on the currently existing relationship between U.S. law and international norms.

2-2. The U.S. Approach. *a.* The U.S. Constitution sets forth three sources of the supreme law of the land: the Constitution itself, legislation enacted by Congress in accordance with the Constitution, and all treaties constitutionally entered into by the United States. [3] As a result, it would appear to be self-evident that all treaties, the primary source of international law, of which the U.S. is a party are an integral part of the American system of jurisprudence. Specifically, the U. S. Constitution, Article VI, Clause 2, provides:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

b. Given the validity of the preceding statements regarding treaties, it is essential to examine the results of a possible contradiction between American domestic legislation and international agreements entered into by the U.S. A conflict of this nature may, in fact, arise in either of two ways. First, the agreement may be in conflict with a rule of domestic law already in effect at the time the international agreement becomes binding. Secondly, a rule of domestic law may come into effect after the agreement has become binding and be in conflict with it. Where the conflict is between an international agreement and anterior legislation, courts have usually not found it difficult to resolve a conflict in favor of the international agreement; but in doing so, courts usually do not take the position that the agreement is intrinsically superior to existing legislation. Instead, they treat it as equal in rank with the

1. *See generally J. Starke, an Introduction to International Law* 68-90 (6th ed. 1967); *I. Brownlie, Principles of Public International Law* 29-31, 50-51 (1966); *H. Kelsen, Principles of International Law* 551-588 (2d ed. 1966); *P. Jessup, Transnational Law* (1956); and Ginsburg, *The Validity of Treaties in the Municipal Law of the "Socialist" States,* 59 *AM. J. INT'L L.* 523 (1965).

2. In national legal systems, constitutional provisions may provide a legal basis for the application by the courts of rules of customary international law. *See N. Leech, C. Oliver and J. Sweeney, The International Legal System* 12 (1973). For purposes of discussion in this publication, attention will be focused on the U.S. legal system.

3. *U.S. CONST.* art. VI, cl. 2.

legislation and apply the rule of construction that as between anterior and posterior laws in conflict, the one later in time prevails.

c. In the United States, the equality in rank of treaties and acts of Congress is provided by Article VI, Clause 2, of the Constitution. Since neither is superior to the other, the one later in time is held to prevail. Hence a self-executing treaty, i.e., one whose provisions are directly applicable as rules of domestic law without the need of implementation by an act of Congress, supersedes the provisions of prior and inconsistent Federal legislation. Should the treaty not be self-executing, its provisions, once enacted into rules of domestic law by act of Congress, also supersede (because they are later in time) the provisions of prior and inconsistent Federal legislation.

d. National courts are presented with a more difficult issue when, absent an applicable constitutional provision, they must resolve a conflict between an international agreement and domestic legislation that becomes effective at a later date. The rule of construction that the law later in time prevails operates to deprive of *internal* effect the conflicting provisions of the prior agreement.

The U.S. Supreme Court, in the 1870 *Cherokee Tobacco* case, [4] had an opportunity to comment upon the effect of just such a conflict. The question before the court concerned the effect to be given to, respectively, an 1868 Act of Congress [5] and the tenth article of an 1866 treaty between the U.S. and the Cherokee Indian nation. If terms of the 1868 act were adjudged by the court to be applicable to the Cherokee territory in question, the earlier treaty would be contravened. In noting the obvious inconsistency, the court declared:

> . . . it is insisted that the section [of the act of Congress] cannot apply to The Cherokee nation because it is in conflict with the treaty. Undoubtedly, one or the other must yield. The repugnancy is clear and they cannot stand together.
>
> The [second paragraph] of the [sixth article] of the Constitution of the United States declares that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land."
>
> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (Foster v. Neilson, 2 Pet. 314), and an act of Congress may supersede a prior treaty (Taylor v. Morton, 2 Curt. 454; The Clinton Bridge, 1 Woolw. 155). In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief. [6]

The "last-in-time" doctrine enunciated by the court in *Cherokee Tobacco* has been consistently adhered to in subsequent decisions, as shown by *The Over the Top* decision of 1925:

THE OVER THE TOP
SCHROEDER v. BISSELL
United States District Court, D.Conn., 1925.
5 F.2d 838.

Three libels by the United States, one against the schooner Over the Top, and two against its cargo, with application by A. L. Schroeder, owner of the cargo, against Harvey Bissell, Collector, for return of cargo. Libels dismissed.

THOMAS, DISTRICT JUDGE.

* * * *

From the evidence I find the following facts established: On August 27, 1924, the schooner Over the Top, carrying a cargo of whisky and operating under the British flag and under British registry, cleared for Cuba from St. Johns, New Brunswick. It arrived at a point off the coast of Block Island several weeks prior to October 19, 1924.

* * * *

On the 19th of October, 1924, at about 10 o'clock in the evening, the supercargo on board the schooner sold 25 cases of whisky for $550 to a special agent of the Internal Revenue Department. The sale was made in the presence of the captain, and thereupon the crew of the vessel, in the presence and under the direction of the Captain, unloaded these cases of whisky and transferred the same to a sea sled employed in the government service. . . . The transaction occurred at a point approximately 19 miles distant from the shore, or 115 degrees true from the southeast light of Block Island, * * *

On the following day, Over the Top was seized by officers of the United States coast guard, and the captain and crew were placed under arrest, and the ship and her cargo were towed into the Port of New London and turned over to the collector of customs and are now in his custody. . . .

The government bases its claim of forfeiture upon the alleged violation of sections 447, 448, 450, 453, 585, 586, 593, and 594 of the Tariff Act of 1922 * * * as well as upon the provisions of the American-British Treaty which became effective May 22, 1924. The above sections of the Tariff Act provide as follows:

> Sec. 447. *Unlading—Place.*—It shall be unlawful to make entry of any vessel or to unlade the cargo or any part thereof of any vessel elsewhere than at a port of entry * * *.
>
> Sec. 586. *Unlawful Unlading—Exception.*—The master of any vessel from a foreign port or place who allows any merchandise (including sea stores) to be unladen from such vessel at any time after its arrival within four leagues of the coast of the United States and before such vessel has come to the proper place for the discharge of such merchandise, and before he has received a permit to unlade, shall be liable to a penalty equal to twice the value of the merchandise but not less than $1,000, and such vessel and the merchandise shall be subject to seizure and forfeiture: * * *

But before we proceed to discuss the above-quoted sections of the Tariff Act as well as the treaty, it may be well to dispose of one of the contentions made by counsel in behalf of the cargo and schooner.

The proposition is advanced that, regardless of our municipal legislation, the acts complained of could not constitute offenses against the United States when committed by foreign nationals, on foreign bottoms, on the high seas at a point beyond the territorial jurisdiction of the country. Well-known principles of international practice are invoked in support of this contention accompanied with the citation of authority.

4. The Cherokee Tobacco, 78 U.S. 616 (1870).

5. 15 Stat. 167 (1868).

6. 78 U.S. 616, 620-21.

Upon careful consideration, however, I am led to conclude that a misconception exists here as to the status, in a federal forum, of so-called international law when that law encounters a municipal enactment.

If we assume for the present that the national legislation has, by its terms, made the acts complained of a crime against the United States even when committed on the high seas by foreign nationals upon a ship of foreign registry, then there is no discretion vested in the federal court, once it obtains jurisdiction, to decline enforcement. International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress. It is not the function of courts to annul legislation; it is their duty to interpret and by their judicial decrees to enforce it—and even when an act of Congress is declared invalid, it is only because the basic law is being enforced in that declaration. There is one ground only upon which a federal court may refuse to enforce an act of Congress and that is when the act is held to be unconstitutional. The act may contravene recognized principles of international comity, but that affords no more basis for judicial disregard of it than it does for executive disregard of it. These libels, therefore, cannot be attacked upon the ground that the territorial jurisdiction of the United States cannot be extended beyond the three-mile sea zone under international law.

If, however, the court has no option to refuse the enforcement of legislation in contravention of principles of international law, it does not follow that in construing the terms and provisions of a statute it may not assume that such principles were on the national conscience and that the congressional act did not deliberately intend to infringe them. In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it. It is with such a principle in mind that we now proceed to an examination of the legislation upon which the government relies.

Section 447 of the Tariff Act of 1922, quoted supra, makes it unlawful for the vessel to make entry of or to unlade any part of its cargo elsewhere than at a port of entry. Part of the cargo of Over the Top was unloaded on the high seas, and the government contends that the statute was thereby violated. To me it seems that the statute was intended to prevent entry or unlading at a port or place in the country other than a port of entry. It had no reference to unlading on the seas even when done within the three-mile zone. But waiving that question, it is to be noted that the act is phrased in general language and that it bespeaks no suggestion of territorial limitation. The proposition has not heretofore been advanced that for that reason the act has attempted to extend the territorial jurisdiction of the United States over the whole earth. Almost all criminal statutes, or statutes prohibiting defined conduct, are phrased in general language without mention of territorial limitation. But they are all to be read in the light of the principle that jurisdiction is not extraterritorial and that the municipal legislation is not attempting to regulate or to punish conduct performed outside of the national domain. For example, the statutes of Connecticut do not forbid larceny in Connecticut—they forbid larceny. The statutes of the United States do not forbid counterfeiting in the United States—they forbid counterfeiting. That the Congress may, in disregard of the law of nations, prohibit acts by foreign nationals not committed within our domain, has already been conceded; but unless such intent clearly appears from the language of the statute such intent is not to be presumed.

* * * *

The same considerations apply with equal force to the provisions of sections 448, 450, 453, 585, 593, and 594 of the Tariff Act of 1922. These enactments of the Congress are implicit with the proviso that the acts therein denounced be accomplished within the territory of the United States. No attempt is there discernible to extend the legislative jurisdiction of the United States beyond its boundaries.

* * * *

Here we have a distinct extension of our sea jurisdiction to a point 12 miles from the coast—an assertion of authority which may perhaps clash with international practice, but which, whether challenged or not, is unmistakable, and which, therefore, it is the business of our courts to enforce. Had the master and super cargo of Over the Top been guilty of unlading the liquor at a point within this 12-mile zone, it may be that we would have had no difficulty in sustaining the libels.

* * * *

My conclusion, then, is that as no statute embracing the subject-matter of sections 447, 448, 450, 453, 585, 586, 593, and 594 of the Tariff Act of 1922 has extended our territorial jurisdiction to a point on the high seas distant 19 miles from our coast, conduct which would have been in violation of these sections if performed within our territory cannot constitute an offense against the United States when performed at such a distance by foreign nationals on ships of foreign registry. If, for the purpose of our treasury, we can extend our sea jurisdiction to a point four leagues from the coast, I see no reason why we cannot extend it four leagues more. I merely observe that we have not done so yet.

I now come to the provisions of the American-British Treaty, which was obviously contracted for the purpose of preventing hovering ships from supplying intoxicating liquor to carriers running between the ships and the shore. * * *

* * * *

Whether therefore the Senate and the Executive may constitutionally enact criminal legislation by the device of a mere treaty is a question which fortunately we need not discuss. It is sufficient to conclude that the American-British Treaty did not in fact enact new criminal legislation.

* * * *

The considerations as above expressed therefore impel the conclusion that there is no legal basis for these libels, and it follows that they must be and the same are dismissed. * * *

In *Tag v. Rogers*[7], the appellant argued that international practice, formalized in a rule of law, forbids the seizure or confiscation of the property of enemy nationals during time of war, at least where that property had been acquired by enemy nationals before the war and in reliance upon international agreements. In rejecting this argument the court said in part:

Once a policy has been declared in a treaty or statute, it is the duty of the federal courts to accept as law the latest expression of policy made by the constitutionally authorized policy-making authority. If Congress adopts a policy that conflicts with the Constitution of the United States, Congress is then acting beyond its authority and the courts must declare the resulting statute to be null and void. When, however, a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that agency.[8]

e. The preceding cases clearly demonstrate the fact that treaties are indeed an integral part of U.S. law. Just as clearly evidenced, however, is the fact that Congress may denounce previous treaties if it see fit to do so and pass superseding and contravening legislation to this effect.[9] Though a Congressional decision to contravene prior treaty commitments does have the effect of law *within* the

7. Tag v. Rogers, 267 F.2d 664, *cert. denied,* 362 U.S. 904 (1959).

8. *Id.* at 668.

9. In a 1972 case, Diggs v. Schultz, 470 F.2d 461, *cert. denied,* 411 U.S. 931, 93 S. Ct. 1897, a group of black Congressmen attempted, *inter alia,* to challenge the validity of a 1971 law sponsored by Senator Byrd of Virginia which had set the stage for importing chrome from Rhodesia in derogation of the United Nations embargo previously adopted with the affirmative vote of the United States. *See* Executive Order Nos. 11322, 11419, 22 USCA § 287c. *See also* Strategic and Critical Materials Stock Piling Act, §§ 1-10, 50 U.S.C.A. §§ 98-98h-1. The D.C. Court of Appeals held that ". . . under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches can do about it." 470 F.2d at 466.

United States, it cannot absolve the U.S. of its previously incurred *international* obligations and responsibilities. [10] The same is true of any state in the international community.

f. As noted, the Constitution specifically mentions treaties as a primary source of "the supreme law of the land." This document is silent, however, as to the role that *customary* international law is to play in the American legal system. The U.S. Supreme Court was not long in filling this apparent void. In the case of *The Paquete Habana*, [11] previously discussed in chapter 1, [12] the court referred to customary international law in this manner:

> 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. For this purpose, 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 civilized nations. . . . [emphasis supplied] [13]

g. It is evident, therefore, that customary international law, like treaties, is a vital part of U.S. law. Notwithstanding this fact, however, as in the case of international agreements, courts often prefer to yield to other branches of the government in certain matters of international legal concern.

UNITED STATES v. BERRIGAN
United States District Court, D.Md., 1968.
283 F.Supp. 336.

NORTHROP, DISTRICT JUDGE. The defendants before this court are charged in three counts that they did willfully

1. injure property of the United States;
2. mutilate records filed in a public office of the United States; and
3. hinder the administration of the Military Selective Service Act.

Defendants wish to proffer an opening statement to the jury as to what they would present for their defense. Specifically, they contend that, by virtue of what they have read, heard, and seen, the war in Vietnam is immoral and illegal; and that the United States, in carrying on the war in Vietnam, is violating certain precepts of international law, constitutional law, and judgments which were handed down at Nurnberg.

To serve as a foundation and a basis for their beliefs, defendants wish to produce in court, among other evidence, "the outstanding experts" on international law who would testify that the acts of the United States government in Vietnam are illegal. Their conduct, they say, was prompted by their belief that the United States is acting illegally and was intended to prevent criminal acts from being committed. Because this belief prompted their acts, they argue that the necessary *mens rea* is lacking.

Initially, it must be pointed out that in law once the commission of a crime is established—the doing of a prohibited act with the necessary intent-proof of a good motive will not save the accused from conviction.

* * * *

Counsel also contends that the defendants' acts are symbolic expressions of speech which are protected by the First Amendment of the United States Constitution and thus he is entitled to offer this defense before the jury.

* * * *

This court finds that under the circumstances of this case the conduct which is charged in the indictment is not afforded the protections of the First Amendment and a conviction under these criminal statutes would not deny to these defendants any of the guarantees of that Amendment.

Finally, counsel contends that these defendants should be allowed to present to the jury what is popularly known as the "Nurnberg Defense." The trial of the Nazi war criminals at Nurnberg was premised on the generally accepted view that there are, as a part of international law, certain crimes against peace and humanity which are punishable. The Nurnberg Trial, 6 F.R.D. 69 (1946). It is urged here that the belief of these defendants that the United States was waging a war of aggression, and thus committing a crime against peace, justified the acts charged.

It is not clear what standing these defendants have to raise the legality of this country's involvement in Vietnam when they have not been called to serve in the armed forces, are not directly affected by our government's actions in that country, and are not even directly affected by the Selective Service apparatus. As pointed out by Judge Charles E. Wyzanski in an article in the February 1968 issue of the Atlantic Monthly:

> As the Nuremberg verdicts show, merely to fight in an aggressive war is no crime. What is a crime is *personally* to fight by foul means. [Emphasis supplied.]

The important element in this defense, assuming its applicability in an American court, is the individual responsibility which is necessary before it can be raised. These defendants do not have standing to raise the validity of governmental actions, either under international law or constitutional law, on the grounds that the rights of parties not before this court are violated. Courts "must deal with the case in hand, and not with imaginary ones." Yazoo & M.V.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 218, 33 S.Ct. 40, 41, 57 L.Ed. 193 (1912).

I refer again to the opinions expressed by Judge Wyzanski because they are timely articulations of ancient principles found in scores of cases. In our disturbed times, modern expressions seem to have more persuasion than the authority of antiquity.

> For men of conscience there remains a less risky but not a less worthy moral choice. Each of us may bide his time until he personally is faced with an order requiring him as an individual to do a wrongful act. Such patience, fortitude, and resolution find illustration in the career of Sir Thomas More. He did not rush in to protest the Act of Henry VIII's Parliament requiring Englishmen to take an oath of supremacy attesting to the King's instead of the Pope's headship of the English Church. Only when attempt was made to force him to subscribe to the oath did he resist. * * *
>
> This waiting until an issue is squarely presented to an individual and cannot further be avoided will not be a course appealing to those who have a burning desire to intervene affirmatively to save his nation's honor and the lives of its citizens and citizens of other lands. It seems at first blush a not very heroic attitude. But heroism sometimes lies in withholding action until it is compelled, and using the interval to discern competing interests, to ascertain their values, and to seek to strike a balance that marshals the claims not only of the accountant and of others in his society, but of men of distant lands and times.

But irrespective of the lack of standing of these defendants to raise the issue of the legality of the government's actions as they relate to the Vietnam situation, the proffered defense suffers from a more fundamental bar. It is clear that there are certain questions of substantive law, that is, "political questions," which are not cognizable in our courts because of the nature of our governmental system which is based upon a separation of functions among different branches of the government. The doctrine

> "is one of 'political question,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional

10. The inability of a state to absolve itself of international obligations and responsibilities is addressed at chapters 7 & 8, *infra*. Means by which to legitimately terminate or suspend treaties do exist under international law. This subject will be examined in detail chapter 8.

11. The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290 (1900).

12. *See* p. 1-6, *supra*.

13. 175 U.S. 677, 700.

authority. Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962)."

Certain clearly defined areas have traditionally and necessarily been left to other departments of the government, free from interference by the judiciary. One such area is foreign relations. Baker v. Carr, supra, at 211, 82 S.Ct. at 691.

It is true that not every case which touches the foreign-relations power of the country is necessarily a "political question." Courts have usually decided the constitutional questions concerning international agreements, Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), but the corresponding question of international law has been treated as a "political question."

The activities of these defendants were directed towards the Selective Service System, which system counsel has admitted is not criminal or illegal in and of itself. What is called into question here in the utilization of the armed forces by the executive and legislative branches. It cannot be disputed that the recognition of belligerency abroad, and the measures necessary to meet a crisis to preserve the peace and safety of this country, is uniquely an executive and a legislative responsibility. Whether the actions by the executive and the legislative branches in utilizing our armed forces are in accord with international law is a question which necessarily must be left to the elected representatives of the people and not to the judiciary. This is so even if the government's actions are contrary to valid treaties to which the government is a signatory. And the Supreme Court has held that Congress may constitutionally override treaties by later enactment of an inconsistent statute, even though the subsequent statute is in violation of international law.

The categorization of this defense as a "political question" is not an abdication of responsibility by the judiciary. Rather, it is a recognition that the responsibility is assumed by that level of government which under the Constitution and international law is authorized to commit the nation.

The "Nurnberg Defense" is premised on a finding that the government is acting in violation of international law in waging an aggressive war, and, as such, cannot be raised here because the question of violations of international law by the government is uniquely a "political" question.

Counsel will govern themselves accordingly, and the court's instructions to the jury will reflect this decision if any transgression makes it necessary.

h. The purpose of the preceding discussion has been to demonstrate the manner in which and degree to which international law, in the form of treaties and customary norms, has been integrated into the American legal system. As noted, international jurisprudence is considered a part of U.S. law. [14] The role it plays, however, is largely dependent on whether it is considered by courts to be in conflict with existing U.S. law or practice. In speaking to this point, *Restatement, Second, Foreign Relations Law of the United States* urges accommodation:

§ 3. Effect of Violation of International Law . . .

(3) If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law.

Comment:

J. *Application of international law in courts in the United States.* International law is applied by courts in the United States without the necessity (i) of pleading and proving it; or (ii) of showing an affirmative acceptance by legislative or other national authority of the rule of international law applied. However, if there is domestic legislation contrary to international law that is also pertinent, courts in the United States will normally apply the legislation. But courts in the United States interpret general or ambiguous words in statutes in a manner consistent with international law as understood by them.

i. This examination of the relationship between international and state law has, until this point, limited itself to the national level, i.e., to an interpretation of international norms by state courts in light of domestic legislation. Attention must now be focused on the relationship between these two forms of jurisprudence on the international plane.

Section II. ON THE INTERNATIONAL LEVEL

2-3. Introduction. *a.* A former legal adviser to the Department of State was discussing with the late Mr. Justice Frankfurter the position of national courts in the international legal system and said:

Mr. Justice, with all due deference, I would say that from the standpoint of international law, your court is but another municipal court and a decision of your court does not have any more effect internationally than a decision by a bureaucrat. [15]

b. The principle that a state cannot plead its own law as an excuse for noncompliance with international law has been long established and generally recognized. In 1887, for example, U.S. Secretary of State Bayard declared:

[I]t is only necessary to say, that if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules. . . . [16]

c. Article 13 of the Declaration of Rights and Duties of States adopted by the International Law Commission in 1949 provides: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty." There is an abundance of decisions of international courts and tribunals recognizing this principle. [17] The principle is also recognized by Soviet jurists:

Proceeding from one and the same supreme authority, both the rules

14. The United States Supreme Court, like the courts of other federations, often refers to rules of international law in settling disputes between the states of the Union. *See,* e.g., New Jersey v. Delaware, 291 U.S. 361, 54 S.Ct. 40, 78 L.Ed. 847 (1934); Iowa v. Illinois, 147 U.S. 1, 13 S.Ct. 239, 27 L.Ed. 55 (1893); Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 5 L.Ed. 113 (1820).

15. *Leech, supra* note 2, at 2.

16. *U.S. For. Rel.* 751, 753 (1887).

17. *See* Case Concerning Certain German Interests in Polish Upper Silesia, [1926] P.C.I.J. 19, 22, 42; Chorzow Factory Case, [1928] P.C.I.J. 33-34; Free Zones Case, [1932] P.C.I.J. 167; Treatment of Polish Nationals in Danzig, [1932] P.C.I.J. 24; and Case Concerning Rights of Nationals of the United States of America in Morocco, [1952] I.C.J. 176.

of International Law and those of domestic origin should have the same binding force for all organs and nationals of the countries concerned. By concluding an international agreement a governing authority undertakes, if necessary, to bring its domestic legislation into line with the international commitments it has assumed. On the other hand, by promulgating a law clearly contrary to International Law, the government concerned commits a violation of International Law, for which the State concerned is responsible under International Law. . . .

Therefore, International Law and National Law must not in their very nature either contradict each other or have primacy one over the other. [18]

d. In many cases, international tribunals have awarded damages because a state's courts have disregarded or misapplied international law. For example, after the American Civil War, an arbitral tribunal awarded damages to Great Britain for the detention or condemnation in the United States of six British vessels as prizes during the Civil War. It held that, in these cases, the condemnation or detention was contrary to international law, although it had been upheld by the Supreme Court as lawful. [19] It should be further noted that, in such cases, the international tribunal normally has no power to reverse or set aside the judgment of the municipal court, which may continue to have legal effect (e.g., with respect to passage of title to property). The international tribunal, however, will award damages to the aggrieved state.

e. Although international law is normally controlling on the international level, questions of municipal law may arise in disputes between states, and international tribunals may find it necessary to interpret such law. This may happen, for example, in disputes arising out of alleged breaches of state contracts. In the *Serbian Loans* and *Brazilian Loans* cases, [20] the Permanent Court of International Justice had to determine the meaning and effect of French legislation governing payments of debts in gold or at gold value. In construing this legislation, the Court attached controlling weight to the manner in which it had been applied by the French courts, saying in the latter case:

Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.

Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.

It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based.

Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law. As the Court has already observed in the judgment in the case of the Serbian loans, it would be a most delicate matter to do so, in a case concerning public policy—a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in a case where no relevant provisions directly relate to the question at issue. Such are the reasons according to which the Court considers that it must construe Article VI of the Special Agreement to mean that, while the Court is authorized to depart from the jurisprudence of the municipal courts, it remains entirely free to decide that there is no ground for attributing to the municipal law a meaning other than that attributed to it by that jurisprudence.

Exceptionally, however, an international tribunal may reject an interpretation of a state's law by a court of that state if it is obviously fraudulent or erroneous. [21]

2-4. Summary. *a.* The place of international law within a particular municipal legal system, though both giving rise to intricate domestic legal problems and adding to or subtracting from the effectiveness of international law, does not affect the international rights and obligations of the state. These rights and responsibilities are founded in international law. Domestic constitutions and other state laws are, alone, incapable of adding to or subtracting from the existing norms of international jurisprudence. This is both logical and just. International law is not *foreign* law. Far more being a legal system imposed upon states against their will, it consists of rules and regulations designed both to protect and to promote the interests of all members of the world community.

b. It is upon the question of membership in the international community that attention must now be focused. If, in fact, states are the only true subjects of public international law, it is essential that the military attorney fully understand the characteristics of these principal participants in the international legal system.

18. *Academy of Sciences of The U.S.S.R., Institute of State and Law, International Law* 15 (Ogden transl. 1961).

19. Alabama Claims (United States v. Great Britain), 3 J. Moore, *International Arbitrations* 3209-10 (1898); 4 *J. Moore,* at 3902, 3911, 3928, 3935, 3950 (1898).

20. Serbian Loans and Brazilian Loans Cases, [1929] P.C.I.J. 5, 40-47, 93, 120-125.

21. *Id.* at 121, 22. *See generally A. Freeman, The International Responsibility of States for Denial of Justice* 342-354 (1938); *C. Jenks, The Prospects of International Adjudication* 547-603 (1964).

CHAPTER 3
SUBJECTS OF INTERNATIONAL LAW

3-1. Introduction. *a.* As mentioned in chapter 1, international law has been thought to apply only to *states.* The notion has been that only states may claim rights under international law and, consequently, only states are burdened with the duties imposed by this jurisprudence. A large body of law has developed dealing with the characteristics of states for purposes of international law, the recognition of states and their government by other states, and the legal consequences of such recognition or nonrecognition. This chapter will survey this body of law.

b. In recent years, the historical view that only states have rights and duties under international law has given way to a less restrictive view regarding the subjects of international law. For example, international organizations, such as the United Nations, have been held to have international personality. Similarly, it is gradually becoming accepted that individuals and corporations may also have rights and duties under international law in certain circumstances.

c. Although only states were formerly regarded as proper subjects of international law, for many years groups recognized as *belligerents* have been treated as having certain rights and duties under international law. On the other hand, *insurgents* (groups not yet accorded belligerent rights with respect to neutrals) have a less sharply defined status as "persons" subject to international law. [1]

Section I. THE BASIC NATURE OF STATES AND GOVERNMENTS

3-2. Necessary Qualifications for Statehood. *a.* Public international law has been, and remains, primarily a law applicable to the conduct of sovereign states in their interstate relationships. Although there are many definitions of a state, one widely accepted definition stipulates that a state is an entity possessing the following qualifications: (1) a permanent population; (2) a defined territory; (3) a government; and (4) capacity to enter into relations with other states. [2]

b. Certain nation states, such as the United States, are recognized by all as "states" having full rights and duties under international law. Likewise, it is clear that a state within a federal system, such as the State of New York, is not a "person" for purposes of international law, i.e., it is not a "state" in the international law sense inasmuch as it does not carry on international relations. [3] The same is true of municipalities, (e.g., Boston) and territories (e.g., Puerto Rico), neither of which are "states."

3-3. Sovereignty: The Key to Statehood. *a.* The basic test of statehood and the thrust of the traditional requirements mentioned above is *sovereignty*, which may be defined as legal (as distinguished from actual) self-sufficiency. A sovereign state does not rely for its juridical existence on anything foreign to itself. [4] Subject to its treaties and other international legal obligations, it is independent of other states both within its territory and in its international affairs. [5] International organizations, on the other hand, rely for their existence upon the states that create them. For example, the United Nations and the European Economic Community came into being by the act of their member-states. Their existence can be terminated simply by the member-states withdrawing from them. By contrast, the existence of a state cannot be terminated by the action of other states. This lack of reliance upon the will of other states is the core meaning of the phrase "States are sovereign."

b. As a practical matter, every treaty entered into between sovereign states restricts, to some extent, the exercise of the power incidental to sovereignty. Likewise, the norms of international law tend to restrict the exercise of the individual state's sovereign power. Such restrictions on a state's freedom of action do not, however, affect its status as a sovereign state. As long as a state is not under the legal authority of another state, it remains a sovereign state, regardless of how extensive or burdensome its international legal obligations may be. [6]

c. Although the concept of sovereignty implies a certain amount of independence, it is apparent from what already has been said that the two terms are not synonymous. A state can be sovereign without being completely independent in either a legal or a practical sense. For analytical purposes, states may be classified as either *independent* or *dependent.* There are, or have been, many types of dependent states, each largely governed by the facts of the particular situation. They may be called vassal states, protected states, protectorates, suzerainties, or by other names. These terms do not have precise juristic meaning, and do not necessarily imply that the dependent state lacks international legal personality. Rather, each de-

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1. This topic is dealt with extensively in *International Law, Volume II, DA Pam 27-161-2.*

2. Art. 1, Convention on Rights and Duties of States, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. For other definitions, see *Restatement (Second) Foreign Relations Law of The United States* § 54 (1965) [hereinafter cited as *RESTATEMENT*]; *J. Brierly, The Law of Nations* 137 (6th ed. 1963) [hereinafter cited as *Brierly*]; *I. Hyde, International Law* 22-23 (2d rev. ed. 1945); *I. Oppenheim, International Law* 118 (8th ed. Lauterpacht 1955) [hereinafter cited as *Oppenheim.*]

3. Article 2 of the *Convention on Rights and Duties of States, supra* note 2, expressly provides that "[T]he federal state shall constitute a sole person in the eyes of international law."

4. *See Korowicz, Introduction to International Law* 274 (1959).

5. *Id. See* Chief Justice Marshall's statements in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

6. *See* Advisory Opinion on Customs Regime between Germany and Austria, [1931] P.C.I.J., ser. A/B, No. 41, at 37, 45-46, 57-58, 77.

pendent state has individual legal characteristics resulting from its origins, the treaties it has entered, and the stage of its development. [7]

d. A well-known British case, *Duff Development Co. Ltd. v. Government of Kelantan*, [8] illustrates this point. The House of Lords affirmed an order staying proceedings against the Government of Kelantan (a princely Malay State under British protection) on the ground that Kelantan was a sovereign state over which the court had no jurisdiction. This result was reached even though, by agreement between the two states, the British government had assumed the conduct of Kelantan's foreign affairs, and even though the agreement severely limited the control of the Sultan of Kelantan over his country's internal affairs. Kelantan had contracted away to a great deal of its independence, but it had not forfeited its *status* as a sovereign power. Similarly, the states that have joined the European Economic Community have obviously contracted away, for so long as they remain members of the Community, a substantial degree of their independence. Yet they remain sovereign states in their dealings with one another and with other states.

3-4. Legal Consequences of Statehood. Once the necessary qualifications for statehood are present (i.e., there exist the elements of territory, people, government, and engagement in foreign relations), the question arises as to what legal consequences normally follow from this. The potential ramifications are myriad; it is feasible here to refer only to a few of the more basic legal consequences of statehood.

First, all states are legally equal, i.e., all states have equality before the law. [9] This principle is expressly recognized in Article 2(1) of the Charter of the United Nations: "[T]he Organization is based on the priniciple of the sovereign equality of all its members." Yet, although every state is juristically equal in the sense that no state has greater sovereignty or greater right to equal protection of law than any other, it is not empirically true that all states have equal rights and duties. The rights and duties of a state that has a seacoast are necessarily different than those of a state that is landlocked. The rights of a state that is a member of an international organization, such as the United Nations, are different in some ways from those of nonmembers. Every state to some extent either circumscribes or increases its rights and duties by the treaty commitments into which it has entered. [10] Thus, it has been contended that the principle of equality simply means application of the law in conformity with the law, i.e., that in applying the law only those differences shall be regarded which are recognized in the law itself. [11]

Second, only states may be parties in cases before the International Court of Justice. [12] This rule, however, does not bar the United Nations from seeking advisory opinions of the Court. [13]

Third, every state, whatever its other duties may be, has the duty to respect the rights enjoyed by every other state in accordance with international law. [14] The right of each state to exercise its sovereign power does not authorize it to commit unlawful acts against another state. [15]

Fourth, sovereignty entails the power to exclude states from exercising their sovereign functions within the territory of another state. This is a universally accepted core principle of international law. Thus, for example, in 1957 the U.S. Department of State instructed the American

7. *See* Advisory Opinion on Nationality Decrees in Tunis and Morocco, [1923] P.C.I.J., ser. B, No. 4, at 27. Examples of protectorates and of other kinds of openly-avowed dependent states are few at present. Andorra is under the joint protectorate of France and Spain, San Marino under the protectorate of Italy, and Monaco under that of France. As Brierly points out, the "growth of national sentiment in all parts of the world makes any extension of the status unlikely." *Brierly, supra* note 2, at 136. Of course, a relation of dependency sometimes exists between two states in fact, but for political reasons is not avowed. For example, the U.S. at one time exercised extensive control over some of the nominally independent states of Central America. *Id.* at 134. The Soviet Union today exercises far-reaching control over some of the nominally independent states of Eastern Europe. The American Indian nations or tribes are generally considered to be "domestic dependent nations." *W. Bishop, International Law Cases and Materials* 315 (3d ed. 1971) [hereinafter cited as *Bishop*].

8. [1924] A.C. 797.

9. *See* Convention on Rights and Duties of States, *supra* note 2, art. 4.

10. *See* Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (memorandum submitted by the Secretary-General) U.N. Doc. A/CN 4/2, at 66 (1948).

11. *See* Kelsen, *The Draft Declaration on Rights and Duties of States*, 44 *Am. J. Int'l L.* 259, 269 (1950). The considerations mentioned in the text above detract from the plausibility of the Draft Recommendations on Equality of States, adopted on April 22, 1966, by the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, U.N. Doc. A/6230, at 176, 183 (1966), Article 1 of which states, *inter alia*, that all states "have equal rights and duties." This document nevertheless represents a useful attempt to flesh out the meaning of "sovereign equality."

Articles 1 and 2 thereof read as follows:

> 1. 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.
>
> 2. In particular, sovereign equality includes the following elements:
>
> (*a*) States are juridically equal.
>
> (*b*) Each State enjoys the rights inherent in full sovereignty.
>
> (*c*) Each State has the duty to respect the personality of other States.
>
> (*d*) The territorial integrity and political independence of the State are inviolable.
>
> (*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems.
>
> (*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

12. *Statute of The International Court of Justice*, Art. 38-1.

13. *See*, e.g., Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174.

14. *See Charter of the Organization of American States*, Art. 10, 2 U.S.T. 2394, 119 U.N.T.S. 3, *as amended* 21 U.S.T. 607 (1967).

15. This principle is expressed in article 14 of the *Charter of the Organization of American States, supra* note 14.

Embassy in Spain that the conduct of public hearings by a Congressional committee is an exercise of a sovereign function by a branch of the United States Government. Accordingly, if such hearings were conducted in another country (Spain) without its consent, this would constitute an infringement of that country's sovereignty. [16]

Fifth, every state is entitled to represent its nationals in claims proceedings against another state for injury caused by the latter's violation of international law. [17] Although the actual injury is to the person or property of nationals of the state asserting the claim, international law treats the injury as having been suffered by that state. Therefore, only the state of which the aggrieved persons are nationals has standing to bring claims against another state for violations of international law. [18] Except as otherwise provided in the municipal law of the offending state, the aggrieved persons do not have standing to prosecute such claims against that state. Their normal recourse, municipal law remedies having been exhausted, is to request that the proper authorities of their national state intercede on their behalf. [19]

3-5. Statehood and U.N. Membership. Article 4 of the Charter of the United Nations opens membership in the U.N. to "all . . . peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." It is arguable whether or not members of the U.N. are required to admit as additional members only those entities meeting the standard minimum qualifications for statehood as defined by international law. [20] In any event, Article 4 makes membership available to "states" that also meet other criteria ("peace-loving," etc.) besides statehood. Thus, denial of U.N. membership to a political entity is not necessarily (and usually would not be) a denial of statehood. Major political entities that are not members of the U.N. are Switzerland, the two Koreas, and the two Germanies.

3-6. State Distinguished from Government. *a.* A government is (1) a small group of people (2) who are in effective control of the state. [21] Many definitions of a state include a government as an essential part of the definition. [22] A distinction, however, between the two is useful for several reasons. First, it assists in understanding the historical instances of a state continuing to exist for short periods without a government: for example, China, during periods of interim anarchy in the 19th century, Austria from 1938 to 1945, [23] and Germany from 1945 to 1949. [24] Certainly, a state cannot exist very long without a government, as its independence would soon be in jeopardy. Nevertheless, the fact that it can exist shows that the two are distinct concepts. Second, the recognition of governments often entails the selection of one faction over another by the recognizing government. These factions are always groups of people vying for control of the already-existing state. It has been the practice of governments to treat these groups as distinct from the state itself, which remains internationally unchanged by the change of governments. Third, a government may bind a state internationally. The state thereafter remains bound by many of the acts of its government regardless of the changes in administration. [25] Likewise, the rights of a state remain unaffected by changes in government. [26]

b. The essential ingredient of a government in international law is that it must be in control. The manner in

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16. 1 *M. Whiteman, Digest of International Law* 256 [hereinafter cited as *Whiteman*]. *See generally I. Hyde, supra* note 2, at 641-44.

17. The subject of international claims is treated more fully in chapter 7, *infra*.

18. *See* Mavrommatis Palestine Concessions (Jurisdiction), [1924] P.C.I.J., ser. A, No. 2. *See also* note 177, *infra*.

19. *See Bishop, supra* note 7, at 742; chapter 7, *infra*.

20. Byelorussia and the Ukraine have separate memberships in the United Nations, even though they are but parts of the Soviet Union and do not conduct international relations. This strongly suggests that admission into the United Nations depends largely upon political, rather than legal, considerations.

In 1948, during debate over the admission of Israel to the United Nations, Professor Jessup, then United States representative to the Security Council, observed that "the term 'State,' as used and applied in Article 4 of the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks of international law." *See W. Friedmann, O. Lissitzyn. & R. Pugh, International Law Cases and Materials* 154 (1969) [hereinafter cited as *Friedmann*]. The basic issue regarding Israel's statehood concerned her lack of a precisely defined territory. Besides arguing that classical international law does not necessarily govern the meaning of the term "State" for article 4 purposes, Professor Jessup also contended that "the concept of territory does not necessarily include precise delimitation of the boundaries of that territory." *Id.* at 155. Israel was admitted to United Nations membership, but because of the political nature of this action it cannot be presumed that either of Professor Jessup's arguments necessarily was accepted. For purposes of the admission of former colonial territories to the United Nations, the traditional requirement of a stable and effective government in a territory claiming statehood has been deemphasized. It has been argued that this traditional requirement runs counter to developments in international law regarding a legal right of self-determination, and that it is often at variance with the political reality (anti-colonial pressures and unacceptable economic costs) that has caused Western European states in several cases to withdraw from their former colonies before any adequate indigenous system of government has been established. *See Higgins, The Development of International Law Through The Political Organs of The United Nations* 22 (1963), discussing the admission of Ruanda and Burundi to United Nations membership.

21. Control is the quality stressed in judicial decisions as well as in practice. *See* Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923), and Salimoff v. Standard Oil Co. of New York, 262 N.Y. 220, 186 N.E. 679 (1933).

22. *See* note 2, *supra*.

23. *Marek, Identity and Continuity of States in Public International Law* ch. 7 (1954).

24. *See Von Glahn, The Occupation of Enemy Territory* ch. 21 (1957) and citations therein. *See also The Status of Germany, I World Polity* 177 (1957).

25. *Oppenheim, supra* note 2, at 925, 949; Tinoco Claims Arbitration (Great Britain—Costa Rica) 1 U.N.R.I.A.A. 369; Hopkins Claims (United States—Mexico) 21 *Am. J. Int'l L.* 160 (1927).

26. *See The Sapphire*, 78 U.S. (11 Wall.) 164 (1871), where a suit by France in a U.S. court was unaffected by a revolutionary change in France.

which the government gains control is not of primary importance. However, it may be of the utmost importance in international politics and may be a decisive factor in the decision by other states to grant or withhold recognition.

Section II. RECOGNITION OF STATES AND GOVERNMENTS

3-7. Nature of Recognition. *a.* Recognition is essentially a political act, taken by the government of a state in the conduct of foreign affairs. It may be extended to another state, to the government of another state, or to a belligerency. Generally, the need for recognition arises only when there has been some extraordinary political change, such as the creation of a new state by separation from an existing state [27] or the formation by *coup d'etat* (or some other departure from orderly transition) of a new government of an existing state. As a practical matter, most recognition problems involve recognition of new governments of already-recognized states. [28]

b. Recognition of belligerency rarely occurs. It arises only in cases of armed conflict—rebellion or civil war—within a particular state. This type of recognition means the recognition by one state that a revolt or insurrection within another state has attained such a magnitude as to constitute a state of war, entitling the revolutionaries (or insurgents) to the benefits, and imposing upon them the obligations, of the laws of war. [29] The state granting such recognition demands for itself all the legal consequences that flow from the existence of a war; it claims the rights of a neutral, and accords the rights of belligerents to the warring factions. [30] If a state is unwilling to accord the rights of a belligerent to an insurgent group within another state, it may nevertheless accord them a more limited status, i.e., a recognition of insurgency. [31] Although the status of belligerency gives rise to definite rights and duties, the status of insurgency does not. At least, however, recognition of insurgency indicates a desire to treat the insurgents as something more than outlaws. [32]

c. In the case of a new state or government, recognition is evidenced by an act acknowledging the existence of such state or government and indicating a readiness on the part of the recognizing state to enter into formal (but not necessarily diplomatic) relations with it. [33] Recognition is fundamentally a matter of intention, and may be express or implied. The mode by which it is accomplished is of no special significance. [34] An act that would normally have the effect of recognition may be deprived of that effect if the government performing it indicates that it is not intended to constitute recognition. [35] Recognition of a new state usually carries with it recognition of the government of that state, as states can speak and act only through their governments. [36]

3-8. International Legal Aspects of Recognition. *a. Theories of Recognition.* The two principal theories proposed to explain the legal effect of recognition are the constitutive and the declaratory.

(1) *The Constitutive Theory.* [37] According to this theory, recognition has a "constitutive" effect, i.e., it is through recognition (and only through recognition) that a state becomes an international person and a subject of international law. This view has two significant weaknesses. First, if a state is recognized by some states but not by others, then under the constitutive theory that state is both an international person and not an international person at the same time. Second, and perhaps more important, it follows from the constitutive theory that an unrecognized state has neither rights nor duties under international law. Although nonrecognition may make the enforcement of rights and duties more difficult than it would otherwise be, international practice does not support the view that a state has no legal existence before recognition. [38]

(2) *The Declaratory Theory.* [39] This theory maintains that both states and governments are facts. Once the objective criteria mentioned earlier are met, international legal personality exists. Recognition merely declares the existence of the state or government, which existence has preceded the recognition in time. A state may exist without being recognized, and if it does exist in fact, then it is an entity having rights and duties under international law, whether or not it has been formally recognized by other states. [40] Under this view, the granting of recognition merely enables the recognized state to exercise its international legal personality with the state that extends recogni-

27. A recent example of extraordinary political change resulting in recognition of a new state is the case of Bengladesh.

28. *Leech, Oliver, & Sweeney, The International Legal System* 768 (1973) [hereinafter cited as *Leech*].

29. 1 *G. Hackwork, Digest of International Law* 161 (1940) [hereinafter cited as *Hackworth*].

30. *Brierly, supra* note 2, at 142.

31. See *Friedmann, supra* note 20, at 163.

32. *Id.* DA Pam 27-161-2 deals comprehensively with the recognition of belligerency and insurgency. Accordingly, these topics are given only passing mention here.

33. *Hackworth, supra* note 29, at 161.

34. *Id.* at 166-67.

35. For example, the conclusion of a bilateral treaty ordinarily implies recognition, but that implication may be negatived by appropriate language or conduct. Thus, during 1919 and 1920 the British, French, Danish, and Belgian governments entered into bilateral agreements with the Soviet Union (which had not yet been recognized by those contracting governments) for the repatriation of prisoners of war, without those agreements being considered as constituting recognition. *See 2 Whiteman, supra* note 16, at 52. *See also Restatement, supra* note 2, at § 104. Although recognition by implication can occur, a disclaimer is sufficient to negate it.

36. *See Hackworth, supra* note 29, at 167.

37. For a comprehensive treatment of the constitutive theory, *see H. Lauterpacht, Recognition in International Law* (1948).

38. *Brierly, supra* note 2, at 138-39.

39. For a detailed analysis of the declaratory theory, see *I. Chen, The International Law of Recognition* (1951).

40. *Brierly, supra* note 2, at 138-39.

tion. [41] An unrecognized state or government, however, does not depend upon recognition from anyone for its international legal personality. Rather, its juridical existence is complete when the objective criteria of statehood or government are satisfied.

b. Criteria for Recognition. (1) *The Objective Criteria.* If the four elements of a state (i.e., people, territory, independence, and governmental structure) or the two elements of a government (i.e., (a) a group which is (b) in effective control) exist, formal recognition may follow by other states. If formal recognition is not extended it would be difficult in practice for the withholding government to ignore entirely the factual existence of the other state or government. This it seldom attempts to do. The withholding government merely attempts to keep its international deals with the other to a minimum. The result is that the withholding of recognition from a factually existing state or government is often very similar to the breaking off of diplomatic relations between two governments that have previously extended recognition to one another. [42]

(A) If a foreign government extends recognition when all the objective criteria of a state or government are not present, particularly those of independence and control, then it may be viewed as interfering in the internal affairs of another state. [43] The government of the latter state may consider the recognition a hostile act. For example, if Group A attempts to unseat Group B, which is and has been in control of State X, any recognition of Group A before it has actually gained control may work to the disadvantage of Group B. [44] Similarly, if a portion of State X attempted to separate itself from State X, any recognition of the separatists before they had achieved their independence would be detrimental to State X. [45]

(B) Some governments have, from time to time, adopted the practice of following only the objective criteria. However, it is difficult to prevent additional subjective criteria from entering the considerations of governments. Criteria, other than the objective facts of people, territory, independence, and a group in actual control, may come into play as a result of the fact that international law, according to most authorities, does not require formal recognition once the objective criteria have been met. [46] The more common of these subjective criteria will now be considered.

(2) *The Subjective Criteria.* It should be made clear at the outset that the subjective criteria are not a substitute for the objective criteria discussed above. Subjective criteria are considered only *after* the objective criteria have been met. Moreover, the various subjective considerations usually come into play in conjunction with the recognition of governments rather than with the recognition of states. They may be grouped under three major headings.

(A) Willingness to abide by international law. The peaceful intentions of the new government and its respect for the prior international obligations of the state are generally considered by governments before recognition is extended. This is particularly true if the government considering recognition suspects that the new government may not intend to honor bilateral treaties existing between the two states. For example, treaties of alliance or of friendship and cooperation , nonaggression pacts, trade agreements, and treaties concerning the protection of foreign assets are among the many that a new government, particularly a revolutionary one, may be reluctant to fulfill.

(B) Lawfulness of the control assumed by the new group. This lawfulness may be tested in three ways.

(i) By the municipal laws of the state. If a new group comes into power by revolution the constitution of the state has usually been broken in the process. If a foreign government has a policy of discouraging revolutions and of promoting free democratic elections in neighboring states it may withhold recognition until the revolutionary group has agreed to elections and other constitutional processes.

(ii) By international law. If an aggressor invades a foreign state and annexes it contrary to international law, other states may wish to discourage such unlawfulness by withholding recognition of the fruits of the conquest. [47]

(iii) By means of the will of the nation substantially declared. This is the Jeffersonian principle that a government derives its power to govern from the consent

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41. *See* Convention on Rights and Duties of States, *supra* note 2, art. 6. Article 3 of this *Convention,* which appears expressly to adopt the declaratory theory of recognition, states in part: "[T]he political existence of the state is independent of recognition by other states."

42. *Jaffe, Judicial Aspects of Foreign Relations* 148 (1933).

43. *Brierly, supra* note 2, at 138. Such recognition is termed "precipitate recognition." *Oppenheim, supra* note 2, at 128. An example was the recognition of the Provisional Government of the Algerian Republic by seventeen states as of 1959 while France was still actively seeking to retain Algeria. *Algerian Office, White Paper on the Application of the Geneva Convention of 1949 to the French Algerian Conflict* 9 (1960).

44. The newly recognized group may request aid from the recognizing state. Such took place shortly before the Soviet-Finnish War when the U.S.S.R. was alleged to have recognized a faction which did not control the Finnish State.

45. Usual examples given are the recognition of the American States by France in 1778, and the recognition of Panama by the U.S.A. in 1903. *Oppenheim, supra* note 2, at 129. More recently, Egypt took offense at the recognition of Syria by Turkey and Jordan in September 1961, and France at the recognition of Algeria by the U.S.S.R. in 1962.

46. *J. Moore, Digest of International Law* 72 (1906). Professor Lauterpacht's contrary view that states are under a legal duty to recognize new states that meet the objective criteria is criticized by Kunz, *Critical Remarks on Lauterpacht's Recognition in International Law,* 44 *Am. J. Int'l L.* 713-719 (1950).

47. This was the primary purpose of the Stimson Doctrine. On Jan. 7, 1932, the United States sent the following message to both China and Japan: "The American Government . . . does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which both China and Japan, as well as the United States, are parties. . . ." 26 *Am. J. Int'l L.* 342 (1932); [1932] *Documents on Foreign Affairs* 262; *see also Oppenheim, supra* note 2, at 143. Moreover, there may well be an affirmative duty under Article 1(1) of the U.N. Charter to withhold recognition of territorial gains resulting from acts of aggression.

of the people. This principle has a deeper meaning than mere compliance by the group in power with the municipal laws of the state. These laws may not even provide for a means whereby the will of the nation may be substantially declared.

(C) Gain or loss to the state extending recognition. This third subjective criterion places the extention of or the withholding of formal recognition upon the basis of national self-interest. [48]

3-9. Practice of the United States. *a.* Since its inception, the United States generally has followed the declaratory theory of recognition. But in recognizing or not recognizing new states and governments, our government has not been guided solely by the objective criteria mentioned above. Rather, the United States has tended to regard recognition as an act of policy signifying something more than the recognition of a situation of fact and law. Subjective criteria, the content of which has varied from time to time, have been used. Jefferson, for example, in instructing the United States Minister to France regarding recognition of the new government produced by the French Revolution, expressed the view that the essential test for recognition of a new government is whether or not that government has been formed by "the will of the nation, substantially declared. . . ." [49] Later, Chief Justice Taft referred to "illegitimacy or irregularity of origin" of the Tinoco government of Costa Rica as a basis for nonrecognition by the United States of that government. [50] Another subjective criterion sometimes used is that of willingness of the new government to fulfill the international commitments of the state it represents. [51] Still another is whether or not the new government has been created by formal constitutional process. [52]

b. Although the United States has, at times, granted recognition upon a straightforward application of the objective criteria, subjective criteria continue to play an important role in particular cases. [53] That fact is demonstrated by the nonrecognition of the Communist government of China, a policy clearly based more upon political and national security considerations than upon legal ones. [54] Since recognition is a political act and a tool in the conduct of foreign relations, it is hardly surprising that extra-legal factors may be decisive. Recognition is a discretionary matter; international law does not require any government to extend recognition to any other state or government. [55] Ultimately, then, all states, including the United States, formulate their policies on recognition in accordance with their perceptions of national self-interest. [56]

c. Although the United States has asserted that nonrecognition denies to an aspiring state or government certain international rights, [57] it also has insisted upon compliance with international law by regimes it has refused to

48. As mentioned at the beginning of this discussion of recognition, for one government to extend recognition to another government or to a state is essentially a political act. De Visscher emphasizes this aspect of recognition. He sees a tendency for recognition to be used as a weapon of power politics, especially in periods of high tensions in international relations. *See De Visscher, Theory and Reality in Public International Law* 239 (rev. ed. Corbett transl. 1968).

49. *Moore, supra* note 46, at 120.

50. Tinoco Claims (Great Britain—Costa Rica), 1 U.N.R.I.A.A. 369; *see also* 18 *Am. J. Int'l L.* 147 (1934).

51. For example, the United States refused to recognize the Soviet Government in 1919 because, among other things, it was not willing to abide by the international obligations of the Russian State. *See I. Hyde, supra* note 2, at 169-70.

52. Use of this criterion was initiated in 1913 by President Wilson. *See I. Hyde, supra* note 2, at 166. In 1915 its application resulted in the denial of *de jure* recognition to the Carranza Government in Mexico. *Id.* at 168. Abandonment of this criterion was announced by Secretary of State Stimson in 1931. *See Bishop, supra* note 7, at 342. Meanwhile Mexico, reacting against the United States practice of withholding recognition from revolutionary governments in Latin America, in 1930 pronounced the so-called "Estrada Doctrine," which declares there is no more reason for new recognition following a revolution or a *coup d'etat* than for new recognition following a constitutional change of government. *See* Jessup, *The Estrada Doctrine*, 25 *Am. J. Int'l L.* 719 (1930).

53. The period 1823-1855 probably saw the high-water mark of use of solely objective criteria by the United States in extending recognition. The Monroe Doctrine includes the statement: "Our policy in regard to Europe [is] . . . to consider the government 'de facto' as the legitimate government for us. . . ." 4 *Moore, supra* note 46, at 401. Secretary of State Van Buren elaborated on that theme in 1830 when explaining why the United States was one of only three states that had recognized the Dom Miguel Government in Portugal. 1 *Moore, supra* note 46, at 137. And Secretary of State Buchanan reiterated the policy of adherence to objective criteria in 1848: "It is sufficient for us to know that a government exists, capable of maintaining itself, and then its recognition on our part inevitably follows." *Id.* at 124. But consistent application of that policy lasted no longer than 1855, when recognition was denied the Walker-Rivas Government in Nicaragua because it "was as yet unsanctioned by the will or acquiescence of the people." *Id.* at 140.

More recently, during the 1960's coup after coup in sub-Sahara Africa and southeast Asia resulted in routine recognition of the new regimes, apparently by reason of application of the objective criteria. Yet in 1962, President Kennedy delayed for nearly a month in recognizing a coup in Peru, on the grounds that the new government had not come to power by democratic means. *See Leech, supra* note 28, at 813.

54. In 1958, the Department of State sent a memorandum to its missions abroad outlining U.S. policy with regard to the nonrecognition of Communist China. This document states in part:

> Basically the United States policy of not extending diplomatic recognition to the Communist regime in China proceeds from the conviction that such recognition would produce no tangible benefits to the United States or to the free world as a whole and would be of material assistance to Chinese Communist attempts to extend Communist dominion throughout Asia. It is not an "inflexible" policy which cannot be altered to meet changed conditions. If the situation in the Far East were so to change in its basic elements as to call for a radically different evaluation of the threat Chinese Communist policies pose to United States and free-world security interests, the United States would of course readjust its present policies. . . .

55. *See* note 46, *supra*. *See also Restatement, supra* note 2, at § 99(1): "[A] state is not required by international law to recognize an entity as a state or a regime as the government of a state."

56. A state's perception of its self-interest may lead it to adopt a policy of granting recognition to any state or government that meets the objective criteria. An apparent example is the United Kingdom. *See Leech, supra* note 28, at 810-12.

57. *See Friedmann, supra* note 20, at 175-77.

recognize. [58] The United States also has taken the position that the adherence of nonrecognized states to a multilateral treaty is without legal significance. [59]

d. United States policy in recent years has tended to de-emphasize the importance of recognition. Indeed, it has been suggested that the United States may have virtually abandoned the act of recognition altogether. [60] That perhaps is an overstatement, yet recent developments in this country's relations with the Peoples' Republic of China at least demonstrate that extensive dealings can take place even in the absence of recognition. Moreover, in the Panamanian and Peruvian coups of 1968, the United States took the position that the occurrence of a coup did not necessarily mean that a new act of recognition would be essential to ongoing relations. Instead, the government adjusted relations according to the stage of the coup, the stability of the regime, and the national interests of the United States. The ambassadors to these countries were not withdrawn, and "full" relations were resumed without any formal acts, such as presentations of credentials. [61]

3-10. De Facto and De Jure Recognition. *a.* When used in connection with problems of recognition, the terms *de facto* and *de jure* may have several different meanings. The context in which they are used must be noted carefully to determine precisely what is meant. They are used principally in the following four meanings: [62]

(1) *The Prospects for Permanency of the State or Government Recognized. De facto* recognition is sometimes extended to a government whose control is still tenuous, or to a state whose independence is not yet entirely secure. *De jure* recognition would follow this type of *de facto* recognition once the precariousness of the situation implied in the *de facto* recognition had passed. [63]

(2) *The Legitimacy of the State or Government. De facto* recognition is sometimes extended to states or governments where a question of legitimacy exists under either international or municipal law. [64] *De jure* recognition is withheld from the usurper until it has legally validated its position, usually by conducting free elections. An example of the use of such recognition occurred in the Italian-Ethiopian War when the United Kingdom recognized the King of Italy as the *de facto* sovereign of Ethiopia but still extended *de jure* recognition to the Government of Haile Selassie. [65] The United States practice has sought to avoid such questions of legitimacy at the time of recognition by considering the government *de facto* to be the government *de jure*. [66] Therefore, except on two occasions, [67] the United States has not distinguished between the kinds of recognition it extends.

(3) *As a Substitute for Formal Recognition.* The *de facto* recognitions described above are intentional recognitions by one government or another. [68] However, one government may withhold recognition from another, yet conduct transactions with that government. The government which is withholding recognition is sometimes said under the circumstances to have recognized *de facto* the other government. It has been contended that such conduct is an implied recognition, with as much weight in international politics as any express recognition. [69] However, governments in practice do not stumble into recognition; it is a deliberate political act. Thus, they see nothing inconsistent in withholding recognition due to the failure of the other government to meet some subjective criterion, and at the same time conducting a minimum of transactions with that government.

(4) *By Courts in Deciding the Effect to be Given the Acts of Nonrecognized Regimes.* The term *de facto* has been used by national courts and international tribunals in deciding the legal effect to be given the acts of nonrecognized regimes that are in actual control of that state. For example, in the Tinoco claims arbitration Chief Justice Taft, serving as arbitrator of a dispute involving Great Britain and Costa Rica, characterized the Tinoco regime as the *de facto* government of Costa Rica, with the result that the acts of that regime were given binding effect. The conclusion that the Tinoco regime was the *de facto* government of Costa Rica was not altered by the fact that the United States, Great Britain, and other leading countries had not recognized that regime. [70] Other decisions dealing with the effect given to acts of states and governments

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58. For examples of this practice, *see id.* at 176-77.

59. *See Id.* at 177-78, giving examples but indicating this practice lacks consistent application.

60. *See Leech, supra* note 28, at 810.

61. This shift toward a "modified Estrada Doctrine" is referred to in *Leech, supra* note 28, at 813.
For a concise statement of the Estrada Doctrine, see note 52 *supra*. The Department of State's approach in the Panamanian and Peruvian cases seems entirely consistent with the later announcement by President Nixon, pursuant to his "Low Posture" doctrine, that the United States will deal with governments as it finds them.

62. As to varying uses of the term *de facto*, see *Restatement, supra* note 2, at § 96, Reporter's Note 2.

63. *Oppenheim, supra* note 2, at 135.

64. This type of *de facto* recognition is criticized in *Brierly, supra* note 2, at 139, and by Moore, *Fifty Years of International Law*, 50 *Harv. L. Rev.* 395 (1937).

65. *See* Haile Selassie v. Cable and Wireless, Ltd. [1939] chap. 182. Subsequently, the United Kingdom granted retroactive *de jure* recognition to the King of Italy while the aforementioned case in the course of being appealed.

66. For early American practice in this regard, *see Hyde, supra* note 2, at 148-97, particularly the citations contained therein; *Goebel, The Recognition Policy of The United States* (1915); and *Newman, Recognition of Governments in The Americas* (1947).

67. *De facto* recognition was extended to the Carranza Government of Mexico in 1915. *De jure* recognition did not follow until 1917. Similarly, in 1948 *de facto* recognition was extended to the Provisional Government of the new state of Israel. *De jure* recognition followed in 1949.

68. Brierly correctly points out that *de facto* and *de jure* describe the thing recognized, and not the act of recognition. *Brierly, supra* note 2, at 139.

69. *Moore, supra* note 46, at 166.

70. Tinoco Claims, *supra* note 50.

(recognized and unrecognized) are summarized in paragraph 3-15, *infra.*

b. Although the terms *de facto* and *de jure* frequently are used in one or more of the senses mentioned above when recognition is discussed, it appears there is little if any difference in legal effect between recognition that is labeled "*de jure* recognition" and recognition that is labeled "*de facto* recognition." [71] In current United States practice, when the Government extends recognition it is recognition *per se,* not *de facto* recognition. [72]

3-11. Actions Constituting Recognition. *a.* As mentioned earlier, [73] recognition is fundamentally a matter of intent, and may be either expressed or implied. Thus far, the discussion has dealt primarily with express recognition. Under what circumstances may recognition be implied? The general test is that recognition can be implied only from acts that unequivocally show the intention of a government to recognize a state or a regime. [74] More specifically, it has been said that recognition of a state or government may be implied legitimately only on three occasions: (1) the conclusion of a bilateral treaty between the recognizing state and the unrecognized state, such as a treaty of commerce and navigation, regulating more or less permanently relations of a general character between the two states; (2) the formal initiation of diplomatic relations; and (3) the issue by the recognizing state of a certificate to a consul of the unrecognized state, accepting his official character and authorizing him to fulfill his consular duties. [75]

b. As previously mentioned, the implication of recognition arising from a bilateral treaty can be negated by an appropriate disclaimer. [76] The overriding question is always whether recognition was intended. In a case of asserted implied recognition based upon entry into a bilateral treaty, the answer to this question of intention will depend largely upon the subject matter of the treaty (or other agreement) and the circumstances under which it was concluded. In general, the more formal the agreement, the more comprehensive its subject matter, the more it involves the establishment of political relations, and the longer its intended duration, then the greater the presumption of recognition to which it would give rise. [77]

c. Participation in a multilateral treaty does not give rise to recognition by implication. [78] Although the application of this rule is clearest when the treaty is open for adherence by any state, the rule appears to apply regardless of whether the treaty is open for general adherence. However, in the case of a closed multilateral treaty negotiated with a small number of known parties, a cogent argument for implied recognition could be made by analogy to implied recognition in the case of bilateral treaties.

d. The practice of the United States has consistently affirmed that participation in a multilateral treaty does not accord recognition to entities that the U.S. has not otherwise recognized. [79] The United States has also taken the position that in such cases no disclaimer is necessary in order to avoid recognition. [80] Further, the United States contends that, within the framework of a general multilateral treaty, it can have dealings with a nonrecognized regime without thereby recognizing that regime, and that any possible implication can be negated by an appropriate disclaimer. [81] When acting as depositary for a multilateral treaty, the United States submits that it can receive and circulate communications from regimes it does not recognize without thereby extending implied recognition. [82]

e. It is apparent that entering into diplomatic discussions (even at a very high level) does not imply recognition. The current relations of the United States and the Peoples' Republic of China afford and excellent example of this principle in operation. [83]

3-12. Existence or Nonexistence of Duty to Recognize. *a.* Authority exists for the proposition that international law requires the recognition of new states and new governments that meet the necessary objective criteria. [84] Some states have purported to carry out this requirement in their policies concerning recognition. [85] It appears, however, that there has been insufficient state practice of this asserted requirement to establish it as a rule of customary international law. Indeed, the *Restatement* flatly concludes that no such requirement exists. [86] The practice of the United States has been to view recognition as being within the sound discretion of the recognizing government, i.e., as being a privilege and not a right of the unrecognized state or regime. [87]

b. There may, however, be a duty imposed by international law to not recognize a state or regime when the minimum criteria for recognition are not satisfied. The

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71. *See* Cochran, *De Facto and De Jure Recognition: Is There a Difference?,* 62 *Am. J. Int'l L.* 457, 459-60 (1968). *But see Lauterpacht, supra* note 37, at 343-46, suggesting that (1) a government recognized *de jure* is entitled, as against the *de facto* government, to property of the state located abroad, and (2) representatives of a government recognized only *de facto* may not be entitled to full diplomatic immunities.

72. *2 Whiteman, supra* note 16, at 3.

73. *See* text at notes 33-36, *supra.*

74. *See Opinion of the Legal Adviser, U.S. Dep't of State, Hearings on the Nuclear Test Ban Treaty before the Senate Committee on Foreign Relations,* 88th Cong., 1st Sess., at 15-17 (1963) [hereinafter cited as *Hearings*].

75. *See Oppenheim, supra* note 2, at 147-48.

76. *See* note 35, *supra.*

77. *See Chen, supra* note 39, at 192-94.

78. *See Lauterpacht, supra* note 37, at 374.

79. *Hearings, supra* note 74, at 16.

80. *Id.*

81. *Id.*

82. *Id.* at 16-17.

83. *See* Schwebel, *Is the "Recognition" of Governments Obsolete?,* Washington Post, Feb. 23, 1972, § A, at 16, col. 3.

84. *See Lauterpacht, supra* note 37, at 32-33, 50-51, 62-63, 73.

85. *See* notes 43-48, *supra,* and accompanying text.

86. *Restatement, supra* note 2, at § 99(1). For other authorities supporting the *Restatement* position, see note 46 *supra.*

87. *See* Dep't of State memorandum cited *supra* note 54.

Restatement takes the position that there is such a duty and that unwarranted recognition violates the rights of any state adversely affected thereby, although the recognition is nevertheless effective. [88]

3-13. Recognition and Diplomatic Relations. *a.* Recognition of a government implies a willingness to carry on diplomatic relations with that government. However, recognition does not *require* the initiation or resumption of diplomatic relations between the government of the recognizing state and the recognized government. [89]. Thus, it is possible for a government to be recognized and for the establishment of a diplomatic mission to be delayed or postponed, or not maintained, for a variety of reasons. [90]

b. Likewise, diplomatic relations can be broken without effect upon a previous recognition of a state or its government. [91] The severance of diplomatic relations with a state recognized by the United States does not deny that state access to courts of the United States under principles of comity which allow sovereign states to sue in those courts. [92]

3-14. The Status of Recognized and Unrecognized States and Governments Under Municipal Law. *a. General.* Legal problems concerning recognition and nonrecognition frequently have arisen in the domestic courts of the United States, Great Britain, and other states. Typically, the problem is whether or not a court may treat a state or regime as having juridical existence in the absence of recognition of that state or regime by the government of the forum state. In other words, does recognition or nonrecognition have any effect upon the ability of a state to maintain suit and to have its acts represented in the courts of other states? The following is a summary of selected judicial responses (mainly by United States courts) to this question and other related ones.

b. Standing to Sue. (1) Generally, friendly foreign states are permitted, as a matter of comity, to bring proceedings in the courts of another state. [93] But access to domestic courts is usually denied to foreign powers that have not been recognized by the forum state. [94] The recognition of a state or government before a decision denying it access to the courts becomes final gives rise retroactively to its capacity to maintain the action. [95] Withdrawal of recognition prevents the state or government from maintaining an action already commenced. [96]

(2) Although a foreign government not recognized by the political arm of the United States may not maintain suit in American courts, if the foreign government is not the suitor its lack of juridical status is not determinative of whether transactions with it or within its territory will be denied enforcement. [97] The acts of a *de facto* government (even though the government is not recognized) may affect private rights and obligations arising either as a result of activity within, or with persons or corporations within, the territory controlled by the *de facto* government. The private rights and obligations thus arising are judicially cognizable, unless to permit suit thereon would violate United States law or public policy. [98] Even a creature corporation of the nonrecognized regime could perhaps maintain suit in a United States court to enforce such rights and obligations. [99] As stated in a widely-noted New York decision:

> There are many things which may occur within the purview of an unrecognized government which are not evil and which will be given customary legal significance in the courts of nations which do not recognize the prevailing *de facto* government. In a time in which governments with established control over territories may be denied recognition for many reasons, it does not mean that the denizens of such territories or the corporate creatures of such powers do not have the juridical capacity to trade, transfer title, or collect the price for the merchandise they sell to outsiders, even in the courts of nonrecognizing nations. . . . [100]

c. Sovereign Immunity from Suit. Under the doctrine of sovereign immunity, it is the traditional rule that a foreign state may not be sued without its consent in the courts of another state. [101] Thus, United States courts may not bring a foreign sovereign before the U.S. bar, not because of comity, but because that state has not submitted itself to U.S. laws. [102] This result depends not upon recognition or nonrecognition by the United States, but upon fundamental considerations regarding the nature of sovereignty. [103] Moreover, sovereign immunity is not limited to the foreign state or its government, but may extend to its property, its agents, and its instrumentalities. [104]

d. Law-Making Authority of Foreign Governments. (1) The courts of the United States generally will not question the validity of acts of another government done within its own territory. [105] This result obtains even though diplomatic relations between the United States and the foreign

88. *Restatement, supra* note 2, at § 99(2).
89. *Id.* at § 98(1).
90. *See* 2 *Whiteman, supra* note 16, at 29.
91. *Id.*; Restatement, *supra* note 2, at § 98(2).
92. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12 (1964).
93. *The Sapphire*, 78 U.S. (11 Wall.) 164 (1871).
94. *See Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. (1923). *See also* decisions in other legal systems noted in *Leech, supra* note 28, at 791-92.
95. *Republic of China v. Merchants' Fire Assurance Co.*, 30 F.2d 278 (9th Cir. 1929).
96. *Gov't of France v. Lobrandtsen-Moller Co.*, 48 F. Supp. 631 (S.D.N.Y. 1943).
97. *See Upright v. Mercury Business Machines Co.*, 13 A.2d 36, 213 N.Y.S. 2d 417 (1st Dep't 1961).
98. *Id.*
99. *Id.*
100. *Id.* at 41, 213 N.Y.S. 2d at 422.
101. *See* ch. 5, *infra.*
102. *See Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (1923).
103. *Id.*
104. *Friedmann, supra* note 20, at 642.
105. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

government have been severed, [106] and this apparently is the rule even in cases in which the foreign government has not been recognized by the United States. [107] However, if the act of the unrecognized foreign government purports to destroy title to either real or personal property located outside its territorial jurisdiction, then the courts of a nonrecognizing state will probably not give effect to such an act, especially if the property involved is within the territorial jurisdiction of the nonrecognizing state. [108]

(2) It has been held that the recognition of a revolutionary government is retroactive and validates all acts of that government from the commencement of its existence. [109] Such recognition binds conclusively the courts of the recognizing state. [110] However, when the executive branch of the Government has adopted a policy of nonrecognition of a specific foreign decree (including those of a recognized government) regarding property that was not within the territory of the foreign state at the time of the decree in question, U.S. courts have refused to give effect to such a decree. [111] Likewise, the courts have refused to give extraterritorial effect to the decrees of subsequently recognized governments, when those decrees are contrary to the public policy of the United States. [112]

(3) The retroactivity principle has generated considerable confusion in both American and British courts. [113] Basically, however, retroactivity of recognition operates to validate acts of a *de facto* government that subsequently has become a *de jure* government, and not to invalidate acts of a previous *de jure* government. [114]

3-15. Termination or Withdrawal of Recognition. *a.* The *Restatement* declares that the binding effect of the recognition of a state can be terminated by withdrawal of the recognition only if the recognized state no longer meets the minimum criteria necessary for recognition. [115] Similarly, the *Restatement* sharply limits the ability or right of the recognizing state to withdraw its recognition of a government, permitting such withdrawal only if one of three tests is satisfied: (1) the withdrawal involves recognition of a successor government; (2) the previously recognized government is no longer functioning; or (3) the recognizing state announced that the recognition of the government in question was tentative. [116]

b. Withdrawal of recognition by any state is a concept not known to have been used in modern times. [117] There being a dearth of state practice to support any asserted rule regarding withdrawal, there is doubt as to the authority of the rules set forth in the *Restatement.* Moreover, the limitations imposed by those rules appear to conflict with the admittedly political nature of the decision to extend recognition to a state or government. [118] In any event, it seems likely that national courts would give effect to a decision by the political branches of government to withdraw recognition. [119]

3-16. Continuity of States and Change of Government. *a.* In much the same sense in which corporations have perpetual duration, states also have perpetual existence. [120] Once a state has come into being, it continues until extinguished through absorption by another state or by dissolution. [121] A government, on the other hand, is simply the instrumentality through which a state functions. [122] Changes of government, whether in the form of the government (as from a monarchy to a republic) or in the head of the government, do not affect the continuity or identity of the state as an international person. [123]

b. Traditionally, a mere change of government in an existing state has no legal effect upon the treaty and other international obligations of state; it remains bound by all such obligations. [124] The rule to be applied when there is a change in the state itself, i.e., a change of sovereignty, is less clearly established, two conflicting theories having been advanced.

(1) *The Theory of "Universal" Succession.* This theory is based on the Roman law concept of succession after death, and its application results in the view that the successor state inherits all the treaties, debts, and contracts of its predecessor. [125]

106. *Id.*

107. *See Salinoff & Co. v. Standard Oil Co. of New York*, 262 N.Y. 220, 186 N.E. 679 (1933), giving effect to confiscatory decrees of the then unrecognized Soviet government and the seizure of oil lands thereunder.

108. *See Petrogradsky M.K. Bank v. National City Bank of New York*, 253 N.Y. 23, 170 N.E. 479 (1930), wherein the court refused to give effect to decrees of the then unrecognized Soviet government nationalizing Russian banks, where the result of giving effect to such decrees would have been to divest plaintiff Russian bank of funds on deposit with defendant New York bank.

109. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); U.S. v. Pink, 315 U.S. 203 (1942).

110. *U.S. v. Pink, supra* note 109.

111. *See Latvian State Cargo and Passenger S.S. Line v. McGrath*, 188 F.2d 1000 (D.C. Cir. 1951); *Estonian State Cargo and Passenger S.S. Liner v. U.S.*, 116 F. Supp. 447 (1953) (both cases dealing with Soviet nationalization decrees).

112. *See Republic of Iraq v. First National City Bank*, 353 F.2d (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

113. *See Leech, supra* note 28, at 789-90.

114. *Guaranty Trust Co. v. U.S.*, 304 U.S. 126 (1938) (rejecting argument that valid judgments obtained in United States by Provisional Government of Russia, recognized by United States as the *de jure* representative of the Russian State, became invalid upon subsequent recognition of Soviet Government as the successor of prior governments of Russia).

115. *Restatement, supra* note 2, at § 96(1).

116. *Id.* at § 96(2).

117. *Leech, supra* note 28, at 825.

118. *Friedmann, supra* note 20, at 199.

119. *See* Meeker, *Recognition and the Restatement*, 41 *N.Y.U.L. Rev.* 83, 90 (1966).

120. *See The Sapphire*, 78 U.S. (11 Wall.) 164 (1871); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (2d Cir. 1927), *cert denied*, 275 U.S. 571 (1927).

121. 1 *Hackworth, supra* note 29, at 127.

122. *Id.*

123. *Id.*

124. *Friedmann, supra* note 20, at 200.

125. *Id.* at 432.

(2) *The "Clean Slate" Theory.* The more recent theory, favored by many writers and governments during the nineteenth and early twentieth century, is the "clean slate" theory. Under this approach, a new or successor state does not inherit any of the rights or obligations of the predecessor state. [126]

Neither theory appears to accord with present state practice, which is admittedly inconsistent regarding questions of state succession. [127] Since World War II most new states, without adhering to any general doctrine, have tended to opt for flexible techniques that give them freedom to pick and choose the treaty rights and obligations they wish to retain. Most of the older states have tolerated this approach by the evolving countries. [128]

c. The distinction between changes in government and the creation of a new state may be difficult to draw in particular situations, there being no clear criteria applicable to all cases. [129] For example, Italy regards itself as being, and has been accepted as being, not a new state formed by the union of the several formerly independent states of the Italian Peninsula, but a continuation of the kingdom of Piedmont territorially enlarged by the annexation of other Italian states. [130] However, a Federal district court in California saw the closely analogous case of Yugoslavia in a different light, and held that Yugoslavia is not the old kingdom of Serbia enlarged, but a new state that came into existence after World War I. [131]

d. In recent years, the distinction between changes of government and the creation of new states has become blurred, and its utility has been questioned. [132] The problems engendered by the transition of former colonial territories in Africa and Asia to independent status have contributed largely to this reevaluation. [133]

Section III. INTERNATIONAL LEGAL PERSONALITY

3-17. The Concept of "International Legal Personality." *a.* One of the more significant developments of contemporary international law is the extension of international legal personality to entities other than states. [134] This is, of course, merely another way of saying that certain entities other than states have come to be regarded as having rights and duties under international law and as being endowed with capacity to act. As a result of this gradual (and ongoing) development, international organizations, corporations, and even individuals may now be said to possess international legal personality in varying degrees.

b. It is important to note not only the extension of international legal personality but also its relativity. In neither a theoretical nor a pragmatic sense can the scope of legal personality accorded to states, public international organizations, corporations, and individuals be the same. [135] The state is still, and doubtless will continue to be, the basic and most complete subject of international law. [136] Yet it is clear that the traditional view—that only states can be subjects of international law—is changing. The following discussion will suggest some of the ways, and the extent to which, this change has occurred.

3-18. International Organizations. *a.* In 1949, the International Court of Justice held that the United Nations, as an international organization, has the capacity to bring an international claim against the responsible government for injury suffered by an agent of the United Nations in the performance of his duties. [137] This was a significant extension of international personality, for theretofore only states had been regarded as being competent to advance such international claims. [138] The Court was careful to point out, however, that to conclude that the United Nations is an international person is not equivalent to saying that its legal personality and accompanying rights and duties are the same as those of a state. [139]

b. Surprisingly, there is actually a long history of non-sovereign organizations performing acts in international law, and thus implicitly being recognized as having international personality. [140] The growth of international capacity as a result of practice and interpretation continues today. This point can be illustrated by reference to the formation and administration of United Nations peacekeeping forces, which have entailed various agreements between the United Nations and the "host" states and also between the Secretary-General and the states providing

126. With the possible exception of "dispositive" or "localized" treaties. *Id.* at 432, 439. A "dispositive" or "localized" treaty is defined by Brierly as one "regarded as impressing a special character on the territory" to which it relates, and which creates "something analogous to the servitudes or easements of private law." *Brierly, supra* note 2, at 154.

127. *Friedmann, supra* note 20, at 432.

128. *Id.* at 439. A more detailed discussion of succession to treaties appears in chapter 8, *infra.*

129. *Id.* at 200.

130. *Brierly, supra* note 2, at 151.

131. That decision was reversed by the Ninth Circuit Court of Appeals. *See Certupovic v. Boyle,* 107 F. Supp. 11 (S.D. Calif. 1953), *rev'd sub nom. Ivancevic v. Artukovic,* 211 F.2d 565 (9th Cir. 1954), *cert. denied,* 348 U.S. 818 (1954).

132. *Friedmann, supra* note 20, at 200.

133. *See, e.g.,* O'Connell, *Independence and Problems of State Succession in The New Nations in International Law and Diplomacy* 7 (O'Brien ed. 1965). The author argues that because the problems of colonial independence raise new, important and urgent social questions, a "new look" is in order, and a "new breakdown in the process of examination is necessary if the peculiar problems of the contemporary breakup of colonial empires are to be handled in a juristically satisfying way." *Id.* at 8-9.

134. *See Friedmann, supra* note 20, at 201.

135. *Id.*

136. *Id.*

137. Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 174.

138. *Id.*

139. Still less is it the same thing as saying the Organization is a "superstate," whatever that expression may mean. *Id.*

140. *See* 1 *O'Connell, International Law* 105-06 (1965).

personnel for the forces. [141] The de facto acquisition of international capacity by nonsovereign organizations has resulted in widespread acknowledgment of the extension of international legal personality to such entities. [142]

c. Generally, international organizations have treaty-making capacity only insofar as this power is necessary in order to effectuate clearly defined purposes of the organization. [143] The agreements concluded by an international organization may be governed by a municipal law system, but they are more often governed by international law. [144]

d. The mere fact that states have created an international organization is insufficient to establish its international personality. It may be merely a mechanism by which the states carry out their interstate relations, in which case it would have no independent role and thus no need for international personality. [145] On the other hand, if the organization has the capacity for independent action in carrying out its purposes, it may then be said to have international legal personality. [146] A further criterion is the extent to which the organization operates autonomously rather than under the control of its members. [147] Accordingly, it would seem that the proper approach toward determining the existence of international legal personality is a functional one centering on the capacities necessary for adequate performance by the international organization of the responsibilities that states have conferred upon it. [148]

3-19. Corporations. *a. Intergovernmental corporations and consortiums.* Many international corporations and consortiums, public in purpose, but private or mixed public and private in legal form, have been organized since World War II. [149] They exist for the fulfillment of certain joint purposes of the participating governments or of governments and private enterprises. [150] Their reach generally extends to matters that are beyond the scope of any one state or of any corporation created by one state. [151] These transnational organizations are governed in the first instance by the international agreement pursuant to which they are established. [152] If the venture takes the form of a corporation, it will be subject in its organizational and operational aspects to the law of the state in which the corporation is chartered or has its headquarters. [153] Because these entities are to some extent governed by international agreements, and because they perform transnational public functions, they may be regarded as having international personality.

b. Private corporations. (1) As a result of the increased participation by governments in business and commercial ventures and due to the increased participation by private corporations in the economic development plans of many newly emerged states, there are a growing number of transactions and projects involving governments on the one side and foreign private corporations on the other. [154] Private corporations also are becoming involved in publicly important international ventures. [155]

(2) International law does not govern the contractual relations between a private corporation and a foreign state in transactions of this kind unless the parties so intend. [156] But the parties, expressly or by implication, may select public international law, rather than any national system of law, to govern the transaction. [157] For that reason, and also because private corporations may perform transnational public or quasi-public functions, such corporations may be regarded as having a measure of international personality. [158]

(3) In addition, there is a growing number of arbitrations arising from transactions of this kind; these decisions form the basis of a developing public international commercial law. [159] It should be noted, however, that for most purposes international law treats private corporations as nationals of a particular state. [160] Like individuals, corporations in most instances must rely on their governments to protect them from unredressed injury by foreign states and do not have access to international legal proceedings to protect their rights. [161]

3-20. Individuals. *a.* It has been historically true, and it remains true today, that international law is made by states or by international bodies deriving their authority from states. Thus states, not individuals, are the creators of international legal norms. [162] These norms, however,

141. *See Friedmann, supra* note 20, at 213.

142. *See, e.g.*, 1 *Whiteman, supra* note 16, at 38-58; *P. Jessup, A Modern Law of Nations* 8-9, 15-19 (1949).

143. *See Friedmann, supra* note 20, at 212.

144. *Id.*

145. *Id.* at 213.

146. *Id.*

147. *Id.*

148. *Id.*; 1 *O'Connell, supra* note 140, at 109.

149. *Friedmann, supra* note 20, at 213. Examples of such transnational organizations include the European Company for Financing Railway Equipment (Eurofina), established by a 1955 agreement among 16 European states for the purpose of standardizing and improving the construction and performance of railway rolling stock; and, in the field of river navigation, the International Moselle Company formed by France, Luxembourg, and the Federal Republic of Germany in 1956.

150. *Friedmann, supra* note 20, at 213-15.

151. *Id.* at 214.

152. *Id.*

153. *Id.*

154. *Id.* at 215.

155. *Id.* at 216.

156. McNair, *The General Principles of Law Recognized by Civilized Nations*, [1957] *Brit. Y.B. Int'l L.* 1.

157. *See W. Friedmann, The Changing Structure of International Law* 221-231(1964).

158. *Friedmann, supra* note 20, at 216.

159. *Id.* For an example of this kind of arbitration, *see* Sapphire-N.I.O.C. Arbitration, 13 *Int'l & Comp. L.Q.* 987 (1964).

160. *See* McNair, *The National Character and Status of Corporations*, [1923-24] *Brit. Y.B. Int'l L.* 44.

161. *See Friedmann, supra* note 20, at 217.

162. It may, of course, be argued that states operate by virtue of the will of individuals and that the individual is thus the ultimate source of authority. Although this view accords with modern theories of representative government, the international state system is firmly entrenched in both the theory and practice of public international law. *See*, e.g., *Jessup, A Modern Law of Nations* 17-18 (1948).

may apply not only to states in their mutual relations, but also to individuals in their relations with states and even to interrelationships among individuals. [163] For example, a treaty may create rights and obligations for individuals that are enforceable in the national courts of the contracting states. [164] Similarly, a treaty may confer upon individuals direct rights of international action. [165] Thus, it is clear that individuals may have both rights and duties arising from international law, and that they may properly be regarded in certain contexts as subjects of international law. Lauterpacht sums up the point:

> The question whether individuals in any given case are subjects of international law and whether that quality extends to the capacity of enforcement must be answered pragmatically by reference to the given situation and to the relevant international instrument. That instrument may make them subjects of the law without conferring upon them procedural capacity; it may aim at, and achieve, both these objects. [166]

b. An individual who suffers an international legal wrong at the hands of a state other than his own usually will not have access to an international adjudicatory body. In the absence of a treaty authorizing the individual to take independent steps in his own name to enforce his rights, he must look to his national state for the espousal of his claim in the international arena. His national state is not required to take up his claim, but may do so if it wishes. It is a basic principle of international law that a state is entitled to protect its subjects when they have been injured by acts contrary to international law committed by another state from whom they have been unable to obtain satisfaction. [167] In doing so, the protecting state makes the case its own and becomes, in the eyes of the international tribunal that hears the case, the sole claimant. [168]

3-21. International Law and Human Rights. *a.* As indicated in the preceding paragraph, the violation of the human rights of an alien can be redressed at the international level through processes initiated by the injured individual's national state. Options available to the injured individual's state include diplomatic protest, international arbitration, and international adjudication. Recent developments in human rights law under the aegis of the United Nations suggest that, either by the growth of international law or by convention, internationally-recognized human rights may be asserted by an individual even against his own state. [169] A comprehensive survey of these recent developments is beyond the scope of this chapter. [170] The principal documents involved in the emerging law of international human rights are certain articles of the U.N. Charter, [171] the Universal Declaration of Human Rights, [172] and the so-called Human Rights Covenants. [173] Although the Charter provisions and the Declaration are not directly binding on U.N. member-states, municipal courts may nevertheless treat them as indicative of public policy or even as part of the law of the land, and thus give them effect in adjudicated cases. [174] Moreover, international tribunals may treat these provisions, or at least some of them, as being part of customary international law and hence binding on all states. [175] As for the various Human Rights Covenants, they are, of course, intended to operate as treaties. Once in force, such conventions would legally obligate states that become parties to them to accord specific rights to all individuals. [176] It is not apparent, however, what means are available to

163. *Id.*

164. *See* Advisory Opinion on the Jurisdiction of the Courts of Danzig, [1928] P.C.I.J., ser. B., No. 15, at 17-21. This case establishes, in effect, that the traditional state system concept of international law does not prevent the individual from becoming the subject of international rights if states so wish.

165. For example, the Convention for the Establishment of a Central American Court of Justice, art. II, [1907] 2 *For. Rel. U.S.* 697, 2 *Am. J. Int'l L. Supp.* 231 (1908), gave individuals access to an international court to bring claims against any contracting government except their own, providing that certain conditions were met. This right was available regardless of whether the individual's own government was willing to press the claim.

166. *H. Lauterpacht, International Law and Human Rights* 27-28 (1950).

167. *See* Mavrommatis Palestine Concessions (Jurisdiction), [1924] P.C.I.J.

168. *Id.* The topic of protection of nationals is treated in greater detail in chap. 6, *infra.*

169. *Leech, supra* note 28, at 629.

170. For a useful collection of basic materials on international human rights, see *id.*, at 606-655; *Friedmann, supra* note 20, at 217-235.

171. The Charter refers generally to fundamental human rights in articles 1(3), 55(c), 62(2), 68, and 76(c). It does not, however, define these rights in any detail.

172. G.A. Res. 217, U.N. Doc. A/810 at 71. The Declaration proclaims the rights listed therein as a "common standard of achievement for all peoples and all nations." It includes such rights as equal protection of the law, the right to a fair hearing, to freedom from torture or degrading punishment, to freedom of movement and asylum, to marry and found a family, to work, and to form and join trade unions. These and the other rights set forth in the Declaration apply to "all human beings," to "everyone." In the words of the U.S. representative in the General Assembly, "It [the Declaration] is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligations. 19 *Dep't State Bull.* 751 (1948).

173. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, 21 *U.N. Gaor* Supp 16, at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, *id.* at 52. Neither is yet in force. There are many other conventions already in force dealing with human rights but the U.S. is party to very few of them. *Leech, supra* note 28, at 626. The aforementioned two covenants carry into detailed treaty form most of the provisions of the Universal Declaration of Human Rights, but they do not entirely parallel the Declaration. *Id.*

174. *See Re* Drummond Wren [1945] O.R. 778, [1945] 4 D.L.R. 674 (Ontario High Ct.), in which the court declared a racially restrictive covenant void, *inter alia*, as against public policy, citing the Charter provisions on human rights as indicative of public policy. *See also* Oyama v. California, 332 U.S. 633, 649-50, 673 (1948), holding a section of the California Alien Land Law unconstitutional as violative of the Fourteenth Amendment. In concurring opinions Justices Black, Douglas, Rutledge, and Murphy referred to the section's inconsistency with the U.N. Charter.

175. *See* the separate opinion of Vice President Ammoun in the *Advisory Opinion on the Continued Presence of South Africa in Namibia* (South West Africa), [1971] I.C.J. 16, 76.

176. *Friedmann, supra* note 20, at 222.

vindicate such rights at the international level if the individual's state fails or refuses to accord them to him. Indeed, in today's world it is obvious that a great many human rights are being grossly violated in a great many countries. No effective international machinery for dealing with this problem has yet been forthcoming. [177]

b. Aside from U.N. efforts in the field of human rights, there are noteworthy programs in this field at the regional level.

(1) Particularly significant is the European Convention for the Protection of Human Rights and Fundamental Freedoms. [178] The substance of this convention is comparable in scope and purpose to that of the U.N. Covenant on Civil and Political Rights. [179] But unlike the U.N. document, the European Convention provides a working system for the international protection of individuals whose rights (as defined in the Convention) have been violated by the state of which they are nationals. The international organs of enforcement are the European Commission on Human Rights and the European Court of Human Rights. These organs have developed a substantial body of precedent under the Convention. [180]

(2) In the Western Hemisphere, the Inter-American Commission on Human Rights, established in 1959 by the Organization of American States, is empowered to receive and examine individual communications charging the violation of fundamental human rights and to make recommendations to governments with respect thereto. In 1969, a Conference of the American States approved the American Convention on Human Rights, [181] which widens the earlier American Declaration of the Rights and Duties of Man and establishes the Inter-American Court of Human Rights. [182]

3-22. The Legal Responsibility of Individuals in International Law. The development of rights enforceable by individuals at the international level is in an embryonic stage. It has long been held, however, that individuals are capable of *violating* international law. For example, piracy has been deemed an offense "against the law of nations" and the offender has been subject to punishment by any state that captures him. [183] More recently, there has been widespread acceptance of the principle that individual members of belligerent armed forces are criminally responsible for violations of the laws of war, and may be punished by enemy or international authorities. [184] A discussion of war crimes and related offenses is beyond the scope of this chapter. These matters are mentioned here merely to make the point that individuals may incur penal sanctions under international law and thus are, to that extent, subjects of international law. [185]

177. A number of possible procedures for international implementation of the law of human rights are explored in *Leech, supra* note 28, at 629-47. International adjudication (state versus state) is a possibility, but presents a serious question as to the "standing" or "interest" of a state to take up the cause of an individual who is not one of its nationals. *See Nottebohm Case (Lichtenstein v. Guatemala)*, [1955] I.C.J. 4, discussed and cited in chap. 4, *infra*.

178. 213 U.N.T.S. 221. This convention, which became effective in 1953, was sponsored by the Council of Europe. It is open to accession by all members of the Council; all the major states of Western Europe, except France and Switzerland, have ratified it.

179. Basically, the substantive provisions of the Convention prohibit unlawful arrest or detention and establish a minimum standard of due process that must be accorded individuals by each ratifying state. For example, the Convention provides, *inter alia*, that "no one shall be deprived of his liberty [except in several broadly defined classes of cases encompassing the normal criminal and civil spectrum] and in accordance with a procedure prescribed by law" (Art. 5()); that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (art. 6(1)); that "Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law" (art. 6(2)); and that everyone charged with a criminal offense has specific minimum rights (art. 6(3)).

180. For a description of the work of the Commission and the Court, see *Friedmann, supra* note 20, at 230-31; *Leech, supra* note 28, at 649-51.

181. *See* 65 *Am. J. Int'l L.* 679 (1971).

182. *See generally* Fox, *The Protection of Human Rights in the Americas*, 7 *Colum. J. Transnat'l L.* 222 (1968).

183. *See*, e.g., *U. S. v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820). *Cf.* Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (assault on a foreign diplomat held an infraction of the law of nations).

184. *See Ex Parte* Quirin, 317 U.S. 1 (1942). *See also Attorney General of Israel v. Eichmann*, 36 *Int'l L. Rep.* 277 (1968) (Israel Sup. Ct. 1962).

185. For a collection of materials dealing with individual responsibility for war crimes, see *Leech, supra* note 28, at 656-724; *see also* Parks, *Command Responsibility for War Crimes*, 62 *Mil. L. Rev.* 1 (1973).

CHAPTER 4
JURISDICTION

Section I. BASES OF JURISDICTION UNDER INTERNATIONAL LAW

4-1. General. *a.* Having examined the essential characteristics of states, the primary actors in the framework of public international law, attention must now be focused on the manner in which these entities might exercise jurisdiction over territory, individuals and events. In doing so, it is important to note that the term "jurisdiction," or its equivalent in other languages, expresses a concept which is common to municipal legal systems.

b. In the United States, for example, reference is made to "Federal jurisdiction," as opposed to the jurisdiction of the States of the Union. This is true in that under U. S. domestic law—the Constitution in this instance—certain categories of persons, events or places are subject to Federal law and others to the law of the several States. Whenever it is said that a matter is one of "Federal jurisdiction," this means that the Federal Government is empowered under the domestic law of the United States to act—by way of legislation, juridical decision or executive action—with respect to the particular category of persons, events, or places involved in the matter at hand. The same concept applies when one speaks of the jurisdiction of the states.

c. In the international legal system, the term "jurisdiction" expresses a concept similar to the concept it expresses in municipal legal systems. When reference is made to the "jurisdiction" of a state in the international system, this means the state is entitled under international law to subject certain categories of persons, events, or places to its rules of law. It does not follow, however, that the rules of international law determining whether a state has jurisdiction over a particular person, event, or place are the same as those used in a State legal system in determining, for example, whether this court or that court has jurisdiction over a particular person, event, or place.

d. Jurisdiction may also refer to the jurisdiction of the state as a whole and not of its constituent units or political subdivisions. The United States is a federation, while France, for example, is not. The question as to whether an alien is to be tried by a court of New York State or a U. S. Federal court or whether he is to be tried by a court in Paris or Marseilles does not create an international issue of jurisdiction. The jurisdictional question in the international system is whether the United States or France is entitled to try the alien.

e. Moreover, the international legal system is not concerned with a state's allocation of its jurisdiction among its branches of government. In a municipal legal system, the making of legal rules might be vested in a legislature and their enforcement vested in the executive or judicial branch. However, this division of functions is not always so distinctive. The House of Lords in the United Kingdom has legislative functions and also functions as a law court. In turn, a court of law in a municipal legal system may not have been instructed by its legislature to apply a particular rule and may thus have to articulate one of its own devising before it can proceed to give it effect. Additionally, the executive may be empowered to make legal rules. International law does not determine which branch of government should perform various legislative and judicial functions. Accordingly, it is advisable, if not necessary, to discuss the jurisdiction of states under international law in terms which are neutral so far as the organs of government exercising the jurisdiction are concerned.

f. The term jurisdiction is all too often used imprecisely. A sharp distinction between rule-making and rule-enforcing jurisdiction is essential to effective analysis. First, the state "prescribes" a rule, which is to say that either by act of the legislature, decree of the executive or decision of a court, it declares a generalized principle or legal norm. Second, the state "enforces" the rule. That is, it arrests, subpoenas witnesses and documents, and tries and punishes for violation of the rule. Any one of these actions—and of course all of them together—is enforcement. Hence, jurisdiction is discussed in terms of the jurisdiction of a state "to prescribe" rules of domestic law and its jurisdiction "to enforce" them.

g. A state normally has jurisdiction to prescribe rules of domestic law governing conduct taking place physically within its territory. At the other extreme, no state has jurisdiction to prescribe rules of domestic law governing the conduct of everyone everywhere in the world. Normally, a state also has jurisdiction to enforce within its own territory the rules of law it has properly prescribed. Yet, a state may not normally send its police and courts outside its borders to arrest and punish people even for murders committed within its territory. Accordingly, the following provisions are contained in *Restatement, Second, Foreign Relations Law of the United States.*

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 6. Jurisdiction Defined

"Jurisdiction," as used in the Restatement of this Subject, means the capacity of a state under international law to prescribe or to enforce a rule of law.

Comment:

a. Prescriptive and enforcement jurisdiction distinguished. Jurisdiction to "prescribe" refers to the capacity of a state under international law to make a rule of law, whether this capacity be exercised by the legislative branch or by some other branch of government. Jurisdiction to "enforce" refers to the capacity of a state under international law to enforce a rule of law, whether this capacity be exercised by the judicial or the executive branch . . . or by some other branch of government. . . .

The action taken by a branch of the government of a state may be an exercise of both jurisdiction to prescribe and jurisdiction to enforce,

rather than the exercise of only one of them.

§ 7. Relationship between Jurisdiction to Prescribe and Jurisdiction to Enforce

(1) A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases.

(2) A state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe the rule.

(3) Jurisdiction to prescribe in Subsection (2) includes jurisdiction to prescribe the applicable rule of conflict of laws. . . .

§ 8. Effect of Lack of Jurisdiction

Action by a state in prescribing or enforcing a rule that is does not have jurisdiction to prescribe or jurisdiction to enforce, is a violation of international law. . . .

h. This chapter will examine some of the factual bases of jurisdiction generally accepted in the international legal system as adequate foundation for a state's prescription and enforcement of rules of municipal law. Thus, attention will be focused on state jurisdiction based on territory, the nationality of the accused, agreement with the territorial state, the protection of certain state interests, and the concept of universality.

4-2. Jurisdiction Based on Territory. *a.* A state has jurisdiction over everything within its territorial boundaries. A derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case. [1] The United States Supreme Court, as early as 1812, observed this general principle when Justice Marshall stated, "It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied." [2] Thus, no state may exercise its police powers in another state, even against its own citizens, without the consent of this state. The jurisdiction to perform any governmental acts within a state's borders belongs exclusively to that state, unless and until it consents to the exercise of jurisdiction by a foreign state. [3] The territorial basis of jurisdiction is universally accepted throughout the world, and it is the basic system adopted in the law of the United States, England, and many other countries. [4]

b. What are the areas where the United States exercises its jurisdiction without valid international objection? Clearly, they include all the land area of the United States and its islands, its inland waters, lakes, and rivers within its frontiers; the territorial waters along its coast; and the air space above this land and these waters. Similarly, by a special arrangement, the United States exercises jurisdiction over the trust territories which have been placed under its control [5] and bases or zones over which it exercises personal or, to some extent, territorial jurisdiction under certain treaties. [6] Finally, by means of a fiction, international law accepts the idea that every state exercises "territorial jurisdication" over its ships, wherever these may be.

4-3. Acquisition of Sovereignty over Territory. Quite naturally, in order to legitimately exercise jurisdiction based on territory, a state must have sovereignty over this territory. Thus, it is imperative that attention be focused on the means by which sovereignty over territory can be acquired. Given the interrelationship of several of these methods of territorial acquisition [7] with many of the basic concepts of conflict management, they should be of significant interest to the military attorney.

a. Discovery and contiguity.

THE ISLAND OF PALMAS CASE (UNITED STATES AND THE NETHERLANDS)
Scott, Hague Court Reports 2d 83 (1932) (Perm. Ct. Arb. 1928)
2 U.N. Rep. Intl. Arb. Awards 829

[Palmas, an island about two miles long by three fourths of a mile wide, with a population of 750, having at the time little strategic or economic value, lies about 48 miles southeast of Mindanao in the Philippines (then part of the United States territory) and about 51 miles from Nanusa in the Netherlands Indies. Situated at about 5° 35' N., 126° 36' E., it lies within the boundaries of the Philippines as ceded by Spain to the United States in 1898. At the time of a visit by General Leonard Wood in 1906, United States authorities learned that The Netherlands also claimed sovereignty over Palmas (or Miangas, as it was often called). By a "Special Agreement" signed January 23, 1925, the two states submitted to the Swiss jurist Max Huber, as arbitrator acting for the Permanent Court of Arbitration, the question "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory."]

HUBER, Arbitrator: The United States, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Munster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas

1. Colombian-Peruvian Asylum Case, [1950] I.C.J. 226.

2. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, at 136 (1812).

3. *For example,* the British government properly protested the seizure of Sun Yet Sen in London in 1896 by the Chinese legation with the intended purpose of forceably taking him back to China. 1 *L. Oppenheim, International Law* 796 (8th ed. Lauterpacht 1955). Serbia showed a similar sensitivity to its jurisdiction when it rejected that portion of the Austrian ultimatum of 1914 which demanded that Austria be allowed to conduct an investigation in Serbian territory independent of the Serbian government. Serbia maintained that such a demand was not "in accordance with international law" and asked that it be referred to the Hague for adjudication." 1 *Halsey, Literary Digest History of World War I* 70-72 (1919).

4. *J. Brierly, The Law of Nations* 232 (5th ed. 1955).

5. These are the former Japanese mandated islands (Micronesia) in the Pacific, held by the U.S. under Articles 77, 82, and 83 of the U.N. Charter. In 1975, a segment of Micronesia, the Commonwealth of the Northern Mariana Islands, entered into a commonwealth status with the U.S. The future status of other elements of this island chain, the Marshalls, the Carolines, and the Palau Islands, was in the process of negotiations.

6. The many Status of Forces Agreements entered into by the United States around the world are examples of this type of special arrangement. *See* chap. 10, *infra.*

7. Most notably, the concepts of prescription and conquest. *See* paras. 4-3*b* and *e, infra.*

(or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines. . . .

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. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. . . .

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. . . .

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. . . .

The principle that continuous and peaceful display of the functions of state within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent states and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal state, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the states members. . . . [8]

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring states may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of hinterland may also be mentioned in this connection. . . .

8. The arbitrator cited Rhode Island v. Massachusetts, 4 *How.* 591 (U.S. 1845), and Indiana v. Kentucky, 136 U.S. 479 (1890).

The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. . . .

It is recognized that the United States communicated, on February 3rd, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect of the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory. . . .

. . . In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain. . . .

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e., the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an "inchoate title," a *jus ad rem,* to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, *i.e.,* the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of states members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a state, nor without a master, but which are reserved for the exclusive influence of one state, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one state in order that the sovereignty of another may take its place does not arise.

. . . Even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another state; for such display may prevail even over a prior, definitive title put forward by another state. This point will be considered, when the Netherlands argument has been examined and the allegations of either party as to the display of

their authority can be compared. . . .

In the last place there remains to be considered title arising out of contiguity. Although states have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same state have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one state rather than another, either by agreement between the parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular state, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other states from a region and the duty to display therein the activities of a state. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious. . . .

It is, however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (*e.g.*, the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola; Lafontaine, Pasicrisie international, p. 201-209) would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries. . . .

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal state as a part of his territory.

c. Acts characteristic of state authority exercised either by the vassal state or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights. . . .

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counterbalance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty. . . .

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not already been disposed of by the Treaties of Munster and Utrecht, would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law. . . .

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably back beyond the year 1700, therefore holds good. . . .

For these reasons the Arbitrator . . . decides that: The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory. [9]

(1) *Discovery.* In reaching his decision in this case, M. Huber spoke to both discovery and contiguity as methods of acquiring sovereignty over territory. With reference to the former, primary importance was placed on the "effectiveness" of the occupation of the territory in question. This concept has been dealt with in several other cases. In the *Clipperton Island* arbitration, [10] involving a dispute between France and Mexico over territorial rights to a small and unpopulated Guano Island situated in the Pacific Ocean about 670 miles southwest of Mexico, the Arbitration, in holding for France, declared that, although the exercise of effective, exclusive authority ordinarily required the establishment of an administration capable of securing respect for the sovereign's rights, this was not necessary in the case of uninhabited territory which is at the occupying state's absolute and undisputed disposition from the latter's first appearance. In the *Eastern Greenland* case, [11] an adjudication between Norway and Denmark resulting from a Norwegian attempt to place portions of Eastern Greenland under its sovereignty, the Permanent Court of International Justice declared:

. . . a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. [12]

The Court then went on to say, however, that in the case of conflicting claims to sovereignty over areas in thinly

9. On this case, *see* Jessup, *The Palmas Island Arbitration,* 22 Am. *J. Int'l L.* 735 (1928) *See* generally, *Y. Blum, Historic Titles in International Law* (1965).

10. Clipperton Island Arbitration, 2 U.N.R.I.A.A. 1105, 26 *Am. J. Int'l L.* 390 (1931).

11. Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53.

12. *Id.*

populated or unsettled countries, the requirement of effective occupation is satisfied with very little in the way of an actual exercise of sovereign rights, provided that the other state cannot establish a superior claim. [13] Third state recognition of Danish sovereignty over the territory in question, by means of treaties, was also cited as a factor in the Court's decision in favor of Denmark. Thus, it would appear that in cases of conflicting territorial claims based on discovery, the arbitrator or Court will look most favorably on that state most "effectively occupying" the territory in question. Moreover, in thinly populated or unsettled areas, this degree of occupation may be minimal. [14]

(2) *Contiguity.* As was noted, the arbitrator in the *Island of Palmas* case [15] also spoke to contiguity as a means by which to acquire sovereignty over territory. In doing so, however, he declared it was impossible to show the existence of a rule of positive international law which stood for the proposition that islands situated outside the territorial waters of any state should be considered to be a part of the territory of the state whose land mass constitutes the *terra firma* (nearest continent or island of considerable size). [16] Thus, the title of contiguity, understood as a basis of territorial sovereignty, had, in his opinion, no foundation in international law. This rejection of the concept of contiguity is generally accepted and acknowledged by international publicists. However, there are those who contend the principle does possess some validity as an international norm. Lauterpacht submits that the *Island of Palmas* award:

> . . . related only to islands; that, in a sense, it was *obiter* inasmuch as the claim of the United States was not based mainly on contiguity; that the arbitrator admitted that a group of islands may form 'in law a unit, and that the fate of the principal part may involve the rest'; and that he held in effect, with regard to occupation of territories which form a geographical unit, that the appropriation must be presumed, in the initial stages, to extend to the whole unit (a rule which is one of the main aspects of the doctrine of contiguity) and that the only consideration to which contiguity must cede is that of actual adverse display of sovereignty by the competing state. [17]

Even in light of Lauterpacht's favorable comments regarding contiguity, however, it would appear that the concept is generally viewed, at best, as a minimally effective means of territorial acquisition.

b. Prescription. Prescription, as a title to territory, is ill-defined, and some writers deny its recognition altogether. International law does appear, however, to admit that, by a process analogous to the prescription of municipal law, long possession may operate either to confirm the existence of a title the precise origin of which cannot be shown or to extinguish the prior title of another sovereign. In the absence of definite evidence that the possession began as a wrongful assumption of a sovereignty already belonging to another state, peaceful and continuous possession raises a presumption that the original assumption of sovereignty was in conformity with international law and has the effect of consolidating the claimant's title. Possession of territory consists in the exercise or display of state authority in or in regard to the territory in question. In the *Island of Palmas Arbitration,* M. Huber spoke of the acquisition of sovereignty by way of continuous and peaceful display of state authority as 'so-called prescription' and also said that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other states) is as good as a title. Again, even in the *Eastern Greenland* case, which is commonly referred to as the leading case on 'occupation,' the Court emphasized that Denmark did not found her claim upon any 'particular act of occupation' but alleged a title 'founded on the peaceful and continuous display of state authority,' and it awarded sovereignty to Denmark on the basis of the latter's display of state authority with regard to the whole of Greenland during successive periods of history. In fact, it is neither very easy nor very necessary to draw a precise line between an ancient title derived from an original 'occupation' and one founded simply on long and peaceful possession.

(1) In the *Island of Palmas* case, M. Huber emphasized that proof of an original taking of possession is not enough and that possession must be maintained by display of state authority. On the other hand, both he in that case and the Court in the *Eastern Greenland* case pointed out that proof of peaceful possession in the most recent period before the rival claimant attempts to assume the sovereignty is sufficient by itself to establish a title to the territory—without proof of a long historic possession. The truth seems to be that peaceful display of state authority is in itself a valid title to sovereignty and that proof either of an original act of occupation or of the long duration of a display of state authority is important primarily as confirming the peaceful and nonadverse character of the possession. Peaceful display of state authority over a long period excludes the existence of any valid prior title in another state and makes it unnecessary to rely upon the principle of extinctive prescription by long adverse possession.

(2) The principle of extinctive prescription, under which the passage of time operates ultimately to bar the right of a prior owner to pursue his claim against one who, having wrongfully displaced him, has continued for a long time in adverse possession, is recognized in almost all systems of municipal law, and it appears equally to be admitted by international law. It is debatable as to exactly how far diplomatic and other paper forms of protest by the dispossessed state suffice to 'disturb' the possession of the occupying state, so as to prevent the latter from acquiring

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13. *For example,* a claim in the form of a valid treaty of cession.

14. Territorial conflicts of this nature still occur, as evidenced by the controversy between the former Republic of Viet Nam and the Peoples' Republic of China in 1974 regarding the Spratley Islands in the South China Sea.

15. *See* page 4-2, *supra.*

16. *See* Page 4-4, *supra.*

17. Lauterpacht, *Sovereignty over Submarine Areas,* [1950] *Brit. Y.B. Int'l L.* 376, 428-29 (footnotes omitted).

a title by prescription. Paper protests may undoubtedly be effective for a certain length of time to preserve the claim of the dispossessed state. If, however, the latter makes no effort to carry its protests further, by referring the case to the United Nations or by using other remedies that may be open to it, paper protests will ultimately be of no avail to stop the operation of prescription. [18] Thus, it was largely for the purpose of avoiding any risk of the extinguishment of its claims by prescription that in 1955 the United Kingdom filed a unilateral application with the I.C.J., challenging alleged encroachment by Argentina and Chile on the Falkland Islands Dependencies. [19]

c. Accretion. Accretion is the expansion of a state's territory by operation of nature; that is, by the gradual shifting of the course of a river, the recession of the sea, or the building up of river deltas. This concept is generally free of controversy and is mostly spoken to in terms of land, river, and lake boundaries. [20]

d. Cession. Cession of territory involves the transfer of sovereignty by means of an agreement between the ceding and acquiring states. It is a *derivative* mode of territorial acquisition. The cession may comprise a portion only of the territory of the ceding state, or it may comprise the totality of its territory. In this latter situation, as for example, in the treaty of August 22, 1910, between Japan and Korea, the ceding state disappears and becomes merged into the acquiring state. The consent of the population of ceded territory has generally not been considered essential to the validity of the cession; however, it should be noted that the last instances of cession were frequently conditioned upon the will of the people as expressed in a plebiscite. [21] Moreover, acquisition of territorial sovereignty by means of cession is now generally considered to be a thing of the past, a concept no long applicable to today's international community.

e. Conquest. With the formation of the U.N. and the specific prohibitions against the use of force contained within its Charter, [22] war has been outlawed as a legitimate instrument of national policy. Consequentially, logic would dictate that a state can no longer acquire sovereignty over territory by conquering an enemy and declaring an intent to annex this state. Reality, however, does not allow for such legal simplicity. Despite the universally accepted prohibition against the use of force, conflict still occurs and often results in a change in territorial sovereignty of an undefined nature. Moreover, this shift in territorial control may occur as a result of either an overt invasion of another state's territory or from what might perhaps be regarded as a legitimate act of self-defense. Two examples suffice to illustrate these points.

(1) The status of Goa. On December 18, 1961, Indian troops invaded the territories of Goa, Damao, and Diu, comprising the Portuguese State of India. In a letter to the President of the Security Council, the Permanent Representative of Portugal requested him ". . . to convene the Security Council *immediately* to put a stop to the condemnable act of aggression of the Indian Union, ordering an immediate cease-fire and the withdrawal forthwith . . . of all the invading forces of the Indian Union." [23] The following excerpts are from the Security Council's debate.

Mr. Jha [India]: . . . I have already said that this is a colonial question, in the sense that part of our country is illegally occupied by right of conquest by the Portuguese. The fact that they have occupied it for 450 years is of no consequence because, during nearly 425 or 430 years of that period we really had no chance to do anything because we were under colonial domination ourselves. But during the last fourteen years, from the very day when we became independent, we have not ceased to demand the return of the peoples under illegal domination to their own countrymen, to share their independence, their march forward to their destiny. I would like to put this matter very clearly before the Council: that Portugal has no sovereign right over this territory. There is no legal frontier—there can be no legal frontier—between India and Goa. And since the whole occupation is illegal as an issue—it started in an illegal manner, it continues to be illegal today and it is even more illegal in the light of resolution 1514 (XV) [15 GAOR, Supp. 16(A/4684), at 66 (Dec. 14, 1960), entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples"]—there can be no question of aggression against your own frontier, or against your own people, whom you want to liberate.

That is the situation that we have to face. If any narrow-minded legalistic considerations—considerations arising from international law as written by European law writers—should arise, these writers were, after all, brought up in the atmosphere of colonialism. I pay all respect due to Grotius, who is supposed to be the father of international law, and we accept many tenets of international law. They are certainly regulating international life today. But the tenet which . . . is quoted in support of colonial Powers having sovereign rights over territories which they won by conquest in Asia and Africa is no longer acceptable. It is the European concept and it must die. It is time, in the twentieth century, that it died. . . .

Mr. Garin [Portugal]: . . . Indian attempts to annex the territories of the other sovereignties in the neighbourhood cannot find any legal justification. Such attempts could be legitimized only by the other sovereignties concerned, if they agreed to a formal transfer of their territories, but only if the transfer could be voluntary, never compulsory, much less by means of an armed aggression. It matters little whether those other sovereignties are held by whites or coloured people or, as in the case of the Portuguese State of India, by both whites and coloured people together. It likewise matters little if the territories belonging to those other sovereignties are large or small in size. The principle of sovereignty ought to be respected. The Indian Union has not done this in respect of the Portuguese State of India and is, therefore, guilty of a base breach of international law.

It has been said here that international law in its present form was made by Europeans. I submit that, so long as it is not replaced, it must be accepted and followed by civilized nations, and I am not aware that international law relating to sovereignty has been changed so far . . .

Mr. Stevenson [United States]: . . . [W]hat is at stake today is not co-

18. *J. Brierly, The Law of Nations* 167-71 (6th ed. Waldock 1963).

19. The dispute between the U.K. and Argentina over the Falkland Islands continues to exist. See The Washington Post, Dec. 10, 1972, § G, at 1, col. 1. Likewise, Arab states continue to lodge official protects in the U.N. with regard to the Israeli occupation of certain Arab territory.

20. *See* 2 *M. Whiteman, Digest of International Law,* 1084-85 (1963) (hereinafter cited as 2 *M. Whiteman*).

21. 1 *G. Hackworth, Digest of International Law* 421-22 (1940).

22. Specifically, U.N. Charter Art. 2, paras 3 and 4.

23. U.N. Doc. S/5030 (1961).

lonialism; it is a bold violation of one of the most basic principles in the United Nations Charter, stated in these words from Article 2, paragraph 4:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

> We realize fully the depths of the differences between India and Portugal concerning the future of Goa. We realize that India maintains that Goa by right should belong to India. Doubtless India would hold, therefore, that its action is aimed at a just end. But, if our Charter means anything, it means that States are obligated to renounce the use of force, are obligated to seek a solution of their differences by peaceful means, are obligated to utilize the procedures of the United Nations when other peaceful means have failed. . . . [24]

At the end of the Security Council debate on December 18, 1961, Ceylon, Liberia, and the United Arab Republic submitted a draft resolution which cited G.A. Res. 1514, "Declaration on the Granting of Independence to Colonial Countries and Peoples," [25] rejected the Portuguese complaint of Indian aggression, and called upon Portugal to terminate hostile action and to cooperate with India in the liquidation of her colonial possessions in India. [26] This resolution was defeated by a vote of 4 in favor and 7 against. France, Turkey, the United Kingdom, and the United States then introduced a draft resolution which recalled the obligation of members under Article 2 of the Charter to settle disputes by peaceful means, called for an immediate cessation of hostilities, called upon India to withdraw its forces, urged the parties to work out a permanent solution of the problem by peaceful means, and requested the Secretary-General to provide appropriate assistance. [27] Although a majority of the Council voted in favor of this resolution, it was vetoed by the Soviet Union. The territory in question remains in Indian hands. [28]

(2) The 1967 Middle East War. International publicists disagree as to whether the military action undertaken by Israel in 1967 constituted a "legitimate" act of self-defense in terms of the currently existing international norms. [29] For purposes of this chapter, however, this question is not the primary point of concern. Instead, it focuses attention on the issue of whether a state may extend its sovereignty over territory through the use of force which is "lawful" under the U.N. Charter; that is, armed measures taken in "self-defense." Israel's success in the Six Day War of 1967 resulted in its military occupation of substantial territory: the Sinai, the Gaza Strip, parts of Jerusalem, portions of Jordan on the West Bank of the Jordan River, and the Syrian Golan Heights. In Security Council Resolution 242, adopted November 22, 1967, the Council called for the withdrawal of Israel armed forces from these territories. [30] For a number of reasons, political as well as military, this withdrawal did not occur. Moreover, following the 1967 war, Israel took certain measures to accomplish the "administrative unification" of Jerusalem. Reacting quickly to this development, the General Assembly, by a vote of 99-0-20, adopted the following resolution:

> *The General Assembly,*
>
> *Deeply concerned* at the situation prevailing in Jerusalem as a result of the measures taken by Israel to change the status of the City,
>
> 1. *Considers* that these measures are invalid;
>
> 2. *Calls* upon Israel to rescind all measures already taken and to desist forthwith from taking any action which would alter the status of Jerusalem;
>
> 3. *Requests* the Secretary-General to report to the General Assembly and the Security Council on the situation and the implementation of the present resolution not later than one week from its adoption. [31]

As of 1977, Israel continues to both occupy most of the territory taken by its military forces in 1967 and to administer the City of Jerusalem.

(3) The purpose of the discussion of these two events, is not to assess blame or to adjudge the legality of events examined. They are offered only as topical examples of what might be viewed as territorial acquisition by conquest. The legal status of the territory in question will be dependent upon whether other states agree or refuse to recognize "title" to the land occupied by India and Israel. Moreover, these actions serve to demonstrate to the military attorney the interdependent nature of the two major components of public international law, the Law of Peace and Use of Force. That is, the legality of acquisition of sovereignty over territory by conquest can be fully discussed only if currently existing conflict management norms are taken into consideration.

f. The Polar Regions. Although various states have attempted to claim sovereignty over portions of the polar regions, [32] the United States refuses to recognize these claims. In a note dated June 16, 1955, to the Secretary of State, the Australian Ambassador at Washington stated:

> I have the honour to refer to my letter of 11th March, 1949, depositing with the Government of the United States the Australian Instrument of Ratification of the Convention of the World Meteorological Organization signed at Washington, D.C. on 11th October, 1947.
>
> I wish to inform you that the Australian Government has now decided, by virtue of its membership of the World Meteorological

24. 16 U.N. SCOR, 987 meeting, 10-11, 16, 988th meeting 7-8 (1961).

25. 15 U.N. GAOR, Supp. 16 at 66, U.N. Doc. A/4684 (1961).

26. *See* U.N. Doc. S/5032 (1961).

27. *See* U.N. Doc. S/5033 (1961).

28. Wright, *The Goa Incident,* 56 *Am. J. Int'l L.* 617 (1962).

29. *See J. Stone, Legal Controls of International Conflict,* 244, n. 8 (1955); Wright, *The Cuban Quarantine,* 57 *Am. J. Int'l L.* 546, 559 (1963); *McDougal, The Soviet-Cuban Quarantine and Self-Defense,* 57 *Am. J. Int'l L.* 597-98 (1963); and Henkin, *Force, Intervention and Neutrality in Contemporary International Law, Proc., Am. Soc. Int'l L.* 147, 150 (1963).

30. S.C. Res. 242, SCOR, Resolutions and Decisions of the Security Council at 8 (22 Nov. 1967).

31. G.A. Res. 2253, U.N. GAOR, 5th Emergency Special Session, Annexes and Resolutions, Supp 1, at 4, U.N. Doc. A/6798 (1967); 57 *Dep't State Bull.* 113 (1967).

32. States have attempted to claim sovereignty over portions of the polar regions on the basis of discovery, contiguity, and the polar sector theory. For a discussion of these claims and a concise explanation of the polar sector theory, *See W. Friedmann, O. Lissitzyn, & R. Pugh, International Law* 458-63 (1969) (hereinafter cited as 2 *W. Friedman*).

Organization, to apply the Convention to the Australian Antarctic Territory which does not maintain its own meteorological service.

In his reply dated January 30, 1956, the Secretary of State, after acknowledging receipt of the Australian Ambassador's note and summarizing its contents, stated:

My Government wishes to point out, as it has on previous occasions, that it does not recognize any claims so far advanced in the Antarctic and reserves all rights accruing to the United States out of activities of nationals of the United States in the area.

The American Embassy in Santiago delivered the following aide-memoire to the Foreign Minister of Chile on August 2, 1955:

The Government of the United States of America notes Chilean law 11,846 was promulgated on June 17, 1955. That law purports to incorporate into Chilean provincial administration those areas claimed by Chile in the Antarctic. The Government of the United States wishes to reiterate that it has recognized no claims advanced with respect to the Antarctic by other countries and that it reserves all rights of the United States with respect to the area.

The Department of State replied in like manner on November 5, 1956, to a Chilean memorandum transmitting a copy of a Decree implementing the above law. On May 14, 1958, the Legal Advisor of the Department of State, Loftus Becker, said in the course of testimony before the Special Committee on Space and Astronautics of the United States Senate:

... There [in Antarctica], for many, many years, the United States has been engaged in activities which under established principles of international law, without any question whatsoever, created rights upon which the United States would be justified in asserting territorial claims. I mean by that, claims to sovereignty over one or more areas of the Antarctic.

Notwithstanding this fact, the United States has not asserted any claim of sovereignty over any portion of Antarctica, although the United States has, at the same time, made it perfectly plain that it did not recognize any such claims made by other States.

It is the position of the United States Government, and one well founded in international law, that the fact that the United States has not based a claim of sovereignty over one or more areas of Antarctica, upon the basis of the activities it has engaged in there, in no way derogates from the rights that were established by its activities. [33]

Influenced perhaps by the momentum generated during the International Geophysical Year of 1957-58, during which scientific expeditions from many countries conducted research and experiments in Antarctica without regard to questions of territorial sovereignty, a conference called by the United States of those states having substantial interests in that continent succeeded in producing the Antarctic Treaty, signed on December 1, 1959. [34] The most important provision of the treaty states that Antarctica "shall be used for peaceful purposes only" (Art. I), and to that end, the treaty prohibits military installations, maneuvers, and weapons tests, including nuclear explosions of all kinds. The free exchange of scientific information and personnel is provided for (Art. III), and provision is made for the meeting at suitable intervals of representatives of contracting states in order to formulate and recommend measures in furtherance of the objectives of the treaty (Art. IX). In addition to other articles dealing with mutual inspection of Antarctic activities and installations by the contracting parties and with the exercise of jurisdiction over certain Antarctic personnel, the treaty provides in Article IV:

1. Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or nonrecognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, nor enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The Treaty contains no general provision governing jurisdiction over persons in Antarctica. [35] It entered into force on June 23, 1961. As of the beginning of 1975, the parties to the treaty were: Argentina, Australia, Belgium, Chile, Czechoslovakia, Denmark, France, Japan, Netherlands, New Zealand, Norway, Poland, Romania, South Africa, Union of Soviet Socialist Republics, United Kingdom, and the United States. The Treaty may be amended at any time by unanimous vote of the contracting parties. At the expiration of thirty years from the date of entry into force, any of the original contracting parties may call for a conference of all contracting parties. The conference may amend the Treaty by majority vote. Failure to ratify any amendment constitutes withdrawal from the Treaty.

g. The Moon and Other Celestial Bodies. With the advent of space travel and exploration, still another area of potential jurisdictional dispute has evolved. In an attempt to prevent such conflicts, early efforts have been made to regulate state activities in this area. Of primary importance is the 1967 Outer Space Treaty [36] of which the most important articles are the following:

Art. 1. The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the

33. 2 *M. Whiteman, supra,* note 20 at 1250-53.

34. [1959] 12 U.S.T. 794, 402 U.N.T.S. 71.

35. The failure of the treaty to include general jurisdictional provisions has produced interesting results. In July of 1970, Mario Escamilla shot and killed a fellow U.S. government researcher on Arctic ice island T-3, a 28-mile-square ice slab floating in the Arctic. Defense attorneys argued the U.S. had no jurisdiction to try Escamilla, while the Justice Department asserted the crime was covered by U.S. maritime jurisdiction, 18 U.S.C.A. § 7(1) (*see* n. 174, *infra*). The Fourth Circuit, in overturning Escamilla's original conviction, decided the case without speaking to the issue of jurisdiction. The proposed Federal Criminal Code now under consideration deals with this type of situation, Criminal Justice Reform Act of 1975, § 204.

36. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, T.I.A.S. 6347, 610 U.N.T.S. 205.

interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Art. 2. Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Art. 3. States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

Art. 4. States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations, and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

Art. 5. States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle.

In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts.

Art. 6. States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

Art. 7. Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.

Art. 8. A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body. Ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the Earth. Such objects or component parts found beyond the limits of the State Party to the Treaty on whose registry they are carried shall be returned to that State Party, which shall, upon request, furnish identifying data prior to their return.

Art. 12. All stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity. Such representatives shall give reasonable advance notice of a projected visit, in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited.

Art. 13. The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international intergovernmental organizations.

Any practical questions arising in connection with activities carried on by international intergovernmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization or with one or more States members of that international organization, which are Parties to this Treaty.

The Treaty incorporates the principles enunciated in the Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space. [37] The major difference between the Treaty and the Declaration is the inclusion in the Treaty of articles concerning the military uses of space and providing for mutual inspection of facilities on the moon and other celestial bodies. [38]

(1) There is no generally accepted boundary between air space and outer space. Although the U.N. Committee on the Peaceful Uses of Outer Space placed the problem of such a boundary on its agenda, it has done little work on it. Scholars and commentators have discussed a wide variety of possible boundaries. The physical characteristics of space and the atmosphere offer no sure guidance, but there is a tendency to agree that the boundary, if one is necessary, should be somewhere between the highest altitude at which aircraft dependent on the reactions of the air for lift and control can operate and the lowest altitude (perigee) at which artificial earth satellites can remain in orbit without being destroyed by friction with the air, roughly between 40 and 90 miles above the surface of the earth. [39]

(2) A more recent treaty, of considerable importance to the United States, is The Agreement on the

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37. G.A. Res. 1962, 18 U.N. GAOR Supp. 15, at 15, U.N. Doc. A/5515 (1963).

38. *See generally,* Dembling and Arons, *The Evolution of the Outer Space Treaty,* 33 *J. Air L. & Com.* 419 (1967).

39. *See M. McDougal, H. Laswell & I. Vlasio, Law and Public Order in Space* 323-59 (1963) (hereinafter cited as *M. McDougal, Space Law*), and J. Fawcett, *International Law and the Uses of Outer Space* 20-24 (1968). For a Soviet view, *see* Zhukov, *Space Flights and the Problem of the Altitude Frontier of Sovereignty,* [1966] *Y.B. of Air and Space L.* 485.

Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space. [40]

4-4. Extent of Territory. *a.* Having examined the various means by which states may acquire territory over which to exercise jurisdiction, attention must next be directed toward the extent of this territory. Such an analysis generally entails an examination of land, river, and lake boundaries. In this regard, specific provisions of *Restatement, Second,* serve as pronouncements of the relevant international legal norms.

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 12. Land, River, and Lake Boundaries

(1) The boundary separating the land areas of two states is determined by acts of the states expressing their consent to its location.

(2) Unless consent to a different rule has been expressed,

(a) when the boundary between two states is a navigable river, its location is the middle of the channel of navigation;

(b) when the boundary between two states is a nonnavigable river or a lake, its location is the middle of the river or lake.

Comment:

a. *Land boundaries.* . . . Many boundary disputes have been settled by peaceful means including, in particular, boundary conventions and arbitration, as in the case of the continental land boundaries of the United States. Because, in a majority of cases, the location of land boundaries between states is defined by agreement (frequently as interpreted by arbitration) almost no specific principles of international law have developed in this field.

b. *Thalweg doctrine.* The rule locating the boundary in the middle of the channel of navigation rather than the middle of the stream is called the "thalweg" doctrine. See Louisiana v. Mississippi, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed. 913 (1906); New Jersey v. Delaware, 291 U.S. 361, 54 S.Ct. 407, 78 L.Ed. 847 (1934).

c. *Effect of natural shift.* In disputes between the states of the United States, the Supreme Court has applied the distinction between accretion and avulsion, under which the boundary between two states shifts with the gradual shifting of the channel caused by erosion and deposit of alluvium (accretion) but does not shift when the river is suddenly diverted from the previous channel (avulsion). See Nebraska v. Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186; Arkansas v. Tennessee, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1918); 12 Am.J. Int'l L. 648 (1918). . . .

Although, as noted in the Comment to § 12, the majority of land boundaries are defined by specific agreement between the states concerned, disputes still arise concerning the proper *interpretation* or *application* of such agreements. [41] One such boundary dispute of long standing involved the U.S. and Mexico. Inasmuch as this dispute involves several of the concepts spoken to in § 12 of the *Restatement,* it is of particular interest.

b. In the Treaty of Guadalupe Hidalgo of 1848 and the Gadsden Treaty of 1953, the United States and Mexico attempted to fix the boundary line between their respective territories. Because the Colorado and Rio Grande Rivers constantly shifted their channels, the two countries agreed in 1884 that the dividing line should continue to "follow the center of the normal channel" of each river, "notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium. . . ." Other changes brought about by the force of the current, such as the sudden abandonment of an existing river bed and the opening of a new one ("avulsion"), were to produce no change in the dividing line, which would continue to follow the middle of the original channel bed, even though this should become wholly dry or obstructed by deposits. [42] In 1889, an International Boundary Commission was created by agreements between the United States and Mexico and charged with the task of deciding whether changes in the course of the Colorado River and the Rio Grande had occurred "through avulsion or erosion" for the purposes of the 1884 treaty. [43] In 1895 a dispute arose over a tract of land in El Paso, Texas, known as "El Chamixal." Each country claimed the entire tract. The Boundary Commission was unable to agree on the boundary line, and a convention was signed by the two governments on June 24, 1910, establishing a commission to "decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico." [44] In rendering the award, the Presiding Commissioner of the arbitral tribunal, with the Mexican Commissioner concurring in part, said:

. . . [T]he Presiding Commissioner and the Mexican Commissioner are of the opinion that the accretions which occurred in the Chamizal tract up to the time of the great flood in 1864 should be awarded to the United States of America, and that inasmuch as the changes which occurred in that year did not constitute slow and gradual erosion within the meaning of the Convention of 1884, the balance of the tract should be awarded to Mexico. [45]

The American Commissioner dissented. At the session of the Commission in which the award was read, the agent for the United States protested against the decision and award, *inter alia,* on the following grounds:

1. Because it departs from the terms of submission in the following particulars:

a. Because in dividing the Chamizal tract is assumes to decide a question not submitted to the commission by the convention of 1910 and a question the commission was not asked to decide by either party at any stage of the proceedings;

b. Because it fails to apply the standard prescribed by the Treaty of 1884;

c. Because it applied to the determination of the issue of erosion or avulsion a ruling or principle not authorized by the terms of the submission or by the principles of international law or embraced in any of the treaties or conventions existing between the United States and Mexico;

d. Because it departs from the jurisdictional provision of the Treaty of 1889 creating the International Boundary Commission. [46]

Shortly after the Commission had adjourned, the United States notified Mexico ". . . [f]or the reasons set forth by

40. 19 U.S.T. 7570; T.I.A.S. 6599; 672 U.N.T.S. 119.

41. *See* Case Concerning the Temple of Preah Vihear, [1962] I.C.J. 6.

42. 24 Stat. 1011, 1 Malloy 1159.

43. 26 Stat. 1512, 1 Malloy 1167.

44. 36 Stat. 2481, 2483.

45. Chamizal Arbitration (United States v. Mexico), [1911] For Rel U.S. 572, 586 (Int'l Boundary Commission 1911).

46. *Id.* at 597-98.

the American commissioner in his dissenting opinion, and by the American agent in his suggestion of protest, [it did] not accept this award as valid or binding." [47] The United States suggested the negotiation of a new boundary convention to settle the matter, but Mexico declined on the ground that the matter had been fully adjudicated and that there remained only the admittedly difficult task of relocating the line of 1864. Discussion of the matter was terminated because of disturbed conditions in Mexico, and no further action was taken until the conclusion in 1963 of a treaty by which the disputed territory was divided between the two countries. [48] The agreement entered into force on January 14, 1964. [49]

4-5. Scope of Territorial Jurisdiction. *a.* As was noted earlier in this chapter, jurisdiction is dependent upon the capacity to both prescribe and enforce rules of law. [50] It is essential to keep this fact in mind when examining the scope of territorial jurisdiction. With the increasing facility of communication and transportation, the opportunity for committing crimes, the constituent elements of which occur in more than one state, have grown apace. Accordingly, the jurisdiction of crime founded upon the territorial principle has been expanded in several ways. First, national legislation and jurisprudence have developed the subjective territorial principle, which establishes the jurisdiction of the state to prosecute and punish for crime commenced within the state but completed or consummated abroad. Secondly, there has, over the years, evolved the so-called objective territorial principle, which establishes the jurisdiction of the state to prosecute and punish for crime commenced outside of the state but consummated within its territory. [51] These concepts are reflected in the following provisions of the *Restatement.*

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§17. Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory.

§18. Jurisdiction to Prescribe with Respect to Effect within Territory

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

b. The subjective territorial principle, embodied in § 17 of *Restatement, Second,* has generated very little controversy. The objective territorial concept of § 18, however, has consistently been criticized as an invalid extension of the territorial base of jurisdiction. Nearly all European publicists have been critical of the Restatement's notion of extraterritorial application of a state's laws to its citizens. The European Advisory Committee on the Restatement criticized the *Restatement* rule of extraterritorial jurisdiction in the following manner:

> In our view, the exercise of jurisdiction based on territory is not justified in cases where all that has occurred within the territory is the effects of certain conduct and not at least part of the conduct itself. [52]

c. As noted, the objective territorial principle is often said to apply where the offense "takes effect" or "produces its effects" in the territory. In relations to elementary cases of direct physical injury, such as homicide, this is only natural, for here the "effect" is an essential ingredient of the crime. Once out of the sphere of direct physical consequences, however, the "effects" formula is most difficult to apply. Here, the effects within the territory may be fairly remote. Thus, the extension of the notion of effects, without qualification, from the simple cases of direct physical injury to cases such as defamation and sedition, introduces a certain degree of ambiguity into the basis of the doctrine.

d. Most of the major problems regarding the scope of territorial jurisdiction and conflicts between the territorial jurisdiction of several states have occurred in commercial and antitrust matters, i.e., basically concerns of private international law. [53] The reader should also be alert to the fact that though a state may *prescribe* rules against conduct which occurs outside of its territory, it is, due to the widespread opposition to the objective territorial concept, most difficult to *enforce* these norms on the basis of territorial jurisdiction. Effective enforcement thus depends generally on whether the state actually has custody of the individual or property in question.

4-6. Extradition. *a. Basic Principles.* Extradition is the surrender of an individual accused or convicted of a crime by the state within whose territory he is found to the state under whose laws he is alleged to have committed or to

47. *Id.*

48. 15 U.S.T. 21, T.I.A.S. 5515, 505 U.N.T.S. 185.

49. *See generally,* 3 *M. Whiteman, Digest of International Law* 680-99 (1973) (hereinafter cited as 3 M. Whiteman). (1964). For a discussion of the controversy from a Mexican point of view, *see* Antonio Gomez Robledo, *Mexico y el Arbitraje Internacional,* 161-293 (1965). On international boundaries, *see* generally 3 *M. Whiteman,* supra. at 1-871.

50. *See* Page 4-1, *supra.*

51. *See,* Harvard Research in International Law, *Jurisdiction with Respect to Crime,* 29 *Am. J. Int'l L. Supp.* 435, 484, 487-88 (1935) (hereinafter cited as Harvard Research, Criminal Jurisdiction).

52. Riedweg, *The Extra-Territorial Application of Restrictive Trade Legislation—Jurisdiction and International Law,* INTERNATIONAL LAW ASSOCIATION, *Report of the Fifty-First Conference,* 357, 372-73, (1964).

53. *See* U.S. v. Aluminum Co. of America, 148 F.2d 416 (1945), and the cases cites therein. *See also,* Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (1968), cert. denied, 89 S.Ct. 872 (1969).

have been convicted of the crime. Until the nineteenth century, the extradition of fugitives was rare and was a matter of sovereign discretion rather than of obligation. With the dramatic improvements in transportation in the nineteenth century, however, the number of criminals fleeing to foreign states increased, and states began to conclude bilateral treaties providing for their extradition. In *Factor v. Laubenheimer,* [54] the court noted that

> . . . the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled . . . the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.

In fact, the municipal law of many states prevents arrest and extradition of a fugitive except pursuant to a treaty operating as internal law or a statute providing for extradition. [55] In the United States, international extradition is governed by Federal law. [56] The States have no power to extradite fugitives to foreign countries.

(1) Since most instances of extradition arise under bilateral or multilateral treaties, many of the problems raised by extradition are questions of treaty interpretation. Most bilateral treaties contain a list of acts for which a fugitive may be extradited. Multilateral and some bilateral treaties merely stipulate that the act for which extradition is sought be a crime in both the asylum and requisitioning states, punishable by a certain minimum penalty, usually imprisonment for at least one year.

(2) Difficult problems arise under the treaties that list extraditable crimes when the act committed by the fugitive is punishable in the requisitioning state and listed in the treaty, but not punishable in the asylum state because the law of the latter defines the crime differently. [57] In such a situation, if the asylum state applies its own law to define the crime, it may violate its obligations under the treaty. If the asylum state applies the law of the requisitioning state, it would be extraditing the fugitive for an act that was not an offense under its own law. The solution to the problem may be found in the requirement of "double criminality,"—i.e., that extradition is available only when the act is punishable under the law of both states. The name of the offense and the elements that make it criminal need not be precisely the same, providing that the fugitive could be punished for the act in both states. [58] Under the requirement of "double criminality," the act must be characterized as a crime by the law of the asylum state. However, in *Factor v. Laubenheimer,* [59] the Court approved extradition to Great Britain for the crime of receiving money, knowing it to have been fraudulently obtained, although the law of Illinois, where the fugitive was found, did not make such an act criminal. The Court felt that the extradition treaty between the United States and Great Britain did not require "double criminality" for the particular offense and stressed the fact that the offense was criminal under the laws of several of the States. [60] The principle of "double criminality" would also require that the act be criminal in both states when it was committed. [61]

(3) Treaties frequently provide that extradition shall not take place if the prosecution of the fugitive is barred by a statute of limitations in either the asylum state or requisitioning state. [62] Moreover, according to the principle of specialty, the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited. The permission of the asylum state is also required for the requisitioning state to re-extradite the fugitive to a third state. [63]

(4) The majority of extradition treaties contain provisions exempting nationals of the asylum state from extradition. The usual provision is that neither party shall be obligated to surrender its nationals, thus leaving the matter in the discretion of the asylum state. The policy, which is most commonly reflected in civil law jurisdictions, apparently stems from a feeling that individuals should not be withdrawn from the jurisdiction of their own courts. [64] However, the courts in many civil law countries have broad jurisdiction to try and punish their nationals for crimes committed in other countries. [65] Most common law states, including the U.S., limit their jurisdiction over a crime to the location of the offense. [66] The United States has not adopted a criminal code that generally provides for punishment of its own nationals for ordinary crimes committed in other states. [67] (The U.C.M.J. is, of course, an

54. 290 U.S. 276, 287, 54 S.Ct. 191, 193 78 L.Ed. 315 (1933).

55. *See* 2 *D. O'Connell, International Law* 793-94 (2d ed. 1970) (hereinafter cited as 2 *D. O'Connell*). Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 9, 57 S.Ct. 100, 102, 81 L.Ed. 5 (1936).

56. 18 U.S.C.A. §§ 3184-3195.

57. *See* Note, *The Eisler Extradition Case,* 43 *Am. J. Int'l L.* 487 (1949).

58. *See* Harvard Research in International Law, *Draft Convention on Extradition,* 29 *Am. J. Int'l L. Spec. Supp.* 81-86 (1935).

59. 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315 (1933).

60. For a critical analysis of this case, *see* Hudson, *The Factor Case and Double Criminality in Extradition,* 28 *Am. J. Int'l L.* 274 (1934); *cf.*, Borchard, *The Factor Extradition Case,* 28 *Am. J. Int'l L.* 742 (1934).

61. *But see* U.S. ex rel. Oppenheim v. Hecht, 16 F.2d 955 (1927), granting extradition for an act which was made criminal in the United States after it had been committed.

62. *See,* e.g., Extradition Treaty between the United States and Great Britain, Dec. 22, 1931, art. 5, 47 Stat. 2122, T.S. 849, 163 L.N.T.S. 59.

63. U.S. ex rel. Donnelly v. Mulligan, 74 F.2d 220 (1934). *See also,* U.S. v. Rauscher, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886).

64. *See* Havard Research, Criminal Jurisdiction, *supra,* note 51 at 125.

65. *I. Shearer, Extradition in International Law* 15-16 (1971) (hereinafter cited as *I. Shearer*).

66. *See, e.g.,* U.S. Const., Art. III, § 2, cl. 3.

67. If criminal conduct by American citizens abroad were considered an offense against the law of nations, Congress could define and provide for the punishment thereof. U.S. Const., Art. I, § 8, cl. 10. *See* Blackmer v. U.S., 284 U.S. 421, 436-37 (1931); Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952); *cf.* American Banana Co. v. United Fruit Co., 213 U.S. 347, 353-57 (1909).

important exception to this rule. It is, however, limited to individuals on active duty in the Armed Forces.) [68] Accordingly, the U.S. enters into extradition treaties providing only limited requirements for extradition of nationals to civil law countries. [69]

(5) In order to avoid creating absolute immunity for citizens who have committed crimes outside of its territory, the United States is generally willing to allow extradition of its nationals on a reciprocal basis. [70] Civil law countries are reluctant to agree to this, however. [71] The U.S. also generally includes a clause in its extradition agreements which permits both states to deliver fugitive citizens when, in their discretion, they decide to do so. [72] The U.S. Supreme Court has upheld the validity of the refusal to extradite an American citizen who proved that the requesting state, in clear violation of its bilateral treaty commitments, had refused to extradite its own nationals to the United States. [73] Multilateral extradition conventions which recognize the principle of nonextradition of nationals generally provide that if the asylum state refuses to extradite a national, it shall itself prosecute the person requested. [74]

b. The U.S. Extradition Process. Depending on municipal law, extradition may be exclusively an executive function or may require a judicial hearing. The United States requires a judicial hearing of the evidence against the fugitive. [75] Article 9 of the 1931 Extradition Treaty between the United States and Great Britain provides: "The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied . . . to justify the committal of the prisoner for trial, in case the crime or offense had been committed in the territory of such High Contracting Party. . . ." [76] If, on such hearing, [the judge] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State. The Secretary of State then may grant or refuse extradition. [77] The function of the judicial hearing is to permit the fugitive to insure that the proceedings comply with the applicable statutes and treaties. He may produce evidence that he did not commit the offense or object that the offense was political. The decision of the committing magistrate on the sufficiency of the evidence is not subject to correction by appeal. [78] The fugitive may, however, petition for a writ of habeas corpus to challenge the legality of his detention and may urge upon the Secretary of State that his extradition not be granted. [79]

c. Nonextradition for Political Offenses. In the eighteenth century, extradition was most frequently sought and granted for what are now termed political offenses. By the nineteenth century, public opinion in Western Europe turned against the extradition of fugitives accused of only political offenses. Belgium, which enacted the first extradition law in 1833, incorporated the principle of nonextradition for political offenses into the law. Today, most

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68. *See* Art. 5, U.C.M.J., 10 U.S.C. 805 (1970); Toth v. Quarles, 350 U.S. 11 (1955); Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Kruger, 361 U.S. 234 (1960); McElroy v. U.S. ex rel. Gungliardo, 361 U.S. 281 (1960); U.S. v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). The Supreme Court cases held unconstitutional a Congressional grant of limited authority for the exercise of court-martial jurisdiction over discharged servicemen (Art. 3(a), UCMJ, 10 U.S.C. § 803(A) (1970)), and civilian employees and other persons accompanying the Armed Forces outside the United States (Art. 2(11), UCMJ, 10 U.S.C. § 802(11) (1970)). The Court of Military Appeals in the Averette case decided that a provision of the Code (Art. 2(10), UCMJ, 10 U.S.C. § 802(10) (1970)), purporting to grant jurisdiction over civilians accompanying the Armed Forces overseas in wartime was not operative is an undeclared war such as the Vietnam conflict. For an excellent discussion of whether existing Status of Forces Agreements might be used as a substitute for extradition proceedings, *see* W. Norton, *United States Obligations Under Status of Forces Agreements: A new Method of Extradition?,* 1973 (unpublished thesis, The Judge Advocate General's School of the Army).

69. *I. Shearer, supra,* note 65 at 68-72. Under the doctrine of Charlton v. Kelly, 229 U.S. 447 (1913), extradition treaties containing no mention of the nationality of the fugitive compel the United States to surrender American citizens if all the other requirements of the treaty are satisfied.

70. *I. Shearer, supra,* note 65 at 110. *See,* e.g., Extradition Treaty with Bavaria, Preamble, Sept. 12, 1853 [1854] 10 Stat. 1022, T.S. No. 17.

71. *See,* e.g., Grundgesetz, Art. 16(2) (1949) (W. Ger.). At least one writer from a civil law country considers that nonextradition of nationals is almost a principle of international law. *S. Lazareff, Status of Military Forces under Current International Law,* 232, 266 (1971).

72. The extradition treaties with the following countries came into effect after the November 9, 1936, Supreme Court decision in United States ex rel. Valentine v. Niedecker, 299 U.S.5. Five contain provisions permitting extradition of the requested state's nationals when that state's appropriate authorities deem it proper: Liberia, Nov. 1, 1937, [1939] 54 Stat. 1733, T.S. No. 955; Sweden, Oct. 24, 1961 [1963] 14 U.S.T. 1845, T.I.A.S. No. 5496; Brazil, Jan. 16, 1961, [1964] 15 U.S.T. 2093, T.I.A.S. No. 5691; New Zealand, Jan. 12, 1970, [1970] 22 U.S.T. 1, T.I.A.S. No. 7035; France, Feb. 12, 1970, [1971] 22 U.S.T. 407, T.I.A.S. No. 7075; Spain, May 19, 1970, [1971] 22 U.S.T. 737, T.I.A.S. No. 7136; Argentina, Jan. 21, 1972, [1972] 23 U.S.T. 3501, T.I.A.S. No. 7310. The only presently effective United States extradition treaty which precludes surrender of nationals and which was signed after the Valentine decision is the Extradition Treaty with Monaco.
Older United States extradition treaties permitting discretionary surrender of nationals and in effect on January 1, 1976, were with the following countries: Japan, Apr. 29, 1886, [1886] 24 Stat. 1015, T.S. No. 191; Mexico, Feb. 22, 1899, [1899] 31 Stat. 1818, T.S. No. 242; Argentina, Sep. 26, 1896, [1900] 31 Stat. 1883, T.S. No. 6; Guatamala, Feb. 27, 1903, [1903] 33 Stat. 2147, T.S. No. 425; Nicaragua, Mar. 1, 1905, [1907] 35 Stat. 1869, T.S. No. 462; Uruguay, Mar. 11, 1905, [1908] 35 Stat. 2023, T.S. No. 501. U.S. Dep't of State, Treaties in Force (1972).

73. Charlton v. Kelly, 229 U.S. 447 (1913); *see also,* Neely v. Henkel, 180 U.S. 109 at 123 (1901).

74. *See,* e.g., Convention on Extradition, signed at Montevideo, Dec. 26, 1933, Art. 2, 49 Stat. 3111, T.S. 882, 165 L.N.T.S. 45.

75. 18 U.S.C.A. § 3184.

76. 47 Stat. 2125.

77. 18 U.S.C.A. § 3184.

78. Collins v. Miller, 252 U.S. 364, 369, 40 S.Ct. 347, 349, 64 L.Ed. 616 (1920).

79. As has been noted, the U.S. extradition process is governed by Federal law, 18 U.S.C.A. § 3184-3195. A complete treatment of U.S. extradition procedures is found in 6 *M. Whiteman, Digest of International Law* 905-1117 (1968).

treaties exempt fugitives accused of political offenses from extradition. Though the principle has been almost universally accepted, "political offenses" have never been precisely defined. The first attempt to delineate the principle was the "attentat" clause in many treaties, which provides that the murder of the head of a foreign government or a member of his family is not to be considered a political offense. [80] Some treaties extend the exclusion to any murder or attempt on life in general. [81] However, in 1934, in the absence of such a clause in the applicable treaty, the Turin Court of Appeal refused to extradite the assassins of King Alexander of Yugoslavia to France on the ground that the crime was political. [82]

(1) In 1892, Switzerland adopted a law which provided that a crime was not to be considered political if it was primarily a common offense, even though it had a political motivation or purpose. The decision on extradition was left to the highest Swiss Court. [83] Some treaties provide that "... [c]riminal acts which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organizations" shall not be considered political offenses. [84] British and American courts have held that for an offense to be political, it must be committed in furtherance of a political movement or in the course of a struggle to control the government of a state. [85] However, this strict rule has been relaxed recently to provide refuge for private individuals fleeing totalitarian states. [86] Treaties also frequently prohibit extradition for purely military offenses. [87]

(2) The inability to define "political offense" continues to be of primary concern to the international community. Most treaties which speak to the extradition of individuals who fall within the context of the agreements continue to grant states the right to unilaterally determine whether the offense of which the accused is charged is, in fact, political in nature. Accordingly, individuals who hijack aircraft or engage in other terrorist activities are, for the most part, able to find refuge in states which are sympathetic to their particular "political" cause. [88]

d. Nonextradition for Military Offenses. Strictly military offenses such as desertion and absence without leave are as a general rule nonextraditable offenses. [89 a] A military offense for purposes of extradition is one which is punishable only under military law. It does not constitute primarily an infraction of the ordinary penal law. Treaties usually use phrases such as "purely," "strictly," or "essentially" military offenses to delimit the type of offense which is nonextraditable.

To fall within the exception of a "military offense," it must be shown that" ... the acts charged do not constitute a crime under the ordinary laws of the requesting state." [89 b] The crime of murder, for example, would not be considered a strictly military offense. As a Swiss Court stated in granting a French request for extradition, "... murder has never been regarded as a 'purely military' offense, because it affects human life and does not relate to military organization or military duties." [89 c] Among the other crimes that would be punishable by military courts but which are not deemed to be "strictly military" are violations of the laws of war.

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80. *See,* e.g., Treaty of Extradition Between the U.S. and Venezuela, Jan. 19, 1922, Art. 3, 43 Stat. 1698, T.S. 675, 49 L.N.T.S. 435.

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82. In re Pavelie, [1933-34] Ann. Dig. No. 158 (Italy).

83. *See* 2 *D. O'Connell, supra,* note 55 at 802.

84. Treaty of Extradition Between the U.S. and Brazil, Jan. 13, 1961, Art. V(6), 15 U.S.T. 2093, T.I.A.S. 5691, 532 U.N.T.S. 177.

85. In re Castioni, 1 Q.B. 149, 156, 166 (1891); In re Ezeta, 62 F. 972, 999 (1894).

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88. The U.N. has failed to take action on the recommendation of several of its members that aircraft hijacking and terrorist activities be considered as crimes resulting in automatic extradition.

89 a. *See,* e.g., *M. Bassiouni, International Extradition and World Public Order* 430-33 (1974); *S. Bedi, Extradition in International Law and Practice* 196 (1966); 4 *G. Hackworth, Digest of International Law* 192-93 (1942); 6 *M. Whiteman, Digest of International Law* 858-59 (1968); Shamgar, *Extradition for Military Offenses,* in 2 *L'Extradition Pour Delits Militaires* 201, 205 (1969); I. Shearer, Extradition in International Law 9 (1971). A case illustrating this principle is *In Re Girardin,*[1933-1934] Annual Digest of International Law Cases 357 (No. 153) (Camara Federal De La Plata, Argentina 1933). An example in a treaty is the Convention on Extradition Between the United States of America and Sweden, Oct. 24, 1961, 14 U.S.T. 1845, T.I.A.S. No. 5496, 494 U.N.T.S. 141. Article V states that extradition shall not be granted "[w]hen the offense is purely military." See York, *Extradition for Military Offenses,* in 2 *L'Extradition Pour Delits Militaires* 273, 275-76 (1969).

The principle stated above applies to formal extradition requests. It should be noted that serviceman stationed in countries with which the United States has a status of forces agreement can under certain circumstance be transferred to the foreign country concerned for trial for certain limited offenses. This does not involve an extradition procedure since the transfer is basically made pursuant to the custody provisons of the status of forces agreement. *See* e.g., Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 869 (1972); United States ex. rel. Stone v. Robinson, 309 F.Supp. (W.P.D. Pa. 1970), *aff'd,* 431 F.2d 548 (3d Cir. 1970); and William v. Rogers, 449 F.2d 513 (8th Cir. 1971); *cert. denied,* 405 U.S. 926 (1972).

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The concept of nonextradition for military offenses is illustrated in an extradition case decided in 1977. [89 d] An Irish national in the United States armed forces was convicted by a general court-martial in Vietnam for several offenses, including murder and absence without leave. He escaped from confinement and was subsequently imprisoned for a different offense in Canada. At the request of the Secretary of the Army, the Secretary of State formally asked for the serviceman's extradition to the United States for the murder offense only. Canada granted the extradition request and the serviceman was returned.

e. Methods Other Than Extradition. Where extradition is not possible because of the lack of a treaty or for some other reason, or where extradition is not feasible because of the time and expense involved, states may resort to other methods of surrendering or recovering fugitives. If the fugitive is not a national of the asylum state, it may deport him as an undesirable alien or exclude him (i.e., deny him permission to enter the country). In either case, the fugitive may be turned over directly to the state that desired to prosecute him, or may be sent to a third state from which his extradition is possible. The United States and Mexico and the United States and Canada have frequently resorted to exclusion or deportation in order to deliver fugitives to each other without going through the process of extradition. [89 e]

States may also acquire custody of fugitives by kidnapping or through the failure of police officials to observe the procedures governing extradition, deportation, or exclusion. In these situations, the United States courts have assumed jurisdiction over the fugitive in spite of the illegal manner in which he may have been brought into the country. [90] These methods of acquiring custody do, nevertheless, constitute violations of municipal or international law. [91]

4-7. Jurisdition Based on Nationality. *a.* A state has jurisdiction to prescribe rules governing the conduct of its nationals outside its territory. As a result, it may use its enforcement jurisdiction to give effect to such rules by actions taken against its nationals if they are found in the territory or, if they are not, by action taken against their property in the territory. Upholding a judgment for contempt against an American citizen who refused to return from France to testify when ordered to do so, the Supreme Court said, in *Blackmer v. United States,* [92] "With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his government." [93] Hall writes:

> Its laws travel with them [its nationals] wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state, but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. [94]

b. States exercise their jurisdiction to prescribe rules governing the conduct of their nationals in various degrees. In the United States, a number of statutory provisions, in addition to that under which Blackmer was convicted, specifically apply to the conduct or income of United States nationals abroad. [95] The U.S. does not, however, use extensively its prescriptive jurisdiction based on nationality. Generally, the use of this jurisdictional theory is the exception, rather than the rule, in common law states. Civil law countries usually make much more use of this concept, sometimes going so far as to provide that all, or nearly all, offenses committed by their nationals abroad are punishable if these citizens are ever found in the national territory. Some examples follow.

(1) In the United Kingdom, statutes provide for the punishment of not only treason, but also homicide, bigamy, perjury, and other crimes, when committed abroad by a British subject. [96] India has provided that its criminal law applies to Indian nationals everywhere, no

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[89 d]. *See* DAJA-IA 1977/1064, dated 31 August 1977, Subject: Extradition of Servicemen from Canada; DAJA-IA 1977/1084, dated 20 December 1977, Subject: Extradition Case.

[89 e]. *See* Evans, Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice, [1964] *Brit. Y.B. Int'l L.* 77.

[90]. *See* U.S. v. Insull, 8 F. Supp. 310 (1934); Ex parte Lopez, 6 F. Supp. 342 (1934); Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886); Evans, *supra* at 89-93.

[91]. The most celebrated case of illegally acquired jurisdiction is that of the Israeli kidnapping of Adolf Eichmann from Argentina. For the international issues raised by this act, *see W. Friedmann, supra,* note 32 at 495-97. A bibliography on the Eichmann trial is included in *G. Mueller & E. Wise, International Criminal Law,* 370-71 (1965).

[92]. 284 U.S. 421, (1932).

[93]. *Id.* at 437. The statute involved in Blackmer v. United States is now codified as 28 U.S.C.A. § 1783 (1964), and is incorporated by reference into Fed.R.Civ.P. 45(e)(2) and Fed.R.Crim.P. 17(e)(2). It provides in relevant part that a United States court may order the issuance of a subpoena requiring the appearance as a witness of a "national or resident of the United States who is in a foreign country" if such testimony is "necessary in the interest of justice." For another case upholding jurisdiction over nationals abroad, *see* United States v. Bowman, 260 U.S. 94 (1922) (Prosecution for acts committed abroad to defraud the United States): "[T]he three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance." 260 U.S. at 102.

[94]. *W. Hall, International Law* 56-57 (8th ed. 1924).

[95]. *See* 18 U.S.C.A. § 2381 (1964), proscribing treason by anyone "owing allegiance to the United States within the United States or elsewhere"; 18 U.S.C. § 953 (1964), punishing unauthorized attempts by "any citizen of the United States, wherever he may be," to influence a foreign government in its relations with the United States; Internal Revenue Code § 1, imposing an income tax on "all citizens of the United States, wherever resident"; and 50 U.S.C.A. app. § 435 (1964), requiring "every male citizen of the United States," *inter alia,* to register for military service.

[96]. 10 *Halsbury's Laws of England* 322-24 (Simonds ed. 1955). *See also,* 2 *D. O'Connell, supra,* note 55 at 898-99.

matter how minor the offense. [97] In France, a citizen can be prosecuted for any *crime* (roughly equivalent to felony) and many *delits* (misdemeanors) committed abroad. [98]

(2) In the case of *In re Guttierez*, [99] the defendant was a Mexican national charged with stealing a truck in Texas. The Mexican court dismissed his challenge to its jurisdiction on the broad ground, apparently, that a crime committed abroad by a Mexican national is punishable in Mexico.

(3) A Dutch national " . . . is liable to prosecution in Holland for an offense committed abroad, which is punishable under Netherlands law and which is also punishable under the law of the country where the offense was committed. . . ." [100]

(4) In the case of *In re Roquain*, [101] Belgium, Court of Cassation, 1958, the defendant, while lawfully married, committed adultery in Paris. The court held the defendant could not be prosecuted because under "the law governing criminal proceedings in respect of offenses committed outside Belgian territory," the offense of adultery may be prosecuted only if it was committed against a Belgian national.

(5) As to offenses generally, Spain apparently will not prosecute a Spanish national for an offense committed abroad unless the victim is also of Spanish nationality. [102]

(6) In *X. v. Prosecutor, Netherland.* [103] District Court of Middleburg, 1952, Court of Appeal of the Hague, 1952, the defendant was a national of the Netherlands. She lost her nationality by marriage, then committed outside the Netherlands a criminal offense for which she was prosecuted and convicted in the state where it was committed. Upon the dissolution of her marriage, she recovered her former Dutch nationality. She was then prosecuted for the same offense in the Netherlands. It was held that the previous prosecution abroad did not preclude a new prosecution in Holland, though it might mitigate the punishment, and moreover, she could not object to the prosecution on the ground that she had lost her nationality at the time the offense was committed. Any alien committing an offense abroad could be prosecuted if and when such person subsequently became a citizen of the Netherlands.

c. In *United States v. Bowman*, [104] the Supreme Court spoke to the circumstances under which a U. S. statute will be held to apply to conduct occurring outside United States territory, where the statute does not expressly so provide. In this decision, the Court held that a statute punishing conspiracy to defraud a United States-owned corporation was applicable to conduct taking place on the high seas. The Court stated that to limit the statute's scope to "the strictly territorial jurisdiction" would be greatly to curtail its usefulness and to leave open "a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." In such cases, the Court continued, Congress had not "thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." [105] The conviction of three United States nationals was accordingly affirmed on the ground that they were "certainly subject to such laws as [the United States] might pass to protect itself and its property." [106] The Court expressly reserved the question whether there was jurisdiction to try to a fourth conspirator, a British subject, who had not been apprehended. [107]

d. Difficult questions arise when there is a conflict between the demands of the state of which the individual is a national and those of the state in which he is residing. It has been held, however, that a state has jurisdiction to try and punish one of its nationals for an offense committed against its laws while he is residing abroad. [108]

e. The problem of civil jurisdiction is one in which international law leaves to each state a very wide choice. For instance, U. S. courts may deal with contracts made between two French citizens in France with regard to conduct performed in that state. Although applying French law, the court will nevertheless take jurisdiction, because, under U. S. law, the question of civil jurisdiction depends usually on the service of a summons or the attachment of property within U. S. territorial jurisdiction. [109] Under exisiting admiralty law, an individual may bring civil suit against a vessel, regardless of the location of the port in which it is located and "arrested." [110]

97. Indian Penal Code, § 4 (3d ed. 1965).

98. *Code de Procedure Penale*, Art. 689 (Dalloz ed. 1966); *see* Delaume, *Jurisdiction over Crimes Committed Abroad: French and American Law*, 21 *Geo. Wash. L. Rev.* 173 (1952); 1 *Travers, Le Droit Penal International* 584-631 (1920). *See also*, German Penal Code (Strafgesetzbuch) § 3 (German criminal law applicable to Germans whether act committed in Germany or abroad), § 4 (German criminal law applicable to persons acquiring German citizenship after criminal act has been committed).

99. 24 *Int'l L. Rep.* 265 (1961).

100. Public Prosecutor v. Y., 24 *Int'l L. Rep.* 264-265 (1961).

101. 26 *Int'l L. Rep.* 209, (1963).

102. Forgery Committed in Venezuela by a Spaniard, 89 *Journal du Droit International* 189 (1962).

103. X v. Prosecutor (Netherlands), 19 *Int'l L. Rep.* 226 (1957).

104. 260 U.S. 94 (1922).

105. *Id.* at 98.

106. *Id.* at 102.

107. As noted in n. 35, *supra,* the proposed Federal Criminal Code deals with extraterritorial jurisdiction in § 204 of the Criminal Justice Reform Act of 1975.

108. It has been held that a state has jurisdiction to try and punish one of its nationals for an offense committed abroad, even though he is also a national of the state in which the offense was committed. Coumas v. Superior Court, 31 Cal.2d 682, 192 P.2d 449 (1948); Kawakita v. United States, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249 (1952).

109. McDonald v. Mabee, 243 U.S. 90 (1917); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

110. Suits against vessels are *in rem* proceedings. For that reason the cases generally contain only the name of the ship which has been libeled.

f. In summary, then, jurisdiction based on nationality operates on the principle that a state may prescribe rules for the conduct of its own citizens, even when these individuals are outside its territory. It is a theory universally recognized in international law as a proper basis for the exercise of jurisdiction. However, it is important to note that, although some U.S. laws apply to American citizens abroad, the U. S. views jurisdiction based on nationality as a secondary jurisdiction concept. On the other hand, civil law states generally regard it as the primary basis upon which to exercise jurisdiction over nationals outside these countries' territorial confines.

4-8. Jurisdiction Based on Agreement with the Territorial State. *a.* As has been noted, a state " . . . possesses and exercises within its own territory an absolute and exclusive jurisdiction and . . . any exception to this right must be traced to the consent of the nation, either express or implied." [111] Accordingly, no state may exercise its police powers in another state, even against its own subjects, without the agreement of this state. An analysis of several such agreements follows. These jurisdictional arrangements should be of particular interest to the military attorney.

b. After World War II the United States continued to control islands captured from Japan, including Okinawa and the other Ryukyu Islands. Article 3 of the 1951 Treaty of Peace with Japan gave to the United States, pending the creation, at the option of the United States, of a United Nations trusteeship administered by the United States, "the right to exercise all and any powers of administration, legislation and jurisdiction, over the territory and inhabitants of these islands, including the territorial waters." [112] At the time the United States denied any intent of acquiring permanent possession of the islands and stated that Japan retained "residual sovereignty." [113] Sovereignty over the Ryukyu Islands did, in fact, revert to Japan on May 15, 1972. [114]

c. The basis for United States jurisdiction in the Panama Canal Zone is a treaty of November 18, 1903, between the United States and Panama, by which the United States is granted "in perpetuity" the use, occupation, and control of the ten-mile wide Canal Zone. Article III of the agreement provides that the United States may exercise all the rights, power, and authority " . . . which the United States would possess and exercise, if it were the sovereign of the territory within which said lands and water [i.e., of the Canal Zone] are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." [115] By an agreement of February 23, 1903, Cuba leased to the United States certain territory in Guantanamo for use by the latter as a naval station. Article III of the agreement recited the United States' recognition of Cuba's continuing "ultimate sovereignty" over the leased territory and Cuba's consent that the United States should exercise "complete jurisdiction and control over and within" the leased areas. [116] A later agreement of the same year fixed the conditions of the lease and also provided for the mutual extradition of persons committing offenses against the law of Cuba or the United States in areas under their respective control. [117] A significant revision of jurisdictional arrangements in the Canal Zone is now under active consideration and negotiation.

d. Another example of jurisdiction based on agreement arises out of the trusteeship arrangements under chapter XII of the United Nations Charter and the mandate system under the Covenant of the League of Nations. The trustee state, while not sovereign of the trust territory, has the power to prescribe and enforce rules of law. Under the Trusteeship Agreement for the former Japanese Mandated Islands, the United States was given full powers of administration, legislation and jurisdiction. [118] The powers of the trustee state are exercised under the supervision of the Trusteeship Council of the United Nations.

e. The territory of South West Africa, of which the Republic of South Africa is the mandatory, is the only League of Nations mandate in which the mandatory still exercises jurisdiction. The International Court of Justice decided in 1950 that the supervisory functions provided for in the mandate were to be exercised by the United Nations. [119] The Court subsequently held that the mandate was still in existence and that charges of violations of the mandate and Charter were justiciable before the Court. [120] However, the Court, in effect, reversed its 1962 decision by holding, in 1966, that Liberia and Ethiopia lacked a legal right or interest in South Africa's administration of South West Africa and dismissed their action against South Africa. [121] Thereafter, the General Assembly passed a resolution declaring that South Africa's mandate over South West Africa was terminated, and that ". . . South West Africa comes under the direct responsibility of the United Nations." [122] The Republic of South Africa, however, continues to exercise jurisdiction

111. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).

112. [1951] 3 U.S.T. 3169, T.I.A.S. 2490, 136 U.N.T.S. 45 (1951).

113. 25 *Dep't State Bull.* 455, 463 (1951).

114. For an excellent discussion of the Okinawan reversion, *see* Albertson, *The Reversion of Okinawa: Its Effect on the International Law of Sovereignty over Territory*, 1973 (unpublished thesis, The Judge Advocate General's School of the Army).

115. 33 Stat. 2234.

116. 1 Malloy 358.

117. *Id.* at 360.

118. 61 Stat. 3302, T.I.A.S. 1665, 8 U.N.T.S. 189.

119. Advisory Opinion on the International Status of South West Africa, [1950] I.C.J. 128.

120. South West Africa Cases, Preliminary Objections, [1962] I.C.J. 319.

121. South West Africa Cases, Second Phase, [1966] I.C.J. 6.

122. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, U.N. Doc. A/6316 (1966).

over South West Africa. [123]

f. States may also agree to exercise jurisdiction jointly over a territory. The resulting arrangement, the so-called condominium, may call for a joint or some form of divided administration of the conjoint sovereignty of the parties. Under one such agreement the United Kingdom and France govern the New Hebrides. [124] Neither party may exercise separate authority over the New Hebrides; however, each retains sovereignty over its nationals. Depending on the subject matter, a resident may be subject to one of several courts. The Joint Court administers law binding on all residents. National Courts, of which there are two, administer the pertinent laws of either the United Kingdom or France. Each has jurisdiction over the nationals of the state whose laws it administers. Nationals of other states must opt for the legal system of one of the parties.

g. The types of jurisdictional arrangements based on agreement with the territorial state of most interest and relevance to the military attorney are those concerning U.S. military forces stationed overseas. These agreements—the Military Assistance Advisory Group (MAAG) Agreement, the Military Mission Agreement, and the Status of Forces Agreement (SOFA) will be examined fully in chapter 10.

4-9. Jurisdiction Based on Protection of Certain State, Universal, and Other Interests. *a. Protective Principles.*

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 33. Protective Principle

(1) A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

(2) Conduct referred to in Subsection (1) includes in particular the counterfeiting of the state's seals and currency, and the falsification of its official documents.

Section 33 of *Restatement, Second,* accurately reflects an extraterritorial theory of jurisdiction known as the protective principle. An accepted, but ill-defined jurisdictional concept, this theory stands for the proposition that a state may exercise its jurisdiction over a national of another country who commits a particular act in his or a third state. The necessary jurisdictional link lies in the fact that the act is one directed against and adversely affecting particular interests of the state exercising this form of jurisdiction. [125]

(1) A concise explanation of the U. S. view of the protective principle, as well as a clearly articulated distinction between this concept and the objective territorial principle, is found in the following case.

UNITED STATES v. PIZZARUSSO
United States Court of Appeals, Second Circuit, 1968.
388 F.2d 8 [126]

MEDINA, CIRCUIT JUDGE. This case is of interest because it brings before this Court for the first time the question of the jurisdiction of the District Court to indict and convict a foreign citizen of the crime of knowingly making a false statement under oath in a visa application to an American consular official located in a foreign country, in violation of 18 U.S.C. Section 1546. [1] Supreme Court cases give some guidance but none of them passes on this question directly. [2] A Ninth Circuit decision, Rocha v. United States, 288 F.2d. 545 (9th Cir.), cert. denied 366 U.S. 948, 81 S.Ct. 1902, 6 L.Ed.2d 1241 (1961), is in point but we sustain jurisdiction on the basis of somewhat different reasons.

The indictment charges that on March 4, 1965 Jean Philomena Pizzarusso wilfully made under oath a number of false statements in her "Application for Immigrant Visa and Alien Registration" at the American Consulate, Montreal, Canada. Each of these false statements was patently material to the matter in hand. For example: she falsely swore that since her sixteenth birthday her only places of residence for six months or more had been London, England and Montreal, Canada; she falsely swore that she had been in the United States only for short visits for pleasure; she falsely swore that she had never been arrested, and so on. Although at all times pertinent to this case she was a citizen of Canada, she was taken into custody in the Southern District of New York on April 18, 1966.

Upon the issuance of the visa and by its use Mrs. Pizzarusso immediately entered the territory of the United States, but this fact is not alleged in the indictment nor required by the terms of the statue, nor is it material, as we find the crime was complete when the false statements were made to an American consular official in Montreal. We shall return later to this feature of the case.

The evidence to sustain the charge is so ovewhelming that we shall not pause to discuss it. Indeed, the only contention made on this appeal is that the District Court lacked jurisdiction to indict appellant and convict her of the crime alleged. [3] As we find no lack of jurisdiction, we affirm the judgment. Our reasons follow.

. . .

International law has recognized, in varying degrees, five bases of jurisdiction with respect to the enforcement of the criminal law. See Harvard Research In International Law, Jurisdiction with Respect to Crime, 29 Am.J.Int'l L.Spec.Supp. 435, 445 (1935) (hereinafter cited as Harvard Research). Thus both the territoriality and nationality principles under which jurisdiction is determined by either the situs of the crime or the nationality of the accused, are universally accepted. The third basis, the protective principle, covers the instant case. By virtue of this theory a state "has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." Restatement (Second), Foreign Relations, Section 33 (1965). See also Harvard Research Section 7. [5]

Traditionally, the United States has relied primarily upon the territoriality and nationality principles, Harvard Research at p. 543, and judges have often been reluctant to ascribe extraterritorial effect to

123. The U.N. and many other states now refer to South West Africa as Namibia.

124. Protocol respecting the New Herbrides, Aug. 6, 1914, [1922] Gr. Brit. T.S. 7, Cmd. 1681, 10 L.N.T.S. 333.

125. *C. Hyde, International Law,* 804-07 (2d rev. ed. 1945).

1. Fraud and misuse of visas, permits and other entry documents: "Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—shall be fined not more than $2,000 or imprisoned not more than five years, or both."

2. *United States v. Bowman,* 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922), cited by appellee as authority for upholding jurisdiction in the instant case is distinguishable, as that case involved imposition of criminal liability on United States citizens for acts committed abroad.

3. Appellant received a one-year suspended sentence and was placed on probation for two years.

5. The other two principles are universality, where jurisdiction is determined by the custody of the person committing the offense and passive personality, where jurisdiction is determined by reference to the nationality of the person injured. Harvard Research at p. 445.

126. Cert. denied, 392 U.S. 936, 88 S.Ct. 2306 (1968).

statutes. See, e.g., American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). Nonetheless, our courts have developed what has come to be termed the objective territorial principle as a means of expanding the power to control activities detrimental to the state. This principle has been aptly defined by Mr. Justice Holmes in Strassheim v. Daily, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 (1911). "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect * * *." See also Judge Learned Hand's opinion in United States v. Aluminum Co. of America, 148 F.2d. 416 (2d Cir. 1945). Underlying this principle is the theory that the "detrimental effects" constitute an element of the offense and since they occur within the country, jurisdiction is properly invoked under the territorial principle. See also Restatement (Second), Foreign Relations Law Section 18.

However, the objective territorial principle is quite distinct from the protective theory. Under the latter, all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a "potentially adverse effect" upon security or governmental functions, Restatement (Second) Foreign Relations Law, Comment to Section 33 at p. 93, and there need not be any actual effect in the country as would be required under the objective territorial principle. Courts have often failed to perceive this distinction.

Thus, the Ninth Circuit, [6] in upholding a conviction under a factual situation similar to the one in the instant case, relied on the protective theory, but still felt constrained to say that jurisdiction rested partially on the adverse effect produced as a result of the alien's entry into the United States. The Ninth Circuit also cited Strassheim and Aluminum Company of America as support for its decision. With all due reference to our brothers of the Ninth Circuit, however, we think this reliance is unwarranted. A violation of 18 U.S.C.A. Section 1546 is complete as the time the alien perjures himself in the foreign criminal sanctions of Section 1546 will never be enforced unless the defendant enters the country, but entry is not an element of the statutory offense. Were the statute re-drafted and entry made a part of the crime we would then be presented with a clear case of jurisdiction under the objective territorial principle.

Statutes imposing criminal liability on aliens for committing perjury in United States Consulates in foreign countries have been in existence for over one hundred years, see, e.g., 22 U.S.C. Section 1203, which was derived from an act of 1856, and oftentimes courts have routinely sustained convictions without even considering the jurisdictional question. See, e.g., United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956). [7] Only one court has ever held that the United States did not have jurisdiction to proceed against an alien under the legislation governing this case. United States v. Baker, 136 F. Supp. 546 (S.D.N.Y. 1955). In Baker it was conceded that there was authority for deporting an alien for making perjurious statements to a United States Consul, United States ex rel. Majka v. Palmer, 67 F.2d 146 (7th Cir. 1933), but the court thought the imposition of criminal sanctions was "far different" from deportation and dismissed the indictment. We would have sustained jurisdiction in Baker had the case been before us, and in this view we are apparently joined by the judge who decided Baker, since he presided over the instant case in the court below.
Affirmed.

(2) In *United States v. Rodriguez,* [127] the defendant aliens were charged with making false statements in immigration applications while they were outside the United States. The court discussed the territorial and the protective principles in the following terms:

> Acts committed outside the territorial limits of the State but intended to produce, or producing, effects within the boundaries of the State are subject to penal sanctions; . . . Where the effect is felt by private persons within the State, penal sanctions rest on the "objective," or "subjective," territorial principle . . . Where the effect of the acts committed outside the United States is felt by the government, the protective theory affords the basis by which the state is empowered to punish all those offenses which impinge upon its sovereignty, wherever these actions take place and by whomever they may be committed. The results of such a theory are, in many ways, similar to those reached in the Strassheim case . . . where the court directed its attention to the objective results of the criminal act and the location of its effect. Any act which would offend the sovereignty of a nation must, of necessity, have some effect within the territorial limits of that state or there would be no adverse effect upon the government justifying a penal sanction. [128]

(3) The court in *Pizzarusso* holds the principle to be applicable because the conduct of the aliens abroad had a "potentially adverse effect" upon the governmental function. The Court in *Rodriguez* holds the principle applicable because the conduct of the aliens abroad of necessity had "some effect" upon the governmental function in the United States. It may be that the difference between the two formulations is metaphysical. What is important, however, is the willingness of both courts to use the protective principle. The alternative in both cases would have been to hold that an effect in the territory had taken place when the aliens entered the United States. Had the courts involved adopted this position, they would have reflected a traditional attitude towards the protective principle, for little use has been made of it in the United States in the past. A manifestation of this traditional attitude can be found in legislation concerning counterfeiting: it is a Federal offense to counterfeit foreign currency in the United States, but not a Federal offense to counterfeit United States currency abroad.

(4) It is beyond doubt that the protective principle applies to crimes such as the counterfeiting of state seals, currency, stamps, passports or other public documents. Most states punish these offenses wheresoever and by whomever committed. The danger, however, is that the principle can be abused due to its susceptibility to practically unlimited expansion. The danger is particularly great when the principle is formulated in broad terms, as it often is, and made to cover any crime against the security, territorial integrity, or political independence of the state.

b. Nationality of the Victim. This so-called "passive personality" theory has failed to gain universal acceptance and has always been challenged by the United States. The concept is based on the proposition that a state may exercise its jurisdiction on the basis of the nationality of the victim. Two cases serve to demonstrate this principle.

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[6]. *Rocha v. United States,* 288 F.2d 545 (9th Cir.), *cert. denied,* 366 U.S. 948, 81 S.Ct. 1902, 6 L.Ed.2d 1241 (1961).

[7]. One other court has upheld jurisdiction under a statute comparable to 18 U.S.C. Section 1546 on an alternative ground. The District court for the Southern District of California, relying in part on the territorial principle, sustained the conviction of an alien for false swearing in a visa application, on the somewhat novel theory that the United States Consulate was part of United States territory. *United States v. Archer,* 51 F. Supp. 708 (1943).

[127]. 182 F. Supp. 479 (1960). Affirmed sub nom. Rocha v. United States, 288 F.2d 545 (1961), with respect to the substantive counts of the indictment, reversed as to conspiracy counts not at issue in Rodriguez, cert. denied, 366 U.S. 948, 81 S.Ct. 1902 (1961).

[128]. 182 F. Supp. 488-89.

(1) In the *Lotus Case* [129] Turkey tried and convicted a French national on the basis of a Turkish criminal statute which provided that Turkey might try and punish any individual who injured a Turkish citizen. This particular case involved a collision between a French vessel, the Lotus, and a Turkish ship, the Boz-Kourt, five to six miles off the coast of Turkey. Upon the docking of the Lotus in Turkey, a Lt. Demons, officer of the watch on the Lotus on the day of the crash, was arrested and convicted of manslaughter on the basis, partially, of the above-mentioned Turkish statute. As a result of strong French protests, Turkey agreed to submit the question of the legality of Lt. Demons' conviction to the Permanent Court of International Justice. The Court, in upholding the conviction, decided the case on other grounds, one of which was the fact that, as the Turkish citizens killed in the collision were abroad a Turkish vessel, Turkey had territorial jurisdiction. The majority of the Court did not, however, hold the Turkish statute in question to be invalid. [130] In his dissenting opinion in the *Lotus* case, Judge Moore stated that basing jurisdiction on the nationality of the victim meant that:

> . . . . the citizen of one country, when he visits another country, takes with him for his "protection" the law of his own country and subjects those with whom he comes into contact to the operation of that law. . . . It is evident that this claim is at variance not only with the principle of exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law. . . . [131]

(2) The *Cutting incident* of 1886-88 arose out of the Mexican prosecution of an American citizen who had allegedly libeled a Mexican by means of a statement published in a Texas newspaper. Judge Moore, then a State Department Officer, had prepared the *Report on Extraterritorial Crime and the Cutting Case,* [132] on which subsequent United States protests were based. The Mexican Government relied on Article 186 of the Mexican Penal Code, which provided, in part, that "[p]enal offenses committed in a foreign country . . . by a foreigner against Mexicans, may be punished . . . [in Mexico] according to its laws," if the accused was present in Mexico, if he had not been "definitively tried in the country where the offense was committed," and if the offense was a "penal offense" by the laws of both states. Secretary of State Bayard stated in an instruction dated November 1, 1887, to the United States Charge d'Affaires in Mexico:

> [T]he assumption of the Mexican tribunal, under the law of Mexico, to punish a citizen of the United States for an offense wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government. . . .
>
> . . . It is not now, and has not been contended, by this Government . . . that if Mr. Cutting had actually circulated in Mexico a libel printed in Texas, in such a manner as to constitute a publication of the libel in Mexico within the terms of Mexican law, he could not have been tried and punished for this offense in Mexico. . . .
>
> As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction made in Article 186 of the Mexican penal code can be justified. . . .
>
> It has constantly been laid down in the United States as a rule of action, that citizens of the United States cannot be held answerable in foreign countries for offenses which were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state. When a citizen of the United States commits in his own country a violation of its laws, it is his right to be tried under and in accordance with those laws, and in accordance with the fundamental guaranties of the Federal Constitution in respect to criminal trials in every part of the United States.
>
> To say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite criminal responsibility. . . . [133]

c. Universal Jurisdiction. The last basis of jurisdiction to merit discussion is the "universality" theory. As in the case of "passive personality," this jurisdictional concept enjoys limited acceptance. The only crime to which its applicability appears to be wisely recognized is that of piracy. In this regard, Hackworth writes:

> It has long been recognized and well settled that persons and vessels engaged in piratical operations on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them. This stern rule of international law refers to piracy in its international law sense and not to a variety of lesser maritime offenses so designated by municipal law. [134]

The 1958 Geneva Convention on the High Seas [135] contains specific articles pertaining to piracy and the universal right of states to apprehend and punish those guilty of this crime.

> Art. 14. All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.
>
> Art. 19. On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.
>
> Art. 21. A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

(1) The characteristic of piracy as a crime of univer-

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129. Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9 (hereinafter cited as "Lotus" Case).

130. The Geneva Convention on the High Seas, 13 U.S.T. 2312 (1958) (hereinafter cited as High Seas Convention) provides in Article 11 that penal or disciplinary action arising out of collision or other incident of navigation may be instituted only before judicial or administrative authorities either of the state of which the individual proceeded against is a national, or the flag state of the vessel on which he served. Ships may be arrested or detained, even as a measure to aid investigation, only by authorities of the flag state. Only the state which issued a master's certificate or other license may revoke the certificate.

131. "Lotus" Case, *supra,* note 129 at 92.

132. [1887] U.S. For. Rel. 757.

133. *Id.* at 751.

134. 2 *G. Hackworth, Digest of International Law* 681 (1941).

135. Geneva Convention on the High Seas, *supra,* note 130.

sal interest is that any state apprehending the alleged pirate outside the territory of any other state, that is, upon the high seas, may exercise prescriptive and enforcement jurisdiction over him. [136]

(2) Certain other crimes are universally, or almost universally, condemned and made the subject of multilateral international conventions aimed at their elimination. These include the slave trade, to which Article 13 of the Convention on the High Seas [137] makes reference. This particular provision commits the parties to this Agreement to adopt effective measures to prevent and punish the transport of slaves in vessels authorized to fly their flags and to prevent the unlawful use of their flags for this purpose. Under Article 22(1)(b) of this Convention, a warship may board a foreign merchant vessel on the high seas if there is reasonable grounds for suspecting that the latter is engaged in the slave trade.

(3) In addition to slave trade, traffic in women for prostitution, traffic in narcotic drugs, and war crimes have been the subject of similar universal condemnation. However, with the possible exception of war crimes, universal interest in the suppression of slavery and these other crimes has not as yet been carried to the point of recognition either in customary law or in international agreements, of the principle of universal jurisdiction that obtains in the instance of piracy. [138]

Section II. CASES OF MULTIPLE JURISDICTION

4-10. General. As indicated by the preceding discussion of the various jurisdictional theories, there do arise cases of dual or multiple jurisdiction. For example, if an Italian citizen commits murder in the United States, the U.S. may exercise jurisdiction on the basis of the *territorial* theory, while Italy may claim jurisdiction on the basis of either the *nationality* or *universality* concept. The jurisdictional complexities can be even further multiplied if the accused has dual nationality, that is, if he has both Italian and Greek citizenship. Finally, still another state may seek to exercise jurisdiction on the basis of the *passive personality* theory. In most instances of dual jurisdiction, the state having the accused in custody will exercise jurisdiction over him. This, as noted above, results from the fact that, subject to specific agreement, the police of one state may not *legally* exercise their authority in the territory of another. This general rule is, of course, subject to treaties of extradition and other agreements arrived at between states on the diplomatic level.

Section III. JURISDICTION OVER AIRCRAFT AND SPACE VEHICLES

4-11. Jurisdiction Over National Aircraft and Space Vehicles. *a. General.* When the twentieth century began, the techniques of airflight and space exploration were almost all in the future. Little in the way of positive law existed for the regulation of the technology that exploded in the first decade of the century. It is instructive to observe the ways in which international law has been created by a process that either anticipated unpredictable changes or reacted to events that have not been foreseen.

b. Nationality of aircraft and space vehicles.

CONVENTION ON INTERNATIONAL CIVIL AVIATION
Signed at Chicago, December 7, 1944
61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295

Art. 17. Aircraft have the nationality of the State in which they are registered.

Art. 18. An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.

Art. 19. The registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its laws and regulations.

Articles 17 and 19 of the Chicago Convention are often cited as establishing that international law regards each state's granting of its nationality to aircraft as conclusive. [139] Earlier aviation agreements had contained similar provisions. Whether articles 17 and 19 of the Chicago Convention and corresponding provisions of earlier agreements merely codify rules that would be binding as customary international law in the absence of agreement is a question still under debate. [140]

c. Scope of Jurisdiction Over National Aircraft, Space Vehicles, and Persons Thereon.

CONVENTION ON INTERNATIONAL CIVIL AVIATION
Signed at Chicago, December 7, 1944
61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295

Art. 12. Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and the regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time

136. On piracy, *see generally,* Harvard Research in International Law, *Piracy,* 26 *Am. J. Int'l L. Supp.* 739 (1932); Lenior, *Piracy Cases in the Supreme Court,* 25 *J. Crim. L. and Crim'y* 532 (1934); Johnson, *Piracy in Modern International Law,* 43 *Trans. Grot. Soc'y* 63 (1957); the municipal law of a number of states provides for the punishment of so-called *delicta juris gentium* other than piracy on the same basis as the latter. *See* Harvard Research, Criminal Jurisdiction, supra, note 51 at 569-72.

137. High Seas Convention, *supra,* note 130.

138. A strong argument exists that specific provisions of each of the four 1949 Geneva Conventions, to which reference was made in chapter I, establish a "universal" jurisdiction on the part of signatories over "grave breaches" of the Conventions. Each Convention contains similar articles to this effect. In the Geneva Convention Relative to the Treatment of Prisoners of War, these articles 129-131. *See* D.A. Pam 27-1, *Treaties Governing Land Warfare* (December 1956).

139. *See, e.g., M. McDougal, Space Law,* supra, note 39 at 552-54 (1963).

140. Compare, *e.g., id.* at 553-54, with *B. Cheng, The Law of International Air Transport* 130-31 (1962).

under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

d. The International Civil Aviation Organization. The Convention on International Civil Aviation created the International Civil Aviation Organization (I.C.A.O.), an intergovernmental organization, the objectives of which are to "develop the principles and techniques of international air navigation and to foster the planning and development of international air transport." The convention entered into force for the United States on April 4, 1947. As of January 1, 1975, 119 states were parties to the convention, including the United States and the USSR. In 1945 the United States became a party to the International Air Services Transit Agreement. [141] Article 1, section 1, provides the so-called "two freedoms" for scheduled air services:

> Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
>
> (1) The privilege to fly across its territory without landing;
>
> (2) The privilege to land for nontraffic purposes.
>
> The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities.

As of January 1, 1975, 86 states were parties to the Transit Agreement.

(1) There is no widely accepted multilateral treaty which provides for the granting of traffic rights to foreign airlines. Consequently, the operation of international scheduled airlines depends on the consent of the states to or through the territory of which they fly.

(2) The possession of these privileges by a foreign airline depends either on a unilateral grant by a state, or on a bilateral agreement between the state of the airline and the other state. Since World War II, close to a thousand bilateral agreements concerning these privileges have been made between the states of the world. Before World War II, the United States government generally permitted its airlines to obtain operating rights abroad through their own arrangements with the foreign governments concerned. In that period, few governments outside North America desired reciprocal rights in the United States for their airlines. During the war, however, the policy of the United States was changed in favor of operating rights abroad being obtained by inter-governmental agreements, whenever feasible, and the United States has bilateral air transport agreements with some fifty nations. Such agreements are concluded as "executive agreements" rather than "treaties," and are negotiated by teams composed of officials of the Department of State and Civil Aeronautics Board, with the Department of State having the primary responsibility. A representative of the United States air carriers sits in during the negotiations as an observer. [142]

4-12. Jurisdiction Over Foreign Aircraft and Space Vehicles. *a. Sovereignty Over Airspace.*

CONVENTION ON INTERNATIONAL CIVIL AVIATION
Signed at Chicago, December 7, 1944
61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295

> Art. 1. The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.
>
> Art. 2. For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, or mandate of such State.
>
> Art. 5. Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit nonstop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.
>
> Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharges takes place to impose such regulations, conditions, or limitations as it may consider desirable.
>
> Art. 6. No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

(1) The Convention goes on to provide a legal framework regulating flights of civil aircraft (excluding state aircraft, which include aircraft used in military, customs, and police services). Under Article 3, state aircraft are not permitted to fly over or land in the territory of a state without authorization by special agreement or otherwise.

(2) The question is often raised as to whether aircraft enjoy a right of "innocent passage" through the air space of a foreign state in the absence of the latter's express agreement. [143] The International Air Services Transit Agreement [144] grants limited transit and landing rights to scheduled aircraft. As a matter of practice, no state concedes or claims a right of innocent passage for aircraft in the air space of another state, absent international agreement. Statements made by delegates to the Geneva Conference on the Law of the Sea (1958) indicate a widespread conviction that aircraft enjoy no right of innocent passage, such comparable privileges as exist being

141. 49 Stat. 1693; 84 U.N.T.S. 389.

142. Lissitzyn, *Bilateral Agreements on Air Transport,* 30 *J. Air L. & Com.* 248 (1964). *See* also chap. 8, *infra.*

143. On the right of innocent passage of vessels through a foreign state's territorial waters, *see* pages 4-31 thru 4-33, *infra.*

144. Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389, E.A.S. 487.

solely the result of international agreement. [145]

(3) Another question often posed is whether a right of "entry in distress' exists for aircraft. Article 25 of the Convention on International Civil Aviation provides: "Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable. . . ." Whether the foregoing provision imposes any obligation with respect to state aircraft, or whether states not parties to the Chicago Convention are under any similar obligation with respect to aircraft of any type, are still open questions. The *ad hoc* committee of the General Assembly on the peaceful uses of outer space, however, "considered that certain substantive rules of international law already exist concerning rights and duties with respect to aircraft and airmen landing on foreign territory through accident, mistake or distress. The opinion was expressed that such rules might be applied in the event of similar landings of space vehicles." [146]

(4) A problem related to that of landing rights is raised when an aircraft enters another state's air space because of either navigational error or because it is forced by bad weather to do so. In 1946 five United States airmen were killed when their unarmed transport was shot down over Yugoslavia. The United States claimed that the plane had been forced by bad weather to deviate from its course. Yugoslavia, however, denied that there was bad weather in the vicinity of the incident and alleged that the aircraft had ignored landing signals. In paying an indemnity, "inspired by human feelings," to the United States on behalf of the families of the airmen, Yugoslavia reserved its position on the facts. [147] Numerous subsequent disputes involving a number of Western and Soviet-bloc states were characterized by disagreement over factual issues, such as the location of aircraft, the reason for their presence in foreign territory, and whether they had been warned to land. [148] The conclusion has been offered, however, that:

> . . . there is a right of entry for all foreign aircraft, state or civil, when such entry is due to distress not deliberately caused by persons in control of the aircraft and there is no reasonably safe alternative. . . . Foreign aircraft and their occupants may not be subjected to penalties or to unnecessary detention by the territorial sovereign for entry under such circumstances or for entry caused by a mistake, at least when the distress or mistake has not been due to negligence chargeable to the persons in control of the aircraft. [149]

b. Sanctions Against Aircraft Entering Airspace. Does the fact that a state has jurisdiction to prescribe law governing the airspace above it mean that it has freedom of choice in the methods used to exercise that jurisdiction? Does a state have a right to shoot down any plane that enters its airspace? In 1955 an El Al Israel Airlines Ltd. commercial airplane, with passengers aboard, entered the airspace of Bulgaria for "some unknown reason." Bulgarian fighter aircraft fired at the plane; it exploded in flight and crashed in Bulgarian territory. All 58 persons aboard were killed, including American and British passengers. Proceedings were instituted against Bulgaria in the International Court of Justice by Israel, the United States and the United Kingdom, protesting the inhuman and excessive use of force by the Bulgarians, the lack of adequate warning, the failure of Bulgaria to recognize the right of entry in distress. The cases did not proceed to the merits because of Bulgaria's having failed to consent to the jurisdiction of the Court. [150]

(1) In May 1960 a United States U-2 reconnaissance plane was shot down while flying over the Soviet Union at an altitude of approximately 60,000 to 68,000 feet. The United States did not protest the Soviet action; nor did it protest the trial, conviction and imprisonment for espionage of the American pilot. However, issues other than "technical" trespass of Soviet airspace were involved in the U-2 incident. The criminal charge against the American pilot in the Soviet Union was espionage, as defined in the domestic law of that state. In the tradition of the international spy, fictional and real, the espionage agent is " out in the cold." [151] When Soviet fire brought down a United States RB-47 two months later, however, the United States made vigorous protests on the ground that the aircraft had been over the high seas at the time of its interception. The Soviet Union claimed that the American plane had deliberately intruded into Soviet airspace and had disobeyed an order to land. [152]

(2) It is an accepted principle of international law that aircraft of one nation are not permitted to fly over another without the other's consent and that they may be obliged to land if they stray. But, the degree of force which a country may use to enforce an order to land would depend on the facts of any specific incident and the reasonableness of the belief that the intruder aircraft constituted a threat. Subsequent to the 1967 conflict in the Middle East, Israel claimed sovereignty over the Sinai and the airspace above it. On February 21, 1973, a Libyan Arab Airlines passenger plane flying from Tripoli to Cairo apparently experienced navigational difficulties, wandered 100 miles east of its normal track and was intercepted by two F-4 fighters of the Israeli Air Force over the Sinai. The Libyan airliner was visually signaled by the interceptors to follow them and the airliner lowered its landing gear but shortly thereafter retracted the landing gear and continued straight ahead. The lead interceptor then fired a

145. *See*, e.g., 3 U.N. Conf. on the Law of the Sea, *Off. Rec.* 8, 104 (United Kingdom), 26 (United States), 90-91 (Canada) (1958); 1 *Id.* 336 (comments by International Civil Aviation Organization) (1958).

146. U.N. Doc. A/4141, at 67 (1959).

147. *See* Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 *Am. J. Int'l L.* 559, 569-73 (1953).

148. *Id.* at 573-85.

149. *Id.* at 588-89.

150. 9 *M. Whiteman, Digest of International Law* 326-340 (1968).

151. *See* Wright, *Legal Aspects of the U-2 Incident*, 54 *Am. J. Int'l L.* 836, 838 (1960).

152. *See* Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 *Am. J. Int'l L.* 135 (1962).

burst of tracer ammunition across the flight path of the Libyan craft and again gave the visual signal to "follow me." The airliner did not comply with this command. The final result of the incident was that after several attempts to compel the airliner to land, the Israeli pilot fired at the starboard wing roof of the plane. The airliner then attempted a forced landing in the desert but was unsuccessful, the ensuing crash killing over 100 passengers and crew. [153] While publicly regretting the tragedy, the Israelis maintained that their actions were motivated by self-defense and were a legitimate exercise of their sovereign power. The Israeli government characterized the incident as the result of a "tragic series of mistakes" and stated that it would not have forced the plane down if it knew the true circumstance but that, at the time, it had reason to fear a possible "suicide bombing mission" on an Israeli town or military installation by an airliner loaded with explosives. [154]

c. Security Zones. To what extent may security considerations justify the extension by a state of its jurisdiction into zones of airspace contiguous to those in which it enjoys sovereignty? The United States (since 1950) and Canada (since 1951) have promulgated regulations establishing Air Defense Identification Zones (ADIZ), extending out some points several hundred miles over the high seas. Foreign aircraft entering such zones are required to file flight plans and to make periodic position reports. The United States regulations appear to be normally applicable to foreign aircraft only if they are bound for the United States, but there is no comparable limitation in the Canadian regulations. During the Algerian conflict, France established a "zone of special responsibility," extending some eighty miles from the coast of Algeria, within which aircraft were required to file detailed information regarding their flight, to stay within assigned corridors, and to maintain contact with ground identification stations. [155]

4-13. Offenses Aboard or Against Aircraft. *a.* The special maritime and territorial jurisdiction of the United States is defined in 18 U.S.C. § 7. In *United States v. Cordova,* [156] it was held that an aircraft was not a "vessel" within the meaning of 18 U.S.C.A. § 7(1) and that a United States court therefore had no jurisdiction to try and punish a defendant accused of assaulting certain persons (including the pilot) on a United States aircraft flying over the high seas between Puerto Rico and New York. Congress thereupon amended 18 U.S.C. § 7 by an act of July 12, 1952 (69 Stat. 589), adding a new subsection (5), so that the "special maritime and territorial jurisdiction of the United States" now includes:

> Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

Note that sec. 501(b) of the Federal Aviation Act of 1958 [157] permits the registration in the United States only of aircraft owned by citizens of the United States and not registered in any foreign country. United States citizens are not forbidden, however, to own or otherwise hold interests in aircraft that are registered in a foreign country.

b. Hijacking. A passenger in a commercial airplane threatens to explode a bomb which, he asserts, is in a handbag he is carrying. The pilot diverts the flight of the plane to a destination demanded by the passenger. The passenger leaves the plane at that destination and the plane is flown to its original destination. Even in this simple example there may be a number of problems of domestic and international law. The plane may be registered in the United States or in some other country. The passenger may hijack the plane on the ground in New York, while it is over the Atlantic on its way to London, or while it is on the ground in London. The hijacker may be a U.S. national or the national of another state. He may or may not eventually return to the United States and thus be subject to its enforcement jurisdiction. The United States may ask the government of the foreign state in which the hijacker is located to return him to the United States by extradition proceedings. Additionally, the government of a state to which the hijacker has fled may decide to try him, even though that state has had no connection with the event other than having become a place of refuge.

(1) The 1963 Tokyo Convention. [158] This convention was drafted under the auspices of the International Civil Aviation Organization and signed in 1963. It entered into force for the United States on December 4, 1969. Seventy-four states were parties to the Convention on January 1, 1975. The Convention is concerned broadly with the question of crimes on board aircraft in flight, on the surface of the high seas, or any other area outside the jurisdiction of a nation state. A special purpose of the Convention is to provide that there be no lapse of jurisdiction with respect to such crimes. To that end, Article 3 provides that at least one state shall have jurisdiction:

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offenses

153. For an in-depth factual account of this incident, *see Aviation Week and Space Technology,* July 9, 1973, at 51; July 16, 1973, 85; and July 23, 1973, at 83.

154. N.Y. Times, Mar. 2, 1973, § 1, at 4, col. 1.

155. *See M. McDougal, Space Law, supra,* note 39 at 307-11; MacChesney, *Situation Documents and Commentary on Recent Developments in the International Law of the Sea* 577-600 in *Naval War College, International Law Situation and Documents* 1956; *J. Murchison, The Contiguous Air Space Zone in International Law* (1957); Martial, *State Control of the Air Space Over the Territorial Sea and the Contiguous Zone,* 30 *Can. Bar Rev.* 245 (1952).

156. 89 F. Supp. 298 (1950).

157. 49 U.S.C.A. § 1401(b).

158. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 20 U.S.T. 2941 (Documentary Supplement) (1969).

committed on board aircraft registered in such State.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

(a) the offence has effect on the territory of such State;

(b) the offence has been committed by or against a national or permanent resident of such State;

(c) the offence is against the security of such State;

(d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;

(e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

The Convention deals in detail with the powers of the aircraft commander to "off-load" and to restrain offenders or suspected offenders. Article 11 deals specifically with hijacking:

Article 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

The provision on extradition (Article 16) is relatively weak:

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

(2) The 1970 Hague Convention.[159] The Hague Convention was a product of the work of the ICAO. It was approved at a diplomatic conference at The Hague in 1970 and entered into force for the United States on October 14, 1971. Fifty-nine states were parties to the Convention on January 1, 1975. In contrast to the Tokyo Convention, the Hague Convention is directed narrowly to the question of hijacking. Its major provisions create universal jurisdiction for the prosecution of hijackers and impose an obligation on the states either to prosecute the hijacker or to extradite him:

Article 1

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offence (hereinafter referred to as "the offence").

Article 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

(a) when the offence is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender 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 or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 7

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.

Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8

1. The offence shall be deemed to be included as an extraditable offence in any extradition treaty existing between Contracting States. Contracting States undertake to include the offence as an extraditable offense in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may as its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

4. The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.

(3) U. S. legislation relevant to the 1970 Hague Convention follows:

U.S. FEDERAL AVIATION ACT OF 1958 (AS AMENDED), SECTION 902
75 Stat. 466 (1961), 49 U.S.C.A. § 1472

Title 49, Section 1301.

As used in this chapter, unless the context otherwise requires—

. . . .

(32) The term "special aircraft jurisdiction of the United States" includes the following aircraft while in flight—

(a) civil aircraft of the United States;

(b) aircraft of the national defense forces of the United States; and

(c) any other aircraft—

(i) within the United States, or

(ii) outside the United States which has its next scheduled destination or last point of departure in the United States provided that in either case it next actually lands in the United States. For the purpose of this definition, an aircraft is considered to be in flight from the moment when power is applied for the purpose

159. Convention for the Suppression of Unlawful Seizure of Aircraft, T.I.A.S. 7192 (Documentary Supplement).

of takeoff until the moment when the landing run ends.

Title 49, Section 1472.

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

(j) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance of such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life.

(k) (1) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act which, if committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of Title 18, would be in violation of [sections defining, *inter alia,* murder, robbery, assault] shall be punished as provided therein.

(2) Whoever, while aboard an aircraft within the special aircraft jurisdiction of the United States, commits an act, which, if committed in the District of Columbia would be in violation of section 9 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," approved July 29, 1892, as amended (D.C. Code, sec. 22-1112), shall be punished as provided therein.

c. Sabotage. The Sabotage Convention [160] was adopted by a Conference on International Air Law at Montreal in 1971. It entered into force on January 26, 1973, and as of January 1, 1975, had 59 signatories. The scope of the convention is described by the head of the U.S. delegation to the conference as follows:

Although this convention is similar to the Hijacking Convention in many respects, it is significantly distinct: It does not, basically, require states to define any new offenses—it covers acts which already are common crimes; it does not, for the most part, establish new crimes to fall within the extradition process—most of the acts already are extraditable crimes. These were important elements of the Hijacking Convention. It might be said that states could punish offenders or extradite them without this convention.

What this convention does is to impose an obligation on states *requiring* them to prosecute or extradite offenders. It serves as a warning to any person who contemplates such acts that the international community has responded with unanimity to condemn such acts. In this respect it is like the Hijacking Convention.

And in an important respect this convention does more than the Hijacking Convention. It covers acts against aircraft in a state's domestic service, even when the acts take place wholly within that same state, if the offender escapes to another state. While this element is not critical for the Hijacking Convention, it is crucial for the effectiveness of the convention we have concluded, because of the possibility that offenders may escape before they are discovered. This convention declares that no one who sabotages a civil aircraft—whether in domestic or international service—no one who places a bomb on board such an aircraft, no evildoer who commits violence aboard such an aircraft in flight, no criminal of this character shall ever find sanctuary anywhere in the world, no matter how deviously he may seek to evade retribution for his deeds. The parties to this convention have declared that this despicable criminal shall be pursued without respite. [161]

4-14. Jurisdiction Over Vessels and Individuals Thereon. *a.* The importance of international norms comprising the Law of the Sea becomes increasingly apparent, as there is now under way a significant struggle over the control and use of the world's oceans. There exists an ongoing debate over whether navigation, fishing, and the extraction of minerals can be engaged in freely by all states in all parts of the oceans, or whether countries can carve out areas of the sea for their exclusive use and control. There is agreement that a state has jurisdiction over its "internal waters" and an area of the sea adjoining the coastline, the "territorial sea." There is no agreement, however, as to how wide an area may be lawfully claimed as territorial sea. The United States, though claiming a territorial sea of three miles, has indicated it might accept a twelve-mile limit. In contrast, while the claims of most states do not exceed twelve miles, a few countries claim an area as extensive as 200 miles. Beyond the territorial sea, there are claims to more limited use of the oceans, with respect to so-called contiguous zones, and beyond these zones, with respect to portions of the seabed such as the continental shelf. Moreover, though an older body of law governs many of the uses of the high seas, new law is being formulated with respect to the bed of the deep sea.

(1) The 1958 Geneva Conference on the Law of the Sea has had a significant impact on the development of legal norms in this area. The conventions emanating from that conference variously codified portions of the customary law or created new law. Not all of the problems that were then perceived were solved by the conventions, however, The conference was unable, for example, to agree on the breadth of the territorial sea. Moreover, technological developments have created new problems about the exploitation of the seabed. [162]

(2) In 1970, the General Assembly of the United Nations decided to convene a third conference on the law of the sea in 1973. Accordingly, the task of preparing draft articles was assigned to the Assembly's Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. The conference, scheduled for 1973, actually convened in 1974 in Caracas, Venezuela. As a result of little substantive progress, further sessions were held in 1975 and 1976. In 1976 the conference issued a Revised Single Negotiating Text and recommended that another session be held in

160. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, T.I.A.S. 7570 (Documentary Supplement).

161. 65 *Dep't State Bull.* 464 (1971).

162. The conventions are: Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205, 15 U.S.T. 1606; Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312; Convention on the Continental Shelf, 49 U.N.T.S. 311, 15 U.S.T. 471; and Convention on Fishing and Conservation of the Living Resources of the High Seas, 17 U.S.T. 138, 559 U.N.T.S. 285.

1977. [163] The Revised Single Negotiating Text may prove to be the single most important document regarding the law of the sea since the 1958 Geneva Convention in terms of its influence on state practice, whether by way of an ultimate treaty produced by the conference or by the effect it will have on how the law is regarded by states even without a treaty.

4-15. Nationality of Vessels.

CONVENTION ON THE HIGH SEAS
Geneva, April 28, 1958
13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82

Art. 4. Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Art. 5. (1) Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

(2) Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Art. 6. (1) Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

(2) A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

The report of the Senate Committee on Foreign Relations explained the final version of Article 5 as follows:

The International Law Commission did not decide upon a definition of the term "genuine link." This article as originally drafted by the Commission would have authorized other states to determine whether there was a "genuine link" between a ship and the flag state for purposes of recognition of the nationality of the ship.

It was felt by some states attending the Conference on the Law of the Sea that the term "genuine link" could, depending upon how it were defined, limit the discretion of a state to decide which ships it would permit to fly its flag. Some states, which felt their flag vessels were at a competitive disadvantage with vessels sailing under the flags of other states, such as Panama and Liberia, were anxious to adopt a definition which states like Panama and Liberia could not meet.

By a vote of 30 states, including the United States, against, 15 states for, and 17 states abstaining, the provision was eliminated which would have enabled states other than the flag state to withhold recognition of the national charter of a ship if they considered that there was no "genuine link" between the state and the ship.

Thus, under the Convention on the High Seas, it is for each state to determine how it shall exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag. The "genuine link" requirement need not have any effect upon the practice of registering American built or owned vessels in such countries as Panama or Liberia. The existence of a "genuine link" between the state and the ship is not a condition of recognition of the nationality of a ship; that is, no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state. Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a "genuine link" existed. [164]

4-16. Scope of Jurisdiction Over National Vessels and Persons Thereon. *a.* Control over the movements and activities of national vessels. It is generally recognized that it is ". . . unquestioned practice that the state which is responsible for a ship's conformity with international law has a competence equal to its responsibility and may control the movement and activities of its ships as its interpretation of community obligations and its national policies require." [165] An example of this authority, as exercised by the United States, follows.

U.S. DEP'T OF COMMERCE, TRANSPORTATION ORDER
T-2 (AMENDED)

Section 1. Prohibition of movement of American carriers to Communist China; North Korea, or to the Communist-controlled area of Viet Nam.

No person shall sail, fly, navigate, or otherwise take any ship documented under the laws of the United States or any aircraft registered under the laws of the United States to any Chinese Communist port; North Korea, any other place under the control of the Chinese Communist, or to the Communist-controlled area of Viet Nam.

Section 2. Prohibition on transportation of goods destined for Com-

163. For a concise discussion of the third Conference and the unresolved issues, *see* Stevenson and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 *Am. J. Int'l L.* 1 (1975); *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 *Am. J. Int'l L.* 763 (1975); *The Third United Nations Conference on the Law of the Sea: The New York Sessions*, 71 *Am. J. Int'l L.* 247 (1977). For the 1976 Revised Single Negotiating Text, *see* U.N. Doc. A/CONF. 62/WP.8/REV 1, May 6, 1976. The negotiations at the Third Conference are basically deadlocked over three critical issues: a regime for exploiting the resources of the deep seabed, the rights of landlocked and geographically disadvantaged states, and the legal status of the agreed 200-mile economic zone. Regarding the latter issue, the Revised Single Negotiating Text, *id.*, in providing for a 200-mile zone, reflects what had essentially become a fait accompli as a result of the tide of state claims in recent years running to approximately this extent. In March of 1977, the United States began to roll with this tide by claiming such a zone in order to control foreign fishing within 200 miles of U.S. coasts. *See Fishery Conservation and Management Act*, P. L. 94-265, 90 STAT 331 (1 March 1977). Since then, states, such as Canada, Denmark, the Federal Republic of Germany, France, India, Norway, Pakistan, South Africa, the U.K., and the U.S.S.R. have declared their intent to claim such zones regardless of the outcome of the Third Conference. Unresolved, however, is the issue concerning the scope of "national jurisdiction" in the zone. One group of states, mostly South American, contend that such jurisdiction should be total, making the zone in effect a territorial sea in which other countries only enjoy such rights as navigation, overflight, and communication. Another group, mostly maritime nations, want to limit coastal state jurisdiction to a right to exploit the natural resources in the zone. They would limit the territorial sea to 12 miles and would define the remainder of the 200-mile zone as part of the high seas, subject only to certain economic rights of the coastal state. Still another position, perhaps a popular middle ground, would classify this area as neither high seas nor territorial sea but subject to "national jurisdiction," except for the freedoms of navigation and overflight and the right to lay cables.

164. Executive Report No. 5—Law of the Sea Convention, 106 Cong. Rec. 11189, 90, 86th Cong., 2d Sess., 1960. *See generally, M. McDougal & W. Burke, The Public Order of the Oceans* 1013-15, 1033-35, 1073-75, 1080-82, 1087-88, 1137-39 (1962) (hereinafter cited as *M. McDougal, Oceans Law), and B. Boczek, Flags of Convenience* 276-83 (1962).

165. *M. McDougal, Oceans Law*, at 1066.

munist China; North Korea, or the Communist-controlled area of Viet Nam.

No person shall transport, in any ship documented under the laws of the United States or in any aircraft registered under the laws of the United States, to Chinese Communist ports, North Korea, any other place under the control of the Chinese Communists, or to the Communist-controlled area of Viet Nam, any material, commodity, or cargo of any kind. . . .

b. Acts committed aboard national vessels.

UNITED STATES v. FLORES
Supreme Court of the United States, 1933
289 U.S. 137, 53 S.Ct. 580, 77 L.Ed. 1086

JUSTICE STONE: By indictment found in the District Court for Eastern Pennsylvania it was charged that appellee, a citizen of the United States, murdered another citizen of the United States upon the Steamship Padnsay, an American vessel, while at anchor in the Port of Matadi, in the Belgian Congo, a place subject to the sovereignty of the Kingdom of Belgium, and that appellee, after the commission of the crime, was first brought into the Port of Philadelphia, a place within the territorial jurisdiction of the District Court. . . . [T]he Padnsay, at the time of the offense charged, was unloading, being attached to the shore by cables, at a point 250 miles inland from the mouth of the Congo River.

The District Court . . . sustained a demurrer to the indictment and discharged the prisoner on the ground that the court was without jurisdiction to try the offense charged. 3 F. Supp. 134. The case comes here by direct appeal. . . .

Sections 273 and 275 of the Criminal Code, 18 U.S.C. §§ 452, 454 (18 USCA §§ 452, 454), define murder and fix its punishment. Section 272, upon the construction of which the court below rested its decision, makes punishable offenses defined by other sections of the Criminal Code, among other cases, "when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States" or any of its nationals. And by section 41 of the Judicial Code, 28 U.S.C. § 102 (28 USCA § 102), venue to try offenses "committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district," is "in the district where the offender is found, or into which he is first brought." As the offense charged here was committed on board a vessel lying outside the territorial jurisdiction of a state . . ., and within that of a foreign sovereignty, the court below was without jurisdiction to try and punish the offense unless it was within the admiralty and maritime jurisdiction of the United States.

Two questions are presented on this appeal, first, whether the extension of the judicial power of the federal government "to all Cases of admiralty and maritime Jurisdiction," by article 3, § 3, of the Constitution confers on Congress power to define and punish offenses perpetrated by a citizen of the United States on board one of its merchant vessels lying in navigable waters within the territorial limits of another sovereignty; and, second, whether Congress has exercised that power by the enactment of section 272 of the Criminal Code under which the indictment was found.

[The Court held that Congress had the constitutional power to define and punish crimes on American vessels in foreign waters, and that the language of the statute making it applicable to offenses committed on an American vessel outside the jurisdiction of a state "within the admiralty and maritime jurisdiction of the United States" was broad enough to include crimes in the "territorial waters" of a foreign country. Mr. Justice Stone continued:]

It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect. United States v. Bowman, 260 U.S. 94, 98, 43 S.Ct. 39, 67 L.Ed. 149; compare Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375. But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. . . . Subject to the right of the territorial sovereignty to assert jurisdiction over offenses disturbing the peace of the port, it has been supported by writers on international law, and has been recognized by France, Belgium, and other continental countries, as well as by England and the United States. . . .

A related but different question, not presented here, may arise when jurisdiction over an offense committed on a foreign vessel is asserted by the sovereignty in whose waters it was lying at the time of its commission, since for some purposes, the jurisdiction may be regarded as concurrent, in that the courts of either sovereignty may try the offense.

There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both. See Jessup, The Law of Territorial Waters, 144-193. The position of the United States exemplified in Wildenhus's Case, 120 U.S. 1, 7 S.Ct. 385, 30 L.Ed. 565, has been that at least in the case of major crimes, affecting the peace and tranquility of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel. . . .

This doctrine does not impinge on that laid down in United States v. Rodgers [150 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071 (1893)], that the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction. In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. So applied the indictment here sufficiently charges an offense within the admiralty and maritime jurisdiction of the United States and the judgment below must be

Reversed.

c. In *Regina v. James Anderson,* [166] an American crewman serving on a British vessel had been convicted of murder committed on board the vessel while the latter was in the Garonne River in France, about 45 miles from the sea and about 300 yards from the nearest bank. The court upheld the conviction despite defendant's argument that the court had no jurisdiction, pointing out that although "the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offense within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country." [167]

d. Pertinent provisions applicable to jurisdiction over national vessels follow.

166. 11 Cox Crim. Cas. 198.

167. *Id.* at 204. Birth on an American vessel on the high seas is not, under the law of the United States, equivalent to birth "in the United States," and a child born on such a vessel of alien parents does not acquire United States nationality. 3 *G. Hackworth, Digest of International Law,* 11-12 (1942).

CONVENTION ON THE HIGH SEAS
Geneva, April 28, 1958
13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82

Article 11 [168]

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or license shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

RESTATEMENT, SECOND,
FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 31. A state has jurisdiction to prescribe rules attaching legal consequences to

(a) conduct of any person aboard a vessel or aircraft having its nationality while the vessel is under the control of its commanding officer, and

(b) conduct of any person who is a member of its national military services.

§ 32. (1) A state having jurisdiction to prescribe a rule of law has jurisdiction to enforce the rule outside of its territory:

(a) aboard a vessel or aircraft having its nationality while under the control of its commanding officer,

(b) against a member of its military service.

(2) The exercise of the jurisdiction to enforce a rule of law stated in this Section is subject to the rights of the territorial state as indicated in § 44.

§ 44. (1) A state may not exercise in the territory of another state the jurisdiction to enforce rules of law that it has under the rule stated in § 32, except to the extent that

(a) the exercise of the right of innocent passage or entry in distress into the territory of the other state permits it to exercise such jurisdiction on board a vessel under the rules stated in §§ 46-48;

(b) consent from the other state to the visit of one of its vessels or consent to the presence of its military force impliedly permits the exercise of such jurisdiction with respect to such vessel or force under the rules stated in §§ 49 and 50 and §§ 51-62;

(c) the other state otherwise permits its exercise of such jurisdiction.

(2) A state that exercises its enforcement jurisdiction when, under the rules stated in Subsection (1), it may not do so, violates the other state's rights under international law. [169]

4-17. Exercise of Jurisdiction in Particular Situations.

a. Foreign vessels in internal waters; resolution of conflicts of jurisdiction.

WILDENHUS' CASE
Supreme Court of the United States, 1887
120 U.S. 1, 7 S.Ct. 385, 30 L.Ed. 565

[Wildenhus, a Belgian national, killed another Belgian national below the deck of the Belgian vessel of which they were both crew members, which was at the time of the slaying moored to a dock in Jersey City. The local police authorities arrested Wildenhus, charging him with the killing, and held two other crew members as witnesses. The Belgian consul applied for a writ of habeas corpus, citing Article 11 of the treaty of March 9, 1880 (21 Stat. 776) between Belgium and the United States, which provided: "The respective consuls-general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew shall be concerned therein." The Circuit Court refused to order the release of the prisoners, and the consul appealed to the Supreme Court.]

WAITE, C.J. ... By sections 751 and 753 of the Revised Statutes, the courts of the United States have power to issue writs of *habeas corpus* which shall extend to prisoners in jail when they are in "custody in violation of the constitution or a law or treaty of the United States," and the question we have to consider is whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch. 144: "It would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such ... merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of

168. The effect of Article 11 is to overrule in part the holding of the Permanent Court of International Justice in the "Lotus" Case, supra, note 129. To some extent, this result has already been achieved as among the parties to the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collisions and Other Incidents of Navigation, signed at Brussels on May 10, 1952. [1960] Gr.Brit.T.S. No. 47, at 14, Cmnd. 1128 (entered into force Nov. 20, 1955).

169. For discussion regarding the extent to which a state may exercise aboard a vessel having its nationality the enforcement jurisdiction recognized by the Restatement, §§ 32, 44, when the vessel is subject to another state's territorial jurisdiction, *see Restatement* § 46(3) (permitting "detention or such other interim enforcement measures as the internal management or discipline of the vessel requires" when the vessel is in innocent passage through territorial waters of another state), and § 50(a) (permitting enforcement measures to the "extent necessary to detain on board the vessel a person with respect to whom the coastal state does not exercise its jurisdiction" when the vessel is in internal waters of another state). *See also* Arts. 19 and 20 of the Geneva Convention on the Territorial Sea and the Contiguous Zone. *Compare* the extent of United States jurisdiction asserted in 18 U.S.C.A. § 7(1), providing that the "special maritime and territorial jurisdiction of the United States" includes:

> The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

the country." . . . And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina v. Cunningham, Bell, Cr.Cas. 72; S.C. 8 Cox, Crim.Cas. 104; Regina v. Anderson, 11 Cox, Crim.Cas. 198, 204; S.C.L.R. 1 Cr.Cas. 161, 165; Regina v. Keyn, 13 Cox, Crim.Cas. 403, 486, 525; S.C. 2 Exch.Div. 63, 161, 213. As the owner has voluntarily taken his vessel, for his own private purposes, to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance, for the time being, as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require. But, if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions.

. . . .

[The Court then analyzed a number of treaties subsequently entered into by the United States, and concluded that these treaties either impliedly, or as in the case of the Belgian treaty under consideration explicitly] gave the consuls authority to cause proper order to be maintained on board, and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. This treaty is the law which now governs the conduct of the United States and Belgium towards each other in this particular. Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel, but has reserved to inself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

. . . [T]he only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public repose," of the people who look to the state of New Jersey for their protection. If the thing done—"the disorder," as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done, is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they, as a rule, care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads, and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act, itself. If that is of a character to awaken public interest when it becomes known, it is a "disorder," the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a "disorder" which will "disturb tranquillity and public order on shore or in the port." The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction; and that, if the proper authorities are proceeding with the case in a regular way the consul has no right to interfere to prevent it. . . .

. . . .

The judgment of the circuit court is affirmed.

As the Chief Justice indicated in *Wildenhus' Case,* states customarily resort to international agreements in order to reconcile potential conflicts of jurisdiction that might arise from the presence of merchantmen in foreign ports. [170] The *Consular Convention* of 1951 between the United States and the United Kingdom provides in Article 22(2):

Without prejudice to the right of the administrative and judicial authorities of the territory to take cognizance of crimes or offenses committed on board the vessel when she is in the ports or in the territorial waters of the territory and which are cognizable under the local law or to enforce local laws applicable to vessels in ports and territorial waters or persons and property thereon, it is the common intention of the High Contracting Parties that the administrative and police authorities of the territory should not, except at the request or with the consent of the consular officer,

(a) concern themselves with any matter taking place on board the vessel unless for the preservation of peace and order or in the interests of public health or safety, or

(b) institute prosecutions in respect of crimes or offenses committed on board the vessel unless they are of a serious character or involve the tranquillity of the port or unless they are committed by or against persons other than the crew. [171]

It may be doubted whether in the absence of a concession by treaty, the territorial sovereign is deterred by the operation of any rule of international law from exercising through its local courts jurisdiction over civil controversies between masters and members of a crew, when the judicial aid of its tribunals is invoked by the latter, and notably when a libel *in rem* is filed against the ship. It is to be observed, however, that American courts exercise discretion in taking or withholding jurisdiction

170. The British view regarding the exercise of jurisdiction in a foreign port is that "the subjection of the ship to the local criminal jurisdiction is . . . complete and that any derogation from it is a matter of comity in the discretion of the coastal state." *J. Brierly, The Law of Nations* 223 (6th ed. Waldock 1963). When the United States prohibition laws were held in Cunard S. S. Co. v. Mellon, 262 U.S. 100, 43 S.Ct. 504, 67 L.Ed. 894 (1923) to be applicable to foreign vessels temporarily in United States ports, the protests of foreign governments were based almost entirely on appeals to comity. *P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction* 221-28 (1927). For general discussions of criminal jurisdiction over visiting foreign vessels, see *id* at 144-94; R. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces,* [1957-58] *Naval War College International Law Studies,* 43-54.

171. 3 U.S.T. 3426, T.I.A.S. 2494, 165 U.N.T.S. 121.

according to the circumstances of the particular case. Their action in so doing is not to be regarded as indicative of any requirement of public international law. [172]

b. After the court has decided to retain a case for decision, whether in the exercise of its sound discretion or in compliance with legislative mandate, it must decide whether the forum's jurisdiction to prescribe shall be deemed to have been exercised so that United States law applies to the issue presented. [173] In the *Kate A. Hoff* claim, the General Claims Commission [174] hearing this claim spoke to the degree of jurisdiction to be exercised over a merchant vessel forced into internal waters by a superior force.

The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs or for provisioning, or carried into port by mutineers. It has also been asserted in defense of a charge of attempted [breach] of blockade. It was asserted by as early a writer as Vattel.

4-18. Foreign Vessels in the Territorial Sea: The Right of Innocent Passage. *a. General.*

The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral states a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law. [175]

Codified norms applicable to foreign vessels in the territorial sea and the right of innocent passage follow.

b. Convention on the territorial sea and the contiguous zone.

Geneva, April 28, 1958
15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205
SECTION III. RIGHT OF INNOCENT PASSAGE
Sub-section A. Rules applicable to all ships

Art. 14. (1) Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

(2) Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

(3) Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

(4) Passge is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

(5) Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

(6) Submarines are required to navigate on the surface and to show their flag.

Art. 15. (1) The costal State must not hamper innocent passage through the territorial sea.

(2) The coastal State is required to give appropriate publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.

Art. 16. (1) The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

(2) In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

(3) Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

(4) There shall be no suspension of the innocent passage of foreign ships through 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.

Art. 17. Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation. [176]

Sub-section B. Rules applicable to merchant ships

Art. 18. (1) No charge may be levied upon foreign ships by reason only of their passage through the territorial sea. . . .

Art. 19. (1) The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only 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.

(2) The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

(3) In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken. . . .

(5) The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship

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172. *I. Hyde, International Law* 742-43 (2d rev. ed. 1945). On the application of the doctrine of forum non conveniens in litigation involving foreign merchant vessels and seamen, see The Estes, 109 F. 216 (1911); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty,* 35 *Cornel L. Q.* 12 (1949).

173. *See, e.g.,* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963); Lauritzen v. Larson, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

174. United States v. Mexico, 4 U.N. R.I.A.A. 444.

175. *P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction* 120 (1927) (hereinafter cited as *P. Jessup, Territorial Waters). See also* Franklin, *The Law of the Sea: Some Recent Developments,* [1959-60] NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 127-56.

176. On the question of the coastal state's duty to publicize dangers to navigation, compare the Conventions requirement of actual knowledge of such dangers with the conditions laid down in the Corfu Channel case, [1949] I.C.J. 4.

entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Art. 20. (1) The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.

(2) The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save 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 waters of the coastal State.

(3) The provisions of the previous paragraph are 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 foregin ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Sub-section C. Rules applicable to government ships other than warships

Art. 21. The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes. [177]

Sub-section D. Rule applicable to warships

Art. 23. If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea. [178]

A warship's right of innocent passage under customary law is unclear. Jessup concluded, in 1927, that ". . . the sound rule seems to be that they [warships] should not enjoy an absolute legal right to pass through a state's territorial waters any more than an army may cross the land territory." [179] The Hague Codification Conference confined itself to observing that states ordinarily "will not forbid the passage of foreign warships" and "will not require a previous authorization or notification." [180]

c. Innocent passage through straits. In the *Corfu Channel Case,* [181] the United Kingdom sought to hold Albania responsible for damage caused to British warships by mines moored in the Corfu Channel in Albanian territorial waters. Albania contended that the British warships had violated Albanian sovereignty by passing through its territorial waters without previous authorization. In deciding that the Corfu Channel belonged to "the class of international highways through which a right of passage exists," the Court held that the "decisive criterion" was "its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." The Court rejected as immaterial Albanian arguments that the Channel was not a necessary, but only an alternative, passage between two parts of the high seas, holding that it was sufficient that the Channel had been "a useful route for international maritime traffic." [182] The decision has been criticized as giving insufficient weight to functional considerations; i.e., as failing to balance "the interest which the coastal state has in its own territorial sea against that which the international maritime community has in traversing that passage." [183]

(1) The International Law Commission, in its final version of the predecessor of Article 16(4), limited the right of passage through straits to those which are "normally used for international navigation between two part of the high seas." [184] In the First Committee, however, the word "normally" was deleted and the article was further amended to its present form by a vote of 31-30-10, over vigorous objection by the Arab states. (Prior to the occupation of the Sinai Peninsula by Israeli forces in 1967, Egypt and Saudi Arabia controlled the Straits of Tiran which provided the sole access to the Gulf of Aqaba, on which Israel has several miles of frontage.) [185] In the Plenary Meeting, a motion by the U.A.R. for a separate vote on paragraph 4 of Article 16 was defeated by a vote of 34-32-6; the Article was then approved in full. Several Arab states, however, have entered reservations to this provision.

(2) By the terms of the Treaty of Lausanne, [186] the Dardanelles and the Bosphorus came under the supervision of an international commission, the only one of its type ever to function. Vessels of commerce were to be allowed free passage in time of war and in peace, but limits were placed on the number of naval vessels permitted to transit the Straits into the Black Sea. Turkey was permitted to take defensive measures against enemy ships in time of war. [187] But the Straits were demilitarized (Art. 4). The Straits Commission functioned as a supervisor of transit, assuring that warships could pass through the Straits without undue hindrance, upon occasion making representations to Turkey on this subject. The Commission was terminated upon conclusion of the Montreux Convention of 1936. [188] The Convention transferred the functions of the Straits Commission to Turkey, the littoral state, which thus reasserted its sovereignty. Restrictions on the number of warships transiting the Straits into the Black Sea were maintained, and Turkey assumed responsibility for assuring free passage. Free and unlimited navigation for merchant vessels was retained, but Turkey was granted the right to remilitarize the Straits. The Montreux Convention was to remain in force for twenty years from the

177. Reservations have been entered by the Communist states to the articles permitting coastal states to exercise civil jurisdiction over state trading vessels.

178. Many states have, on ratifying the Convention, made reservations asserting the coastal state's right to require warships to seek previous authorization before passing through the territorial sea. *See* Slonim, *The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea,* 5 COLUM. J. TRANSNAT'L L. 96 (1966).

179. P. JESSUP, TERRITORIAL WATERS, *supra,* note 175 at 120.

180. 24 AM. J. INT'L SUPP. 246 (1930). For a collection of view, *see* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 404-17 (1965) (hereinafter cited as 4 M. WHITEMAN).

181. Corfu Channel case, [1949] I.C.J. 4.

182. *Id.* at 28.

183. 1. D. O'CONNELL, INTERNATIONAL LAW 563 (2d ed. 1970) (hereinafter cited as 1 D. O'CONNELL).

184. 2 Y.B. INT'L L. C. 273 (1956).

185. 3 U.N. Conf. on the Law of the Sea, OFF. REC. 93-96, 100 (1958).

186. Convention Relating to the Regime of the Straits (1928), 28 L.N.T.S. 115.

187. Annex to Art. 2 of the Treaty of Lausanne.

188. Convention Concerning the Regime of the Straits (1936), 173 L.N.T.S. 213.

date of its entry into force and was subject to denunciation upon two years' notice after 1956. The right of free transit for merchant vessels, however, is to continue without time limitation. As of January 1, 1976, none of the parties had sought to denounce the Convention. [189]

d. Innocent passage through international canals.

The right of free passage through international straits is a product of state practice hardening into customary international law and thence into treaty. The right of free passage through interoceanic canals is a consequence of the opening of each waterway to usage by the international community. It is the origin of the right in a series of individual grants which distinguishes the law relating to canals from the law of straits. The privilege of free passage through the three major interoceanic canals, Suez, Panama, and Kiel, has been created in each case by a treaty to which the territorial sovereign, acting freely or under the pressure of other powers, has been a party. [190]

(1) The right of free passage through the Suez Canal is usually said to be founded on the Convention of Constantinople of 1888, [191] although some writers maintain that the international character of the canal had already been established by concessions of 1854 and 1866. The Convention was signed by Great Britain, Germany, France, Austria-Hungary, Italy, the Netherlands, Russia, Spain, and the Ottoman Empire (then holding sovereignty over Egypt). After the Canal's nationalization in 1956, Egypt reaffirmed its obligations under the Convention. [192] The Convention provides in Article I that the Canal ". . . shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag," and in Article IV that ". . . no right of war, no act of hostility, nor any act having for its object the obstruction of the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers." The Convention also includes restrictions on warships and fortifications. In practice, rights under Article I have usually been regarded as granted to all states whether or not they adhere to the Convention. [193] During the two World Wars, the United Kingdom justified measures inconsistent with the Convention as necessary to prevent the Canal's destruction. Since 1948, Egypt has justified anti-Israeli restrictions on the basis of its "inherent" right of self-defense. [194]

(2) The regime of the Panama Canal is governed by the Hay-Pauncefote Treaty of 1901 between the United States and Great Britain, [195] the rules of which are expressly stated to be "substantially as embodied in the Convention of Constantinople." The agreement provides in Article III 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, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise." The foregoing language was substantially reproduced in the 1903 treaty by which the United States acquired the Canal Zone from Panama. [196]

(3) The Kiel Canal had not, prior to the Treaty of Versailles of 1919, been considered by Germany as an international waterway, open without restriction to all states. Article 380 of the Treaty of Versailles, however, provided that ". . . the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." [197] The Permanent Court of International Justice, in the *Case of the S.S. Wimbledon,* [198] referred to the Canal as "an international waterway . . . for the benefit of all nations of the world," even though only 28 states were parties to Article 380. In 1936 Germany denounced Article 380 without effective protest from other states.

(4) The legal position of states that are not parties to treaties guaranteeing passage through international canals has been rationalized by the doctrine of "international servitudes"; by the "third-party beneficiary" concepts drawn from municipal law; by the theory that certain treaties are "dispositive" in nature in the sense that they create "real rights" that attach to a territory and are therefore not dependent on the treaty which created them; and by analogy to treaties, such as the United Nations Charter, that have an objective, legislative character, in that they create international status that must be recognized by all states, whether contracting parties or not. Baxter states that:

. . . the preferable theory concerning the rights of nonsignatories is that a state may, in whole or in part, dedicate a waterway to international use, which dedication, if relied upon, creates legally enforceable rights in favor of the shipping of the international community. A treaty, a unilateral declaration—perhaps even a concession—may be the instrument whereby the dedication is effected. Its form is not important; what is important is that it speaks to the entire world or to a group of states who are to be the beneficiaries of the right of free passage. [199]

4-19. Foreign Vessels On the High Seas (Contiguous Zone and Beyond).

CONVENTION ON THE HIGH SEAS
Geneva, April 28, 1958
13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82

Art. 1. The term "high seas" means all parts of the seas that are not

189. 4 M. WHITEMAN, *supra,* note 180 at 417-47; *see* also R. BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 159-68 (1964) (hereinafter cited as R. BAXTER). For materials on the problem of the Gulf of Aqaba, *see* 4 M. WHITEMAN, *supra* at 465-80.

190. R. BAXTER, supra at 168-69.

191. 79 BRIT. & FOR. STATE PAPERS 18, *Reprinted* in 3 AM. J. INT'L L. SUPP. 123 (1909).

192. 265 U.N.T.S. 299; 272 U.N.T.S. 225.

193. *See* 1 D. O'CONNELL, *supra,* note 183 at 643-48; R. BAXTER, *supra,* note 189 at 89-91, 169-70, 183 n. 162.

194. *See* 1 D. O'CONNELL, *supra* at 647-48 and Gross, *Passage Through the Suez Canal of Israel-bound Cargo and Israel Ships,* 51 AM. J. INT'L L. 530 (1957).

195. 32 Stat. 1903.

196. R. BAXTER, *supra,* note 189 at 170-71.

197. 112 BRIT. & FOR. STATE PAPERS 1, 189.

198. [1923] P.C.I.J., ser. A, No. 1.

199. R. BAXTER, *supra,* note 189, at 182-83.

included in the territorial sea or in the internal waters of a State.

Art. 2. The high seas being open to all nations, no State may validly purport to subject any part of them its sovereignty. Freedom of the high seas is exercised under the conditions laid down by this article and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

(1) Freedom of navigation;

(2) Freedom of fishing;

(3) Freedom to lay submarine cables and pipelines;

(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Art. 22. (1) Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

(2) In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have ben checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

(3) If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE
Geneva, April 28, 1958
15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205

Art. 24. (1) In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

(2) The contiguous zone may not extend beyond twelve miles from the base line from which the breadth of the territorial sea is measured.

(3) Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

The exercise of jurisdiction in contiguous zones of the high seas becomes necessary in view of the inadequacy under modern conditions of any reasonable breadth of territorial waters; whatever we may regard as the breadth of marginal sea now accepted under international law, there are occasions and purposes for which jurisdiction must be exercised farther out from shore. This differs from an attempt to declare such areas territorial waters subject to the full sovereignty of the coastal state. [200]

4-20. Comment on Materials Presented. As indicated in the opening paragraph of this section, no attempt has been made to examine fully the vast and rather complex area of the Law of the Sea. Instead, attention has been focused on those concepts which the military attorney is most likely to have occasion to apply in the field: jurisdictional norms applicable to vessels and persons thereon. This chapter has dealt with one of the most significant, as well as substantive, aspects of public international law: the various jurisdictional theories by which states exercise control over territory, individuals, and events. The necessity for a thorough analysis and comprehension of this area of the law is evident. While emphasis has been placed throughout this chapter on the right of state to control individuals and activities under its jurisdiction, there do exist instances where a state, its agents, and instrumentalities have an international right to immunity from the exercise of jurisdiction over both their actions and property. An increasingly important aspect of international jurisprudence, these jurisdictional immunities are the subject of chapter 5, *infra.*

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200. Bishop, *The Exercise of Jurisdiction for Special Purposes in High Seas Beyond the Outer Limit of Territorial Waters,* reprinted in 99 CONG. REC. 2493 (1953).

CHAPTER 5
JURISDICTIONAL IMMUNITIES

5-1. General. Having examined the various means by which a state may exercise its jurisdiction in the international community, attention must now be focused on those instances when a state generally refrains from exercising this jurisdiction over certain individuals and property. In dealing with this somewhat technical subject of jurisdictional immunities, four specific areas will be analyzed. [1] Although discussed as distinctive elements of the total subject matter, each aspect of jurisdictional immunity relates to the other. Accordingly, it is imperative that the attorney understand fully one area of this chapter before directing his attention to the next.

Section I. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

5-2. The Current Importance of Jurisdictional Immunities. *a.* Under international law, states enjoy certain immunities from the exercise by another state of jurisdiction to enforce rules of law. The primary impact of these immunities, which in some cases extend not only to the foreign state itself, but also to its property, its agents, and its instrumentalities, is felt when a private party finds it necessary to press a claim against a foreign government or the latter's agent or instrumentality in judicial or arbitral proceedings. Often, the major obstacle faced by the private party will be the immunity the foreign government enjoys under applicable principles of international law or under the law of the state in which the proceeding is to be brought. Under United States law, a broader measure of immunity is sometimes accorded to foreign states than is required by international jurisprudence.

b. During the last thirty years, governments throughout the world have become increasingly involved in international commercial dealings with private parties. The most obvious manifestations of this trend have been the state foreign trade monopolies of the Communist states and the pervasive role that the governments of many developing countries have chosen or have been compelled by circumstances to play in international commerce. An increased participation of government in commercial dealings has been a phenomenon clearly discernible even in those industrialized countries that most vigorously champion private enterprise. A continuing increase in governmental participation in commerce, possibly accelerated by a growth in East-West trade and in trade between the industrialized countries and the developing countries suggests that problems of state immunities may well become more frequent and pressing in the years ahead.

c. Any claimant bringing an action against a foreign state in a court within the United States must face problems raised by the special status of the defendant at three key procedural stages. First, steps must be taken to give a court jurisdiction so that it may entertain the action. If the foreign state has no property within the territory of the forum that can provide the basis for in rem or quasi in rem jurisdiction, jurisdiction in personam must be sought. Second, even if jurisdiction can be acquired, a claim of immunity by the foreign state may prevent the court from proceeding to decide the claim on the merits. Finally, even if the claimant obtains a judgment against the foreign state, his victory will be a false one if he is unable to secure payment by the defendant state. The effect of a validly interposed plea of state immunity is to bar consideration of the merits of the claim presented by the claimant. [2] Accordingly, as a general rule, it is only after the court acquires jurisdiction that a claim of immunity becomes important. This will be the case both when the claim is raised after the court has obtained in personam jurisdiction over the foreign state, and when a plea or suggestion of immunity seeks to vacate an attachment of property effected in connection with acquiring in rem or quasi in rem jurisdiction. If, moreover, the claimant should obtain a judgment against the foreign state, a claim of immunity may still be interposed to prevent execution of that judgment against the foreign state's property. Thus, assuming that the claimant can find a basis on which the court's jurisdiction can be founded, state immunity may deny the claimant his day in court, and even if he has, and carries, that day, immunity may make it impossible for him to enforce his judgment if voluntary satisfaction by the defendant is not forthcoming. [3]

5-3. The Two Theories of Sovereign Immunity. *a.* There have evolved through the years, two basic theories of jurisdictional immunity—the absolute and the restrictive. There exists no universal approach toward the granting of this very special form of protection to a sovereign, his agents, and instrumentalities. Often, states employ a combination of the two theories of immunity. Moreover, some countries, such as the United States, generally grant greater immunity than international law would seem to

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1. These areas are: Jurisdictional Immunities of Foreign States, Immunities of State Representatives, Immunities of International Organizations, and the Granting of Political Asylum or Temporary Refuge.

2. *Restatement (Second) Foreign Relations Law of the United States,* § 65, comment *c* (1965).

3. It is important, at this point, to direct the reader's attention to the distinction between the concepts of jurisdictional immunity and the Act of State doctrine. Jurisdictional immunity stands for the proposition that a sovereign, his agents, and property will not be made the subject of a suit in another state, *regardless* of where the activity giving rise to the cause of action occurred. The Act of State doctrine, discussed extensively in chapter 7, *infra,* declares that the actions of a state, taken solely within its territorial boundaries, will not be subjected to judicial review by U.S. courts.

require. Accordingly, it is necessary to examine closely both the manner in which these two basic theories of immunity are employed and the problems often encountered in their utilization.

b. The Absolute Theory.

(1) *The U.S. View.*

THE SCHOONER EXCHANGE v. M'FADDON
Supreme Court of the United States, 1812
11 U.S. (7 Cranch) 116, 3 L.Ed. 287

[A libel was brought against the schooner Exchange by two American citizens who claimed that they owned and were entitled to possession of the ship. They alleged that the vessel had been seized on the high seas in 1810 by forces acting on behalf of the Emperor of France and that no prize court of competent jurisdiction had pronounced judgment against the vessel. No one appeared for the vessel, but the United States Attorney for Pennsylvania appeared on behalf of the United States Government to state that the United States and France were at peace, that a public ship (known as the Balaou) of the Emperor of France had been compelled by bad weather to enter the port of Philadelphia, and was prevented from leaving by the process of the court. The United States Attorney stated that, even if the vessel had in fact been wrongfully seized from the libellants, property therein had passed to the Emperor of France. It was therefore requested that the libel be dismissed with costs and the vessel released. The District Court dismissed the libel, the Circuit Court reversed (4 Hall's L.J. 232), and the United States Attorney appealed to the Supreme Court.]

MARSHALL, C.J.: . . . The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . .

This full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. . . .

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. . . .

[The Court concluded that the territorial sovereign's license to foreign armies must be express, and not merely implied, but that a different rule applied in the case of foreign ships.] . . . If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place. . . .

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. . . .

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within those territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern. . . .

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points. . . .

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in

a friendly manner, she should be exempt from the jurisdiction of the country. . . .

[Judgment of the Circuit Court reversed, and judgment of the District Court, dismissing the libel, affirmed.]

BERIZZI BROS. CO. v. S.S. PESARO
Supreme Court of the United States, 1926
271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088

[A libel *in rem* was brought against the Pesaro, a merchant vessel owned and operated by the Italian Government and engaged in carrying cargo and passengers for hire, to enforce a claim for cargo damage. The vessel was released on the direct suggestion by the Italian Ambassador that the ship was owned and in the possession of the Italian Government, but the Supreme Court reversed, holding that inasmuch as the Ambassador had not appeared as a party, the suggestion must come through the official channels of the United States. The Pesaro, 255 U.S. 216, 41 S.Ct. 308, 65 L.Ed. 592 (1921). Remanded to the District Court, the case was considered on an agreed statement of facts showing, *inter alia*, that the vessel would not be immune from suit in Italy, and that in Italy merchant vessels owned by the United States Government would not be immune. The State Department declined to take a position on the vessel's immunity, but a claim and plea in abatement was entered by the ship's master. Judge Mack overruled objections to the jurisdiction of the Court, The Pesaro, 277 Fed. 473 (S.D.N.Y.1921), stating, at 481-83:

> . . . To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. . . . The attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due a foregin power. . . .
>
> [In] my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.
>
> And as the Pesaro was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the Pesaro would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. . . .

But the fact that the steamship Pesaro itself is subject to the ordinary processes of the Italian court would seem to be vital and decisive. There is no reason of international comity or courtesy which requires that Italian property not deemed extra commercium in Italy should be treated as res publica and extra commercium in the United States. . . .

[Following the decision, however, of the Supreme Court in The Gul Djemal, 264 U.S. 90, 44 S.Ct. 244, 68 L.Ed. 574 (1924), that a ship's master was not a proper person to "vindicate the owner's sovereignty," the order of Judge Mack in The Pesaro was vacated by consent of the parties. The Italian Ambassador then filed a claim and answer. The court upheld the immunity of the Pesaro, finding the weight of authority against the position adopted by Judge Mack. 13 F.2d 468 (S.D.N.Y.1926). Libellant appealed to the Supreme Court.]

VAN DEVANTER, J.: . . . The single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel in rem by a private suitor in a federal district court exercising admiralty jurisdiction.

This precise question never has been considered by this Court before. Several efforts to present it have been made in recent years, but always in circumstances which did not require its consideration. The nearest approach to it in this Court's decisions is found in The Exchange, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 . . . .

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners, and there was little thought of governments engaging in such operations. That came much later.

The decision in The Exchange therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as warships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force. . . .

Decree affirmed.

These early American opinions accurately reflect the basic concept of the absolute theory of jurisdictional immunity, i.e., that a sovereign and its property are *totally* immune to suit and seizure. As will be discussed at a later point in this chapter, the U.S. approach has now become more restrictive in nature. [4]

(2) *The U.K. View.* The case of the *Parlement Belge* [5] involved proceedings in rem brought by the owners of a ship damaged by a collision with the Parlement Belge. No appearance was entered on behalf of the Parlement Belge, but the British Attorney General filed an information and protest asserting that the court had no jurisdiction, inasmuch as the Parlement Belge was a mail packet in the possession, control, and employ of the King of the Belgians, and a public vessel of that sovereign and his state. It was not disputed that the Parlement Belge, besides carrying the mail between Ostend and Dover, carried merchandise and passengers for hire. The Admiralty Division overruled the Attorney General's protest, and the latter appealed. In allowing the appeal Brett, L. J., stated:

> [T]he real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority. . . .
>
> [W]e are of the opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which in-

4. *Infra* note 11.

5. 5 P.D. 197 (Court of Appeal 1880).

duces every sovereign state to respect the independence of every other sovereign state, each and everyone declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

The adherence of English courts to the absolute theory of sovereign immunity may well result from a rigid application of the rule of precedent rather than from a conviction that international law requires them to continue applying the theory.

In *The Porto Alexandre*, [6] the immunity of foreign states, previously established with respect to litigation arising from an activity which was not commercial, was granted in litigation involving a ship owned by a foreign state and used for trading. In *The Cristina*, [7] several of the Law Lords indicated they doubted the immunity should have been granted with respect to a commercial activity in The Porto Alexandre and suggested the extension of immunity in the case was not required by the previous decision in point. However, the facts in *The Cristina* did not afford them the opportunity of passing anew on the issue. Thus, the theory of absolute immunity remains the rule of law in English courts. The precedents established in the United Kingdom with respect to sovereign immunity have been followed generally by courts in the British Commonwealth, though with occasional indications of doubt about the soundness of the absolute theory.

(3) *The Socialist States' View.*

(*a*) Socialist states are committed to the "absolute theory" of sovereign immunity and claim international law requires that it be granted even in cases where the litigation arises from commercial activities. In many states in western Europe and elsewhere, however, the courts apply "the restrictive theory" and deny immunity to socialist states— and other states— in litigation arising from such activities. Socialist states look upon the denial of immunity in these cases as unwarranted interference with the conduct of their trade abroad through state monopolies.

(*b*) In the Soviet system, foreign trade is a state monopoly, normally carried on through trade delegations in foreign countries.

Under Soviet law, these delegations . . . are an integral part of the diplomatic missions of the U.S.S.R. abroad and enjoy the same privileges as the latter. Trade missions fulfil three main functions: a) the representation of the interests of the U.S.S.R. in the field of foreign trade and the promotion of the commercial and other economic relations between the U.S.S.R. and the country in which the mission is resident; b) the regulation of the trade between the U.S.S.R. and the country in which they are resident; c) the implementation of the trade between the U.S.S.R. and the country in which they are resident. . . .

Trade missions enjoy all the powers necessary for the fulfilment of these functions. They can conclude all kinds of agreements and contracts on behalf of the U.S.S.R., enter into commitments, including through the use of promissory notes, give guarantees, conclude agreements regarding the submission of disputes to arbitration courts and in general undertake all legal actions necessary to carry out the responsibilities with which they are vested, including appearing in foreign courts as a plaintiff. Trade missions can be defendants only in cases arising out of contracts concluded or guaranteed by them in the country concerned, and only in countries in relation to which the Government of the U.S.S.R. has by means of an international treaty or unilateral declaration clearly and precisely expressd its consent to the trade mission being subject to local courts in disputes of the character concerned. [8]

(*c*) Although the Soviet view is that, inasmuch as the carrying on of foreign trade is a sovereign activity of the Soviet Union, trade delegations and their property enjoy immunities in foreign countries derived directly from the sovereignty of the Soviet state itself, the Soviet Union has concluded a large number of bilateral treaties which contain provisions subjecting its trade delegations to the local jurisdiction in respect of their commercial activities. [9]

(*d*) Since 1924, the Soviet Union has had legislation requiring the permission of the "Council of People's Commissars" before property belonging to a foreign state could be attached or levied upon in satisfaction of a judgment. The immunity of foreign states receives more extensive regulation in the new Soviet legislation on civil procedure. While the Soviet Council of Ministers or other authorized organs may provide for retaliation against foreign states that do not respect Soviet immunity the new law, unlike the earlier, does not contain a reciprocity provision. [10] Though the absolute theory still finds favor in the courts of the United Kingdom and the socialist states, the majority of the international community has now moved toward the application of some form of the restrictive concept of jurisdictional immunity. Thus, attention must now be focused in this direction.

5-4. The Restrictive Theory. *a. The Tate Letter.* The first major step in the U.S. shift toward the restrictive theory and an explanation of the conceptual basis of this approach were best set forth in 1952, in what has since come to be known as "the Tate Letter."

UNITED STATES: LETTER FROM THE ACTING LEGAL ADVISER OF THE DEPARTMENT OF STATE TO THE DEPARTMENT OF JUSTICE, MAY 19, 1952.

26 United States Department of State Bulletin 984 (1952).

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

6. [1920] P. 30 (C.A.).

7. [1938] A.C. 485.

8. *Academy of Sciences of the U.S.S.R., International Law* 305-07 (Ogden transl. 1961).

9. For details, see J. Triska and R. Slusser, *The Theory, Law, and Policy of Soviet Treaties* 342-33 (1962), and S. Sucharitkul, State Immunities and *Trading Activities in International Law* 152-61 (1959).

10. See *Soviet Civil Legislation and Procedure* (Foreign Languages Publishing House, Moscow, 1965).

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance placed by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

The purpose of the Tate Letter was, of course, to explain future U.S. policy with regard to jurisdictional immunity and to offer guidelines as to how the State Department would act upon requests for such protection. It soon became evident, however, that despite the guidance contained in this letter, uncertainty, as well as legal and political problems, continued to surround this jurisdictional concept. These issues will be discussed in the pages that follow. In order to appreciate the need for the recent shift away from executive to full judicial primacy in determination of state immunity, [11] an examination of U.S. practice under and a critque of the Tate approach follows. It is of importance to note that the Tate Letter was simply tangible evidence to continuing American movement toward the majority view of jurisdictional immunity.

b. Evolution of the Restrictive Theory.

(1) Prior to 1952, there had been a consistent turn away from the absolute to the restrictive theory of jurisdictional immunity by the majority of the world community. The Supreme Court of Belgium adopted the Restrictive theory in 1903. In Egypt, the Court of Appeals of the Mixed Courts—then the highest court with jurisdiction

11. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (1976), 28 U.S.C. 1602.

over sovereign immunity cases—sanctioned in 1920 the Restrictive theory in a litigation involving the United Kingdom. By 1918, the Supreme Court of Switzerland was applying the Restrictive theory, and in 1925, the Supreme Court of Italy adopted this approach when a trade mission of the USSR became involved in litigation before the Italian courts which arose from the mission's commercial activities. By 1928, the lower courts in Greece were declining to grant immunity to the USSR in a suit involving a commercial act, and in 1929, the Supreme Court of France sanctioned the Restrictive theory, previously applied in the lower French courts, when a trade mission of the USSR was sued in connection with its commercial activities in France. Additionally, though refusing to apply the restrictive approach in 1921, the courts of the German Federal Republic have since become committed to this theory. Finally, both the Netherlands and Austria have become exponents of the restrictive view of jurisdictional immunity.

(2) In addition to these unilateral decisions to adopt the Restrictive theory, various states, in 1926, entered into the first multilateral convention embodying this concept—The Brussels Convention on the Unification of Certain Rules Relating to Immunity of State-owned Vessels. [12] Article 1(g) of this agreement provides that:

> Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

An essential element of the convention rests in the fact that when such vessels are involved in controversies relating to collision, salvage, general average, repairs, supplies, or other contracts relating to the vessel, the claimant is entitled to institute proceedings in the courts of the state owning or operating the vessel, without the state being permitted to avail itself of its immunity. [13]

(3) This brief synopsis of the evolution of the restrictive theory has a dual purpose. First, it evidences the fact that a major shift toward the restrictive approach has occurred throughout the international community. Additionally, however, it is designed to alert the reader to the fact that, though many states do currently favor the restrictive theory, there still exists no universal approach toward the question of jurisdictional immunity. Even among those countries which favor the restrictive form of protection, the methods of implementation and interpretation vary. A clear understanding of this lack of uniformity is essential to an informed analysis of the subject in question.

5-5. Procedures for Asserting Immunity. A foreign state may be required to follow certain procedures in asserting its immunity, provided that these procedures do not unreasonably restrict its opportunity effectively to do so. Before the 1976 congressional change instituting the present practice, the procedures required of foreign states before United States courts and agencies were summarized in Restatement (Second), [14] as follows:

> **§ 71. Assertion of Immunity: Law of the United States**
>
> (1) In a federal court or other enforcing agency of the United States, an objection to its exercise of enforcement jurisdiction with respect to a foreign state, based on the rule stated in § 65, is ineffective if made after the merits of the controversy have been placed in issue by the foreign state and unless made to the court or other enforcing agency either:
>
> (a) by the United States by means of a suggestion originating in the Department of State and communicated to the court or other enforcing agency by the Department of Justice, or
>
> (b) by the government of the foreign state or its accredited diplomatic representative upon an appearance before the court or other enforcing agency that does not place the merits of the controversy in issue.
>
> (2) In a court of a state of the United States, the procedure for asserting immunity is determined by the law of that state. Such procedure is normally similar to that indicated in Subsection (1) but may permit assertion of immunity later or in a different manner than required by the rule stated in Subsection (1). A state may not prescribe more stringent requirements other than assertion before the merits of the controversy are placed in issue.
>
> (3) Failure to assert immunity as indicated in Subsections (1) and (2) does not affect immunity from execution unless the circumstances indicate a waiver of such immunity. . . .

5-6. The Evolving Status of Sovereign Foreign Litigants in U.S. Courts. *a. Previous Role of the U.S. Executive Branch in Questions of Jurisdictional Immunity.* The suggestion by the State Department, as set forth in the Tate Letter, that the courts defer to the former's suggestions regarding various requests for jurisdictional immunity was not a novel concept of the function of the American judiciary. U.S. Courts, both State and Federal, and prior to and after the Tate Letter, often deferred to suggestions from the Executive Branch in cases involving the Nation's foreign relations. For example, suggestions of the State Department [15] have played a role in connection with recognition of foreign states and governments and the Act of State Doctrine. [16] While this deference did provoke charges that the courts are abdicating their responsibility and that the State Department was intruding into the judicial sphere, [17] the constitutional supremacy of the Executive Branch [18] in the conduct of foreign relations was generally seen before the recent statutory changes as requiring courts to defer to the Executive judgment with

12. 176 L.N.T.S. 199 (1926).

13. The United States is not a party to this convention.

14. *Restatement (Second)*, *supra* note 2 at § 71.

15. The reader's attention is called to the fact that, as the State Department acts as the official spokesman for the Executive Branch on matters of sovereign immunity, these two terms are very often used interchangeably.

16. See chapter 6, *infra*.

17. See Jessup, *Has the Supreme Court Abdicated One of Its Functions*? 40 Am. J. Int'l L. 168 (1946); Note, *Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 TUL. L. REV. 841 (1972).

18. This supremacy has often been confirmed by the Supreme Court, the most cited decision being *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

respect to certain issues involving foreign states and their property.

b. The Present Status of Jurisdictional Immunity Before United States Courts. To relieve this sometime awkward division of executive and judicial competencies, the Secretary of State and the Attorney General in January, 1973, promoted for consideration a draft bill which would place within exclusive judicial competence the function of determining questions of jurisdictional immunity and the amenability to attachment of the property of a foreign sovereign. [19]

Public Law 94-583, effective 19 January 1977, brought this scheme into law. [20] The Department of State Legal Advisor in a 10 November 1976 letter to the Attorney General assessed the effect and the mechanics of the shift from the Tate Letter era of judicial deference to that of judicial primacy. [21]

DEAR MR. ATTORNEY GENERAL: Since the Tate Letter of 1952, 26 Dept. State Bull. 984, my predecessors and I have endeavored to keep your Department apprised of Department of State policy and practice with respect to the sovereign immunity of foreign states from the jurisdiction of United States courts. On October 21, 1976, the President signed into law the Foreign Sovereign Immunities Act of 1976, P.L. 94-583. This legislation, which was drafted by both of our Departments, has as one of its objectives the elimination of the State Department's current responsibility in making sovereign immunity determinations. In accordance with the practice in most other countries, the statute places the responsibility for deciding sovereign immunity issues exclusively with the courts.

P.L. 94-583 is to go into effect 90 days from the date it was approved by the President, or on January 19, 1977. We wish to advise you . . . what the Department of State's interests will be after that date.

. . . .

P.L. 94-583 will make two important and related changes in the Department's sovereign immunity practice with respect to attachment. First, the statute will prescribe a means for commencing a suit against a foreign state and its entities by service of a summons and complaint, thus making jurisdictional attachments of foreign government property unnecessary.

Second, Section 1609 of the statute will provide an absolute immunity of foreign government property from jurisdictional attachment. Such jurisdictional attachments have given rise to diplomatic irritants in the past and, in recent years, have been the principal impetus for a Department of State role in sovereign immunity determinations. It appears that after January 19, 1977, any jurisdictional attachment of foreign government property could, under Section 1609 of P.L. 94-583, be promptly vacated upon motion to the appropriate court by the foreign state defendant.

Immunity from execution. The Department of State has in the past recognized an absolute immunity of foreign government property from execution to satisfy a final judgment. The Department does not contemplate changing this policy in the period before January 19, 1977. On or after that date, execution may be obtained against foreign government property only upon court order and in conformity with the other requirements of Section 1610 of P.L. 94-583.

Future Department of State interests. The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94-583. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.

After P.L. 94-583 takes effect, the Executive Branch will, of course, play the same role in sovereign immunity cases that it does in other types of litigation—e.g., appearing as amicus curiae in cases of significant interest to the Government. Judicial construction of the new statute will be of general interest to the Department of State, since the statute, like the Tate Letter, endeavors to incorporate international law on sovereign immunity into domestic United States law and practice. If a court should misconstrue the new statute, the United States may well have an interest in making its views on the legal issues known to an appellate court.

Finally, we wish to express appreciation for the continuous advice and support which your Department has provided during the ten years of work and consultation that led to the enactment of P.L. 94-583. We believe that the new statute will be a significant step in the growth of international order under law, to which the United States has always been committed.

Sincerely,

MONROE LEIGH,
Legal Adviser.

The restrictive doctrine of jurisdictional immunity stated by Congress in section 1602 of new chapter 97 of the U.S. Code is an accurate statement of developed case law to this date.

§ 1602. The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

The restrictive scope of immunity and the broad amenability of foreign states to suit flowing from "commercial" activity and from other cases, fairly states the developed U.S. case law.

§ 1604. Immunity of a Foreign State From Jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General Exceptions to the Jurisdictional Immunity of a Foreign State

(a) A foreign state shall not be immune from the jurisdiction courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that

19. Senate Bill 566. See Cong. Rec. 1297 (daily ed. Jan. 26, 1973).

20. *Supra* note 11.

21. *Federal Register*, V. 41, No. 224, November 18, 1976, p. 50883.

agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state. . . .

Beyond the threshold question of amenability to suit, the new legislation breaks some new ground in describing the ultimate status of states with regard to judgment.

§ 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1609. Immunity From Attachment and Execution of Property of a Foreign State

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the Immunity From Attachment or Execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided.* That such property is not used for purposes of maintaining a diplomatic or consular mission of the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to idemntify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain Types of Property Immune From Execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution notwithstanding any withdrawal of the waiver which the bank, authority, or government may purport to effect except in accordance with the

terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency."

Section II. IMMUNITIES OF STATE REPRESENTATIVES

5-7. Diplomatic Representatives and Theories of Diplomatic Immunity. *a.* In a letter of March 16, 1906, to the Secretary of Commerce and Labor, Secretary of State Elihu Root said:

> There are many and various reasons why diplomatic agents, whether accredited or not to the United States, should be exempt from the operation of the municipal law at [*sic*] this country. The first and fundamental reason is the fact that diplomatic agents are universally exempt by well recognized usage incorporated into the Comman law of nations, and this nation, bound as it is to observe International Law in its municipal as well as its foreign policy, cannot, if it would, vary a law common to all. . . .
>
> The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable to the accredited nation it is proper to request his recall; if the request be not honored he may be in extreme cases escorted to the boundary and thus removed from the country. And rightly, because self-preservation is a matter peculiarly within the province of the injured state, without which its existence is insecure. Of this fact it must be the sole judge: it cannot delegate this discretion or right to any nation however friendly or competent. It likewise follows from the necessity of the case, that the diplomatic agent must have full access to the accrediting state, else he cannot enter upon the performance of his specific duty, and it is equally clear that he must be permitted to return to the home country in the fulfillment of official duty. As to the means best fitted to fulfil these duties the agent must necessarily judge: and of the time required in entering and departing, as well as in the delay necessary to wind up the duties of office after recall, he must likewise judge. [22]

b. In its 1958 articles on diplomatic privileges and immunities, which served as the basis for the Vienna Convention on Diplomatic Relations, the International Law Commission noted that diplomatic privileges and immunities had in the past been justified on the basis of the "exterritoriality" theory or on the basis of the "representative character" theory. According to the former, the premises of the mission represented a sort of extension of the territory of the sending state; according to the latter, privileges and immunities were based on the idea that the diplomatic mission personified the sending state. The Commission then observed that a "third theory" appeared to be gaining ground in modern times; i.e., the "functional necessity" theory, "which justifies privileges and immunities as being necessary to enable the mission to perform its functions." The Commission stated that it had been guided by this third theory ". . . in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself." [23]

22. 4 G. Hackworth, *Digest of International Law* 513-14 (1942).

23. 2 Y. B. I.L.C. 95 (1958).

5-8. The Vienna Convention on Diplomatic Relations. *a.* The Vienna Convention on Diplomatic Relations [24] was signed on April 18, 1964; as of January 1, 1975, 114 states were parties to the convention. The convention entered into force for the United States on December 13, 1972. The long delay between the signature of the convention and its ratification by the United States was caused by efforts of the Department of State to obtain, before ratification, the enactment of new legislation to resolve inconsistencies between the present legislation and the convention. As of January 1, 1977, the proposed legislation had not been enacted with the exception of measures *supra* codifying the restrictive approach to foreign state immunity.

b. Prior to the drafting of the convention, the practice of states in the matter of diplomatic immunity was not uniform. There was a great degree of uniformity in some areas and in respect to those the convention sets up a uniform standard for states to follow. In some instances the convention introduces new rules. Some of the more important provisions follow: [25]

VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement

24. 22 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95.

25. Among the substantive articles omitted, *supra*, are those dealing with definitions (Art. 1); the functions of a diplomatic mission (art. 3); the establishment of diplomatic missions (arts. 2, 4-8, 10-13); the declaration by a receiving state that a representative is *persona non grata* (Art. 9); protocol matters (arts. 14-18); the interim administration of missions temporarily without a "head of mission" (art. 19); the obligation of the receiving state to assist in accommodating the mission and its staff (art. 21); and the exemption from taxes on the premises of the mission (art. 23). For a full account and analysis of the proceedings in the Conference that led to the adoption of the Convention, *see* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. § 8 (1962).

and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(*a*) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(*b*) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(*c*) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(*a*) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(*b*) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(*c*) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(*d*) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

(*e*) charges levied for specific services rendered;

(*f*) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(*a*) articles for the official use of the mission;

(*b*) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment. . . .

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign

Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

5-9. The International Law Commission's Convention on the Protection of Diplomats. Motivated by a substantial increase in violent crimes committed against diplomatic personnel by various terrorist organizations, the International Law Commission drafted, in 1973, the Convention on The Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. [26] The wide scope of protection afforded by this convention is evidenced by its first three articles.

Article 1

For the purpose of this Convention:

1. "Internationally protected person" means:

(a) A Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household;

2. "Alleged offender" means a person as to whom there is sufficient evidence to determine *prima facie* that he has committed or participated in one or more of the crimes set forth in article 2.

Article 2

1. The intentional commission of:

(a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person;

(b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty;

(c) A threat to commit any such attack;

(d) An attempt to commit any such attack; and

(e) An act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.

2. Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.

3. Paragraphs 1 and 2 of this article in no way derogate from the obligations of States Parties under international law to take all appropriate measures to prevent other attacks on the person, freedom or dignity of an internationally protected person.

Article 3

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:

(a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

5-10. U.S. Legislation for the Protection of Diplomats. At the request of the Department of State, legislation was enacted in 1972 to supplement that already designed to safeguard protected persons. Applicable provisions of this U.S. Protection of Diplomats Act [27] appear below.

An Act

To amend title 18, United States Code, to provide for expanded protection of foreign officials, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Act for the Protection of Foreign Officials and Official Guests of the United States".

Act for the Protection of Foreign Officials and Official Guests of the United States.

STATEMENT OF FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnaping, and assault has resided in the several States, and that such power should remain with the States.

The Congress finds, however, that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.

86 STAT. 1070

86 STAT. 1071

Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs.

Jurisdiction.

26. 13 Int'l Legal Mat. 41-49 (Jan 1974).

27. 86 Stat. 1070 (1972).

TITLE I—MURDER OR MANSLAUGHTER OF FOREIGN OFFICIALS AND OFFICIAL GUESTS

62 Stat. 756.
18 USC 1111.

SEC. 101. Chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1116. Murder or Manslaughter of Foreign Officials or Official Guests

Penalty.

"(a) Whoever kills a foreign official or official guest shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

Definitions.

"(b) For the purpose of this section 'foreign official' means—

"(1) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

"(2) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

"(c) For the purpose of this section:

"(1) 'Foreign government' means the government of a foreign country, irrespective of recognition by the United States.

"(2) 'International organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288).

59 Stat. 669.

"(3) 'Family' includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official stands in loco parentis, or (b) any other person living in his household and related to the foreign official by blood or marriage.

"(4) 'Official guest' means a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

"§ 1117. Conspiracy to Murder

62 Stat. 756; 65 Stat. 721; *Ante*, p. 1071.

"If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."

SEC. 102. The analysis of chapter 51 of title 18, United States Code, is amended by adding at the end thereof the following new items:

"1116. Murder or manslaughter of foreign officials or official guest."
"1117. Conspiracy to murder."

86 STAT. 1071

86 STAT. 1072

TITLE II—KIDNAPING

62 Stat. 760; 70 Stat. 1043.

SEC. 201. Section 1201 of title 18, United States Code, is amended to read as follows:

"§ 1201. Kidnaping

"(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

"(1) the person is willfully transported in interstate or foreign commerce;

"(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

"(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101 (32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (32)); or

84 Stat. 921.

"(4) the person is a foreign official as defined in section 1116 (b) or an official guest as defined in section 1116 (c)(4) of this title,

Penalty

shall be punished by imprisonment for any term of years or for life.

"(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

"(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."

SEC. 202. The analysis of chapter 55 of title 18, United States Code, is amended by deleting

"1201. Transportation",

and substituting the following:

"1201. Kidnaping."

TITLE III—PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS

SEC. 301. Section 112 of title 18, United States Code, is amended to read as follows: 78 Stat. 610.

"§ 112. Protection of Foreign Officials and Official Guests

"(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Offenses and penalties.

"(b) Whoever willfully intimidates, coerces, threatens, or harasses a foreign official or an official guest, or willfully obstructs a foreign official in the performance of his duties, shall be fined not more than $500, or imprisoned not more than six months, or both.

"(c) Whoever within the United States but outside the District of Columbia and within one hundred feet of any building or premises belonging to or used or occupied by a foreign government or by a foreign official for diplomatic or consular purposes, or as a mission to an international organization, or as a residence of a foreign official, or belonging to or used or occupied by an international organization for official business or residential purposes, publicly— Demonstrations.

86 STAT. 1072

86 STAT. 1073

"(1) parades, pickets, displays any flag, banner, sign, placard, or device, or utters any word, phrase, sound, or noise, for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties, or

"(2) congregates with two or more other persons with the intent to perform any of the aforesaid acts or to violate subsection (a) or (b) of this section,

shall be fined not more than $500, or imprisoned not more than six months, or both.

"(d) For the purpose of this section 'foreign official', 'foreign government', 'international organization', and 'official guest' shall have the same meanings as those provided in sections 1116 (b) and (c) of this title. Definitions.

Ante, p. 1071.

"(e) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States."

SEC. 302. The analysis of chapter 7 of title 18, United States Code, is amended by deleting USC prec. title 1.

"112. Assaulting certain foreign diplomats and other official personnel."

and adding at the beginning thereof the following new item:

"112. Protection of foreign officials and official guests."

5-11. Applicability of Domestic Law. *a. Applicability of Domestic Law Before Obtaining Diplomatic Status.* The appointment by a foreign state of a diplomatic agent does not automatically bring him diplomatic immunity. The receiving state must give its consent and, until it does, the diplomatic agent may be sued or prosecuted if he is already on the territory of the receiving state. [28] In the case of the head of a diplomatic mission, the sending state must inquire before nomination whether the proposed envoy is "persona grata," and the receiving state must also

28. *In Re* Vitianu, [1949] Ann. Dig. 281.

express its "agreement," before the nomination. As to other members of the diplomatic staff, "agreement" is not required and the consent to their appointment may be either express or implied. However, they are entitled to immunity from the time they enter the territory of the receiving state if such consent has been given previously.

b. Applicability of Domestic Law to Private Acts of Diplomatic Agent. Domestic law may be enforced against a diplomatic agent with respect to such of his acts as are private and not covered by immunity. Under Article 31 of the Vienna Convention, it may also be enforced when his act is private and entitled to immunity, but the immunity is waived. [29] Moreover, it may be enforced as well when the act is private and entitled to immunity, but the function of the diplomatic agent has come to an end. In this later case, the immunity ceases from the moment he leaves the territory of the receiving state, or on expiration of a reasonable period of time to do so. [30]

c. Nonapplicability of Domestic Law to Official Acts of a Diplomatic Agent. Suppose a diplomatic agent performs an official act such as the preparation of a report on highly sensitive political matter in the receiving state, at the request of his chief of mission. The report is made public in the sending state and is eventually reprinted in a newspaper in the receiving state. The diplomatic agent then retires from the diplomatic service of the sending state and remains in the state where he formerly exercised his function. Thereupon he is sued for libel in the report he prepared as an official act. He is entitled to immunity. [31]

d. Waiving the Immunity of a Diplomatic Agent. Article 32 of the Vienna Convention provides that diplomatic immunity may be waived by the sending state. If the diplomatic agent is the head of the mission, the waiver must come from the ministry of foreign affairs of the sending state. If the individual involved in junior in rank, presumably the head of the mission, i.e., the person authorized to speak for the sending state in the receiving state, may waive the immunity. In either case, the waiver must be unambiguously expressed.

e. Waiver of Immunity by Initiation of Proceedings. This form of waiver is also provided for in Article 32 of the Vienna Convention. There is no requirement that a diplomatic agent obtain authorization from his state prior to initiating the proceeding.

f. Applicable U.S. Law. Sections 252, 253 and 254 of Title 22 of the United States Code, Annotated, which have to do with the diplomatic immunity of ambassadors and public ministers, are as follows:

§ 252. Suits against ministers and their domestics prohibited. Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

§ 253. Penalty for wrongful suit. Whenever any writ or process is sued out in violation of section 252 of this title, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court.

§ 254. Exceptions as to such against servants, etc., of minister; listing servants. Sections 252 and 253 of this title shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of an ambassador or a public minister, and the process if founded upon a debt contracted before he entered upon such service; nor shall section 253 of this title apply to any case where the person against whom the process is issued is a domestic servant of the ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof, post the same in some public place in his office. All persons shall have resort to the list of names so posted in the marshal's office, and may take copies without fee.

It is important to note that ambassadors and ministers are totally immune from suit in U.S. Courts, even though the cause of action might be based on purely personal transactions. [32] Thus, section 1251 of title 28 stipulates that:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

* * *

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, *not inconsistent with the law of nations.* (Emphasis added.)

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties. . . .

5-12. Proving Diplomatic Status. *a.* Comment *i* to Section 73 of the Restatement as to proof of diplomatic status declares:

Diplomatic status is established by its recognition as such by the Department of State, on request of the foreign government, and communication of this recognition to the court. Mere inclusion in the Diplomatic List maintained by the Department of State (the "Blue List") is not alone sufficient to foreclose judicial inquiry. Preparation of this list is only a ministerial act and not a determination by the executive branch of a right to diplomatic immunity. Where the Secretary or his designee certifies an individual's name as a person accepted as a diplomatic agent, the certification is conclusive on the court.

Comment b to Section 74 of the Restatement states as to proof of status in United States practice for persons other than diplomatic agents.

The Department of State maintains a List of Employees of Diplomatic Missions (the "White List") which is comparable to the "Blue List" * * *. The same procedural and legal questions arise with respect to proof of immunity of persons on the "White List" as apply in the case of persons on the "Blue List."

b. Decisions in matters of diplomatic immunity by the

[29]. See, with respect to waiver, Article 32 of the Vienna Convention, at p.10, *supra.*

[30]. See Article 39 of the Vienna Convention, at p. 10, *supra.*

[31]. See *Restatement (Second)*, *supra* note 2 at § 73.

[32]. See Arcaya v. Paez, 145 F.Supp. 464, *aff'd per curiam*, 244 F.2d 958 (2d Cir. 1957).

national courts of other states often mention that the ministry of foreign affairs has certified the diplomatic status of the person involved in the case, thus suggesting that decision-making by the executive with respect to diplomatic status is widespread.

5-13. The Reach of Diplomatic Immunity. *a.* The Vienna Convention divides the personnel of a diplomatic mission into four categories and assignes different privileges and immunities to each. In assessing the difference in treatment of each of these categories, it is useful to know who the persons are in each and what they do. The information below is a simplified table of organization of a diplomatic mission.

(1) The first category is the diplomatic staff. Its members have diplomatic rank. They are the individuals engaged in the performance of the diplomatic function in the strict sense of the term. These diplomatic agents, as they are called in the Vienna Convention, include the chief of mission (ambassador, or minister or charge d'affaires), counsellor or deputy chief of mission, the first, second and third secretaries (of embassy), the military attaches (air, army, navy) and such other attaches (for commerce, labor, treasury and other matters) as the receiving state may agree to recognize as diplomatic agents.

(2) The next two categories—which may be looked upon as part of the "official" family of the diplomatic agent—are the administrative and technical staff on the one hand and the service staff on the other. The administrative staff includes administrative officers, persons in charge of communications (code and mail), secretary-typists and file clerks. The service staff includes drivers of the mission cars, butlers, cooks, maids and gardeners. The last category—which may be looked upon as part of the "personal" family of the diplomatic agent—consists of private servants.

b. No immunity is required for private servants under the Vienna Convention. Before the Convention, the United Kingdom, like the United States, granted complete immunity to the private servants of diplomatic agents. Many other states did not. Under Article 37(4) of the Convention, private servants of members of the mission are entitled to immunity only to the extent the receiving state wishes to grant it. The statutes by which the United States gives complete immunity to private servants are derived from the Act of April 30, 1790, chap. 9, §§ 25-27, 1 Stat. 117. Thus, as noted above, Section 252 of Title 22 of the U.S. Code expressly bars suits against any "domestic" or "domestic servant" of diplomtaic agents.

c. Immunity of family members and dependents of diplomatic agents under the Vienna Convention. Under Article 37(1) of the Vienna Convention, the members of the family of a diplomatic agent forming part of his household are entitled to the immunity he personally has. Who the "members of the family" are, however, is left unclear and so is the notion of "household." There was a great diversity of views on the meaning of these terms at the Vienna Conference on Diplomatic Relations. In a letter quoted in 7 Whiteman, Digest of International Law 260 (1970), an Assistant Legal Adviser in the Department of State of the United States maintained:

> * * * The Governments represented at the Vienna Conference were unable to agree on a definition of family, for purposes of privileges and immunities. All governments are in general agreement that the wife of a diplomatic agent, his minor children, and perhaps his children who are full-time college students or who are totally dependent on him, are entitled to diplomatic immunity. All governments tend to agree that other relatives forming part of his household who are gainfully employed are not entitled to diplomatic immunity. Other cases, e.g. unmarried adult daughters, dependent parents, and sisters acting as official hostesses, are decided on the basis of the facts in the particular situation and the practice in the receiving state. Under the Vienna Convention, members of the family of a diplomatic agent who are nationals of the receiving state are not entitled to diplomatic immunity.

d. U.S. practice with respect to the immunity of service has been to grant service staff the same immunity as diplomatic agents. In one incident, the driver of the Minister of Iran was arrested in Maryland for speeding and both he and the minister taken to the police station. A justice of the peace dismissed the driver's fine. Upon protest from Iran, the police officers were prosecuted, fined, and removed from duty. [33]

(1) While neither diplomatic representatives nor their drivers are subject to arrest or detention for parking violations, they are expected to pay the charges involved. If they fail to do so, the Department of State will not authorize the issuance to them of DPL plates. [34]

(2) Under Article 37(3) of the Vienna Convention, the members of the service staff have no immunity from criminal jurisdiction and have immunity from civil jurisdiction only for acts performed in the course of their duties. However, the article does not bar the United States from granting the broader immunity given them under its present law and practice.

e. U.S. practice with respect to administrative and technical staff. The practice of the United States has been to give members of the administrative and technical staff the same immunity as is given diplomatic agents. Under Article 37(2) of the Vienna Convention, the U.S. is not required to give these individuals immunity from civil jurisdiction for acts performed outside the course of their official duties. However, neither is it barred from granting them the broader immunity given them under present law and practice. Article 37 of the Vienna Convention does, however, grant to families of the members of the administrative and technical staff the same immunity as is granted the members of that staff themselves. Until the Vienna Convention came into force for the United States, it has been its practice not to grant any immunity to their families.

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33. See Reeves, *The Elkton Incident*, 30 Am. J. Int'l L. 95 (1936).

34. Announcement of April 1, 1964, 58 Am. J. Int'l L. 1001 (1964).

5-14. Protection of Diplomatic Personnel in Transit. The immunities of diplomats while in transit through the territory of a third state have long been the subject of considerable controversy. [35] However, much of the debate surrounding this topic has ceased as a result of Article 40 of the Vienna Convention.

Art. 40 (1) If a diplomatic agent 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 shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

(2) In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

(3) Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

(4) The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

5-15. The Inviolability of Diplomatic Premises. *a.* The concept of jurisdictional immunity as it relates to diplomatic premises is very often misunderstood and misapplied. The case which follows serves the dual purpose of setting forth the law as it exists and dispelling many of the myths surrounding this particular principle.

FATEMI v. UNITED STATES
United States Court of Appeals, District of Columbia, 1963.
192 A.2d 525.

MYERS, ASSOCIATE JUDGE. These are consolidated appeals of fourteen Iranian nationals from convictions for "unlawful entry" under Title 22 D.C. Code § 3102, 1961 Ed.

Appellants, Iranian students studying in this country, entered the Iranian Embassy to deliver a petition protesting an Iranian land reform referendum. After they had staged an overnight "sleep-in," embassy officials requested the Metropolitan police to come to the embassy. Several police officers, headed by a captain, entered the embassy and talked with the Minister who gave the captain a formal, written request addressed to the Metropolitan Police Department asking the police to enter the embassy, eject the students from the premises and arrest them because, after a lawful entry on the previous day, they had refused to leave upon demand of the person lawfully in charge. The Minister then, in the presence of the police, again asked the students to leave within five minutes, addressing them in both Iranian and English. When they refused to depart they were placed under arrest and bodily carried from the embassy.

Following trial on January 22, 1963, the defendants, having refused a continuance and having chosen not to testify, but at all times fully represented by counsel, were found guilty.

Appellants complain numerous errors were commited below. We are of the opinion that only two alleged errors are worthy of consideration: (1) that the District of Columbia police had no authority to enter the Iranian Embassy and arrest Iranian nationals for a crime committed within the confines of the Embassy; and (2) even if the inviolability of the Embassy could be waived, the Minister had no authority to waive it. Appellants contend that a foreign embassy, protected by the doctrine of inviolability, which extends to diplomatic dwellings, is not subject to the jurisdiction of the local police and courts of the receiving state or to its body of criminal law. We find scant authority to support this contention; indeed the weight of authority is to the contrary.

Since our decision must rest in part upon principles of international law, which is part of the law of the land, we have examined custom, case decisions and the works of the treatise writers to aid in ascertaining the nature of the particular questions here involved. Although case law is not controlling in determining issues of international law, recorded decisions help in analyzing the custom or trend of the law in a given area. We believe that the weight of international case law as reinforced by the treatise writers [5] establishes as a modern rule of international law that (1) a foreign embassy is not to be considered the territory of the sending state; and (2) local police have the authority and responsibility to enter a foreign embassy if the privilege of diplomatic inviolability is not invoked when an offense is committed thereon in violation of local law.

Representatives of a foreign sovereign are given immunity from the operation of the laws of the receiving nation, and the premises and buildings occupied by the diplomatic mission usually are regarded as inviolable by the authorities of the receiving state. This is grounded upon the international law concept that all sovereigns are equal and that the representatives of a particular sovereign serve in the place of the one sending them. "No act of jurisdiction or administration of the receiving Government can take place within [the confines of an embassy] *except by special permission of the envoys.*" (Emphasis added.)

That the diplomatic premises are a part of the territory of the sending state and therefore *always* exempt from local laws does not follow as a matter of course, however. "The modern tendency among writers is toward rejecting the fiction of extraterritoriality * * *." Numerous case decisions bear out this trend. As early as 1867, the doctrine of extraterritoriality was abandoned by European nations. Recently, in the case of R. v. Kent, the British courts held that "A crime committed in a foreign embassy is a crime committed in the United Kingdom and the offender, *if not protected by diplomatic immunity,* is liable to prosecution in British courts." (Emphasis added.)

Appellants have failed to distinguish cases in which the privilege of diplomatic immunity is invoked from those in which it is not. If a member of the diplomatic community asserts his claim to immunity, then the local police are powerless to act. Only if the criminal act being committed by the diplomat is such as to endanger the public may the police disregard the inviolability of an embassy and enter to seize the offender. Even in this situation the police may only hold the accused to prevent injury to the public, and only until the Department of State can request his recall, but the law enforcement officers are powerless to prosecute the offender. Such is not the instant case, involving an embassy to which the police had been invited in order to arrest and remove Iranian students who have no claim to the privilege of immunity and were violating local law.

Appellants' next contention—that even if the inviolability of the diplomatic dwellings can be waived, the Minister of the embassy had no authority to do so—that the waiver must come only from the Ambassador—is equally without merit.

* * * We do not think it unreasonable to hold that a police captain can enter the Iranian embassy and make an arrest for a misdemeanor committed in his presence when he has been called by one who purports to

35. For a concise summary, see Harvard Research in International Law, *Diplomatic Privileges and Immunities*, 26 Am. J. Int'l L. Supp. 15, 85-88 (Art. 15) (1932).

5. A few selections from the treatises disclose:

(a) * * * If a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of extraterritoriality, the criminal must be surrendered to the local Government. 1 Oppenheim, International Law (8th Ed. Lauterpacht Editor 1955) § 390.

(b) The inviolability of diplomatic premises does not mean that they are to be considered as altogether outside the application of the law of the receiving state—a foreign enclave within its territory. Brierly, The Law of Nations (6th Ed. 1963).

be the Minister of the embassy and is given a letter on official Iranian stationery asking the local police to disregard, for this one instance, the diplomatic rule of inviolability of the embassy and to lend aid in the ejection of violators. * * *

* * *

Accordingly, we rule that the arrest of the appellants was neither arbitrary nor illegal but orderly and proper under the circumstances, and there being no error concerning the trial, the convictions are

Affirmed.

b. Title IV of the 1972 U.S. Protection of Diplomats Act [36] provides specific protection to the property of foreign governments and international organizations in the United States.

TITLE IV—PROTECTION OF PROPERTY OF FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

SEC. 401. Chapter 45 of title 18, United States Code, is amended by adding at the end thereof the following new section:

62 Stat. 743.
18 USC 951.

"§ 970. Protection of Property Occupied by Foreign Governments

"(a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Offenses and penalties.

86 STAT. 1073

"(b) For the purpose of this section 'foreign official', 'foreign government', 'international organization', and 'official guest' shall have the same meanings as those provided in sections 1116 (b) and (c) of this title."

Definitions.

Ante, p. 1071.

SEC. 402. The analysis of chapter 45 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"970. Protection of property occupied by foreign governments."

SEC. 3. Nothing contained in this Act shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia.

5-16. Counsular Immunity. *a.* The consular function. The institution of the consul derives from the practice in medieval Italy of electing a representative from among the foreign merchants resident in a city. Thus, until very recently, consular functions were principally commercial and not diplomatic, though judicial jurisdiction over nationals of the consul's state was sometimes vested in consuls, especially in undeveloped countries. Today, however, the distinction between commercial and diplomatic activity is difficult to maintain. Much formal diplomatic negotiation is in fact trade promotion, and much trade promotion leads to diplomatic overtures. This fusion of functions has led inevitably to a fusion of the diplomatic and consular services, so that a career officer may be posted on one tour to an embassy secretariat, on the next to a trade mission, and on the next to a consulate proper. Some embassies make no pretence of keeping the consular service distinct and house it in the same building, and to some extent, with the same personnel.

b. In recent times, consuls have come to represent all manner of governmental activity, such as supervising treaty implementation and performing duties with respect to government-owned merchant ships. These functions are not very distinguishable from those of diplomats. [37] Accordingly, some consuls and diplomatic representatives should be accorded the same degree of jurisdictional immunities. Despite the growing similarity of official functions, however, the distinction between these two categories of state representatives continues to exist. This fact is demonstrated by the following case.

ANDERSON v. VILLELA
United States District Court, D. Massachusetts, 1962.
210 F.Supp. 791.

FORD, DISTRICT JUDGE. This is an action for damages for personal injuries in which one of the two defendants moves for judgment dismissing the action as to him on the ground that the court is without jurisdiction as to him.

The sole basis for jurisdiction set forth in the complaint is 28 U.S.C.A. § 1351, which provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states." The defendants here are Vasco A. Villela, the owner of the motor vehicle alleged to have caused plaintiff's injuries, and his son Ruy Villela, who is alleged to have been the driver of the vehicle. The complaint alleges that Vasco is a consul, and he does not appear to challenge the court's jurisdiction as to the action against him. The sole issue raised by Ruy Villela's motion to dismiss is whether § 1351 gives this court jurisdiction over the action as against him, since no other basis of jurisdiction is alleged in the complaint.

Ruy Villela is not himself a consul or vice consul. However, plaintiff contends that § 1351 should be interpreted as applying to members of the family of a consul as well as to the consul personally. He argues that just as the diplomatic immunity from suit of ambassadors and other envoys extends to members of their families, so the immunity of a consul

36. 86 Stat. 1070 (1972).

37. 2 D. O'Connell, *International Law*, 914 (1965).

from suit in a state court should be extended to members of the consul's family. The analogy is not persuasive. The diplomatic immunity of ambassadors and other envoys and the members of their suites rests on a principle of international law which has been recognized and applied by our courts. Under international law a consul does not enjoy any such immunity, at least as to suits not based on his official acts within the scope of his duties as consul. Coppell v. Hall, 7 Wall (74 U.S.) 542, 553, 19 L.Ed. 244; The Anne, 3 Wheat. (16 U.S.) 435, 445, 446, 4 L.Ed. 428; Arcaya v. Paez, D.C., 145 F. Supp. 464, affirmed 2 Cir., 244 F.2d 958. Such immunity as a consul enjoys from suit in a state court is not one based on international law but is conferred solely by statute, and in fact Congress has not always expressly provided for exclusive federal jurisdiction over actions against consuls. Bors v. Preston, 111 U.S. 252, 261, 4 S.Ct. 407, 411, 28 L.Ed. 419. Hence there is no basis for concluding that the scope of any immunity conferred by § 1351 should be co-extensive with the scope of diplomatic immunity under international law.

* * *

Note that under international law, a consul does not enjoy immunity as to suits not based on his official acts within the scope of his duties.

5-17. The 1963 Vienna Convention on Consular Relations. [38] *a.* Personal functions and immunities. Article 5 of the agreement contains a list of consular functions. These cover a wide spectrum and include, among others, protecting in the receiving state the interests of the sending state and its nationals; furthering the development of commercial, economic, cultural and scientific relations; ascertaining conditions and developments in the commercial, economic, cultural and scientific life of the receiving state; issuing passports, visas, and travel documents; helping and assisting nationals of the sending state; serving as a notary or civil registrar; assisting nationals in connection with decedents' estates, guardianships for persons lacking legal capacity and representation and preservation of rights before local tribunals; transitting documents or executing letters rogatory or commissions to take evidence for courts of the sending state; exercising rights of supervision and inspection of vessels and aircraft of the sending state; and extending assistance to such vessels and aircraft and their crews, including conducting investigations and settling disputes. The provisions of the convention most relevant to a discussion of jurisdictional immunities follow.

Art. 41. (1) Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

(2) Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

(3) If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Art. 43. (1) Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

(2) The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:

(*a*) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State;
or

(*b*) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Art. 44. (1) Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

(2) The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. . . .

(3) Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Art. 45. (1) The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

(2) The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.

(3) The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

(4) The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Art. 53. (1) Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

(2) Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

(3) When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

(4) However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from juris-

[38]. 21 U.S.T. 325; U.N.T.S. 261.

diction shall continue to subsist without limitation of time. . . .

Art. 54. (1) If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending state, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

(2) In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

(3) Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

(4) The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure.*

Art. 55. (1) Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State. . . .

b. Article 17 of the convention provides that a consular officer may be authorized to perform diplomatic acts without affecting his consular status. Articles 3 and 70 deal with the performance of consular functions by diplomatic personnel. Other omitted articles deal, *inter alia,* with the appointment and admission of consular officers, the *exequatar* (authorization from the receiving state admitting the head of a consular post to the exercise of his functions), miscellaneous facilities and privileges to be granted by the receiving state, protocol matters, and the termination of consular functions.

c. Inviolability of the consular premises is specifically spoken to in Article 31 of the Vienna Convention.

Article 31
Inviolability of the Consular Premises

1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

It has been stated that the trend before 1948 was to grant absolute consular immunity from military requisition and expropriation, irrespective of considerations of military defense or public utility. However, since World War II, there have been indications that expropriation or requisition of consular property may be permissible under conditions similar to those stated in Article 31. [39]

5-18. The Scope of Consular Immunities. The scope of consular immunities is defined in the great majority of cases by bilateral agreement between the sending and receiving states. The Restatement, moreover, notes that limited immunities ". . . appear to have been accepted in the customary practice that has developed in connection with the performance of consular functions and in the limited number of cases that have arisen." [40] Section 81(1) accordingly lays down the rule that . . . "[a] consular officer or employee is immune from the exercise of jurisdiction by the receiving state to prescribe and enforce any rule of conduct to the extent that it interferes with the performance of his official functions." In elaborating upon the concept of "official functions," the Restatement invokes the analogy of diplomatic immunities, noting that while such functions are "determined in part by the law of the receiving state," subject to the limitation that essential functions such as communication with the sending state must not be hampered, the "permissible scope of official functions tends [in the absence of international agreement] to be settled on a basis of reciprocity." [41]

5-19. Applicable U.S. Law. As noted in *Anderson v. Villela,* [42] all proceedings brought in the United States against consuls or vice consuls of foreign states must be brought in the Federal District Courts. [43] The Supreme Court has held, however, that divorce proceedings may be brought against consuls in the state courts. [44] As a result of the fact that the federal courts cannot enforce state criminal law, consuls enjoy a *de facto* immunity from criminal prosecution for violations of state law. [45]

5-20. Special Missions and Persons Assimilated to Diplomatic Status. *a.* With reference to personnel of special missions, Restatement, section 82, states:

An official representative of a foreign state, who has been received in a capacity that does not entitle him to the immunity of the state . . . or to diplomatic or consular immunity . . ., is immune from the exercise of jurisdiction by the receiving state to prescribe or enforce any rule of conduct to the extent that it interferes with the performance of his official functions.

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39. L. Lee, *Consular Law and Practice* 283-84 (1961).
40. *Restatement (Second), supra* note 2 at § 81, Comment *a.*
41. *Id.* at § 81, Comment *b.*
42. Page 5-17, *supra.*
43. 28 U.S.C.A., § 1351.
44. Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154 (1930).
45. See 4 G. Hackworth, *supra* note 78 at 746-53.

b. The International Law Commission has prepared a set of Draft Articles on Special Missions. [46] In doing so, the I.L.C. observed that the Convention on Diplomatic Relations dealt only with permanent diplomatic missions and that "... diplomatic relations between states also assumed other forms that might be placed under the heading of 'ad hoc diplomacy,' covering a state for limited purposes." [47] Article 29 of the Draft Articles provides for personal inviolability of the persons of the sending state's representatives in the special mission and of the members of its diplomatic staff (as in Article 29 of the Vienna Convention on Diplomatic Relations). Article 31 of the Draft Articles reproduces Article 31 of the Vienna Convention, with the exception that immunity is not granted to members of special missions with respect to "an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question."

5-21. Representatives to International Organizations.

a. In examining the jurisdictional immunities accorded representatives to international organizations, primary attention is focused on those individuals attached to the United Nations. An analysis of the protection afforded these representatives will, in turn, give the reader an overall understanding of this particular aspect of jurisdictional immunity. The basic law governing the relationships between the U.N. and its employees is, of course, the U.N. Charter. Articles of special significance to the question of the status of the employees of the organization (international civil servants) are Articles 97 through 101, defining the powers and duties of the Secretary-General and his staff, and Articles 104 and 105, dealing with questions of capacity, privileges, and immunities.

b. In addition to the Charter, there are basic international agreements detailing in more specific form the broad provisions of the Charter. A major document is the Convention on the Privileges and Immunities of the United Nations, [48] which came into force early in the life of the organization but was not ratified by the United States until April 27, 1970. [49] The organization has also entered into conventions with states in which it has located its principal offices. The agreement governing the United Nations premises in New York City is the Headquarters Agreement with the United Nations. [50]

c. Beyond agreements of general applicability are those the organization has entered into with states on whose territory it is carrying on a specific, temporary project. For example, the Secretary-General of the United Nations concluded an agreement with the Government of Egypt in 1957 on the status of the United Nations Emergency Forces in that country, dealing with such matters as civil and criminal jurisdiction over members of the force, privileges and immunities. [51]

d. It is important to note that in determining what law governs a particular situation arising in the United States, it is of course necessary to analyze the several possibly applicable treaties and legislation, not only in terms of their substantive provisions but also, in case of conflict, in terms of the chronology of their enactment or coming into force. [52] The more relevant provisions of the two most important agreements in this area appear below.

(1) CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Art. IV. § 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

§ 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

§ 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

§ 15. The provisions of Sections 11, 12 ... are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

§ 16. In this article the expression "representatives" shall be deemed

46. See the *Report of the Commission* in 62 Am. J. Int'l L. 244 (1968).

47. *Id.* at 246.

48. 21 U.S.T. 1418; 1 U.N.T.S. 15.

49. The U.S. reserved its acceptance with respect to the immunity of United States nationals from military service and taxation.

50. 61 Stat. 756; 11 U.N.T.S. 11.

51. 11 U.N. GAOR, Annexes, Agenda Item No. 66, at 52-57, U.N. Doc. A/3526 (1957); John, *Recent Cases on United Nations Law* 225 (1963).

52. See chap 2, *supra.*

to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations. [53]

(2) Section 15 of Article V of the agreement between the United Nations and the United States Regarding the Headquarters of the United Nations provides as follows:

(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

(2) such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned,

(3) every person designated by a Member of a specialized agency, as defined in Article 57, paragraph 2, of the Charter, as its principal resident representative, with the rank of ambassador or minister plenipotentiary, at the headquarters of such agency in the United States, and

(4) such other principal resident representatives of Members to a specialized agency and such resident members of the staffs of representatives of a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned, shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members whose governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries.

(3) Section 7(b) of the International Organizations Immunities Act, [54] accords representatives to international organizations, as well as officers and employees of such organizations, immunity "... from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees." [55]

Section III. IMMUNITIES OF INTERNATIONAL ORGANIZATIONS, THEIR AGENTS, OFFICIALS AND INVITEES

5-22. General. *a.* The modern law relating to the immunities of international organizations has developed principally from the experience of the League of Nations and the International Labor Organization, although some aspects of its origin can be traced back to the nineteenth century. This body of law began as little more than "a general principle resting on the questionable analogy of diplomatic immunities; it has become a complex body of rules set forth in detail in conventions, agreements, statutes and regulations." [56] As the scope and importance of the activities of international organizations have increased in the postwar world, so have the extent and significance of their immunities and those of their officials. The bases for these immunities differ in important respects from those for the granting of jurisdictional immunities to foreign states. Like states, international organizations require jurisdictional immunities in order to carry on their functions without interference from municipal courts and administrators. Unlike states, however, international organizations do not enjoy a long history of respect for their authority or the means of taking reciprocal reprisals against infringements of that authority.

b. The fact that no attempt will be made in this publication to fully analyze this particular aspect of jurisdictional immunity is not to be viewed as an attempt to minimize its increasing importance in public international law. A detailed examination of this area of jurisprudence is, however, better suited to an advanced study of international organization. For purposes of the military attorney, several references provide a concise and informative overview of this topic. [57]

Section IV. THE GRANTING OF DIPLOMATIC ASYLUM, POLITICAL ASYLUM OR TEMPORARY REFUGE

5-23. General. Military attorneys may very likely encounter requests for diplomatic asylum, political asylum or temporary refuge, either overseas or within the territorial jurisdiction of the United States. Moreover, a mishandling of such requests may lead to serious diplomatic and domestic consequences. [58] Accordingly, it is necessary to examine the legal norms and DOD regulations applicable to those jurisdictional concepts.

5-24. Applicable International Law. *a.* Initially, it is necessary to distinguish between political or territorial asylum and diplomatic asylum. Political or territorial asylum is the term appropriately to be employed where a political refugees finds refuge within the borders of a

53. As of January 1, 1975, 110 states had acceded to this Convention.

54. 59 Stat. 669; 22 U.S.C.A. § 288d(b).

55. On the immunities of representatives to international organizations, see generally *Restatement (Second)*, *supra* note 2 at § 86 and Gross, *Immunities and Privileges of Delegations to the United Nations*, 16 Int'l Org. 483 (1962).

56. C. Jenks, *International Immunities* XXXV (1961).

57. See W. Friedman, O. Lissitzyn & B. Pugh, *International Law* at 725-44 (1969), and N. Leech, C. Oliver & J. Sweeney, *The International Legal System* (1973) 883-928.

58. A classic example of the serious consequences that can occur arose of a U.S. refusal to grant asylum to a Lithunian seaman in U.S. territorial waters in November 1970. This refusal, now popularly known as The Vigilant Incident, resulted in a complete restructuring of Department of State and Department of Defense guidelines on requests for immunity. These are examined in the following pages. For an excellent discussion of the practical and legal problem involved in this incident, see Mann, *Asylum Denied: The Vigilant Incident*, 23 Naval War Coll. Rev. 4 (May, 1971) and Goldie, *Legal Aspects of the Refusal of Asylum by U.S. Coast Guard on 23 November 1970*, 23 Naval War Coll. Rev. 32 (May, 1971).

foreign state. On the other hand, diplomatic asylum is the term used where an individual, to evade local jurisdiction for a political offense, or to escape from imminent danger, finds protection in certain places that enjoy well-recognized immunities from the local jurisdiction. It is used particularly with reference to asylum in embassies and legations. [59]

b. In the *Asylum Case*, [60] the International Court of Justice observed:

> A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.

In keeping with this I.C.J. opinion, the United States has consistently refused to recognize the right to grant diplomatic asylum. [61] Derogations from this practice have occurred only in instances of serious humanitarian concern. One such instance is described below.

c. In a letter to the American Consulate General in Toronto in 1961, Acting Secretary of State Bowles stated:

> The United States, while not recognizing the doctrine of political [diplomatic] [62] asylum in United States Missions abroad, has in exceptional cases granted refuges on humanitarian grounds to an individual in immediate and grave personal danger.
>
> With special reference to the case of Cardinal Mindszenty, you will recall that he appealed to the American Legation in Budapest for refuge on November 4, 1956, when Soviet armed forces renewed their attack upon the Hungarian people. The decision to grant refuge to the cardinal was taken by the United States Government under highly exceptional and most unusual circumstances and on urgent humanitarian grounds at a time of foreign aggression against Hungary. It was clear in the circumstances of the renewed Soviet attack that Cardinal Mindszenty . . . faced certain death or imprisonment should he fall into the hands of Soviet or Soviet-controlled Hungarian Communist Forces. The American Legation in Budapest was accordingly authorized in this situation of emergency to afford him the refuge which he had requested. [63]

5-25. Controlling State Department Guidelines. Due to the general confusion surrounding the concepts of "political" and "diplomatic" asylum, the Department of State and the Department of the Army have recently developed guidelines and regulations setting forth definitions relating to asylum and the specific actions to be taken when requests for such are made. [64]

a. In the preface to its 1972 guidelines on the granting of asylum and "temporary refuge," [65] the State Department makes the following policy statement.

> Both within the United States and abroad, foreign nationals who request asylum of the United States Government owing to persecution should be given full opportunity to have their requests considered on their merits. The request of a person for asylum or temporary refuge shall not be arbitrarily of summarily refused by U.S. personnel. Because of the wide variety of circumstances which may be involved, each request must be dealt with on an individual basis, taking into account humanitarian principles, applicable laws and other factors.
>
> In cases of such requests occurring within foreign jurisdiction, the ability of the United States Government to give assistance will vary with location and circumstances of the request. [66]

These guidelines then proceed to set forth detailed procedures to follow and information to provide with regard to requests for asylum in the United States in other area outside any foreign jurisdiction.

b. In speaking to requests for asylum by individuals at U.S. installations, vessels or aircraft in foreign jurisdictions, this State Department document declares that while it is policy of the U.S. not to grant asylum at these units or installations within the territorial jurisdiction of a foreign state, any requests for U.S. asylum should nevertheless be reported in accordance with these newly established procedural guidelines. Moreover, attention is called to the fact that U.S. installations overseas *may* grant "temporary refuges" [67] for humanitarian reasons, i.e., in exceptional circumstances where the life or safety of a person is put in danger, such as pursuit by a mob. [68]

5-26. Controlling DA Regulation. In response to the State Department guidelines discussed above, the Department of the Army has formulated AR 550-1, Procedures For Handling Requests for Political Asylum an Temporary Refuge. [69] This regulation provides specific guidelines to Army installations and units that receive requests for political asylum or temporary refuge both within and outside of the territorial jurisdiction of the United States. [70]

The end of this chapter marks the termination of an examination of one of the most critical areas of public international law—state jurisdiction. Due to its importance, it

59. See 6 M. Whiteman, *Digest of International Law* 428 (1968) and 8 M. Whiteman, *Digest of International Law* 660 (1967).

60. Colombian-Peruvian Asylum Case, [1950] I.C.J. 266.

61. 2 G. Hackworth, *Digest of International Law* 622 (1941).

62. The necessity of inserting the word "diplomatic" here is indicative of the confusion surrounding the concept of asylum. The terms "political" and "diplomatic" asylum are consistently used interchangeably, although, as indicated above, these principles are legally and politically different in nature.

63. Letter from C. Bowles, Acting Secretary of State to the American Consulate General in Toronto, April 28, 1961, Instruction No. A-22, Dept of State file 211 0012/4-2861.

64. U.S. Department of State, *New Guidance Reinforces U.S. Policy on Right* of Asylum, 66 State Dep't. Bull. 124-27 (January 31, 1972); *Department of the Army, Procedures for Handling Requests for Political Asylum and Temporary Refuge*, AR 550-1 (August, 1973).

65. Reference here and in AR-550-1 is made to political asylum and "temporary refuge," a term used to describe temporary grants of "diplomatic" asylum. The term is used in deference to the above noted U.S. refusal to recognize the validity of the granting of diplomatic asylum.

66. U.S. Department of State, *supra* note 64.

67. "Temporary refuge" must not be confused with political or diplomatic asylum.

68. U.S. Department of State, *supra* note 64. This section also contains the procedures to be followed in such situations and the degree of force that can be used in order to protect the individual(s) involved.

69. Department of the Army, *supra* note 64. This AR implements DOD Directive 2000.11 of the same title.

70. The analogous U.S. Navy Regulation is SECNAVINST 5710.22 (7 October 1972); change 1 (15 August 1973).

is essential that the attorney be completely familiar with both the means by which jurisdiction might be exercised and the immunities to the enforcement of such. Attention must now be directed toward the responsibilities which states bear as a result of being endowed with the concurrent rights to exercise jurisdiction and to control activities within their territorial boundaries. Essential to such an analysis is an understanding of the manner in which both private and juristic persons acquire and lose a state's nationality and concomitant protection. The following chapter provides this insight.

CHAPTER 6
NATIONALITY

6-1. Introduction. *a.* A basic feature of today's system of nation states is the relative helplessness of the individual. At birth he finds himself a member of some political institution (typically a "state" in the international system) which, more or less, protects him from the violence of other individuals and groups of individuals. In the domestic legal system of that state, its police and courts may offer protection from harm inflicted within the state; while its army may protect him from harm caused by aggression from outside the state. If the individual steps outside "his" state and is injured by someone in another state, he is largely on his own. He must look for redress, if any, in the courts of that other state. Doctrines of sovereign immunity may bar him from redress for injuries caused by that state. However, as a last resort, the individual must appeal to his own state's government to help him. If it chooses, it may come to his aid by espousing a claim against the wrongdoing state through diplomatic channels (or possibly through arbitration or through judicial means such as the International Court of Justice).

b. For the protection it offers him at home and the protection it may afford him against foreign injuries, the state demands obligations of the individual in return: to obey its laws, to pay its taxes, to help to defend it against aggression. The physical fact of an individual's presence within a state has been the major basis from which the state exerts its power to protect the individual and to demand his allegiance. However, the processes of history have developed legal relationships between the state and the individual that do not depend solely upon his physical presence in the territory of the state. The state has a special relationship to those it designates as its "nationals." In broad and inexact terms, the state's nationals are entitled to greater rights than nonnationals (e.g., in states with voting systems, the national is permitted to vote, the nonnational is not); the state is more ready to demand that the national perform obligations (e.g., the national may be subject to laws prescribed by his state even though he is not physically present in its territory). [1]

c. The practices of states in creating the class of people upon whom they confer nationality vary widely. Some states accord nationality to individuals born within the territory; this right of nationality is referred to as *jus soli.* Some states accord nationality at birth only to individuals born of parents who are already nationals; this right of nationality is referred to as *jus sanguinis.* An increasing number of states recognize both bases. In addition to according nationality based upon facts associated with birth, states afford "naturalization" processes by which individuals may apply for and be granted nationality. As a result of such a variety of bases for nationality existing in the international system, it is possible for an individual to be designated a national and thus have "dual nationality" or even "multiple nationality." Indeed, there are circumstances under which he may have no nationality at all and thus be "stateless."

d. From the perspective of the international legal system, several important questions arise:

(1) Is a state free to set its own standards for conferring its nationality upon an individual, or does international law set some minimum standard?

(2) What is the significance of nationality as a base for the state's requiring the performance of obligations by an individual? For example, can the state draft into its army someone who is not its national?

This chapter will explore these and other related questions.

6-2. Nationality as a Concept of Municipal Law. *a.* The law of conflicts in nationality matters. Many municipal statutes and court decisions fall obviously into the category of "municipal law of nationality," for no consideration of any law other than that imposed by a sovereign in its unilateral dealings with individuals is involved. In other instances, the municipal character of the legal consideration is not so obvious, for the consideration may involve principles of nationality belonging to foreign states and contrary to the generally applicable law of the forum. This situation results not from municipal application of international law, but rather, from application of the rules of conflicts of the law, whereby the law of the forum embraces a principle of foreign municipal law. There is a special branch of conflict of laws, dealing with nationality, concerned with determining whether certain rules of foreign law, on which the existence, acquisition or loss of nationality may depend, will be given effect. For instance, the acquisition or loss of the nationality of a particular country may be dependent on the absence or presence, loss or acquisition of a foreign nationality. [2] In this situation the municipal law of the forum is not applied. Instead, a substantive principle of foreign law is applied by the forum. This process does not involve any concept of international law. It is the result of ordinary conflicts of law rules, as the foreign law applied has become the law of the forum in the case at hand.

b. There is a second situation in which a casual observer might mistake the operation of municipal law of nationality for that of international law. This is when resort has been made to international law as a guide in formulating municipal law. For example, the International Claims Settlement Act of 1949 [3] provides:

1. See the discussion on jurisdiction, chapter 4, *supra.*

2. Silving, *Nationality in Comparative Law,* 5 Am. J. Comp. L. 410, 416 (1956).

3. 64 Stat. 13, *as amended,* 22 U.S.C. § 1621 (1958).

A claim . . . shall not be allowed unless the property upon which the claim is based was owned by a national of the United States on the date of . . . taking thereof and . . . continuously thereafter until the date of filing. . . . [4]

With reference to this statutory provision, the House Committee which formulated it commented:

This section gives statutory recognition to the basic requirement of international law governing espousable international claims, which is that no claim can be so regarded unless the claim was continuously owned by a national of the claiming state . . . from the date of loss to the date the claim is filed. [5]

Thus, the United States, in its municipal law, has given formal effect to "one of the best established principles of international law." [6] However, . . . "it is erroneous to attempt to establish rules of international law by methods of comparative law, or even to declare that rules of municipal law of different states which show a certain degree of uniformity are rules of international law." [7] Thus, these legal concepts which bear the label "nationality" and which concern the law of more than one nation fail on close inspection to involve considerations of international law.

6-3. Acquisition of Nationality. *a.* An individual may acquire nationality either originally, that is through the circumstances of this birth, or derivatively, by some action after birth.

(1) *Original acquisition of nationality.* Two principles serve as the basis for the original acquisition of nationality: *jus soli* and *jus sanguinis.* [8] *Just soli* may be defined as the acquisition of a particular state's nationality by virtue of being born within the territory of that state. The principle of *jus sanguinis* may be defined as the acquisition of a particular state's nationality by virtue of the possession of the nationality by one's parents. Nationality, under this principle, may be said to be acquired by descent.

(2) *Derivative acquisition of nationality.* The derivative acquisition of nationality has been referred to as naturalization *ipso facto.* As such, it deals with the process of naturalization in its broadest sense. Naturalization derivatively acquired generally flows from some action of the person naturalized after birth. Several methods of acquiring nationality fall within the broad category of naturalization: by marriage; by legitimation; by acquisition of domicile; by entry into the service of a foreign state; by resumption of a lost nationality; and by the familiar naturalization process of a formal act on the application of the individual concerned. [9] In all of these areas substantial differences exist in the particular practices of individual states. These multifarious practices are consonant with the principles of international law in that it is well recognized that one of the aspects of territorial sovereignty is the power to determine who, by what method and according to which standards an alien may acquire nationality.

b. The most important and commonly encountered method of acquiring nationality is that process known as "naturalization." The extent to which a state may delineate the requirements placed upon aliens seeking its nationality is illustrated by the comprehensive and complex provisions covering this subject in the United States Code. [10] This formal process of naturalization by means of a voluntary petition may be accomplished in proceedings that are either judicial in nature, as in the United States, or that are purely administrative.

6-4. Loss of Nationality. *a.* As nationality may be gained, so may it be lost. The two primary methods by which the loss of nationality occurs are expatriation and denationalization. Expatriation consists of a formal renunciation of the possessed nationality by an individual who has left the state whose nationality he possesses and has or is in a position to acquire another nationality. The renunciation is the explicit announcement by the individual by which he sheds his possessed nationality. The formal consent of the state, whose nationality is renounced, to the individual's renunciation is known as a release.

Denationalization, on the other hand, may be defined as an act by a state by which it deprives one of its nationals of his nationality. Denationalization may occur either by operation of law—certain conduct resulting in *ipso facto* loss—or after an administrative or judicial proceeding instituted by the state.

b. Expatriation. A difficult question arises from the act of renunciation by an individual, as it is not entirely clear whether expatriation is unilateral or bilateral in nature. May an individual legally terminate his allegiance to the state of his nationality by unilaterally renouncing his nationality, or must a release by the state follow the renunciation for the renunciation to be "good against the world?" At common law a subject's allegiance persisted. This theory was known as the "doctrine of indelible allegiance" and was a part of the English law until 1870. It was, of course, a source of friction and bitterness between Great Britain and the United States, particularly in the later 18th and 19th centuries. Between 1870 and 1948, the English reversed this doctrine. In 1948, pursuant to the British Nationality Act, a middle ground was taken: a British subject may now either retain or renounce his allegiance to the Crown, as he chooses, upon acquisition of a new nationality. The doctrine of indelible allegiance was also a part of the law of the United States in early times. Gradually, however, the doctrine was abandoned as it did not comport with the position of the United States

4. 72 Stat. 528 (1958), 22 U.S.C. § 1642d (1958).

5. H. R. Rep. No. 2227, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. & Admin. News, 3304 (1958).

6. Preselj, *The Rule of the Nationality of Claimant, Due Process of Law and the United States Congress,* 53 Am. J. Int'l L. 144-151 (1959).

7. P. Weis, *Nationality and Statelessness in International Law* 3 (1955).

8. 1 L. Oppenheim, *International Law* 650-660 (8th ed. Lauterpacht 1955).

9. *Id.* at 660-63.

10. Immigration and Nationality Act, 66 Stat. 163 (1952), *as amended* 8 U.S.C. §§ 1421-59 (1958).

as a state receiving a heavy flow of immigration. [11]

c. Denationalization. The practice of states with respect to the application of denationalization varies greatly. Some states have no provision in their domestic law for denationalization, while others, like Great Britain and some of the Commonwealth countries, have provisions which relate only to naturalized nationals. Still others, like the United States, [12] have statutory provisions relating to the denationalization of both native born and naturalized nationals.

(1) In the U.S., Congress has provided that an American national shall lose his nationality for a variety of reasons. [13] The meaning of the statutory phrase "lose his nationality" has, however, generated a certain degree of controversy. In *Kennedy v. Mendoza-Martinez,* [14] the court said:

> We recognize at the outset that we are confronted here with an issue of the utmost import. Deprivation of citizenship—particularly American citizenship, which is "one of the most valuable rights in the world today," Report of the President's Commission on Immigration and Naturalization (1953), 235—has grave practical consequences. An expatriate who, like Cort, had no other nationality becomes a stateless person—a person who not only has no rights as an American citizen, but no membership in any national entity whatsoever. "Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress, since there is no State which is competent to take up their case. As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty * * * no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals." I Oppenheim, International Law (8th ed., Lauterpacht, 1955), § 291, at 640. The calamity is "[n]ot the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever * * *"

In holding that denationalization as a punishment is barred by the Eighth Amendment, the court, in *Troy v. Dulles,* [15] said:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

(2) It is not only in *Troy v. Dulles* that the denationalization provisions have suffered badly at the hands of the U.S. Supreme Court. Although in *Perez v. Brownell* [16] the court had held that it was within the foreign relations power of Congress to provide for loss of citizenship by one who votes in a foreign election, this particular case was overruled in *Afroyim v. Rusk.* [17] Moreover, in the *Mendoza-Martinez* case, the court held that the provision for loss of nationality by remaining outside the United States to avoid military service was punitive in nature and could not stand constitutionally in that it lacked due process safeguards guaranteed by the Constitution. Finally, in *Schneider v. Rusk,* [18] the court struck down the provision for loss of nationality by a naturalized citizen who had continuously resided for 3 years in the country of his origin.

6-5. Statelessness. *a.* Although, as noted above, international law does not generally prohibit the use by states of denationalization, the undesirable result, i.e., statelessness, is a matter of great concern. In *Staniszewski v. Watkins,* [19] a "stateless" seaman was released after being detained at Ellis Island for about 7 months at the expense of his employer. The court observed that the government was ". . . willing that he go back to the ship, but if he were sent back aboard ship and sailed to the port . . . from which he last sailed to the United States, he would probably be denied permission to land. . . . There is no other country that would take him without proper documents." The court sustained the seaman's writ of *habeas corpus* and ordered his release: "He will be required to inform the immigration officials at Ellis Island by mail on the 15th of each month, stating where he is employed and where he can be reached by mail. If the government does succeed in arranging for petitioner's deportation to a country that will be ready to receive him as a resident, it may then advise the petitioner to that effect and arrange for his deportation in the manner provided by law."

b. Similarly, in *Public Prosecutor v. Zinger,* [20] the court ordered the release of a stateless person who had been imprisoned for failure to obey expulsion orders. The court weighed the alternatives of releasing the man or imprisoning him "at the cost of the French taxpayer" for an offense which he could not help committing, since he was unable to leave French territory. The court concluded that "release is the best solution from the legal point of view." In the past, statelessness has resulted from a state's decree that members of a whole class of persons are no longer to be considered citizens of the state. During World War II, Germany withdrew German nationality from Jews permanently resident abroad. In France, this loss of nationality relieved an individual from the strictures applied by French law to enemy [German] subjects, even though the denationalization law was repealed by the Allies at the

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11. See generally, Boudin, *Involuntary Loss of American Nationality,* 73 Harv. L. Rev. 1510, 1511-1516 (1960).
12. Immigration and Nationality Act, 68 Stat. 267 (1952), *as amended* 8 U.S.C. §§ 1481-1489 (1958).
13. 8 U.S.C. § 1481.
14. 372 U.S. 144, 160; 83 S.Ct. 554, 563 (1963).
15. 356 U.S. 86, 101; 78 S.Ct. 590, 598 (1958).
16. 356 U.S. 44; 78 S.Ct. 568 (1958).
17. 387 U.S. 253; 87 S.Ct. 1660 (1967).
18. 377 U.S. 163; 84 S.Ct. 1187 (1964).
19. 80 F.Supp. 132 (S.D.N.Y. 1948).
20. [1935-37] Ann. Dig. 307 (No. 138).

end of the war. [21]

6-6. Nationality as a Concept of International Law. *a.* General concepts. The preceding discussion has been directed toward an appreciation of the inherent semantic difficulties involved in the study of nationality and to noting those problems which appear to be, but are not, within the ambit of the international law of nationality. For the purposes of a study of substantive principles, the content of the international law of nationality may be said to be those rules of law which define the relative rights of states regarding the relationship between themselves and foreign persons, a relationship which is governed, at least in part, by rules of international law. [22] The international law of nationality is not concerned with all the rights and duties of states, but only those which concern the relationship between one or more states [the subjects of international law] and foreign persons [the objects of international law]. [23]

It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations. This is a fact which has consequence over the whole area of International Law. [24]

It is obvious that while mental segregation of municipal and international law of nationality is essential to clarity of thought, physical segregation of the two in discussion is impossible. This results from the fact that it is necessary to consider simultaneously the rules which the sovereigns have imposed upon their subjects and the effect these rules have upon the relative rights of various sovereigns; and conversely, the effect the rights of various sovereigns as to one another has had upon the rules which each enforces on its own subjects. In the words of a United States Court of Appeals: "Each country determines for itself who are its nationals, subject to certain limitations on expansive claims imposed by international law." [25]

b. Determination of nationality under International Law.

(1) Limitations imposed by International Law.

NATIONALITY DECREES IN TUNIS AND MOROCCO
(GREAT BRITAIN v. FRANCE)
Permanent Court of International Justice, 1923
P.C.I.J., Ser. B, No. 4; 1 Hudson, World Ct.Rep. 143

[Decrees promulgated in Tunis and Morocco on November 8, 1921, declared every person born in Tunis or the French zone of Morocco of parents at least one of whom was a foreigner who had also been born there to be, subject to certain conditions of proof, a French national. The British government objected to the enforcement of the decrees (particularly with respect to forcible induction into military service) against persons who were the descendants of British subjects and therefore, under British law, themselves British subjects. France having refused to submit the dispute to arbitration, the British government placed the matter before the Council of the League of Nations. France there argued that the dispute arose out of a matter solely within its domestic jurisdiction, and the Council requested an advisory opinion of the Permanent Court of International Justice on the preliminary question whether the dispute between France and Great Britain was "by international law solely a matter of domestic jurisdiction (article 15, paragraph 8 of the Covenant). . . ."]

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.

. . .

[The Court held that the nationality decrees had to be considered in the light of a number of international agreements invoked by France and Great Britain; for that reason, the dispute did not arise out of a matter solely within France's domestic jurisdiction.]

* * * *

CONVENTION ON CERTAIN QUESTIONS RELATING TO THE CONFLICT OF NATIONALITY LAWS
Signed at The Hague, April 12, 1930
179 L.N.T.S. 89, 5 Hudson, Int'l Legislation 359

Art. 1. It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

Art. 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.

Art. 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

(2) What limits does international law, particularly "international custom" and "the principles of law generally recognized with regard to nationality," impose on the power of states to legislate on matters of nationality? Harvard Research in International Law suggested in 1929 that the power of a state to confer its nationality was "not unlimited," observing that although it may be difficult to specify the limitation imposed by international law on the power of a state to confer its nationality, "it is obvious that some limitations do exist." [26]

(3) The Hague Codification Conference of 1930 was unable to agree upon a more precise formulation than that adopted in Article 1 of the Convention on Conflict of Nationality Laws quoted above. However, a number of participating governments asserted that states were not obligated under international law to recognize nationality conferred upon a person in the absence of some generally recognized relationships or connection between the person and the state claiming him as its national. The German Government, for example, stated:

21. Terhoch v. Daudin et Assistance Publique France, [1947] *Ann.Dig.* 121 (No. 64).

22. See P. Weis, *supra*, note 7, at 34-35 for the complexities that may arise in attempting to outline clearly the scope of such a law.

23. As noted in chapter 1 and throughout this publication, the above subject-object distinction is still generally observed in nationality matters. See generally, H. Briggs, *The Law of Nations*, 64, 93-98 (2d ed. 1952).

24. 1 L. Oppenheim, *supra*, note 8 at 640.

25. United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898 (1943).

26. Harvard Research in International Law, *The Law of Nationality*, Art. 2, 23 *Am. J. Int'l Spec. Supp.* 11, 24-27 (1929).

> The general principle that all questions relating to the acquisition or loss of a specific nationality shall be governed by the laws of the State whose nationality is claimed or contested should be admitted. The application of this principle, however, should not go beyond the limits at which the legislation of one State encroaches on the sovereignty of another. For example, a State has no power, by means of a law or administrative act, to confer its nationality on all the inhabitants of another State or on all foreigners entering its territory. Further, if the State confers its nationality on the subjects of other States without their request, when the persons in question are not attached to it by any particular bond, as, for instance, origin, domicile or birth, the States concerned will not be bound to recognize such naturalization. [27]

(4) The United States was of the opinion that there were:

> . . . certain grounds generally recognized by civilized States upon which a State may properly clothe individuals with its nationality at or after birth, but . . . no State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomever it pleases. The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of the States. [28]

Although certain governments participating in the conference questioned the existence of rules of international law, other than those laid down in treaties, that limit a state's freedom in matters of nationality, the text of Article 1 of the Convention on Conflict of Nationality Law was adopted by a vast majority. [29]

c. Consent to the Conference of Nationality. May a state confer its nationality upon another state's national without the latter's consent? Provisions of Peru's 1839 constitution, purporting to confer effective Peruvian nationality upon foreigners who had either resided in Peru for four years and married a Peruvian, or who had acquired real property, drew strong British protests in which it was asserted that "an incontrovertible principle of the law of nations" stipulated that . . . "the consent of a foreigner is necessary to legalize his naturalization in another State whatever may be the provisions of the civil law of the State on the subject." [30]

(1) In 1886 the United States protested Mexican legislation under which foreigners who had acquired real estate or had children born to them in Mexico were to be considered Mexican citizens unless they officially declared their intention to retain their own nationality. Secretary of State Bayard observed that it was "the generally recognized rule of international law" that "the transfer of allegiance must be by a distinctly voluntary act." [31] The United States acquiesced in 1895 in Mexico's refusal to extradite a United States national on the ground he had become a Mexican national by purchase of real estate. [32] The British Government found the Mexican legislation to be "within the competence of the Mexican Government." [33]

(2) A Brazilian decree of 1889 declared that all foreigners residing in Brazil would be considered Brazilian citizens unless they should, within six months from the publication of the decree, make an express declaration of contrary intention. A number of European states entered joint protests against the decree, which was characterized by Italy as "contrary to generally accepted principles of international law." [34] The British Foreign Office requested an opinion of the Law Officers of the Crown, who maintained that a person having notice of the Brazilian decree and an opportunity to make the declaration therein mentioned should be considered as having voluntarily become a Brazilian national if he failed to act. [35] On receiving statements from the Brazilian government relating to the interpretation and enforcement of the 1889 decree, the United States declined to protest and advised its nationals in Brazil to make appropriate declarations of their intention to retain United States nationality. [36] A French court, however, held that the Brazilian legislation was incompatible with international law. [37]

d. Some publicists contend that it is "contrary to law" for a state to impose compulsory nationality on aliens by reason either of their acquisition of real property or of their residence of the country. [38] The Harvard Research considered it to be "generally recognized" that a state might not acquire the allegiance of natural persons without their consent, except under certain special circumstances. [39] In a memorandum to the Hague Codification Conference of 1930, the United States observed that it had taken the position that ". . . as a general rule, no person should have the nationality of a foreign country upon

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27. 1 *League of Nations Docs.* 13 (1929).

28. *Id.* at 145-46.

29. 37 states signed the Convention. However, as of 1 January 1976, only 14 states had ratified or acceeded to this agreement. The U.S. has not ratified the Convention. A study published in 1929 revealed that while a significant number of states conferred nationality at birth exclusively on the basis of descent from nationals (*jure sanguinis*) and a smaller number on the basis of birth within the territory of the state (*jure soli*), the great majority had enacted legislation that combined elements of both systems, with one or the other serving as a principal standard. See R. Flournoy & M. Hudson, *A Collection of Nationality Laws* (1929); Harvard Research in International Law, *supra*, note 26 at 11, 80-82. See also, U.N. Secretariat, *Laws Concerning Nationality*, U.N. Doc. ST/LEG/SER.B/4 (1954), supplemented by ST/LEG/SER.B/9 (1959).

30. P. Weis, *supra*, note 7 at 105. For a U.S. protest and consequent Peruvian concessions, see 3 J. Moore, *Digest of International Law* 302-03 (1906).

31. *Id.* at 304-06.

32. 3 J. Moore, *supra*, note 30 at 307.

33. 5 *Brit. Dig. Int'l L.* 28 (1965).

34. P. Weis, *supra*, note 7 at 105-07.

35. 5 Brit. Dig. Int'l L. 250 (1965).

36. 3 J. Moore, *supra*, note 30 at 307-10.

37. Ulmann v. Min. Pub., 11-12 *Rev. de Droit International Prive* 67, 77 (Trib. Civ. de la Seine, July 13, 1915). For a discussion of the Argentine legislation of 1954, under which foreigners must state their intention to seek or to refuse Argentine nationality after five years' continuous residence, see P. Weis, *supra*, note 7 at 111-13.

38. De Visscher, *Theory and Reality in Public International Law* 185 (Rev. ed. Corbett trans. 1968).

39. Harvard Research in International Law, *supra*, note 26 at Art. 5, 11, 53-55.

or after birth without his consent, express or implied." [40]

e. As noted above, one of the most controversial topics in the areas of nationality is the manner in which a state may legitimately confer its citizenship. The most important decision pertaining to this matter appears below. It is generally regarded as the definitive statement of the effect of nationalization decrees on an international level.

NOTTEBOHM CASE
(LIECHTENSTEIN v. GUATEMALA)
International Court of Justice, 1955
[1955] I.C.J. 4

[Nottebohm had been a German national from his birth in Germany in 1881 until his naturalization in Liechtenstein in 1939, shortly after the outbreak of war in Europe. In 1905 he had taken up residence in Guatemala and engaged in substantial business dealings in that country. Thereafter he sometimes went to Germany on business, to other countries on holidays, and to Liechtenstein in order to visit a brother who lived there after 1931. In early 1939, Nottebohm went to Europe and eventually applied for naturalization in Liechtenstein on October 9, 1939. Nottebohm sought and received dispensation from residence requirements, paid his fees and gave security for the payment of taxes, and completed the naturalization process by taking an oath of allegiance on October 20, 1939. He obtained a Liechtenstein passport, had it visaed by the Guatemalan consul in Zurich, and returned to Guatemala to resume his business activities. At his request, Guatemalan authorities made appropriate changes regarding Nottebohm's nationality in the Register of Aliens and in his identity document.

[On July 17, 1941 the United States blacklisted Nottebohm and froze his assets in the United States. War broke out between the United States and Germany, and between Guatemala and Germany, on December 11, 1941. Nottebohm was arrested by Guatemalan authorities in 1943 and deported to the United States, where he was interned until 1946 as an enemy alien. He applied upon his release for readmission to Guatemala, but his application was refused. Nottebohm then took up residence in Liechtenstein, but Guatemala had in the meantime taken measures against his properties in that country, culminating in confiscatory legislation of 1949.

[Liechtenstein instituted proceedings against Guatemala in the International Court of Justice, alleging the foregoing facts and asking the Court to declare that Guatemala had violated international law "in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property" and consequently was bound to pay compensation. Guatemala's principal argument in reply was that the Liechtenstein claim was inadmissible on grounds of the claimant's nationality.

[The Court stated the facts and rejected Liechtenstein's argument that Guatemala was precluded from contesting Nottebohm's nationality because it had on several occasions acknowledged Nottebohm's claim of Liechtenstein nationality. It then continued:]

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seise the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration. . . .

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would oblige them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor,

[40]. *League of Nations Docs.*, *supra*, note 27 at 146. But see J. Jones, British Nationality Law 15, 27, 31 (1956), in whose opinion state practice shows that ". . . in the present state of international law the sole limitation appears to be the existence of a genuine connection with the state . . .," whether or not there is consent.

but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, *inter alia*, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws. . . . In the same spirit, Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law" (P.C.I.J., Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).

Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State? . . .

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala's refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality

and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers: but his brother's presence is referred to in his application for naturalization only as a reference to his good conduct. Furthermore other members of his family have asserted Nottebohm's desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a beligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-a-vis Guatemala and its claim must, for this reason, be held to be inadmissible. . . .

For these reasons, the court, by eleven votes to three, holds that the claim submitted by the Government of the Principality of Liechtenstein is inadmissible.

[Dissenting opinions of Judges Klaestad and Read, and of Judge *ad hoc* Guggenheim, are omitted.]

6-7. Dual Nationality. *a.* As noted throughout this chapter, the determination of who are nationals of a particular state and who are not is generally the prerogative of the state concerned. Within certain limits international law does not attempt to impose criteria which states must follow in determining who its nationals are. With this power left to the various states, it is not unusual that two states may claim the same individual, since he has fulfilled the requirements of each. [41] This dual nationality has been encountered quite frequently among nationals of the United States. It arose primarily from the fact that many immigrants assumed U.S. nationality and also remained nationals of their homelands after coming to the United States. Their children, under the principle of *jus sanguinis*, were considered as nationals of their father's native country and nationals of the local state under *jus soli.*

b. Conflicts arising from dual nationality have occurred when the dual national returned to the country of origin. On occasion he has either been unable to leave or has been liable to military service. In order to protect its citizens who are also nationals of other states, the United States, beginning in 1868, entered into bilateral agreements with many European and Latin American states which permitted the immigrant to voluntarily renounce his nationality upon becoming an American citizen. [42] Such treaties solve the problem of dual nationality by eliminating one nationality. When, however, both nationalities remain, other solutions have been reached. The first is that of "dominant nationality," initially invoked in the claim of James Louis Drummond. During the Napoleonic wars, France seized the property of British subjects located in France. The Treaty of Paris of 1814 clearly provided for the settlement of British claims arising out of such seizure. Though Drummond was both a French and a British national, he resided in France. He put forward a claim, however, on the basis of his British nationality. It was refused by the British Council in the following language:

> Drummond was technically a British subject but in substance, a French subject, domiciled in France, with all the attributes of French character. . . . The act of violence that was done toward him was done by the French Government in the exercise of its municipal authority over its own subjects. [43]

c. Still another solution is to deny the right of one state to espouse a claim of its dual national against a state which also claims the claimant as its citizen. This rule is termed the "doctrine of nonresponsibility of states for claims of dual nationals." It was first invoked by the American-British Claims Commission in 1871 in the Claim of the Executors of R.S.C.A. Alexander [44] and repeated as a rule of international law by the British-Mexican Claims Commission in 1931.

d. It is an accepted rule of international law that such a person (a dual-national) cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. [45] On June 10, 1955, the Italian-United States Conciliation Commission, established by article 83 of the Peace Treaty with Italy, decided the claim of *U.S. ex rel Florence Strungsky Merge v. Italian Republic.* [46] The claimant was a national of both the U.S.A. and Italy. In this decision, the Commission based its ruling on what are considered to be the two most important international principles associated with the concept of dual nationality.

UNITED STATES EX REL. MERGE v. ITALIAN REPUBLIC
Italian-United States Conciliation Commission, 1955
3 Collection of Decisions No. 55
14 U.N. Rep. Int'l Arbitral Awards 236

[The claimant had acquired United States nationality upon her birth in New York in 1909. At the age of 24, she married an Italian national in Rome and thereby acquired, according to Italian law, Italian nationality as well. She lived in Italy with her husband until 1937, at which time she accompanied her husband to Japan, where the latter had been sent as a translator and interpreter for the Italian Embassy in Tokyo. The United States Consulate General there registered the claimant, at her request, as a United States national. The claimant remained with her husband in Japan until 1946, at which time she returned to the United States for a period of nine months on a passport issued to her by the United States consulate in Yokohama. She then returned to Italy to rejoin her hus-

41. See generally, Rode, *Dual Nationals and the Doctrine of Dominate Nationality* 53 *Am. J. Int'l L.* 139 (1959).

42. III G. Hackworth, *Digest of International Law* 377 (1942).

43. 2 Knapp, P.C. Rep. 295, 12 Eng. Rep. 492.

44. 3 J. Moore, International Arbitration 2529 (1898).

45. Oldenbourg and Honey cases before the British—Mexican Claims Commission under the convention of 1926 cited in Rode, *supra*, note 41 at 141.

46. Reported in 50 *Am. J. Int'l L.* 150-57 (1956).

band. Immediately upon her arrival, she registered as a United States national at the American Embassy in Rome. In 1948, the United States submitted to Italy a claim based on Article 78 of the Italian Peace Treaty (February 10, 1947, T.I.A.S. 1648) for compensation for the loss, as a result of the war, of a grand piano and other personal property located in Italy and owned by the claimant. Italy rejected the claim on the ground that the claimant was an Italian national, and the dispute relating to the claimant's double nationality was submitted to the Conciliation Commission.

[The first sub-paragraph of Article 78, § 9(a), of the peace treaty provided that the term "United Nations nationals" was to mean "individuals who are nationals of any of the United Nations." The Commission first considered whether this definition had been intended to avoid the double nationality problem, by allowing claims by all United Nations nationals whether or not they were also Italian nationals. After concluding that the treaty did not resolve the issue, the Commission considered the applicable general principles of international law:]

In this connection two solutions are possible: a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; b) the principle of effective or dominant nationality.

The two principles just mentioned are defined in [The Hague Convention of 1930]: the first (Art. 4) within the system of public international law; the second (Art. 5) within the system of private international law.

Art. 4 . . . is as follows:

"A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."

The same Convention, in Art. 5, indicates effective nationality as the criterion to be applied by a third State in order to resolve the conflicts of laws raised by dual nationality cases. Such State

"shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be most closely connected."

This rule, although referring to the domestic jurisdiction of a State, nevertheless constitutes a guiding principle also in the international system. . . .

The Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris,* by reason of the near-unanimity with which the principles referring to dual nationality were accepted. . . .

It is not a question of adopting one nationality to the exclusion of the other. Even less when it is recognized by both Parties that the claimant possesses the two nationalities. The problem to be explained is, simply, that of determining whether diplomatic protection can be exercised in such cases.

A prior question requires a solution: are the two principles which have just been set forth incompatible with each other, so that the acceptance of one of them necessarily implies the exclusion of the other? If the reply is in the affirmative, the problem presented is that of a choice; if it is in the negative, one must determine the sphere of application of each one of the two principles.

The Commission is of the opinion that no irreconcilable opposition between the two principles exists; in fact, to the contrary, it believes that they complement each other reciprocally. The principle according to which a State cannot protect one of its nationals against a State which also considers him its national and the principle of effective, in the sense of dominant, nationality, have both been accepted by the Hague Convention (Articles 4 and 5) and by the International Court of Justice (Advisory Opinion of April 11, 1949 and the Nottebohm Decision of April 6, 1955). If these two principles were irreconcilable, the acceptance of both by the Hague Convention and by the International Court of Justice would be incomprehensible. . . .

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.

. . . In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.

It is considered that in this connection the following principles may serve as guides:

a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

c) With respect to cases of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family has had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of an habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purpose of deciding which is the prevalent nationality.

United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of the third State.

In all other cases of dual nationality, Italian and United States, when, that is, the United States nationality is not prevalent in accordance with the above, the principle of international law, according to which a claim is not admissible against a State, Italy in our case, when this State also considers the claimant as its national and such bestowal of nationality is, as in the case of Italian law, in harmony . . . with international custom and generally recognized principles of law in the matter of nationality, will reacquire its force.

Examining the facts of the case in bar, . . . the Commission holds that Mrs. Mergé can in no way be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, because the family did not have its habitual residence in the United States and the interests and the permanent professional life of the head of the family were not established there. In fact, Mrs. Mergé has not lived in the United States since her marriage, she used an Italian passport in traveling to Japan from Italy in 1937, she stayed in Japan from 1937 until 1946 with her husband, an official of the Italian Embassy in Tokyo, and it does not appear that she was ever interned as a national of a country enemy to Japan.

Inasmuch as Mrs. Mergé, for the foregoing reasons, cannot be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace, the Commission is of the opinion that the Government of the United States of America is not entitled to present a claim against the Italian Government in her behalf. . . .

[Petition of the United States rejected.]

6-8. Obligations of Nationality or Allegiance. It is not uncommon for a state to apply its laws to acts performed by its nationals beyond the territorial limits of the state. As stated by Mr. Chief Justice Hughes in *Blackmer v. United States.* [47]

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus although resident abroad, the petitioner remained subject to the taxing power of the United States. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. * * * With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. * * *

6-9. Taxation. *a.* Should the reach of a state's laws based upon the relationship of the individual with the state be confined to those who have the state's nationality? The question is posed below in connection with laws relating to taxation and compulsory military service.

(1) International law has recognized a number of bases for the imposition of taxes. Here as elsewhere it is essential to distinguish between a state's jurisdiction to prescribe a rule imposing a tax and its jurisdiction to enforce such a rule. The practical difficulties of enforcing taxes upon persons not physically within its territory and not owning property within its territory realistically limit the tax collecting state. International controversy as to jurisdiction to tax has been relatively infrequent. Consequently, the only evidence of the international law on the subject is state practice.

(2) The territorial base supports state taxation measured by property located and income produced within the state. States impose such taxes on the individuals owning such property, or producing or claiming such income, even though the individuals do not have a personal relationship with the taxing state such as that of nationality. At the other extreme, states impose taxes upon their own nationals, even though the nationals are physically located outside the state and their property is located and income produced outside the state. Will international law permit taxation measured by property located outside the state or income produced outside the state when the individual to be taxed is not its national? The United States, for example, imposes income tax upon aliens who are resident within the United States. "Resident aliens are, in general, taxable the same as citizens of the United States; that is, a resident alien is taxable on income derived from all sources, including sources without the United States," [48] Residence is defined in the regulations as follows:

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances. [49]

b. Consider the following more general definition of "residence":

It appears that most governments consider that an alien who remains in its territory for a certain period of time, six months or more, is resident in such territory for purposes of income taxation. [50]

If, then, nationality is not a necessary prerequisite to taxability, is there some minimum personal connection that must exist before a state can lawfully prescribe a tax based on events that occur outside the state? "On the one hand it is agreed that a state cannot tax a transient on the whole of his year's income as if he were a resident, but on the other it is equally agreed that his presence may render him subject to poll tax, and sojourn tax, which, indeed, could be of an equivalent amount." [51] Thus, it can only be said that no specific international norms control taxation. The liability of individuals to taxes in both their states of nationality and others depends largely upon the tax laws of the countries concerned.

6-10. Compulsory Military Service. *a.* U.S. legislation on the drafting of aliens. During World War I, citizens and "male persons not alien enemies who have declared their intention to become citizens" were subject to the draft. [52] The Selective Training and Service Act of 1940 [53] contained similar provisions until amended in 1941. [54] This World War II amendment made liable for training and service every male citizen and every other male person "residing in the United States," with the proviso that a citizen or subject of a neutral country could apply for and be granted relief, "but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." The Selective Service Act of 1948 [55] broadened the category of resident aliens able to apply for relief to include "any citizen of a foreign country," retaining the provision for debarring such an applicant from citizenship. The dramatic change in policy in the

47. 284 U.S. 421, 436; 52 S.Ct. 252, 254 (1932).
48. 26 C.F.R. Part I, § 1,871-1.
49. 26 C.F.R. Part I, § 1.871-2(b).
50. Letter from Assistant Secretary of State Macomber to U.S. Senator Carl Hayden, quoted in 8 M. Whiteman, *Digest of International Law* 536 (1967).
51. 2 D. O'Connell, *International Law* 717 (2d ed 1970).
52. Act of May 18, 1917, chapter 15, § 2, 40 Stat. 76.
53. 54 Stat. 885, chapter 720, § 3(a).
54. 55 Stat. 844, chapter 602, § 2.
55. 62 Stat. 604, chapter 625, § 4(a).

1951 Universal Military Training and Service Act [56] was to apply the draft even-handedly to United States citizens and aliens admitted for permanent residence, with no provisions for relief. Nonresident aliens were also subject to the draft, but only if they had remained in the United States for a period exceeding one year. The provisions for application for relief (and debarring from citizenship) were retained as to those nonresident aliens. [57] Thus, nonresident aliens might remain in the United States for up to one year without being subject to the draft; while selected groups of nonresident aliens might remain for longer periods under exemptions provided by law and regulations. [58]

b. By amendments in 1971, which changed the title of the draft statute to "Military Selective Service Act," a wider exclusion of aliens from the draft was provided. The draft now applies to every male citizen and "every other male person residing in the United States" but not to any alien lawfully admitted as a "nonimmigrant" as defined in a long list of categories in the Immigration and Nationality Act. [59] In addition, induction of an alien who is draftable is not to take place until "such alien shall have resided in the United States for one year." Thus, the statute applies to aliens admitted for permanent residence, who can be drafted only after a year's residence. There is no authorization for drafting any other class of aliens and no provision for application for relief or debarring from citizenship. [60] Notwithstanding these changes in the draft statute, the Immigration and Nationality Act continues to provide: "[A]ny alien who applies or has applied for exemption or discharge from training or service in the Armed Forces * * * on the ground that he is an alien, and is or was relieved or discharged from such training * * * on such ground, shall be permanently ineligible to become a citizen of the United States." [61] There is some question as to whether this provision is still viable. In *McGrath v. Kristensen,* [62] in which the court was interpreting the provisions of the Selective Training and Service Act of 1940 debarring aliens from citizenship, the court stated: "As there was no 'liability' for service, his act in applying for relief from a non-existent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved."

c. International law on the drafting of aliens. "[A]n alien does not fall under the personal supremacy of the local State; therefore he cannot, unless his own state consents, be made to serve in its Army or Navy, and cannot, like a citizen, be treated according to discretion." [63] Doubt exists as to whether this statement represents currently existing law. However, in 1967, Rousseau, a noted French publicist, commented upon certain Australian legislation which subjected immigrant aliens to compulsory military service and thus to duty in South Vietnam. In referring to Greek and Italian protests of this legislation, Rousseau states: "The most surprising aspect of the situation is that only two governments seem to have protested an act which constitutes a clear violation of the traditional status of aliens." [64] Thus, as in the case of taxation, no specific international norms dictate the degree to which aliens may be required to serve in the military forces of states other than their own. The United States is a party to a Protocol Relating to Military Obligations in Certain Cases of Double Nationality which was concluded at the Hague April 12, 1930 and entered into force for the United States May 25, 1937. [65] Only 25 states were parties to this international agreement as of January 1, 1977. Article 1 provides: "A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries. This exemption may involve the loss of the nationality of the other country or countries." [66]

6-11. Multilateral Agreements on Nationality. *a.* Status of Naturalized Citizens Who Again Take Up Their Residence in the Country of Their Origin. [67] Parties to this convention are Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Nicaragua, Panama, and the United States. The convention provides as follows:

> Art. I. If a citizen, a native of any of the countries signing the present convention, and naturalized in another, shall again take up his residence in his native country without the intention of returning to the country in which he has been naturalized he will be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by the said naturalization.
>
> Art. II. The intention not to return will be presumed to exist when the naturalized person shall have resided in his native country for more than two years. But this presumption may be destroyed by evidence to the contrary.

b. Convention on Conflict of Nationality Laws. [68] This

56. 65 Stat. 75, chapter 144, § 1(d).

57. In addition, the act provided for exemption of certain nonimmigrant aliens holding diplomatic positions and of other nonimmigrant aliens as determined by the President.

58. For the test of the relevant statutes referred to above, see 8 M. Whiteman, *Digest of International Law* 549 (1967).

59. 8 U.S.C. § 1101(a)(15).

60. 85 Stat. 348.

61. Title 18, U.S.C. § 1426(a).

62. 340 U.S. 162, 71 S.Ct. 224 (1950).

63. 1 L. Oppenheim, *supra*, note 8 at 681.

64. Rousseau, *Chronique des Faits Internationaux*, 71 Revue de Droit International Public 143, 174 (1967).

65. 50 Stat. 1317; T.S. 913; 178 L.N.T.S. 227.

66. For bilateral agreements to which the United States is a party, dealing not only with the drafting of dual nationals but also with the drafting of aliens, see 8 M. Whiteman, *supra*, note 58 at 561-73.

67. Convention between the United States and other powers establishing status of returning naturalized citizens. Signed at Rio De Janeiro Aug. 13, 1906; ratification advised by the Senate, Jan. 13, 1908, ratified Jan. 16, 1909; ratification deposited with draft Jan. 25, 1908; proclaimed, Jan. 28, 1913. 37 Stat. 1653 (1911-1913).

68. Signed at the Hague Conference for Codification of International Law. 5 M. Hudson, *International Legislation* 359 (1936).

convention entered into force on 1 July 1937. It has been ratified or acceded to by thirteen states: Belgium, Brazil, Great Britain, Canada, Australia, India, China, Monaco, the Netherlands, Norway, Poland, Sweden, and Pakistan. The principle articles of the convention are as follows:

Art. 1. It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

Art. 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.

Art. 3. Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.

Art. 4. A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.

Art. 5. Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

Art. 6. Without prejudice to the liberty of a State to accord wider rights to renounce its nationality, a person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorization of the State whose nationality he desires to surrender.

This authorization may not be refused in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied.

c. Convention on the Nationality of Women. [69] States which are parties are Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Uruguay, and the United States. The Convention provides as follows:

Art. 1. There shall be no distinction based on sex as regards nationality, in their legislation or in their practice.

U.S. Reservation. The agreement on the part of the United States is, of course, and of necessity, subject to congressional action.

d. Convention on the Nationality of Married Women. [70] Among the States who have either signed, ratified, or acceded to this convention are Canada, Chile, Ceylon, China, Colombia, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ireland, Israel, Norway, Pakistan, Portugal, Sweden, U.S.S.R., and Yugoslavia. The treaty, in part, is as follows:

Art. 1. Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.

Art. 2. Each Contracting State agrees that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.

Article 3

1. Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.

2. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire her husband's nationality as a matter of right.

6-12. Role of Nationality in State Responsibility. Having examined the various aspects of nationality of special relevance to the military attorney, attention must now be focused on one of the most controversial and topical areas of international law—state responsibility. In doing so, note should be taken of the important role the various concepts of nationality play in the determination of state responsibility and the espousal of claims on an international level.

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69. Signed at Montevideo, Dec. 26, 1933; ratified by U.S., June 30, 1921; proclaimed, Oct. 11, 1934. 49 Stat. 2957 (1935-1936).

70. Resolution 1040 (XI) adopted by the General Assembly of the United Nations on 29 January 1957. Twenty-five states are parties to this Convention. For the historical background and commentary on the Convention, see U.N. Department of Economic and Social Affairs publication No. E/CN. 6/389 (1962), entitled *Convention on the Nationality of Married Women.*

CHAPTER 7
STATE RESPONSIBILITY

Section I. GENERAL CONCEPTS OF STATE RESPONSIBILITY

7-1. Introduction. *a.* As emphasized throughout the preceding chapters of this publication, states are considered the primary, if not exclusive, subjects of international jurisprudence. Consequently, it is the state that is accorded international rights and privileges, and, concomitantly, it is the state that must bear international responsibility for those violations of international law attributable to it. The purpose of this chapter is to examine the ways in which states incur such international responsibilities. No area of international law has generated greater controversy during the last few decades than the law of state responsibility. Even the most basic principles upon which this concept is founded have not been immune from attack.

b. It is essential to begin any discussion of state responsibility with an answer to a basic question: How and in what ways may a state incur responsibility on an international level? The answer, in which every word has importance, is: A state may be held internationally responsible for any *act* or omission attributable to the state which results in a violation of substantive international law and which *injures* another state. Conjunctively, if an act or omission attributable to a state violates any of the substantive international norms discussed throughout this and other DA publications and the consequence of such act is injury to another state, the delinquent state is responsible for making reparation or giving satisfaction to the injured state. Moreover, a delinquency may also give rise to punitive individual or collective sanctions being taken by the affected state or states. [1]

7-2. What Constitutes a Violation. The reparation aspect of state responsibility will be dealt with in the latter portion of this chapter. Initially, however, attention must be focused on the question, "How may a state be injured?"

a. Direct Injury to the State. The most easily explained and understood form of injury to a state is that which is called direct injury. Since any violation of a substantive principle of international law by a state resulting in injury to another gives rise to state responsibility, the substantive bases for direct responsibility are almost infinitely varied. For example, violation of a treaty, failure to respect the immunity of another state's ambassador, assertion of enforcement jurisdiction within the territory of another state without its consent, and use of force in violation of the U.N. Charter would all give rise to state responsibility. [2] One of the best known examples of responsibility for a direct injury arising out of an omission, not an act, was the *Trail Smelter Case* [3] decided in 1941 by a Special Arbitral tribunal. The Convention establishing this Tribunal called for the application of the ". . . law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice." [4] The arbitration grew out of air pollution from sulphur dioxide fumes emitted by a smelter plant at Trail, British Columbia, owned by a Canadian corporation. In a previous decision, the Special Arbitral tribunal had found that the fumes caused damage in the State of Washington during the period from 1925 to 1937. In holding Canada responsible and directing injunctive relief and payment of an indemnity, the Tribunal stated:

> A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction. A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the *Alabama* case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. [5]

b. Indirect Injuries to the State. As noted the ways by which one state may directly injure another, through an act or a failure to act, are fairly easily defined. The great difficulty in discussing state responsibility lies in the area of determining what constitutes an indirect injury to a state. The materials which follow do not relate to responsibility flowing from a directly inflicted injury by one state on another state, but rather deal with the circumstances under which one state may be responsible to another because of an act or omission which results in injury to a private or juristic (corporate) national of the latter. Stated succinctly, because only a state may bring a claim for reparation under existing international law, the state itself must suffer an injury. Injuries to private citizens or corporations must be litigated by the state. Thus, the state is said to suffer indirect injury as a result of internationally illegal actions taken against its nationals. It is only by the use of such a fiction that a state is able to comport with the still predominant theory that only states may participate in the public international law system. Accordingly, a careful examination of state responsibility for injuries to aliens is the key to a thorough understanding of the total concept of "state responsibility."

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1. These sanctions must, of course, be carried out in accordance with the U.N. Charter and other applicable norms of international law.

2. See generally Kelsen, *General Theory of Law and State,* 328-41, 357-58 (Wedberg transl. 1945).

3. Trail Smelter Case (United States v. Canada) 3 U.N.R.I.A.A. 1905, 1908 (1941).

4. *Id.* at 1963-64.

5. *Id.*

Section II. STATE RESPONSIBILITY FOR INJURIES TO ALIENS

7-3. Injury to Aliens. What acts or omissions committed by a state or its citizens against private or corporate aliens located within its territory constitute a violation of international law resulting in an *indirect* injury to the aliens' state of nationality? As a result of the several different approaches toward international law discussed in chapter 1, there exists a diversity of opinion regarding the proper response to this question. Before focusing on these differing views, it is necessary to examine briefly the status of aliens under current international norms.

7-4. The Status of Aliens Under International Law. *a. General.* Under ordinary circumstances and in the absence of an international agreement to the contrary, a state is under no duty to admit nationals of another state into its territory and incurs no international responsibility if it deports them. [6] If aliens are admitted, they may be subjected to restrictions on the duration of their stay, where they may travel, and in what activities they may engage. Moreover, a national of one state who comes within the territorial jurisdiction of another, whether as a transient or as a permanent resident, becomes subject generally to the legal regime applicable to nationals of that state. For example, aliens can be excluded from engaging in various commercial or other gainful activity, from owning real property, from such civil and political rights as the right to vote or to hold public office, and from such duties as fulfilling military service obligation. The admission of aliens into a state likewise gives rise to certain correlative rights and duties. The alien has a right to the protection of the local law. He owes a duty to observe that law and assumes a relationship toward the state of his residence sometimes referred to as "temporary allegiance." While the state has the right to expect the alien to observe its laws, it also has an obligation to give him the degree of protection for his person and property which he and his state have the right to expect under local law, under international law, and under treaties and conventions between his state and the state of residence. [7]

b. It is precisely the question of exactly what rights and protections are afforded aliens under international law that is the most controversial aspect of state responsibility. As noted above, conflicting views exist with regard to the legally imposed degree of responsibility which a state must bear as a member of the international community. To what extent must it guarantee the rights of aliens? To what degree must it "protect" resident aliens?

7-5. Degree of State Responsibility to Aliens: Conflicting Views. Inherent in the controversy surrounding the subject of state responsibility is the disparity of views regarding the rights and protections that must be accorded private and corporate aliens. These views are generally discussed in terms of both an international standard of justice and the principle of equality of treatment.

7-6. The International Standard of Justice. *a.* The arguments set forth by those who insist upon the existence of an international standard of justice applicable to aliens are best represented in a statement by former Secretary of State, Elihu Root:

> . . . Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
>
> There is a standard of justice, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. . . .
>
> . . . The foreigner is entitled to have the protection and redress which the citizen is entitled to have, and the fact that the citizen may not have insisted upon his rights, and may be content with lax administration which fails to secure them to him, furnishes no reason why the foreigner should not insist upon them and no excuse for denying them to him. [8]

Mr. Root's statement, though issued in 1910, still reflects the U.S. and Western European view toward the internationally imposed standard of treatment for aliens. These proponents of an international standard argue that some form of uniform protection must exist if private and corporate citizens are to be safe in their travel and business activities.

b. The Harry Roberts Claim. One of the decisions most widely cited by advocates of the international standard of justice is *The Harry Roberts Claim.* [9] This particular arbitrational award involved a claim presented by the United States on behalf of an American citizen who was arbitrarily and illegally arrested by Mexican authorities and held prisoner for an excessively long period in violation of the Mexican Constitution. The evidence showed that the jail in which Roberts was kept was a room 35 feet long and 20 feet wide with stone walls, earthen floor, straw roof, a single window, a single door, and no sanitary accommodations. Thirty to forty men were placed in this single room and were not provided with facilities to clean themselves. The prisoners were afforded no opportunity to take physical exercise and the food given them was scarce, unclean, and coarse. On behalf of Mexico it was argued that Roberts was accorded the same treatment as

6. A recent example of this was the deportation of Asians from Uganda in 1972.

7. 5 G. Hackworth, *Digest of International Law,* 471-72 (1943) [hereinafter cited as 5 Hackworth].

8. *Proceedings of the American Society of International Law* 20-22 (1910).

9. The Harry Roberts Claim (United States v. Mexico), United States and Mexico General Claims Commission 1926, 4 U.N.R.I.A.A. 77 (1927).

that given to all other incarcerated individuals. [10] The Tribunal, however, held that

> . . . such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test, is broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhuman imprisonment. [11]

c. In sharp contrast to the view espoused by Western European and North American states and in keeping with their basic approach toward international jurisprudence discussed in chapter 1, the third world and lesser-developed states deny the existence of any international standard of justice. These countries submit that private and corporate aliens are entitled only to treatment equal to that afforded citizens of the state through which these aliens may be traveling or in which they may be resident. From the point of view of those states advocating equality of treatment, an "international standard of justice" is subject to five specific objections:

> First, a national of one state, going out to another in search of wealth or for any other purpose entirely at his risk, may well be left to the consequences of his own ventures, even in countries known to be dangerous. For international law to concern itself with his protection in a state without that state's consent amounts to an infringement of that state's sovereignty. Secondly, a standard open only to aliens but denied to a state's own citizens inevitably widens the gulf between citizens and aliens and thus hampers, rather than helps, free intercourse among peoples of different states. Thirdly, the standard is rather vague and indefinite. Fourthly, the very introduction of an external yardstick for the internal machinery of justice is apt to be looked upon as an affront to the national system, whether or not it is below the international standard. Fifthly, a different standard of justice for aliens results in a two-fold differentiation in a state where the internal standard is below the international standard. Its citizens as aliens in other states are entitled to a higher standard than their fellow citizens at home. Again the citizens of other states as aliens in it are also entitled to a better standard than its own citizens. [12]

d. Controversy continues to surround the issue of state responsibility to aliens, and the issue becomes increasingly important as third world and lesser developed countries increase in number and importance. Viewed realistically, the standard of treatment to be afforded aliens most probably lies somewhere between the two positions spoken to above. This fact can best be demonstrated by an analysis of what acts have generally been viewed as violations of basic concepts constituting an international standard of justice, substantive violations enabling a state to espouse the claim of one of its private or corporate citizens. Before initiating such an analysis, however, it is essential to closely examine the manner in which a state may espouse a claim on the international level.

7-7. Procedural Aspects of the Assertion of a Claim Based on Injury to a National. *a. Espousal of Claims by States; General Considerations.* International law imposes no duty on a state to press a claim based on injury caused by a foreign state to one of the former's nationals. Under the law of the United States, as well as most other states, the injured national has no legally enforceable right to compel his government to espouse his claim. [13] Moreover, if the claim is espoused, the Government enjoys exclusive control over the handling and disposition of the claim. In *Administrative Decision V* (United States v. Germany), Umpire Parker stated:

> In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised, and the private owner will be bound by the action taken. Even if made to the espousing nation in pursuance of an award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake, or protect the national honor, as its election return the fund to the nation paying it or otherwise dispose of it. [14]

Thus, it is most clear that the President may waive or settle a claim against a foreign state based on its responsibility for an injury to a United States citizen, despite the latter's objection. [15] Claim settlements by the United States have often involved lump sum settlements of claims based on injuries to a number of claimants. Most have been in the form of executive agreement [16] and have called for the determination of awards to claimants either by mixed claims commissions or by agencies in the executive branch. The Foreign Claims Settlement Commission has been engaged in such determination. [17]

b. Exhaustion of Local Remedies. Prior to requesting his government to espouse a claim, an alien must exhaust local judicial remedies in the state where the alleged wrong occurred. The requirement to do so is mandatory, however, only if these remedies are both "available" and "effective." Although the determination as to whether local remedies are available is a fairly easy one, it is often more difficult to determine whether the available remedies are effective judicial measures. Thus, it is helpful to examine several decisions dealing with this determinative issue.

(1) *In Claim of Finnish Shipowners,* [18] 13 privately

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10. Mexico as a developing state advocated an "equal treatment" standard for aliens.

11. The Harry Roberts Claim, *supra,* note 9 at 81. See also *Restatement (Second); Foreign Relations Law of the United States* § 165 [hereinafter cited as *Restatement*].

12. Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 *Am. J. Int'l L.* 888, 890 (1961).

13. *Restatement, supra,* note 11 at § 212.

14. Administrative Decision V (United States v. Germany), [1923-25] Administrative Decisions and Opinions 145, 190, 7 U.N.R.I.A.A. 119, 152.

15. *Restatement, supra,* note 11 at §§ 213, 214.

16. See United States v. Pink, 315 U.S. 203 (1942) for a discussion of the Executive Branch's right to enter into claims settlements on behalf of the United States and its private citizens.

17. See R. Lillich, *International Claims: The Adjudication by National Commissions* (1962).

18. Claim of Finnish Shipowners (Finland v. Great Britain) 3 U.N.R.I.A.A. 1479 (1934).

owned Finnish ships were used by the British government in wartime service during 1916 and 1917. Following the war, the Finnish government, on behalf of its citizens, sought compensation from Great Britain for the use of these vessels. This claim was rejected by the British government, and the shipowners brought proceedings against the Crown before the Admiralty Transport Arbitration Board. The Board also denied compensation. Although an appeal was available to the shipowners at this point, they chose not to pursue the appellate process. Instead, Finland again took up the claims of its citizens and brought the matter to the attention of the Council of the League of Nations. On the Council's recommendation, the two states agreed to submit to arbitration the question of whether the Finnish shipowners had exhausted "the means of recourse placed at their disposal by British law." In arguments before a sole arbitrator, Great Britain contended that the Finnish shipowners had not exhausted the local judicial remedies available to them and, as a result, the Finnish government had no standing to espouse the claim of its citizens at an international level. Finland asserted that further appellate action by its citizens in the British courts would be pointless. As there could be no *de novo* appeal, any appellate decision would be controlled by the Admiralty Board's original adverse finding of facts. The arbitrator agreed that, due to the lack of *de novo* appeal, further appellate procedure was useless and would provide no effective remedy for relief. Accordingly, Finland was justified in asserting the claim on behalf of its citizens.

(2) In the *Interhandel Case,* [19] Interhandel, a Swiss corporation, brought an action in the U.S. District Court to recover shares of an American corporation that the U.S. had vested in 1942 as German assets. The District Court dismissed the complaint, and Court of Appeals affirmed. While Interhandel's petition for *certiorari* was pending before the Supreme Court, the Swiss government commenced proceedings against the U.S. in the International Court of Justice on behalf of Interhandel. The Supreme Court subsequently reversed the Court of Appeals and remanded the case to the District Court. [20] The International Court found that local remedies in the U.S. had not been exhausted.

(3) If an alien claimant loses on a point of law before a court of first instance, is he obliged to appeal even if the appellate courts regard the applicable point of law as well settled? In the *Panevezys-Saldutiskis Ry. Case* [21] the Court stated that if it could be substantiated that the highest Lithuanian court had already given a decision in a previous case adverse to the Estonian company's claim, there would be no need to appeal in order to satisfy the local remedies rule.

(4) With regard to yet another aspect of the existence of "effective" local remedies, it is generally accepted that a state may waive the requirement of exhaustion of local remedies, thus allowing claims against it to be brought by another state directly to an international tribunal. [22] Moreover, an additional exception to the local remedies rule may be applicable if ". . . the state of the alien's nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct." [23]

7-8. Nationality of the Individual Claimant. *a. General.* As previously noted, a state is imbued with the authority to espouse the claim of a private or corporate claimant on an international level on the basis that the state itself has suffered an "indirect injury." That is, because its citizen has been the victim of a substantive breach of internation law, the state itself has suffered injury. Accordingly, it is essential to the validity of the legal fiction upon which state representation is based that the nationality of the private claimant be clearly established.

b. Individuals. The nationality of private individuals has been dealt with in chapter 6 of this publication. Thus, the factors bearing on the determination of the nationality of these individuals will not be discussed. Several related issues do, however, merit brief analysis. Restatement, Second, § 171, defines an alien as follows:

> A person is an alien for purposes of the responsibility of a state for injury to an alien, if (a) he is not a national of the respondent state, (b) he is a national of the respondent state and of another state, and the respondent state, for purposes of the conduct causing injury, treats him as a national of the other state, or (c) he is a national of the respondent state and of another state, provided (i) his dominant nationality, by reason of residence or other association subject to his control (or the control of a member of his family whose nationality determines his nationality) is that of the other state and (ii) he (or such member of his family) has manifested an intention to be a national of the other state and has taken all reasonably practicable steps to avoid or terminate his status as a national of the respondent state. [24]

In those cases where a claimant changes his nationality after the injury on which his claim is based has occurred, or assigns his claim to a person of another nationality, or dies and leaves heirs of a different nationality, the individual's claim may or may not be espoused by the state of which he is a citizen. The position of the U.S. Department of State on this matter was formulated as follows by an Assistant Legal Adviser in 1960:

> Under generally accepted principles of international law and practice, a claim may properly be espoused by one government against another government only on behalf of a national of the government espousing the claim, who had that status at the time the claim arose and continuously thereafter to the date of presentation of the claim. It has been the long-standing practice of the Department to decline to espouse claims which have not been continuously owned by United States na-

19. Interhandel Case [1959] I.C.J. 6.

20. Interhandel—1959.

21. Panevzys-Saldutiskis Ry. Case [1939] P.C.I.J., ser. A/B, No. 76.

22. H. Freeman, *The International Responsibility of States for Denial of Justice* 435-36 (1938) [hereinafter cited as H. Freeman].

23. *Restatement, supra,* note 11 at § 208(c).

24. *Id.* at § 171.

tionals. [25]

A position similar to this has been taken by the U.S. Foreign Claims Settlement Commission. [26] This rule may, of course, be modified by agreement between the governments of the claimant and the respondent states. The British position on this issue is generally similar, subject to a significant qualification:

> [Modern] British practice still insists that the claimant should be a British national both at the time when the injury was suffered and at the time when the claim is presented. In practice, the adoption of the rule that claims may be taken up in concert with the state whose nationality the claimant has acquired subsequent to the date of injury mitigates the hardship of the general rule. . . . [27]

c. Juristic Persons (Corporation). The increase in international trade and investment during the past several decades has seen an increase in the importance of determining the nationality of various corporate enterprises. The law regarding this subject, after a period of some uncertainty, is now fairly clearly defined. It has long been established that a state might espouse the claim of a corporation incorporated within the state, even though its stock is, in fact, totally owned by foreign nationals. [28] Moreover, until 1970 it was generally accepted that a state might espouse an international claim of its citizen stockholders in a foreign corporation if their stock interests amounted to a substantial portion of the total shareholdings. In 1970, the International Court of Justice spoke to this issue and, in so doing, clarified a question of corporate representation on an international level that had long been a subject of uncertainty.

BARCELONA TRACTION, LIGHT AND POWER CO., LTD. (BELGIUM V. SPAIN)
International Court of Justice, 1970
[1970] I.C.J.Rep. 3.

[In this case, the parent company in the corporate complex involved was incorporated in 1911 in Canada; but after the First World War approximately 85% of its shares came to be held by Belgian nationals, largely through complicated arrangements involving some very large Belgian holding companies. Belgium wished to be allowed to show that its nationals as shareholders had been seriously harmed by actions of the Spanish state after the Spanish Civil War. These included, according to the Belgian memorials in an earlier ICJ case dropped in 1961 in expectation of a diplomatic settlement: denial from 1940 on of foreign exchange licenses to the Traction Company and some of its Spanish subsidiaries to permit service on bonds payable in pounds sterling; a 1948 bankruptcy proceeding in Spain brought by Spanish purchasers of "defaulted" sterling bonds of which the Traction Company itself had not received fair notice; an unfair time limit on appeal in the bankruptcy case; and the eventual passage of very substantial influence over the corporate structure in Spain to one Juan March.

Although the memorials do not mention the matter in just this way, March, known widely as the "Match King" of Spain, was often reported to have been a significant financial supporter of Franco's insurgency against the Spanish Republic and known as a highly skilled and secretive financial operator. The essence of the Belgian claim on the merits in the case that follows would have been that Belgians had been the victims of foreign exchange, bankruptcy, and related official actions that squeezed out the Belgian equity investment in the Barcelona Traction corporate complex. In the jargon of international claims practice the case as seen by Belgium involved "creeping expropriation" and "denial of justice."

A portion of the opinion of the court appears below.]

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it was chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claims in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus, the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

* * *

35. * * * In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

> The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach. (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence of absence of a right, belonging to Belgium and recognized as such as international law, which is decisive for the problem of Belgium's capacity.

This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agree-

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25. 8 M. Whiteman, *Digest of International Law,* 1243 (1967).

26. *Id.* at 1245-47.

27. Sinclair, *Nationality of Claims: British Practice* [1950] Brit. Y.B. Int'l L. 125, 144.

28. Agency of Canadian Car and Foundry Co. Case (United States v. Germany) 5 G. Hackworth, *supra,* note 7 at 833-37.

ment, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. (Paneyezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

* * *

39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

* * *

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-a-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ispo facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

* * *

50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. 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. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by share, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to jus standi assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

* * *

* * * [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint."

(Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. See also Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

* * *

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

* * *

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose

responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

* * *

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, jus standi is conferred on the Belgian Government by considerations of equity.

103. Accordingly, THE COURT rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

* * *

[Declarations, separate opinions and dissenting opinion omitted.]

On the basis of this opinion, it now appears certain that only the state of incorporation may represent a corporate entity on the international level.

7-9. Substantive Bases for International Claims. *a. Attribution of Conduct to the State.* Having examined the manner in which a state may espouse a claim of one of its citizens, attention must now be focused on those acts which have generally been viewed as substantive bases for international claims. Stated concisely, what acts attributable to a state are wrongful under international law when they result in injuries to aliens?

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 165. When Conduct Causing Injury to Alien is Wrongful under International Law

(1) Conduct attributable to a state and causing injury to an alien is wrongful under international law if it

(a) departs from the international standard of justice, or

(b) constitutes a violation of an international agreement.

(2) The international standard of justice specified in Subsection (1) is the standard required for the treatment of aliens by

(a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) analagous principles of justice generally recognized by states that have reasonably developed legal systems. . . .

In order to identify the substantive bases for international claims, it is necessary to analyze specific violations of the international standard of justice. [29]

b. Wrongful Conduct by State Agents Attributed to the State. In the *William T. Way Claim* (United States v. Mexico), [30] a U.S. citizen, while being arrested, was shot and killed by Mexican arresting officers. The warrant for Way's arrest, void on its face under Mexican law for failure to state a charge, had been issued by a local *Alcalde* who had been motivated by personal grievances. Moreover, the arresting officers had been supplied with arms, and the warrant had directed them "to use such means as may be suitable" to seize the accused. In rendering its decision on behalf of the claim for monetary damages brought by the U.S. on behalf of relatives of Way, the Claims Commission stated:

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29. Treaties often refer to the obligation of either party to accord such treatment to the other's nationals as is required by international law. See, e.g., Treaty of Friendship, Commerce and Navigation between the United States and Italy, Feb. 2, 1948, Art. V. 63 Stat. 2225; Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, Art. III, T.I.A.S. No. 3593, 273 U.N.T.S.; Treaty of Friendship, Commerce and Navigation with Pakistan, Nov. 12, 1959, Art. III, 12 U.S.T. 110, 404 U.N.T.S. 259.

30. William T. Way Claim (United States v. Mexico), United States and Mexico General Claims Commission, [1928-29] Opinion of Commissioners 94, 4 U.N.R.I.A.A. 391 [hereinafter cited as William T. Way Claim].

It is believed to be a sound principle that, when misconduct on the part of persons concerned with the discharge of government functions, whatever their precise status may be under domestic law, results in a failure of a nation to live up to its obligations under international law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility.

. . . Under international law a nation has responsibility for the conduct of judicial officers. However, there are certain other broad principles with respect to personal rights which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law. . . . Gross mistreatment in connection with arrest and imprisonment is not tolerated, and it has been condemned by international tribunals. . . . For this tragic violation of personal rights secured by Mexican law and by international law, it is proper to award an indemnity in favor of the claimants. [31]

The *Way* claim clearly demonstrates wrongful conduct by states agents. Just as importantly, however, this decision also reflects conduct that was attributable to the state itself, a factor imperative to the espousal of a claim by a state on behalf of one of its citizens. Attention is called to this fact as a preface to the consideration of the various actions that may be attributed to a state under international law.

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 169. General Rule as to Attribution

Conduct of any organ or other agency of a state, or of any official, employee, or other individual agent of the state or of such agency, that causes injury to an alien, is attributable to the state . . . if it is within the actual or apparent authority, or within the scope of the function, of such agency or individual agent.

Comment:

a. State agency, in general. The term "agency" as used in this Section includes the head of a state and any legislative, executive, administrative or judicial organ, or other authority of the state.

b. Commercial enterprise. The term "agency" as used in this Section includes any commercial enterprise owned by a state unless, under the law of the state, such enterprise is a separate legal entity to which the state does not accord sovereign immunity in its own courts and for which it does not claim the immunity of a foreign state in the courts of other states. . . .

c. Individual agent. The term "individual agent" as used in this Section includes any official, employee, member of the armed forces, or other individual employed by or authorized to act on behalf of the state or any agency of the state. . . .

§ 170. Conduct of Local Authorities

If conduct of an agency or agent of a political unit that is included in a state causes injury to an alien, such conduct is attributable to the state to the same extent as conduct of an agency or agent of the state. . . .

Comment:

a. Federal State. Conduct of local authorities is attributable to the central government of a state without regard to the nature of the state's constitution. Although component units of a federal state have certain attributes of sovereignty for domestic purposes, and may, as in the case of the United States, be known as "states," they are not treated as separate states under international law. . . .

7-10. Responsibility of a State for Acts of Its Military Forces. *a. General.* Military operations offer the largest single factual phenomenon productive of injury to persons or property. Yet, customary international law and the fund of general principles relied on by states in pressing international claims arising from such operations are of little value where posthostilities agreements form the basis of decisions or where the question of liability is likely to be avoided by reciprocal waivers of claims by the states concerned. [32] A line does appear to be drawn between claims arising from military operations incident to combat and those not involving contact with an opposing military force. In the former category are included what may be described as war losses.

b. War Losses. A nation is responsible for the acts of the officers and men of its armed forces. Liability extends to personal injuries, deaths, thefts, wanton destruction of property, and requisitions. There is no liability for losses that, within the meaning of international law, are war losses, in the sense that they are incident to the proper conduct of military operations.

(1) Hague Convention No. IV Respecting the Laws and Customs of Land [33] provides in Article 3 as follows:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

(2) Max Huber, appointed pursuant to an agreement of May 29, 1923, between Great Britain and Spain to examine and report on certain claims out of disturbances in the Spanish Zone of Morocco, said in his report (Oct. 23, 1924): [34]

It seems that a rule generally well recognized exists: the state is not responsible for damages caused by the military operations of its own troops. However, it is not possible to include in this rule every measure having a certain connection with military operations; neither is it possible to include every act committed by soldiers. According to the thesis of the representative of His Catholic Majesty, the evaluation of every act not justified by military necessity would always and exclusively rest with military chiefs, and in every case, national authorities.

The Reporter cannot agree that the acts committed by troops or by isolated soldiers could in no case involve the international responsibility of the state. Article 3 of the Convention of October 18, 1907, relating to the laws of war on land established the principle of such responsibility precisely in the most important contingency. Doubtless this Convention is not directly applicable to any of the facts with which this report must be concerned, but the principle which it establishes merits being retained equally in the event of military action outside of war, properly speaking. This being admitted, it must be remembered, on the other hand, that the rule to which the above-mentioned clause relates gives a large place to military necessity. The determination of this necessity must be left in large measure to the persons themselves who are called upon to act in difficult situations, as well as to their military chief. A nonmilitary jurisdiction, and above all, an international jurisdiction could only intervene in this field in case of manifest abuse of this freedom of judgment. This having been said, it must equally be recognized that the state must be considered as obliged to exercise vigilance of a superior order in order to prevent crimes committed in violation of military discipline and law by persons belonging to the army. The de-

31. *Id.* at 97.

32. W. Bishop, *International Law: Cases and Materials* 696 (1962 ed.). On the general subject of state responsibility for the acts of their forces *see* Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces,* [1955] Receuil Des Cours 267-401.

33. 36 Stat. 2277, T.S. No. 539.

34. 5 G. Hackworth, *supra,* note 7 at 699.

mand for this qualified vigilance is the only complement of the powers of the commander and of the discipline of the military hierarchy. [35]

(3) The British Government presented a claim to the Anglo-American Tribunal established under the agreement of 1910 for reimbursement for losses of personal property by a British subject in Cuba when American Forces, during the Spanish American War, burned certain houses as a health measure. The British Government admitted that losses resulting from necessary war measures do not give rise to a legal right to compensation. However, they contended that this was not a war loss, as it was not a necessity of war but was rather a measure for better securing the health and comfort of troops. The tribunal dismissed the claim, stating:

In law, an act of war is an act of defense or attack against the enemy, and a necessity of war is an act which is made necessary by the defense or attack and assumes the character of *vis major.*

In the present case, the necessity of war was the occupation of Siboney, and that occupation, which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures. i.e., the destruction of the houses and their contents.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war, and according to the principle accepted by the two Governments, it does not give rise to a legal right of compensation. [36]

(4) Before the Hague Convention of 1907 concerning the laws and customs of war on land, the great majority of cases held that the state was not responsible for the wrongful acts of unofficered soldiers, whether incident to a belligerent operation or merely wanton and unauthorized acts of robbery and pillage. Proof generally has been required that the soldiers had acted under the command of officers. [37]

(5) By Article 3 of the Hague Convention of 1907, the state is made liable "for all acts committed by persons forming part of its armed forces." This abolished the restriction of the former rule requiring that officers shall be in command of such wrong doing soldiers. [38]

(6) Article 29 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) [39] provides:

The Party of the conflict in whose lands protected persons may be is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.

(7) The International Committee of the Red Cross, in their Commentary to the Genèva Civilian Convention made the following observation:

The principle of the responsibility of States implies an obligation on the Parties to the conflict to instruct their agents in their duties and their rights. They must take the greatest pains to ensure that the State services in contact with the protected persons are in actual fact capable of applying the provisions of the Convention. In that respect, Article 29 is similar to Article 1, which, as has been seen, binds the Contracting Parties to respect and "ensure respect for" the Convention in all circumstances, and to Article 144, which stipulates that the text of the Convention is to be disseminated as widely as possible both in time of peace and in time of war.

The principle of State responsibility further demands that a State whose agent has been guilty of an act in violation of the Convention should be required to make reparation. This already followed from Article 3 of the Fourth Hague Convention of 1907 respecting the Laws and Customs of War on Land, which states that "a belligerent Party which violates the provisions of the said Regulations (The Hague Regulations) shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

. . . .

The term "agent" must be understood as embracing everyone who is in the service of a Contracting Party, no matter in what way or in what capacity. It includes civil servants, judges, members of the armed forces, members of para-military police organizations, etc., and so covers a wider circle than the definition in the Fourth Hague Convention, according to which the responsibility of the State could only be involved by "persons forming part of its armed forces."

. . . .

The nationality of the agents does not affect the issue. This is of particular importance in occupied territories, as it means that the occupying authorities are responsible for acts committed by their locally recruited agents of the nationality of the occupied country. The position is the same, regardless of whether an agent has disregarded the Convention's provisions on the orders or with the approval of his superiors, or has, on the contrary, exceeded his powers and made use of his official standing in order to carry out an unlawful act. In both instances, the State bears responsibility internationally in accordance with the general principles of law. [40]

c. United States practice.

(1) General. The United States has long followed the policy of making prompt settlement of meritorious claims for damages caused by United States military personnel. Three statutes implement this policy: the Federal Tort Claims Act, [41] The Military Claims Act, [42] and the Foreign Claims Act. [43] Of these, the Foreign Claims Act is of primary relevancy to this problem. Claimants under this statute must be inhabitants of a foreign country [44] who are friendly to the United States. [45] The claim must be in tort rather than in contract, [46] but the act complained

35. The reader's attention is directed toward the interrelationship of state responsibility and the Law of War aspects of "military necessity and command responsibility" discussed in FM 27-10, *The Law of Land Warfare,* chap. 1 § I (1956).

36. William Hardman Claim (Great Britain v. United States) reported in 5 G. Hackworth, *supra,* note 7 at 700. See also Juragua Iron Company, Ltd. v. United States, 212 U.S. 297 (1909).

37. 5 *Hackworth, supra,* note 7 at 709.

38. Harvard Research, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners,* 23 *Am. J. Int'l L. Spec. Supp.* 167 (1929).

39. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* [1955] 6 U.S.T. 3516, T.I.A.S. No. 3365.

40. Commentary, *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 210 (Pictet ed. 1958). Reproduced with the permission of the International Committee of the Red Cross.

41. 28 U.S.C. 1346(b).

42. 10 U.S.C. 2733.

43. 10 U.S.C. 2734.

44. A foreign state or its political subdivision may be a claimant. See 10 U.S.C. 2734(a).

45. An enemy alien, if found to be "friendly to the United States," can be a claimant. 10 U.S.C. 2734(b). DA Pam 27-162, *Claims,* 282 (1961).

46. *Id.* at 284.

of need not be within the scope of employment of the individual soldier or civilian employee. [47] Claims for damages caused by employees of the United States who are not citizens thereof must be within the scope of their employment. Finally, claims incident to combat operations are not payable under the Foreign Claims Act. [48]

(2) It should be noted that these statutory provisions are quite independent of any diplomatic overtures that may be made by a foreign government as a result of violations of international law by the United States. The United States is willing to accept responsibility for the conduct of members of its military services and United States citizens employed by the military departments while they are in foreign countries. [49]

(3) The Foreign Claims Act does not apply where there is an agreement establishing a specific procedure for claims adjudication and settlement. However, such agreements may contemplate recourse to this statute in certain classes of claims, such as claims for injuries caused by acts not done within the scope of employment of the individual wrongdoer. [50]

(4) Applicable treaties and agreements may include those with the country where the incident occurred or with the country of which the claimant is an inhabitant or national. If a claim against the United States is waived or assumed by a foreign government or if the foreign government has agreed to hold the United States harmless from such a claim, the foreign claims commission should not consider and settle the claim but should refer the claimant to the foreign government.

(5) During and after World War II, the United States entered into treaties and agreement with the governments of some foreign nations providing for the mutual waiver of certain classes of claims arising out of activities of the forces of the two countries.

(6) In return for a lump sum payment by the United States, the government of Korea discharged and agreed to hold harmless the United States, its officials, employees, agencies or instrumentalities, nationals, and organizations from claims arising as a result of occupation of Korea by the United States Army during the period prior to 1 July 1948. [51] In return for economic and military assistance provided by the United States during and after World War II, France agreed to process and pay unpaid claims of French residents arising out of acts or omissions in France and French overseas territories prior to 1 July 1946 of members of United States' armed forces and civilian employees attached to such forces. [52] Many of the peace treaties concluded after World War II contained provisions for the release of the United States and other allied nations from responsibility for settlement of specified classes of claims. [53]

(7) Some treaties and agreements provide that the United States will pay just and reasonable compensation in settlement of civil claims arising out of acts or omissions of members of the United States forces, with claims to be processed and settled in accordance with applicable provisions of United States law. [54] Under such agreements, claims would be settled under the "Foreign Claims Act" or, if the claimant was not an inhabitant of a foreign country, the "Military Claims Act."

d. Claims Under NATO SOFA. [55] Article VIII of the Status of Forces Agreement of the North Atlantic Treaty Organization covers the claims formula. The formula established may be divided into three parts:

(1) *Damages to foreign government property in the performance of official duty.* Claims waived entirely include damage caused to military property of one state by the armed forces of the other state in connection with the operation of the North Atlantic Treaty; injury or death suffered by any member of the armed service while engaged in the performance of official duties. Claims are waived, if under $1,400, for damage caused to government property, other than military, of one state by the armed forces of the other in connection with the operation of the North Atlantic Treaty.

(2) *Damage or injury to third parties in the performance of official duties.* In such cases, the "official duty" determination is usually made by the sending State and the claim forwarded to the receiving State for the adjudication of liability. If the claim is allowed, payment is made by the receiving State, and thereafter the receiving State is reimbursed in the amount of 75 percent of its costs by the sending State.

(3) *Damages or injuries not caused in the performance of official duties.* The authorities of the receiving State assess the damages in such a case and forward their report to the sending State. The sending State then decides if it will offer an *ex gratia* payment to the claimant in full satisfaction of the claim. This procedure does not prevent the claimant from suing the member of the force in a civil proceeding or in a combination civil-criminal proceeding.

47. *Id.* at 287.

48. *Id.* at 289.

49. *Id.* at 286.

50. *Id.* at 289. For a complete discussion of claims of this nature, see DA Pam 27-162, *Claims* (1974).

51. 62 Stat. 3242 (1948), T.I.A.S. No. 1851. The release here extended beyond claims of a tort nature.

52. 61 Stat. 417 5 (1947), T.I.A.S. No. 1928. The accepting of responsibility for unpaid tort type claims was only a small consideration involved in this agreement. See JAGD/D-5419638 (Nov. 24, 1954) wherein it was held that a claim of an inhabitant of Tunisia for the death of his daughter during World War II may be presented by claimant to the French Government.

53. 61 Stat. 1245 (1947), T.I.A.S. No. 1648. See also 61 Stat. 4168 (1947), T.I.A.S. No. 1920 and 61 Stat. 4171 (1947), T.I.A.S. No. 1921.

54. Agreement with Federation of the West Indies, Feb. 10, 1961, 12 U.S.T. 408 (1961), T.I.A.S. No. 4734.

55. For a comprehensive discussion of NATO SOFA claims, see chapter 10.

Such suit need only be terminated by the claimant if he accepts the *ex gratia* payment in full satisfaction of his claim. Investigation of incidents and claims is conducted by authorities of the receiving State, with the sending State cooperating by furnishing evidence from sending State sources.

7-11. Failure to Protect Aliens and to Apprehend and Prosecute Those Who Wrongfully Inflict Injury on Aliens. *a.* Failure to protect. In the *William E. Chapman Claim,* [56] a claim was made by the United States on behalf of William Chapman, who was shot and seriously wounded at Puerto Mexico, Mexico. At the time of the shooting, Chapman was serving in Puerto Mexico as Consul of the United States. The Claim was predicated on allegations that the Mexican authorities failed to provide proper protection to the claimant, even though he had apprised them of a threat made on his life, and subsequently failed to take the proper steps to apprehend and punish the person who did the shooting. In awarding compensation to Mr. Chapman, the Commission issued these comments:

> This Commission and other international tribunals have often given application to the general principles invoked in the instant case that a government is required to take appropriate steps to prevent injuries to aliens and to employ prompt and effective measures to apprehend and punish offenders who have committed such injuries. The Commission has also considered the subject of the special protection due to a consular officer. . . . Citation is made by the American Agency to statements found in numerous works on international law and in diplomatic correspondence to the effect that consular officials are entitled to special protection. . . . Of course a request for protection in a case of threatened danger may be appropriate in any case involving the safety of an alien having no official status, and compliance with such a request will be prompted by the desire of authorities of a government to take notice with a view to avoiding any just grounds for complaint by the government to which the alien belongs. . . .
>
> Writers on international law have repeatedly [however] stated that consular officers are entitled, to use the language of Phillimore, to a "more special protection of international law than uncommissioned individuals." [57]

b. Failure to apprehend and prosecute. In the *Laura B. Janes Claim* [58] it was alleged that claimant's husband was shot and killed in view of many witnesses. It was further alleged that the Mexican authorities did not take the proper steps to apprehend and punish the assailant. In finding that, based on all available evidence, the efforts of the Mexican authorities were inefficient and dilatory, the Commission asserted:

> . . . At times international awards have held that, if a State shows serious lack of diligence in apprehending and punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor. . . . The reason is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.
>
> A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender.

c. An often cited example of a governmental failure to protect or apprehend and punish is an incident that occurred in 1918. In that year, the U.S.S. Monocacy, while lawfully navigating the Yangtze River, was fired upon. One seaman was killed, and two others were wounded. In an instruction addressed to the Legation at Peking, the U.S. Department of State maintained:

> Official reports that this deplorable incident was the result of a state of lawlessness which the Chinese Government, though well aware of its existence, took no action to abate; that these casualties were attributable to the inactivity and apparent indifference of the responsible authorities of the Chinese Government; and that no adequate or effective steps have been taken to punish the perpetrators of the outrage. In view of the obligation of the Chinese government to accord protection to American citizens engaged in lawful pursuits in China and of the failure of the Chinese authorities to adopt measures calculated to avert incidents such as the attack on the U.S.S. Monocacy and to adequately punish the guilty parties, and considering that the victims of the attack were American citizens employed in the naval service of the United States, and that O'Brien was the support of a dependent wife and two children, the Department deems it appropriate to ask an indemnity. . . . [59]

In a note of March 14, 1919, the Chinese Vice Minister of Foreign Affairs accepted the proposed settlement "as just and acceptable in every particular." [60] In speaking to this specific substantive basis for an international claim, Restatement, Second, § 183 provides:

> A state is responsible under international law for injury to the person or property of an alien caused by conduct that is not itself attributable to the state, if
>
> (a) the conduct is either (i) criminal under the law of the state, (ii) generally recognized as criminal under the laws of states that have resonably developed legal systems, or (iii) an offense against public order, and
>
> (b) either (i) the injury results from the failure of the state to take reasonable measures to prevent the conduct causing the injury, or (ii) the state fails to take reasonable steps to detect, prosecute, and impose an appropriate penalty on the person or persons responsible for the conduct if it falls within clause (a) (i).

7-12. Denial of Procedural Justice. *a. Definition.* As in other areas of state responsibility, considerable controversy has been generated by the shifting meaning of the concept, "denial of justice." It is frequently said that a state is responsible under international law for a "denial of

56. William E. Chapman Claim (United States v. Mexico), United States and Mexico General Claims Commission, [1930-31] Opinions of Commissioners 121, 4 U.N.R.I.A.A. 632.

57. *Id.* at 127.

58. Laura B. Janes Claim (United States v. Mexico), United States and Mexico General Claims Commission, 1926, [1927] Opinions of Commissioners 108, 4 U.N.R.I.A.A. 82.

59. 5 G. Hackworth, *supra,* note 7 at 655-66.

60. *Id.*

justice" to an alien. However, the term has been employed in a variety of meanings. These include: (1) any treatment of an alien that violates international law, (2) treatment of an alien that departs from generally accepted standards of substantive law, (3) treatment of an alien that departs from generally accepted standards for the conduct of legal proceedings, (4) failure to afford an alien an adequate remedy or protection in the administration of justice, (5) failure to prosecute the perpetrator of a crime causing injury to an alien, or (6) failure to provide an adequate domestic remedy for an injury to an alien for which the state has international responsibility. The rules in *Restatement, Second,* on this subject deal with these different types of injury to an alien but use the term "denial of justice" only in the modified form, "denial of procedural justice," which is confined to the third and fourth meanings indicated above. [61] The sixth meaning referred to is related to the procedural requirement that an injured alien must exhaust his domestic remedies in the foreign state before the state of which he is a national may assert a claim on the international plane. [62]

b. Arrest and Detention. Restatement, Second, § 179 deals with arrest and detention in the following manner:

> (1) The arrest of an alien is a denial of procedural justice if
> (a) he is not informed of the cause of the arrest, or
> (b) the arrest is for a cause not recognized as justifying arrest under the international standard of justice.
>
> (2) The detention of an alien constitutes a denial of procedural justice if he is not, without unreasonable delay,
> (a) informed of the charges against him,
> (b) afforded access to a tribunal or other authority having jurisdiction to determine the lawfulness of his detention and to order his release if such detention is unlawful,
> (c) permitted during detention to communicate with a representative of his government,
> (d) afforded access to counsel, or
> (e) granted a trial.
>
> (3) Mistreatment of an alien in the course of arrest or during detention is a denial of procedural justice.

Arrest and detention are also covered in the U.N. Covenant of Civil and Political Rights. [63] Additionally, certain rights of an accused are specifically guaranteed in U.S. Treaties of Friendship, Commerce and Negotiation. [64]

c. Denial of Trial. Denial of a trial for the determination of an alien's right is an obvious form of denial of procedural justice. Indeed, this is viewed by the great majority of those states which deny the existence of an international standard of justice as the only possible denial of procedural justice. Accordingly, international agreements commonly guarantee reasonable access to a court or other tribunal on the same basis as nationals. [65]

d. Erroneous Decisions. It appears to be well settled that mere error in a decision does not constitute a denial of procedural justice. The injustice in question must be egregious. Indeed, the decision must be "so obviously wrong that it cannot have been made in good faith and with reasonable care," or "a serious miscarriage of justice." [66]

7-13. Injury to Economic Interests of Aliens. *a. Scope.* The subject matter of this secion deals primarily with the "nationalization problems;" that is, state action affecting aliens' property or economic interests. Prior to the First World War, expropriations involving foreign property holders were infrequent. In 1917 the Russian revolution ushered in the problem of nationalization of all private property by Communist states. The Mexican land and oil expropriations ushered in the problem of underdeveloped nations seeking to change the status quo in regard to foreign control of important segments of the economy. The patterns of diplomatic action in the event of expropriation were also set during this period. Diplomatic protests and representations were first made. If local remedies proved insufficient, claims were referred to arbitrators or special commissions or held for further negotiation. Since the end of the Second World War, expropriations have increased, with the most widespread expropriations occurring in countries which adopted communism. Agreements on lump sums to settle claims arising from expropriations have been reached with Yugoslavia, Poland, Bulgaria, and Rumania. Some of the claims against Czechoslovakia and Hungary have been paid out of funds established from assets of those countries in the United States. The problem of obtaining compensation from Cuba and the Peoples' Republic of China is being held in abeyance.

b. Current Practice. The existing international jurisprudencial system is under great stress in this particular area. As can be seen, the nationalization problem is an old one. However, it has become more acute as states, particularly new and developing ones, embark upon various types of social experimentation.

7-14. Expropriation and Nationalization of Alien-Owned Property. *a. General Principles.* As Mr. Justice Harlan observed in *Bance Nacional De Cuba v. Sabbatino*: [67]

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61. *Restatement, supra,* note 11 at § 165, comment *c.*

62. *Id.*

63. 21 U.N. GAOR Supp. 16, at 52-58, U.N. Doc. A/6316 (1966).

64. See, e.g., Treaty with Greece, August 3, 1951, art. IV(2), [1952] 5 U.S.T. 1829, T.I.A.S. No. 3057.

65. The concept of procedural due process would seem to require the grant of a trial to determine what rights an alien has. Aliens are usually guaranteed access to a court or other tribunal on the same basis as nationals by international agreements. See, e.g., Friendship, Commerce and Navigation Treaty with the Netherlands, March 27, 1956, Art. V(1), 8 U.S.T. 2043, T.I.A.S. No. 3942; American Declaration of the Rights and Duties of Man; Art. XVIII (1948), 43 Am. J. Int'l L. Supp. 133, 136 (1949).

66. *Restatement, supra,* note 11 at § 182, comment *a.* See also Herrera v. Canevaro and Co. [1927-28] Ann. Dig. 219 (Sup. Ct. Peru).

67. Banco Nacional de Cuba v. Sabbantino, 376 U.S 398, 428-29 (1964).

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them, and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.

The disparities of views on the basic principles of state responsibility, examined previously in this chapter, are reflected in, and to a considerable extent are focused on, differing views of the international law principles applicable to the taking of alien-owned property. Together with many other capital exporting countries, the United States has consistently maintained that a taking of property for public purposes is contrary to international law unless it is accompanied by prompt, adequate, and effective compensation. In sharp contrast, the traditional Latin American view, now espoused by many developing countries in Africa and Asia as well, is that the international legal obligation of the state to pay compensation to an alien whose property has been taken involves no more than a duty to compensate the alien to the extent that its own nationals are compensated. [68] Others would deny any international legal responsibility on the part of a state to pay compensation to an alien whose property has been taken.

b. Limitations. At this point, it should be noted that, under certain circumstances, the taking of property is wrongful under international law, with the result that a duty to make reparation will arise quite independently of whether compensation has been paid. The specific case about which there appears to exist no room for dispute is when the taking is in violation of a treaty. In the *Case Concerning the Factory at Chorzow*, [69] the Permanent Court held the taking to be in violation of the *German-Polish Convention Concerning Upper Silesia* and that, accordingly, compensation equivalent to restitution of the property in kind was called for. It has also been urged that a taking not for a public purpose would violate international law. [70] Finally, there is broad support for the view that a taking involving discrimination against aliens is wrongful under international jurispurdence. [71] The heart of the problem, however, is to what extent does international law impose a duty to pay compensation in the event of a taking of alien property by a state when the taking is for a public purpose, is nondiscriminatory, and is not violative of a treaty. To what extent must compensation be paid of a taking is lawful under internation law? In connection with this question, attention is called to the Resolution on Permanent Sovereignty over National Resources. [72]

RESOLUION ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The General Assembly

Considering that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule, . . .

Declares that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private captial investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles

68. This is a logical extension of the "equal treatment" theory previously discussed.

69. Case Concerning the Factory at Chorzow (Claim for Indemnity) [1928] P.C.I.J., ser. A, No. 17 [hereinafter cited as Chorzow Factory Case].

70. *Restatement, supra,* note 11 at § 185.

71. *Id.* at § 166. See also Fatouros, *Government Guarantees to Foreign Investors* 249-51 (1962) [hereinafter cited as Fatouros]; S. Friedmann, *Expropriation in International Law* 189-93 (1953).

72. This resolution was adopted by the U.N. General Assembly by 87-2 with 12 abstentions.

of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution. . . . [73]

c. New Developments. Many publicists continue to insist that adequate, prompt, and effective compensation be made for expropriated property. [74] However, considerable opinion seeks to modify the orthodox compensation "rule" in the modern foreign wealth deprivation context. A large number of Eastern European publicists suggest that compensation for claims be fixed by "new criteria," and many Western writers are similarly persuaded. [75] Sir Hersch Lauterpacht has made the following observation:

> The rule is clearly established that a State is bound to respect the property of aliens. This rule is qualified, but not abolished . . . [A] modification must be recognized in cases in which fundamental changes in the political system and economic structure of the State or far-reaching reforms entail interference, on a large scale, with private property. In such cases, neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistent with legal principle, such solution must be sought in the granting of partial compensation. [76]

7-15. Adequacy of Compensation. In essence, the primary focus of the controversy with respect to the duty to pay compensation has not been whether there exists a duty under international law to pay some compensation—a proposition for which there is broad support—but rather the amount and form of the compensation. The key inquiry is what is "just" or "appropriate" or "adequate" compensation under the circumstances. Even accepting the proposition that compensation must be adequate, prompt, and effective, there exists substantial room for disagreement concerning the precise meaning of these terms. Moreover, it is clear that "adequate," "prompt," and "effective" are interrelated. For example, undue delay in payment or payment that cannot be translated into a usable economic benefit to the dispossessed alien can have an impact on the "adequacy" of the compensation arrangements. Finally, it has been urged that the requirement for adequate, prompt, and effective compensation should be mitigated when the taking is pursuant to a broad program of economic and social reform as opposed to an individual expropriation. Failure to do so would deny to poorer states, which could not afford to make full and immediate payment, the right to effect the programs of reform they desire. [77]

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 187. Just Compensation Defined

Just compensation as required by § 186 must be

(a) adequate in amount, as indicated in § 188,

(b) paid with reasonable promptness, as indicated in § 189, and

(c) paid in a form that is effectively realizable by the alien, to the fullest extent that the circumstances permit, as indicated in § 190.

§ 188. Adequacy of Compensation

(1) Compensation, to be adequate in amount within the meaning of § 187, must be in an amount that is reasonable under the circumstances, as measured by the international standard of justice indicated in § 165. Under ordinary conditions, including the following, the amount must be equivalent to the full value of the property taken, together with interest to the date of payment

(a) if the property was acquired or brought into the jurisdiction of the state by the alien for use in a business enterprise that the alien was specifically authorized to establish or acquire by a concession, contract, license, or other authorization of the state, or that the alien established or acquired in reasonable reliance on conduct of the state designed to encourage investment by aliens in the economy of the state,

(b) if the property is an operating enterprise that is taken for operation by the state as a going concern,

(c) if the taking is pursuant to a program under which property held under similar circumstances by nationals of the state is not taken, or

(d) if the taking is wrongful under international law as stated in § 185.

(2) In the absence of the conditions specified in Subsection (1), compensation must nevertheless be equivalent to full value unless special circumstances make such requirement unreasonable.

Comment: . . .

b. *Meaning of full value.* The full value specified in this Section means fair market value if ascertainable. If fair market value is not ascertainable, it means the fair value as reasonably determined in the light of the international standard of justice specified in § 165. So far as practicable, full value must be determined as of the time of taking, unaffected by the taking, by other related takings, or by conduct attributable to the taking state and having the effect of depressing the value of the property in anticipation of the taking. This does not require, however, disregard of the effect on market values of the state's general power to regulate the use of property or the conduct of business operations.

§ 189. Promptness of Compensation

Payment with reasonable promptness, within the meaning of § 187, means payment as soon as is reasonable under the circumstances in the light of the international standard of justice specified in § 165.

§ 190. Effectiveness of Compensation

(1) Compensation, to be in effectively realizable form, within the meaning of § 187, must be in the form of cash or property readily convertible into cash. If not in the currency of the state of which the alien was a national at the time of the taking, the cash paid must be convertible into such currency and withdrawable, either before or after conversion, to the territory of the state of the alien's nationality, except as indicated in Subsection (2).

(2) Such conversion and withdrawal may be delayed to the minimum extent necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of the people of the taking state.

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73. G.A. Res. 1803, 17 U.N. GAOR, Supp. 17, Doc. No. A/5217 at 15-16 (1962).

74. See, e.g., Cheng, *Expropriation in International Law,* 21 Solicitor 98 (1954), and Brandon, *Legal Aspects of Private Foreign Investment,* 18 Fed. B.J. 298 (1958).

75. See, for example, Katzarov, *The Validity of the Act of Nationalization in International Law,* 22 Mod. L. Rev. 639, 647 (1959).

76. 1 L. Oppenheim, *International Law* 318 (H. Lauterpacht ed. 1948) [hereinafter cited as 1 Oppenheim].

77. See Garcia-Amador, *International Responsibility: Fourth Report,* [1959] 2 *Y.B. Int'l L. Comm.* 1, 7, 23-24, U.N. Doc. No. A/CN 4/119 (1959).

7-16. Presidential Statement on Expropriation.

STATEMENT OF POLICY BY THE PRESIDENT OF THE UNITED STATES CONCERNING THE INTERNATIONAL MINIMUM STANDARD

§ Weekly Compilation of Presidential Documents, 64 (1972)

We live in an age that rightly attaches very high importance to economic development. The people of the developing societies in particular see in their own economic development the path to fulfillment of a whole range of national and human aspiration. The United States continues to support wholeheartedly, as we have done for decades, the efforts of those societies to grow economically—out of our deep conviction that, as I said in my Inaugural Address, "To go forward at all is to go forward together"; that the well-being of mankind is in the final analysis indivisible; and that a better-fed, better-clothed, healthier, and more literate world will be a more peaceful world as well.

* * *

I also wish to make clear the approach of this administration to the role of private investment in developing countries, and in particular to one of the major problems affecting such private investment: upholding accepted principles of international law in the face of expropriations without adequate compensation.

The wisdom of any expropriation is questionable, even when adequate compensation is paid. The resources diverted to compensate investments that are already producing employment and taxes often could be used more productively to finance new investment in the domestic economy, particularly in areas of high social priority to which foreign capital does not always flow. Consequently, countries that expropriate often postpone the attainment of their own development goals. Still more unfairly, expropriations in one developing country can and do impair the investment climate in other developing countries.

In light of all this, it seems to be imperative to state—to our citizens and to other nations—the policy of this Government in future situations involving expropriatory acts.

1. Under international law, the United States has a right to expect:
   —That any taking of American private property will be nondiscriminatory;
   —that it will be for a public purpose; and
   —that its citizen will receive prompt, adequate, and effective compensation from the expropriating country.

Thus, when a country expropriates a significant U. S. interest without making reasonable provision for such compensation to U. S. citizens, we will presume that the U. S. will not extend new bilateral economic benefits to the expropriating country unless and until it is determined that the country is taking reasonable steps to provide adequate compensation or that there are major factors affecting U. S. interests which require continuance of all or part of these benefits.

2. In the face of the expropriatory circumstances just described we will presume that the United States Government will withhold its support from loans under consideration in multilateral development banks.

3. Humanitarian assistance will, of course, continue to receive special consideration under such circumstances.

4. In order to carry out this policy effectively, I have directed that each potential expropriation case be followed closely. A special interagency group will be established under the Council on International Economic Policy to review such cases and to recommend courses of action for the U. S. Government.

This explicit Presidential statement concerning an international minimum standard of compensation clearly details the U.S. view toward expropriation.

7-17. State Breach of Its Undertaking to an Alien. *a. General.* Contractual arrangements between states and aliens are a common phenomenon in today's world and cover a variety of matters. A private supplier may sell goods or services to a foreign government or grant it rights to patents or technology under a licensing arrangement. A private company may enter into a concession agreement with a foreign government calling for the exploitation, development and marketing of mineral resources. A private investor may enter into a contractual arrangement with a foreign government pursuant to an investment incentive program under which an investment in productive facilities is made in exchange for various guarantees and incentives afforded by the foreign government. The undertakings made by the state under such varied arrangements differ widely, and these differences may be relevant to the question of whether state responsibility under international law attaches as a result of a breach of a particular undertaking.

b. Breach. When does a breach of an undertaking by a state to an alien constitute a violation of international law? At one extreme, there exists the position that, as only states have rights and obligations under international law, a state can limit its exercise of sovereignty only by international agreement with another state or international organization and not by an agreement with an alien. At the other extreme, it has been argued that the doctrine of *pacta sunt servanda* as a rule of international law applies in the case of any agreement between a state and an alien. [78] Consider both of these views as the following material is examined.

7-18. Choice and Effect of Governing Law. *a.* Unless the repudiation of a contractual obligation is manifest, a necessary step in determining whether a breach has occurred will be to ascertain, in accordance with the principles of the conflict of laws (private international law), what body of law (or bodies of law) govern questions in interpretation, validity, and performance of the contract. As pointed out in the *Saudi Arabia v. Arabian American Oil Company (Aramco) Arbitration Award:* [79]

It is obvious that no contract can exist *in vacuo, i.e.*, without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the Parties. It is necessarily related to some positive law which gives legal effect to the reciprocal and concordant manifestations of intent made by the parties. The contract cannot even be conceived without a system of law under which it is created. Human will can only create a contractual relationship if the applicable system of law has just recognized its power to do so.

b. It should be noted that the choice of governing law problem can be quite complex in relation to an agreement between a state and an alien. If the parties make an explicit choice as to governing law, this will usually be controlling. However, if the agreement is silent, the choice of law problems are complicated by questions such as whether there should be a presumption in favor of the municipal law of the contracting state or whether referral of disputes to an

78. See Domke, *Foreign Nationalizations,* 55 *Am. J. Int'l L.* 585, 597 (1961); Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts,* 28 *Fordham L. Rev.* 177, 194-214 (1959).

79. 27 *Int'l L. Rep.* 117, 165 (1958).

international court or arbitral tribunal implies a choice as to governing law, or, at least, a rejection of municipal law of the contracting state as controlling. In speaking to the body of law which regulates the performance of state contracts, a noted publicits has observed:

It is today becoming increasingly accepted that a new body of law, differing from both international and municipal law, is in the process of developing.... This body of law, variously named "extranational" or ... "transnational," governs those situations where neither municipal law nor the traditional public international law would be wholly appropriate....

It is not yet quite clear under what conditions transnational law is applicable to particular state contracts. There is little doubt as to its applicability when the parties include in the contract itself a provision to the effect that the "proper law of the contract" is transnational law or the general principles of law recognized by civilized nations. Apart from such express statements, a similar intent of the parties may be inferred when the parties provide that any dispute is to be adjudged by an international court. Provision for arbitration may also be an indication of the existence of such intent, though probably not in all cases. Finally, transnational law may sometimes be applied when no other system of law may be said to govern the contract, or in order to supplement other applicable rules of law. [80]

7-19. State Breach as a Violation of International Law.

a. Choice of law. As indicated by the foregoing, under the applicable principles of conflict of laws, the law governing the interpretation, validity, and performance of the contract may be determined to be the municipal law of the contracting state, principles of law applied in common by two or more municipal law systems, public international law, general principles of law applied in common by two or more municipal law systems, public international law, general principles of law, some other body of law, custom, or some combination of all of these. Indeed, various aspects of the contractual relationship may be governed by different bodies of law. Once having determined the governing law, the problem shifts to seeking the content of that law as applied to the particular contractual undertaking involved. To what extent under the governing principles are contracting parties held absolutely to their undertakings under an inflexible application of *pacta sunt servanda*? To what extent, if at all, is either party afforded some leeway in meeting its obligations? What is the relevance of traditional principles of private and public law when applied to various agreements between states and aliens? Then, assuming that a breach of contractual obligation is established under the law governing the agreement, when, in the absence of a treaty violation or a denial of procedural justice, will a breach by the contracting state constitute a violation of international law providing the substantive basis for a claim of state responsibility? Restatement, Second, § 193 offers this answer:

(1) The breach by a state of a contract with an alien, except as indicated in Subsection (2) and (3), is wrongful under international law if either

(a) the breach is effected in an arbitrary manner without bona fide claim of excuse,

(b) the law and practice of the state in effect at the time of the breach do not make reasonable provision for reparation for the breach,

(c) the state entered into the contract with the alien (or an alien assignor of the contract) in his capacity as an alien, or

(d) the circumstances indicate that, when the alien became a party to the contract, the parties contemplated that performance of the contract would involve to a substantial degree foreign commerce, use of foreign resources, or activity outside the territory of the state.

(2) Subsection (1) (a) and (1) (b) are not applicable to a contract for the repayment of money borrowed on the domestic market of the state.

(3) Breach by a political subdivision of a state, whether or not it is a federal state, of a contract to which the central government or an agency of that government is not a party, does not, as such, give rise to responsibility on the part of the state under international law. [81]

b. There exist differing opinions whether one government of a state may restrict the state's future legislative freedom. The following appears to reflect the generally held view.

While it may be said that a State is unable to restrict its future legislative freedom for an indefinite period, there is neither principle nor authority to prevent it from so doing for a limited number of years. If a State violates such a promise made to a foreign concessionaire, its action may be valid on a municipal level within its own territory, but on the international level it is sufficient ground for interposition by the alien's national State. The nationalising state in these circumstances has infringed a limitation of its sovereignty voluntarily assumed by it. [82]

c. The Department of State has often maintained that it would not espouse cases of breach of contract except when the breach is of a "tortious nature" or when there has been a denial of justice. However, both of these expressions have been rather flexibly interpreted, and the only types of claims that seem to be generally deemed unqualified for espousal are those wherein the breach does not constitute a violation of international law or the action is for default in payment of public debt. The general unwillingness of the Department to serve as "a collection agency" also appears to be a factor in minor commercial transactions. Contract claims are often included in lump-sum settlements negotiated by the United States.

7-20. Waiver by Individual Claimant (Calvo Clause).

a. Background. It is generally agreed that if an alien injured by a state in such a way as to constitute a violation of [a type wrongful under] international law, waives or settles the claim prior to diplomatic intervention by the state of which he is a national, then the waiver of settlement ". . . is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not under duress." [83] More troublesome problems have been raised, however, by the efforts of Latin American states to avoid foreign diplomatic intervention through various devices, including waivers required of aliens in advance, which limit their rights to those available under domestic law and secured by domestic legal remedies. These states, by means of their constitutions, statutes, and executive action, make it a condition precedent to the entry of a foreign contractor or direct investor that the alien undertakes at the time of entry and in consideration therefor not to invoke the dip-

80. Fatouros, *supra,* note 71 at 283-94.

81. *Restatement, supra,* note 11 at § 193.

82. H. White, *Nationalization of Foreign Property,* 178 (1961).

83. *Restatement, supra,* note 11 at § 203.

lomatic protection of the state of his nationality and to accept nondiscriminatory national treatment as his sole basis of right. Contractually, this is an anticipatory waiver of claims. The former foreign minister of Argentina who gave his name in the latter part of the nineteenth century to the "Calvo Doctrine," which these waiver clauses seek to implement, grounded the doctrine firmly on a negation of any right of diplomatic protection inhering in states of nationality and on a denial of the existence of an international minimum standard of justice. Inevitably, "Calvo Clauses" raise these questions:

(1) May the private party bind or bar the state of his nationality?

(2) If the promisor, again the private party, breaches his promise and seeks the representation of his government, what happens as to:

(*a*) The investor vis-a-vis the state to which he gave his promise, and

(*b*) Any independent right of actions that the state of nationality otherwise might have had? The questions posed do not have clear and satisfactory answers in either doctrinal writings or in international arbitrations. There have been no International Court of Justice decisions on these matters. Analytically, these questions raise the issue whether a nationalization claim is an injury to the state of espousal, (that is, an expression of a fundamental concept of customary international law), or whether it is merely a doctrine of logical convenience (i.e., a means by which to circumvent the lack of individuals' rights in this particular area of the international legal system).

b. Current practice. Capital exporting states other than the U.S. seem to have been only rarely troubled by *Calvo* clauses. To date, this device for subjecting the foreign investor to greater host state control has not spread throughout the developing nations of the world. In diplomatic correspondence, the U.S. has rejected the notion that its international cause of action can be compromised by an agreement between a foreign state and a U.S. citizen. Often cited in support of this view is the leading decision in this area, *North American Dredging.* [84] In rendering its opinion in this case, the Commission hearing the dispute stated:

> Reading this article [Article 18 contained a Calvo clause] as a whole, it is evident that its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws. . . . But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.
>
> What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to article 18 of the contract? (a) He waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfulling a contract in an inferior country subject to a system of capitulations; and as if the only real remedies available to him in the fulfillment, construction, and enforcement of this contract were international remedies. All these he waived and had a right to waive. (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfillment, execution, or enforcement of this contract as such. (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations. (d) He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. [85]

c. Restatement, Second, though somewhat restrictive in its approach, does appear to grant a greater degree of validity to the Calvo clause. Section 202 provides:

> (1) If an alien, as a condition of engaging in economic activity in the territory of a state, agrees with the state that he is to be treated as if he were a national in respect to such activity, and that his only remedy for injury in this respect is that available under the law of the state, such agreement, commonly called a "Calvo Clause," relieves the state of responsibility for injury to the economic interests of the alien in respect to such activity, if (a) the alien is in fact treated as favorably as if he were a national, (b) the violation of an international agreement under the rule stated in § 165 (1) (b), and (c) the law of the state affords the alien a bona fide remedy for such injury that satisfies the requirements of procedural justice stated in §§ 180-182.
>
> (2) A Calvo Clause does not relieve a state of responsibility for injury to an alien except as stated in Subsection (1).

d. Thus, though the Calvo clause has not been as widely accepted as its proponents would like, both arbitral decision and state practice seem to negate the view that the clause is a complete nullity in international claims law and practice. Moreover, there is some evidence that, in U.S. diplomatic practice, the presence of a Calvo clause is a factor in determining either espousal itself, or the degree and intensity with which the normal diplomatic protection function of the Department of State is discharged. [86]

7-21. Justification for Otherwise Unlawful Conduct. *a.* The Restatement position.

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

Circumstances may justify conduct causing damage to an alien that would otherwise be wrongful under international law. The rules stated in this Chapter, §§ 197-201, are not exceptions to the general rule of responsibility of a state for conduct departing from the international standard of justice as indicated in § 165, but specify situations in which certain types of conduct do not depart from the standard. . . . [T]he rules in this Chapter do not constitute justification for conduct that discriminates against an alien or constitutes a violation of an international agreement. . . .

§ 197. Police Power and Law Enforcement

(1) Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in § 165 if it is reasonably necessary for

(a) the maintenance of public order, safety, or health, or

(b) the enforcement of any law of the state (including any revenue

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84. North American Dredging Co. Case (United States v. Mexico), United States and Mexico General Claims Arbitration 21 (1926).

85. *Id.* at 26.

86. For a thorough and well-reasoned analysis of the Calvo clause, *see* Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection,* 6 *Tex. Int'l L. Forum* 289 (1974).

law) that does not itself depart from the international standard.

(2) The rule in Subsection (1) does not justify failure to comply with the requirements of procedural justice stated in §§ 179-182 except as stated in § 199 with respect to emergencies.

Comment:

a. *General.* The essential criterion in determining whether exercise of police power, or enforcement of a law of a state, that causes damage to an alien is consistent with the international standard, is whether the conduct, in each case, is reasonably necessary to achieve the indicated objective, and whether that objective is consistent with the international standard.

Illustrations:

1. State A enacts a law requiring periodical inspection of livestock and destruction of animals that are found to have certain communicable diseases. The law provides for compensation only in cases where more than five percent of a herd is destroyed. Pursuant to such inspection, the state destroys two percent of a herd belonging to X, an alien. The destruction does not violate the rule stated in § 185 regarding the taking of an alien's property without just compensation.

3. State A makes an agreement with X, an alien corporation, granting it the right to extract minerals in designated areas of A's territory for a period of five years and providing for payment by X of a specified royalty. Thereafter, A enacts a law imposing a reasonable income tax on all corporations operating in its territory with respect to income earned there. Collection of the tax from X, in addition to collection of the royalty, does not violate the rule stated in § 185.

§ 198. Currency Control

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in § 165 if it is reasonably necessary in order to control the value of the currency or to protect the foreign exchange resources of the state.

Comment:

a. *Control of value of currency.* It is generally recognized that devaluation of currency does not give rise to state responsibility by reason of its effect on an alien.

b. *Foreign exchange.* Likewise, the application to an alien of a requirement that foreign funds held within the territory of the state be surrendered against payment in local currency at the official rate of exchange is not wrongful under international law, even though the local currency is less valuable on the free market than the foreign funds surrendered.

Illustration:

2. State A grants a concession to X, a national of state B, for mining operations in the territory of A. To meet local expenses of the project, X opens an account in a bank in A with a deposit in currency of B. A needs currency of B to pay for food and fuel imports from B. It adopts a foreign exchange control system requiring all credits in the currency of B to be surrendered in exchange for local currency at the official rate of exchange, which is the same rate at which X could have withdrawn local currency from his account, but substantially less favorable to him than the free market rate. Enforcement of the requirement against X, that converts his account into local currency, is not a violation of the rule stated in § 188 with respect to the payment of full value for the taking of an alien's property.

§ 199. Emergencies

Conduct attributable to a state and causing damage to an alien does not depart from the international standard of justice indicated in § 165 if it is reasonably necessary to conserve life or property in the case of disaster or other serious emergency.

b. There is authority for the principle that if an alien's property within the territory of a belligerent is requisitioned or destroyed under pressure of urgent necessity, compensation must be paid. Article 21 of the Harvard Research Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War [87] states:

A belligerent may, within its territory or within territory held in military occupation, in case of urgent necessity, requisition a neutral vessel privately owned and operated, or cargo owned by nationals of a neutral State, if the vessel or the cargo was brought into such territory voluntarily and not as the result of compulsion or pressure exercised by the belligerent or by an allied belligerent; provided that this privilege may be exercised by a belligerent only if it pays the fair market value, under prevailing conditions, of the vessel or cargo requisitioned.

The authorities dealing with cases of destruction are discussed in an accompanying comment. Article 22 provides that:

A belligerent has no duty to pay compensation for damage to a neutral vessel or other neutral property or persons, when such damage is incidental to a belligerent's act of war against the armed forces of its enemy and not in violation of the provisions of this Convention or of the law of war. [88]

7-22. Reparation. *a.* General. The violation of international law creates an obligation on the part of the delinquent to give satisfaction or reparation for the wrong to the state injured by the violation. The violation may result in either a material injury or what might be called a "moral" injury. [89] The former is an injury to property or to an individual, while the latter is an injury to the dignity or sovereignty of a state. Since an international delict involving a material injury, whether to state property or the property or person of a private individual, is an injury to the state itself, a moral injury will always accompany a material injury. However, a moral injury need not necessarily result in a material injury. For instance, the violation of a treaty may cause no actual damage, but would still constitute a moral injury, obligating the violating state to make appropriate reparation to the injured state.

b. Reparation or satisfaction for a moral injury may consist of a formal apology or a monetary payment, or both. [90] Moreover, the mere fact that a state is adjudged to have violated international law may be sufficient reparation to the injured state. [91] If the reparation for a moral injury consists of a monetary payment, the amount will depend on the nature and magnitude of the injury to the dignity or sovereignty of the wronged state. When the moral injury is accompanied by or results from a material injury, the reparation often takes the form of a monetary payment measured by the damages of the individual claimant, even though, in theory, the injury has been suffered by the claimant state.

c. As the Permanent Court of International Justice observed in the *Case Concerning the Factory at Chorzow:* [92]

87. 33 *Am. J. Int'l L. Supp.* 167, 359 (1939).

88. For a more detailed discussion of the concept of "military necessity," see DA Pam 27-10.

89. 1 Oppenheim, *supra,* note 71 at 352.

90. The "I'm Alone" Case (Canada v. United States) Department of State Arbitration, Ser. No. 2, at 4, 3 U.N.R.I.A.A. 1609, 1618 (1935) [hereinafter cited as the "I'm Alone" Case].

91. The Corfu Channel Case [1949] I.C.J. 4, 35.

92. Chorzow Factory Case, *supra,* note 69 at 28.

> . . . Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore 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.

In appropriate circumstances, reparation might also include additional monetary damages for the moral injury to the claimant state. [93] The entire reparation is paid to the claimant state and disbursed to its national claimants at its discretion. [94] In the *Chorzow Factory* case, the Permanent Court of International Justice also indicated that:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. [95]

d. In the majority of cases, restitution is impossible because of changed circumstances, and the reparation must consist of monetary compensation. The Permanent Court also distinguished between the case in which the payment of "fair compensation" can render lawful under international law an expropriation or other taking of property and the case in which the taking is wrongful under international law, even if such compensation if paid. [96] In the former case, the Court indicated that the measure of compensation was the value of the property at the time of the taking, plus interest to the date of payment. The *Chorzow Factory* case itself involved the latter, since the taking there was in violation of a specific treaty prohibition against expropriation (even if compensation were paid). The Court stated that in this situation the measure of damages was the value that the undertaking would have had at the time of indemnification had the expropriation not taken place, plus any losses sustained as a result of the expropriation. [97] Thus, the court allowed damages for loss of profits realized between the seizure and the indemnification.

e. Personal injuries. In claims for personal injuries the measure of reparation for the injury to the individual is the loss to the individual claimant. Damages have included medical expenses, loss of earnings, [98] pain and suffering, [99] and mental anguish. [100] Damages may be reduced where the claimant has contributed to the injury. [101] Problems sometimes arise in attributing responsibility to the delinquent state for the damages suffered by an individual claimant. A state is ordinarily responsible only for the damages caused by its delinquency. There the delinquency if a failure to apprehend and punish a private person who has injured an alien or his property, the offending state has not damaged the claimant except is so far as the state's delinquency prevents the claimant from bringing a damage action against the responsible person. If, as is often the case, an action against the private wrongdoer would be fruitless, the delinquent state has not caused any damage to the claimant. International tribunals have generally avoided such a result by finding that the delinquent state's lack of diligence in apprehending or punishing the private wrongdoer amounted to condoning the injury and imposed derivative liability on the state, [102] or by finding that the claimant suffered "grief," "mistrust and lack of safety" resulting from the state's failure to apprehend or punish the wrongdoer. Under either theory, damages have usually been measured by the loss suffered by the individual claimant rather than by the gravity of the state's delinquency. [103]

7-23. Succession to Obligations and International Responsibility. *a.* Although the problem of state succession arises in other contexts, especially in connection with determining whether a successor state succeeds to rights and duties embodied in international agreements, it also arises with some frequency in the context of state responsibility. Particularly significant is the problem of the extent to which a successor state is bound by public debts and by other contractual obligations of the predecessor regime and responsible for international wrongs of that regime. With respect generally to the question of succession to the internal legal system of a territory, a distinction has traditionally been drawn between public law and private law. Public law, broadly, is that body of laws promulgated by

93. For a discussion of determining the measure of reparations, see the opinions in the Laura M.B. Janes Claim (United States v. Mexico), [1927] Opinions of Commissioners 108, 4 U.N.R.I.A.A. 82.

94. On the legal status of reparation received by the United States, see William v. Heard, 140 U.S. 529 (1891); *Opinion of J. Reuben Clark, Solicitor for the Department of State,* 7 *Am. J. Int'l L.* 382 (1913). See generally 1 M. Whiteman, *Damages in International Law* 2035-59 (1943) [hereinafter cited as 1 M. Whiteman, Damages]; 5 G. Hackworth, *supra,* note 7 at 763-901.

95. Chorzow Factory Case, *supra,* note 69 at 47.

96. *Id.* at 46.

97. *Id.* at 48.

98. George Henry Clapham Claim (Great Britain v. Mexico) 5 U.N.R.I.A.A. 201, 203-04 (1931).

99. 1 M. Whiteman, *Damages, supra,* note 94 at 588, 89 (1943).

100. Opinion in the Lusitania Case (United States v. Germany), [1923-25] Administrative Decisions and Opinions 17, 21-22, 7 U.N.R.I.A.A. 32, 36-37 (1923).

101. Lillie S. Kling Claim (United States v. Mexico), General Claims Commission, [1930-31] Opinions of Commissioners 36, 49-50, 4 U.N.R.I.A.A. 575, 585 (1930).

102. Paggioli Case (Italy v. Venezuela), 10 U.N.R.I.A.A. 669, 689 (1903); Laura B. Janes Claim (United States v. Mexico), General Claims Commission, [1927] Opinions of Commissioners 108, 120, 4 U.N.R.I.A.A. 82, 90 (separate opinion of Commissioner Nielsen).

103. 1 M. Whiteman, *Damages, supra,* note 94 at 39; Brierly, *The Theory of Implied State Complicity in International Claims,* [1928] *Brit. Y.B. Int'l L.* 42; M. Freeman, *supra,* note 22 at 367-69. But see William T. Way Claim (United States v. Mexico), *supra,* note 30; the "I'm Alone" Case (Canada v. United States), *supra,* note 90; 1 M. Whiteman, Damages, note 94 at 721-44, 788.

the government for the effective administration of the country; it is political in character, concerns the relation of the population to the state, and pertains to the prerogatives of sovereignty. Private law, on the other hand, governs the relations between individual citizens and only indirectly concerns the administration of the country. [104]

b. The traditional view held that private law survives change in sovereignty, legal control, or international status, but that public law does not. [105] This view, however, does not accord with state practice. An alternative approach, which seems closer to actual practice, is that if the laws of the new state and the predecessor state are consistent, succession takes place, but that if the laws are inconsistent, no succession occurs. In this view, succession is a presumption, which can be rebutted by positive legislation of the new state. [106] Recent practice indicates that new states generally make legislative provision for continuity of the internal legal order, with the qualification that continuity must be consistent with the change in sovereignty. [107] Sometimes, both the predecessor state and the new state make legislative provision for succession to the legal system. For instance, in the case of India, Britain provided for continuity of the legal system in the India Independence Act, [108] while India provided for continuity in the Indian Constitution. [109]

Section III. THE ACT OF STATE DOCTRINE

7-24. The Conceptual Framework. *a.* Definition. In the Anglo-American legal world, a legal consequence deriving from high-level state action—a legal result outside the ordinary field of private law—is labeled an "Act of State." As are many of the aspects of state responsibility, this particular concept is currently in a state of flux and is somewhat controversial in nature. This doctrine must not be confused with the concept of jurisdictional immunity. Although interrelated in many ways, it is essential to differentiate between these two principles if both are to be understood and correctly applied. As noted earlier, jurisdictional immunity stands for the proposition that an agent or agency of a state government, when acting on behalf of that government, may not be subjected to the jurisdiction of another state's courts, regardless of where the alleged cause of action occurred. In short, jurisdictional immunity has no territorial limitation. [110] On the other hand, the act of state doctrine stands for the proposition that the courts of one state will not judicially review the acts of another state, when these acts are taken within the territorial boundaries of the latter.

b. An unresolved question exists as to whether the widely-shared disinclination to declare invalid the act of governance of another state is merely a recognized principle of international relations or a rule of international law. In the U.S., the earlier cases on the act of state doctrine usually involved cases where the plaintiff and the defendant were both private parties and the plaintiff mounted the attack. The major cases in recent years, however, have involved a foreign state as plaintiff, and the defendant has attacked the legitimacy of the foreign law on which the plaintiff relies. In the older cases, the immunity of a state was never involved; in later cases, with the foreign state as plaintiff, interrelationships between immunity to counter claims and act of state may be involved. In the most recent development, a private party is generally suing a state engaged in trade for an alleged invalid act of nationalization/and before the act of state is reached, and issue of immunity from suit has to be resolved.

7-25. The Court-Made Doctrine in the U.S. Analysis of the act of state doctrine as applied in the United States must begin with the decision most often cited in connection with the concept, *Banco Nacional De Cuba v. Sabbatino, Receiver.*

BANCO NACIONAL DE CUBA V. SABBATINO, RECEIVER

United States Supreme Court, 1964.
376 U.S. 398, 84 S.Ct. 923.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question which brought this case here, and is now found to be the dispositive issue, is whether the so-called act of state doctrine serves to sustain petitioner's claims in this litigation. Such claims are ultimately founded on a decree of the Government of Cuba expropriating certain property, the right to the proceeds of which is here in controversy. The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.

In February and July of 1960, respondent Farr, Whitlock & Co., an American commodity broker, contracted to purchase Cuban sugar, free alongside the steamer, from a wholly owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C.A.V.), a corporation organized under Cuban law whose capital stock was owned principally by United States residents. Farr, Whitlock agreed to pay for the sugar in New York upon presentation of the shipping documents and a sight draft.

On July 6, 1960, the Congress of the United States amended the Sugar Act of 1948 to permit a presidentially directed reduction of the sugar quota for Cuba. On the same day President Eisenhower exercised the granted power. The day of the congressional enactment, the Cuban Council of Ministers adopted "Law No. 851," which characterized this reduction in the Cuban sugar quota as an act of "aggression, for political purposes" on the part of the United States, justifying the taking of countermeasures by Cuba. The law gave the Cuban President and Prime Minister discretionary power to nationalize by forced expropriation property or enterprises in which American nationals had an interest. Although a system of compensation was formally provided, the possibility of payment under it may well be deemed illusory. Our State Department has described the Cuban law as "manifestly in violation of

104. 1 O'Connell, *State Succession in Municipal Law and International Law* 101-41 (1967).

105. *Id.* at 104.

106. *Id.* at 107.

107. *Id.* at 118.

108. India Independence Act, 10 and 11 Geo. 6, chap. 30, § 118 (1947).

109. Constitution of India, art. 372(2).

110. See para. 5-2, chap. 5.

those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory."

Between August 6 and August 9, 1960, the sugar covered by the contract between Farr, Whitlock and C. A. V. was loaded, destined for Morocco, onto the S. S. Hornfels, which was standing offshore at the Cuban port of Jucaro (Santa Maria). On the day loading commenced, the Cuban President and Prime Minister, acting pursuant to Law No. 851, issued Executive Power Resolution No. 1. It provided for the compulsory expropriation of all property and enterprises, and of rights and interests arising therefrom, of certain listed companies, including C. A. V., wholly or principally owned by American nationals. The preamble reiterated the alleged injustice of the American reduction of the Cuban sugar quota and emphasized the importance of Cuba's serving as an example for other countries to follow "in their struggle to free themselves from the brutal claws of Imperialism." In consequence of the resolution, the consent of the Cuban Government was necessary before a ship carrying sugar of a named company could leave Cuban waters. In order to obtain this consent, Farr, Whitlock, on August 11, entered into contracts, identical to those it had made with C. A. V., with the Banco Para el Comercio Exterior de Cuba, an instrumentality of the Cuban Government. The S. S. Hornfels sailed for Morocco on August 12.

Banco Exterior assigned the bills of lading to petitioner, also an instrumentality of the Cuban Government which instructed its agent in New York, Societe Generale, to deliver the bills and a sight draft in the sum of $175,250.69 to Farr, Whitlock in return for payment. Societe Generale's initial tender of the documents was refused by Farr, Whitlock, which on the same day was notified of C. A. V.'s claim that as rightful owner of the sugar it was entitled to the proceeds. In return for a promise not to turn the funds over to petitioner or its agent, C. A. V. agreed to indemnify Farr, Whitlock for any loss. Farr, Whitlock subsequently accepted the shipping documents, negotiated the bills of lading to its customer, and received payment for the sugar. It refused, however, to hand over the proceeds to Societe Generale. Shortly thereafter, Farr, Whitlock was served with an order of the New York Supreme Court, which had appointed Sabbatino as Temporary Receiver of C. A. V.'s New York assets, enjoining it from taking any action in regard to the money claimed by C. A. V. that might result in its removal from the State. Following this, Farr, Whitlock, pursuant to court order, transferred the funds to Sabbatino, to abide the event of a judicial determination as to their ownership.

IV.

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, Blad v. Bamfield, 3 Swans. 604, 36 Eng.Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see, e.g., Ware v. Hylton, 3 Dall. 199, 230; Hudson v. Guestier, 4 Cranch 293, 294; The Schooner Exchange v. M'Faddon, 7 Cranch 116, 135, 136; L'Invincible, 1 Wheat. 238, 253; The Santissima Trinidad, 7 Wheat. 283, 336, is found in Underhill v. Hernandez, 168 U.S. 250, p. 252, 18 S.Ct. 83, at p. 84, where Chief Justice Fuller said for a unanimous Court:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Following this precept the Court in that case refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action in this country by Underhill, an American citizen, who claimed that he had been unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill. See American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511; Oetjen v. Central Leather Co., 246 U.S. 297, 38 S.Ct. 309; Ricaud v. American Metal Co., 246 U.S. 304; Shapleigh v. Mier, 299 U.S. 468, 57 S.Ct. 261; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758; United States v. Pink, 315 U.S. 203, 62 S.Ct. 552. On the contrary in two of these cases, *Oetjen* and *Ricaud,* the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms.

* * *

Petitioner then instituted this action in the Federal District Court for the Southern District of New York. Alleging conversion of the bills of lading, it sought to recover the proceeds thereof from Farr, Whitlock and to enjoin the receiver from exercising any dominion over such proceeds. Upon motions to dismiss and for summary judgment, the District Court, 193 F.Supp. 375, sustained federal in personal jurisdiction despite state control of the funds. It found that the sugar was located within Cuban territory at the time of expropriation and determined that under merchant law common to civilized countries Farr, Whitlock could not have asserted ownership of the sugar against C. A. V. before making payment. It concluded that C. A. V. had a property interest in the sugar subject to the territorial jurisdiction of Cuba. The court then dealt with the question of Cuba's title to the sugar, on which rested petitioner's claim of conversion. While acknowledging the continuing vitality of the act of state doctrine, the court believed it inapplicable when the questioned foreign act is in violation of international law. Proceeding on the basis that a taking invalid under international law does not convey good title, the District Court found the Cuban expropriation decree to violate such law in three separate respects: it was motivated by a retaliatory and not a public purpose; it discriminated against American nationals; and it failed to provide adequate compensation. Summary judgment againt petitioner was accordingly granted.

The Court of Appeals, 307 F.2d 846, affirming the decision on similar grounds, relied on two letters (not before the District Court) written by State Department officers which it took as evidence that the Executive Branch had no objection to a judicial testing of the Cuban decree's validity. The court was unwilling to declare that any use of the infirmities found by the District Court rendered the taking invalid under international law, but was satisfied that in combination they had that effect. We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area. 372 U.S. 905, 83 S.Ct. 717. For reasons to follow we decide that the judgment below must be reversed.

* * *

In deciding the present case the Court of Appeals relied in part upon an exception to the unqualified teachings of *Underhill, Oetjen,* and *Ricaud* which that court had earlier indicated. In Bernstein v. Van Heyghen Freres Societe Anonyme, 2 Cir., 163 F.2d 246, suit was brought to recover from an assignee property allegedly taken, in effect, by the Nazi Government because plaintiff was Jewish. Recognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that United States Courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint. In a later case involving similar facts the same court again assumed examination of the German acts improper. Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 2 Cir., 173 F.2d 71, but, quite evidently following the implications of Judge Hand's opinion in the earlier case, amended its mandate to permit evidence of alleged invalidity, 210 F.2d 375, subsequent to receipt by plaintiff's attorney of a letter from the Acting Legal Adviser to the State Department written for the purpose of relieving the court from any con-

straint upon the exercise of its jurisdiction to pass on that question. [18]

This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now. For whatever ambiguity may be thought to exist in the two letters from State Department officials on which the Court of Appeals relied, [19] 307 F.2d, at 858, is now removed by the position which the Executive has taken in this Court on the act of state claim; respondents do not indeed contest the view that these letters were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation.

The outcome of this case, therefore, turns upon whether any of the contentions urged by respondents against the application of the act of state doctrine in the premises is acceptable: (1) that the doctrine does not apply to acts of state which violate international law, as is claimed to be the case here; (2) that the doctrine is inapplicable unless the Executive specifically interposes it in a particular case; and (3) that, in any event, the doctrine may not be invoked by a foreign government plaintiff in our courts.

V.

Preliminarily, we discuss the foundations on which we deem the act of state doctrine to rest, and more particularly the question of whether state or federal law governs its application in a federal diversity case. [20]

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill, supra; American Banana, supra; Oetjen, supra,* 246 U.S. at 303, 38 S.Ct. at 311, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another (supra, pp. 932-933) is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.

That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign goverments, see 1 *Oppenheim's International Law,* § 115aa (Lauterpacht, 8th ed. 1955), and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. See United States v. Diekelman, 92 U.S. 520, 524. Although it is, of course, true that United States courts apply international law as part of our own in appropriate circumstances, Ware v. Hylton, 3 Dall. 199, 281; The Nereide, 9 Cranch 388, 423; The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.

Despite the broad statement in *Oetjen* that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative * * * Departments," 246 U.S., at 302, 38 S.Ct. at 311, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Many commentators disagree with this view; they have striven by means of distinguishing and limiting past decisions and by advancing various considerations of policy to stimulate a narrowing of the apparent scope of the rule. Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively underminded as if there had been no federal pronouncement on the subject.

* * *

. . . [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with the other members of the international community must be treated exclusively as an aspect of federal law. [23]

VI.

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the im-

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18. The letter stated:

1. This government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.

* * *

3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lien thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. State Department Press Release, April 27, 1949, 20 Dept. State Bull. 592.

19. Abram Chayes, the Legal Advisor to the State Department, wrote on October 18, 1961, in answer to an inquiry regarding the position of the Department by Mr. John Laylin, attorney for amici:

The Department of State has not, in the Bahia de Nipe case or else where, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the fufure be given effect in the United States is, of course, for the courts to determine. Since the Sabbatino case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.

A letter dated November 14, 1961, from George Ball, Under Secretary for Economic Affairs, responded to a similar inquiry by the same attorney:

I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

20. Although the complaint in this case alleged both diversity and federal question jurisdiction, the Court of Appeals reached jurisdiction only on the former ground, 307 F.2d at 852. We need not decide, for reasons appearing hereafter, whether federal question jurisdiction also existed.

23. At least this is true when the Court limits the scope of judicial inquiry. We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.

plications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. [26] There is, of course, authority, in international judicial [27] and arbitral [28] decisions, in the expressions of national governments, [29] and among commentators [30] for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. [31] Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them [32] and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states. [33]

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations. [34]

When we consider the prospect of the courts characterizing foreign expropriations, however justifiably, as invalid under international law and ineffective to pass title, the wisdom of the precedents is confirmed. While each of the leading cases in this Court may be argued to be distinguishable on its facts from this one—*Underhill* because sovereign immunity provided an independent ground and *Oetjen, Ricaud,* and *Shapleigh* because there was actually no violation of international law—the plain implication of all these opinions, and the import of express statements in *Oetjen,* 246 U.S., at 304, 38 S.Ct. at 311, and *Shapleigh,* 299 U.S., at 471, 57 S.Ct. at 262, is that the act of state doctrine is applicable even if international law has been violated. In *Ricaud,* the one case of the three most plausibly involving all international law violation, the possibility of an exception to the act of state doctrine was not discussed. Some commentators have concluded that it was not brought to the Court's attention, [35] but Justice Clarke delivered both the *Oetjen* and *Ricaud* opinions, on the same day, so we can assume that principles stated in the former were applicable to the latter case.

The possible adverse consequences of a conclusion to the contrary of that implicit in these cases is highlighted by contrasting the practices of the political branch with the limitations of the judicial process in matters of this kind. Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or mulitlateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. [36] Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect.

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law, would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest. Considerably more serious and farreaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

Respondents contend that, even if there is not agreement regarding

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[26]. *Compare, e.g., Friedman, Expropriation in International Law* 206 211 (1953); Dawson and Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation* ? 30 Fordham L.Rev. 727 (1962), with Note from Secretary of State Hull to Mexican Ambassador, August 22, 1938, V Foreign Relations of the United States 685 (1938); Doman, *Postwar Nationalization of Foreign Property in Europe,* 48 Col.L.Rev. 1125, 1127 (1948). We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not met for adjudication by domestic tribunals.

[27]. *See* Oscar Chinn Case, P.C.I.J., ser. A/B, No. 63, at 87 (1934); Chorzow Factory Case, P.C.I.J., ser. A., No. 17, at 46, 47 (1928).

[28]. *See, e.g.,* Norwegian Shipowners' Case (Norway/United States) (Perm. Ct.Arb.) (1922), 1 U.N.Rep.Int'l Arb. Awards 307, 334, 339 (1948), Hague Court Reports, 2d Series, 39,69, 74 (1932); Marguerite de Joly de Sabla, American and Panamanian General Claims Arbitration 379, 447, 6 U.N.Rep.Int'l Arb. Awards 358, 336 (1955).

[29]. *See, e.g.,* Dispatch from Lord Palmerston to British Envoy at Athens, Aug. 7, 1846, 39 British and Foreign State Papers 1849-1850, 431-432. Note from Secretary of State Hull to Mexican Ambassador, July 21, 1938, V Foreign Relations of the United States 674 (1938); Note to the Cuban Government, July 16, 1960, 43 Dept. State Bull. 171 (1960).

[30]. *See, e.g.,* McNair, *The Seizure of Property and Enterprises in Indonesia,* 6 Netherlands Int'l L.Rev. 218, 243-253 (1959); *Restatement, Foreign Relations Law of the United States* (Proposed Official Draft 1962), §§ 190-195.

[31]. *See* Doman, *supra,* note 26, at 1143-1158: Fleming, States, Contracts and Progress, 62-63 (1960); Bystricky, *Notes on Certain International Legal Problems Relating to Socialist Nationalization, in International Assn. of Democratic Lawyers,* Proceedings of the Commission on Private International Law, Sixth Congress (1956), 15.

[32]. *See* Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order,* 56 Am.J.Int'l L. 383 (1962); Roy, *Is the law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 Am.J.Int'l L. 863 (1961).

[33]. *See* 1957 Yb.U.N.Int'l L. Comm'n (Vol. 1) 155, 158 (statements of Mr. Padilla Nervo (Mexico) and Mr. Pal (India)).

[34]. There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

[35]. *See Restatement, Foreign Relations Law of the United States,* Reporters' Notes (Proposed Official Draft 1962). § 43, note 3.

[36]. It is, of course, true that such determinations might influence others not to bring expropriated property into the country, * * * so their indirect impact might extend beyond the actual invalidations of title.

general standards for determining the validity of expropriations, the alleged combination of retaliation, discrimination, and inadequate compensation makes it patently clear that this particular expropriation was in violation of international law. If this view is accurate, it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possibility of conflict with the Executive view. Even if the courts avoided this course, either by presuming the validity of an act of state whenever the international law standard was thought unclear or by following the State Department declaration in such a situation, the very expression of judicial uncertainty might provide embarrassment to the Executive Branch.

Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade. If the attitude of the United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act.

Against the force of such considerations, we find respondents' countervailing arguments quite unpersuasive. Their basic contention is that United States courts could make a significant contribution to the growth of international law, a contribution whose importance, it is said, would be magnified by the relative paucity of decisional law by international bodies. But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural. Moreover, it rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.

It is contended that regardless of the fortuitous circumstances necessary for United States jurisdiction over a case involving a foreign act of state and the resultant isolated application to any expropriation program taken as a whole, it is the function of the courts to justly decide individual disputes before them. Perhaps the most typical act of state case involves the original owner or his assignee suing one not in association with the expropriating state who has had "title" transferred to him. But it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic channels, as more demanding of judicial cognizance than the claim of title by the innocent third party purchaser, who, if the property is taken from him, is without any remedy.

Respondents claim that the economic pressure resulting from the proposed exception to the act of state doctrine will materially add to the protection of United States investors. We are not convinced, even assuming the relevance of this contention. Expropriations take place for a variety of reasons, political and ideological as well as economic. When one considers the variety of means possessed by this country to make secure foreign investment, the persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison. The newly independent states are in need of continuing foreign investment; the creation of a climate unfavorable to such investment by wholesale confiscations may well work to their long-run economic disadvantage. Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals. Ultimately the sanctions of economic embargo and the freezing of assets in this country may be employed. Any country willing to brave any or all of these consequences is unlikely to be deterred by sporadic judicial decisions directly affecting only property brought to our shores. If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill-advised to undermine indirectly.

It is suggested that if the act of state doctrine is applicable to violations of international law, it should only be so when the Executive Branch expressly stipulates that it does not wish the courts to pass on the question of validity. *See* Association of the Bar of the City of New York, Committee on International Law, A Reconsideration of the Act of State Doctrine in United States Courts (1959). We should be slow to reject the representations of the Government that such a reversal of the *Bernstein* principle would work serious inroads on the maximum effectiveness of United States diplomacy. Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the developing of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret. Of course, a relevant consideration for the State Department would be the position contemplated in the court to hear the case. It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries. We do not now pass on the *Bernstein* exception, but even if it were deemed valid, its suggested extension is unwarranted.

However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.

* * *

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, dissenting.

I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases. I am also disappointed in the Court's declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy. This backward-looking doctrine, never before declared in this Court, is carried a disconcerning step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act. Since the Court expressly extends its ruling to all acts of state expropriating property, however clearly inconsistent with the international community, all discriminatory expropriations of the property of aliens, as for example the taking of properties of persons belonging to certain races, religions or nationalities, are entitled to automatic validation in the courts of the United States. No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompe-

tent to ascertain and apply international law. [1]

I do not believe that the act of state doctrine as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits.

[The remaining text of MR. JUSTICE WHITE's extensive dissenting opinion is omitted.]

7-26. Legislative Reaction to *Banco National v. Sabbatino* - The Hickenlooper Amendments. In reaction to the 1964 *Sabbatino* decision to close the door of U.S. courts to American claimants affected by expropriations abroad, the Congress quickly passed "remedial" legislation, the Hickenlooper Amendments to the Foreign Assistance Act.

UNITED STATES: THE "HICKENLOOPER AMENDMENTS" TO THE FOREIGN ASSISTANCE ACT
22 U.S.C. § 2370.

Prohibitions against furnishing assistance
* * *

(e)(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

Upon request of the President (within seventy days after such action referred to in subparagraphs (A), (B), or (C) of this paragraph), the Foreign Claims Settlement Commission of the United States (established pursuant to Reorganization Plan No. 1 of 1954, 68 Stat. 1279) is hereby authorized to evaluate expropriated property, determining the full value of any property nationalized, expropriated, or seized, or subjected to discriminatory or other actions as aforesaid, for purposes of this subsection and to render an advisory report to the President within ninety days after such request. Unless authorized by the President, the Commission shall not publish its advisory report except to the citizen or entity owning such property. There is hereby authorized to be appropriated such amount, to remain available until expended, as may be necessary from time to time to enable the Commission to carry out expeditiously its functions under this subsection.

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of state in violation of the principles of international law, *including the principles of compensation and the other standards set out in this subsection:* Provided, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court. [Emphasis supplied.]

* * *

7-27. Judicial Reaction to the Hickenlooper Amendments. *a.* Following passage of the Hickenlooper Amendments, the courts were called upon to rule on a number of issues resulting from the passage of this legislation. In *Banco Nacional De Cuba v. Farr,* [111] the U.S. Second Circuit Court of Appeals affirmed the constitutionality of the Hickenlooper Amendments. The 1968 case of *French v. Banco Nacional De Cuba* [112] involved a Cuban law controlling currency in that state. The New York Court of Appeals ruled that the Hickenlooper Amendments notwithstanding, the Act of State doctrine applied to this particular factual situation. The Amendments were said to ap-

[1]. The courts of the following countries, among others, and their territories have examined a fully "executed" foreign act of state expropriating property:

England: Anglo-Iranian Oil Co. v. Jaffrate, [1953] Int'l L.Rep. 316 (Aden Sup. Ct.); N. V. de Bataafsche Petroleum Maatschappij v. The War Damage Comm'n, [1956] Int'l L.Rep. 810 (Singapore Ct.App.).

Netherlands: Senembah Maatschappij N. V. v. Republiek Indonesie Bank Indonesia, Nederlandse Jursiprudentie 1959, No. 73, p. 218 (Amsterdam Ct.App.), excerpts reprinted in Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 Am.J.Int'l L. 305, 307-315 (1960).

Germany: N. V. Verenigde Deli-Maatschapijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H. (Bremen Ct.App.), excerpts reprinted in Domke, supra, at 313-314 (1960); Confiscation of Property of Sudeten Germans Case, [1948] Ann.Dig. 24, 25 (No. 12) (Amtsgericht of Dingolfing).

Japan: Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, [1953] Int'l L.Rep. 305 (Dist.Ct. of Tokyo), aff'd, [1953] Int'l L.Rep. 312 (High Ct. of Tokyo).

Italy: Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L.Rep. 19 (Ct. of Venice); Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L.Rep. 23 (Civ.Ct. of Rome).

France: Volatron v. Moulin, [1938-1940] Ann.Dig. 24 (Ct. of App. of Aix); Société Potasas Ibericas v. Nathan Bloch, [1938-1940] Ann.Dig. 150 (Ct. of Cassation).

The Court does not refer to any country which has applied the act of state doctrine in a case where a substantial international law issue is sought to be raised by an alien whose property has been expropriated. This country and this Court stand alone among the civilized nations of the world in ruling that such an issue is not cognizable in a court of law.

The Court notes that the courts of both New York and Great Britain have articulated the act of state doctrine in broad language similar to that used by this Court in Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, and from this it infers that these courts recognize no international law exception to the act of state doctrine. The cases relied on by the Court involved no international law issue. For in these cases the party objecting to the validity of the foreign act was a citizen of the foreign state. It is significant that courts of both New York and Great Britain, in apparently the first cases in which an international law issue was squarely posed, ruled that the act of state doctrine was no bar to examination of the validity of the foreign act. Anglo-Iranian Oil Co. v. Jaffrate, [1953] Int'l L.Rep. 316 (Aden Sup.Ct.): "[T]he Iranian Laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation." Sulyok v. Penzintezeti Kozpont Budapest, 279 App.Div. 528, 111 N.Y.S.2d 75, aff'd, 304 N.Y. 704, 107 N.E.2d 604 (foreign expropriation of intangible property denied effect as contrary to New York public policy.)

111. 383 F.2d 166 (1964).

112. 242 N.E.2d 152 (1968).

ply only in those cases where the claim of the right of title or some other right in specific property expropriated abroad were involved.

b. The most recent Supreme Court decision concerning the Act of State doctrine is that of *First National City Bank v. Banco Nacional de Cuba.* [113] It has done little toward resolving the confusion surrounding the doctrine and the applicability of the Hickenlooper Amendments. The issue involved was whether the Act of State doctrine should be applied to prevent a set-off to recover damages for the expropriation of First National City Bank's property in Cuba. Banco Nacional's predecessor had borrowed $15 million from First National City Bank in 1958. The loan was secured by a pledge of U.S. Government bonds. In 1960, $5 million was repaid, the $10 million balance renewed and collateral equal to the value of the repaid portion was released. On September 16, 1960, the Castro government in Cuba seized all of First National City Bank's branches in Cuba. In retaliation, the bank sold the collateral that secured the $10 million loan and applied the proceeds to the principal and unpaid interest. This sale resulted in an excess of at least $1.8 million. Banco Nacional then sued in the Federal district court to recover the excess, the First National City by way of set-off and counterclaim asserted the right to recover damages for the expropriation of its branches in Cuba. The district court dismissed Banco Nacional's suit. The court recognized that the *Sabbatino* case, holding that courts of one state would generally not sit in judgment on the acts of another state taken within the latter's territory, barred the assertion of First National City's counterclaim. It held, however, that *Sabbatino* has been overruled, for all practical purposes, by Congress. The U.S. Second Circuit Court of Appeals reversed, holding that the acts of Congress relied upon (the Hickenlooper Amendments) by the district court did not govern and that *Sabbatino* barred the assertion of the counterclaim. [114] The Supreme Court's judgment, reversing and remanding the Circuit Court's decision, [115] took the position that the Act of State doctrine was based primarily on the premise that judicial review of acts of a foreign power might embarrass the conduct of foreign relations by the political branches of the Government. In this case, however, the Legal Adviser of the Department of State had advised the Court that the doctrine need not be applied. Noting this, the court asserted

> We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the Act of State doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the Act of State doctrine. [116]

Concurrences in the final result of this case were based on two theories differing from each other and from that above quoted. The dissent argued that this case was governed by *Sabbatino,* stating that the holding in *Sabbatino* was that the validity of a foreign act of state in certain circumstances is a political question, not cognizable in U.S. courts, and that the executive branch cannot by "simple stipulation change a political question into a cognizable claim." In light of these most recent decisions, and the State Department's latest pronouncement on this matter, it is extremely difficult to speak of the Act of State doctrine, as interpreted by U.S. courts, in definitive terms. Its current status as an element of particular international law is uncertain.

7-28. The Executive Branch View of the Act of State Doctrine. The full text of the latest executive branch viewpoint on the act of state doctrine, referred to by the Supreme Court in the *First National City Bank* case, is carried as an appendix to the second consideration of this case by the Court of Appeals for the Second Circuit. [117] The Legal Adviser of the Department of State referred to the first decision by the court of appeals in the *First National City Bank* Case (i.e., Section 2370 (e) (2) of Title 22 of the United States Code did not apply to the claim and hence the act of state doctrine as laid down by the Supreme Court in the *Sabbatino* case did apply) and stated that the decision involved matters of importance to the foreign policy of the United States, called attention to the *Bernstein* exception, disagreed with the nonapplication of it in the first opinion by the court of appeals, and continued as follows:

> While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.
>
> Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.
>
> The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country.
>
> The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in National City Bank [of New York] v. Republic of China, 348

113. 406 U.S. 759 (1972).

114. 442 F.2d 530 (1971).

115. 406 U.S. 759, 764 (1972).

116. Berstein v. Nederlandsche-Amerikoansche, 210 F.2d 375 (1954).

117. 442 F.2d 530, 536 (1971).

U.S. 356 [75 S.Ct. 423, 99 L.Ed. 389] (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U.S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case—that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff—is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

7-29. Practical Effects of the Hickenlooper Amendment. *a.* Legislative constraints. The Hickenlooper Amendment's requirement that the President be satisfied within 6 months of an assured solution to a nationalization problem has created foreign affairs problems under subsection (e)(1), which requires the President to cut off foreign assistance to the developing country concerned. Under some other provisions of Section 2370, which lists a number of instances in which foreign assistance shall be suspended, the President has authority to waive suspension when he finds that it is in the foreign policy interests of the United States to do so. However, such is not the case with regard to subsection (e)(1).

b. Examples. In 1968, a military regime in Peru nationalized the properties of the International Petroleum Company, entitled in its own right or through its parent, the Standard Oil Company of New Jersey, to United States diplomatic protection. Peru set off against any compensation that otherwise might have been payable a much larger claim for "unjust enrichment," based upon a contention that the company and its predecessors never had the legal right to take out oil. All legal remedies in Peru were exhausted, and the offset was not acceptable to the claimant or to the United States, on ground that seem, at the very least, reasonably arguable. However, subsection (e)(1) was not formally applied. Within the first 6 months after the taking, while efforts at diplomatic settlement were still in progress, the executive branch consulted with key congressional figures and obtained their tacit agreement for nonapplication. A major reason for this informal amendment in the law is that subsection (e)(1), if used, would have serious adverse effects on United States foreign policy and possibly on private interests of other Americans in Peru and elsewhere. Subsection (e)(1) has, as a matter of fact, been used only once, with indifferent results as to its investment-protection objective. [118]

c. Although the amendment has not been invoked, both Peru and Chile have complained that the United States has not in fact entered into new bilateral aid arrangements with them and has opposed international lending agency development assistance to them. The conduct was labeled as "illicit intervention."

7-30. Conclusion. As noted in the introductory paragraphs of this chapter, the concept of state responsibility is currently undergoing substantial modification in response to vary pressures emanating from a number of different sources. New approaches toward old problems have resulted in the realization that some degree of compromise must be reached among those states advocating widely divergent views in this area. As solutions to currently existing differences are found, however, the rules of law associated with this aspect of international jurisprudence will become even more important to the judicial and economic development of the world community.

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[118]. This was invoked against Ceylon.

CHAPTER 8
INTERNATIONAL AGREEMENTS

Section I. GENERAL

8-1. Introduction. As noted in chapter 1, formal agreements between states, or between states and international orgainzations such as the United Nations, have become the major source of international jurisprudence. Customary law has tended to be too slow and uncertain a process, often falling behind the needs and expectations of the international community. Technological developments have become so rapid that frequently only express agreements between states are capable of introducing change into international law. Moreover, the significance of customary international law has also been weakened by the Soviet belief that an international agreement is the principal means of expressing assent to an international obligation. [1]

8-2. International Agreements Defined. *a.* General. International agreements are undertakings between states, or between states and international organizations, which give rise to legal rights and duties. Although the law applicable to such agreements has a number of similarities to contract law, the purpose and effect of international agreements are somewhat different than those of commercial contracts between private parties. Thus, if a state concludes an agreement, not with another state or international organization but with a foreign commercial enterprise, the agreement is not looked upon as an international agreement and is not subject to "treaty law." [2] Notwithstanding this fact, such an agreement may indirectly produce legal consequences on the international plane if, for example, the state of which the private foreign commercial enterprise is a national intercedes on the latter's behalf. [3] As noted in chapter 1, international agreements affect international law in a variety of ways. They may codify existing customary law, modify or abridge existing customary law, or create new international law norms. Agreements cover a wide range of subjects. Some, such as the conventions on the laws of war or use of the seas, are "law-making treaties" and create standards of substantive law binding on states (perhaps including even nonsignatories). Others are basically contractual agreements between states—such as military alliances and trade pact—with many of the elements of a private contract. Some are essentially conveyances of real property—such as boundary agreements and leases or cessions of territory. Finally, some, such as the United Nations Charter, are constitutive agreements creating new international legal entities which may themselves acquire legal personality so as to be able to enter into treaties. The 1957 Treaty of Rome, which created the European Economic Community, is a special kind of constitutive agreement establishing a confederation binding European states to abide by common rules and requirements in order to further the objectives of the Treaty. [4] Similarly, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms requires its signatories to accept the decisions of the European Court on Human Rights in cases over which it has jurisdiction. [5]

b. Agreements are generally classified as either bilateral or multilateral, depending on the number of parties to the agreement. Multilateral agreements are usually kept open for adherence for a protracted period. It is, therefore, possible for a state that was not in existence at the time the agreement was negotiated to announce its assent several years later.

c. International agreements, be they bilateral or multilateral, are generally given different titles depending on the subject matter or the formality with which they were executed. These titles, however, are not used identically in all cases. Thus, it is the substance of each agreement which is important and not its descriptive title. [6]

(1) The term *treaty*, perhaps the most common word in international contractual parlance, is used in a broad sense to mean any international agreement, or in a restricted sense to mean a particularly formal type of international agreement. [7]

(2) The term *protocol* refers to supplementary agreements. [8]

(3) A *concordat* is an agreement by a State with the Holy See; [9] however, agreements between the Vatican and other states need not be called *concordats.*

(4) A *process verbal* is an official record of a meeting or conference. [10]

(5) A *memoire* or *aide memoire* is a diplomatic note summarizing the diplomat's understanding of a conven-

1. Waldock, *General Course on Public International Law,* [1962] 2 *Recueil des Cours* 1, 50. *See* chap. 1, *supra.*

2. Customary and codified rules of public international law which apply specifically to the formulations, interpretation, modification, and termination of international agreements.

3. For a discussion of these legal consequences, see chap. 7, State Responsibility, *supra.*

4. 298 U.N.T.S. 11.

5. *See I. Brownlie, Basic Documents on Human Rights* 339 (1971).

6. *Kelsen, Principles of International Law 318* (1952). Myers, *Names and Scope of Treaties,* 51 *Am. J. Int'l L.* 574 (1957).

7. "Treaty" has a special meaning under United States municipal law. Article II, section 2, of the U.S. Constitution delegates the power to the President "... by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur," and Article VI, paragraph 2, provides that "... all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land."

8. *I. Oppenheim, International Law 878* (8th ed., Lauterpacht 1955).

9. *I. Hyde, International Law 25-26* (1945).

10. *I. Oppenheim, supra,* note 8 at 878.

tion. [11] A *note verbal* is hardly distinguishable from a *memoire* except that it is unsigned and summarizes diplomatic discussions.

(6) Sometimes especially formal agreements are described as *Acts, General Acts, Statutes,* or *Declarations.* [12] On the other hand, the term *Congress* or *Conference* may be substituted for these terms. This practice is, however, a loose use of the terms in question. [13]

(7) A *modus vivendi* is usually a temporary or provisional arrangement. [14]

(8) A *compromise* may signify an agreement generally of a conciliatory nature. It is also used to describe the agreed terms under which an arbitrator is empowered to decide a dispute between two states. [15]

Section II. THE FORM AND STRUCTURE OF INTERNATIONAL AGREEMENTS

8-3. "Treaty Law" — The Law of International Agreements. After years of effort, the International Law Commission [16] finalized the most extensive agreement ever formulated dealing with treaty law. The Vienna Convention on the Law of Treaties [17] (The Treaty on Treaties) establishes definite rules, procedures, and standards governing the formation, interpretation, and application of international agreements. Large portions of this Convention are considered to be declaratory of existing international law and custom. [18] Thus, even though its preamble provides that ". . . the rules of customary international law will continue to govern questions not regulated by the provision of the present Convention," and Article 4 limits its application to ". . . treaties which are concluded by the States, after the entry into force of the present Convention with regard to such States . . .," this chapter's examination of international agreements will occur largely within the framework of the Convention's basic provisions.

8-4. Defining the International Agreement. Article 2(1) (a) of the Vienna Convention defines a treaty as

> . . . an international agreement concluded between two states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.

Similar language used in the earlier Harvard Draft Convention on the Law of Treaties [19] was said to exclude from the scope of the Convention instruments which are not governed by the rules or principles of public international law. [20] Accordingly, some writers have maintained that agreements relating to commercial transactions of states, such as for the purchase of goods, are acts *jure gestionis,* [21] i.e., nongovernmental acts, not falling within a state's sovereign powers and thus governed by the municipal law of contracts. [22] Other writers have rejected this distinction, however, arguing that all agreements between states are governed by the rules of public international law. [23] The comment by the Harvard Draft Convention took no position on this dispute, stating instead that the critical point is whether an agreement creates an obligation *intended* to be governed by public international norms. [24] For example, certain agreements between states, such as a bill of lading issued to a state by a vessel owned and operated by another state, may by their own terms be controlled by the municipal law of one or both of the states. In the absence of an express statement in a treaty as to whether international or municipal law is intended to govern, the intention of the parties has to be determined from the totality of the language and the drafting history.

> Very clear evidence will have to be required before it can be assumed that sovereign states have contracted on the basis of private law. . . . On the other hand, it would probably not be justified to speak of a presumption that public international law applies. [25]

8-5. The Capacity of Parties. *a.* International organizations. The Vienna Convention limits its application to treaties "between states" [26] and provides that "every state has the capacity to conclude treaties." [27] This is hardly surprising for, as noted in chapter 1, states have traditionally been considered to be the sole subjects of in-

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11. *Id.*

12. *E.g.,* The General Act of Berlin of 1885; the Statute of the Permanent Court of International Justice; the Declaration of Paris of 1856, and the Declaration of St. Petersburg of 1868.

13. Thus the phrase, "Congress of Vienna" is loosely used to refer to the Final Act or the actual agreement recorded by the principal powers in 1815 after the downfall of Napoleon. For the text of the Final Act, *see N.R. Martens, Recueil de Traités 2,* 379.

14. For example, see 5 *G. Hackworth, Digest of International Law 392,* 414 (1943).

15. W. Bishop, *International Law 61* (2d ed., 1962).

16. The International Law Commission is a creation of the United Nations. See, W. Bishop, *International Law,* 61 (3rd ed. 1971) (hereinafter cited as Bishop).

17. See, *The Vienna Convention on the Law of Treaties,* 63 *Am. J. Int'l L. 875* (1969). The Vienna Convention was the culmination of many years of effort to codify international standards governing treaties. It was drafted by the International Law Commission and a United Nations conference on the Law of Treaties held in Vienna in 1969 [hereafter cited as Vienna Convention].

18. On the question of the extent to which the Vienna Convention is declaratory of existing international law, see Rosenne, *The Temporal Application of the Vienna Convention on the Law of Treaties,* 4 *Cornell Int'l L.J.* 1 (1970).

19. Harvard Research in International Law, *Draft Convention of the Law of Treaties,* 29 *Am. J. Int'l L. Supp. 686* (1935) [hereinafter cited as Harvard Research].

20. *Id.* at Article 1.

21. The distinction between acts *jure imperii* and *jure gestionis* has long been significant with regard to the issue of sovereign immunity, but, like a number of other rigid either/or categories, it has gradually fallen into disfavor. See J. Brierly, The Law of Nations, 245-51 (6th ed. 1963). See also chap. 5, *supra.*

22. F. Liszt, *Le Droit International 169* (Gidel transl. 1928).

23. Delouter, *Droit International Public Positif 468* (1920).1 D. Anzilotti, *Cours de Droit International* 341 (Gidel transl. 1926). See generally W. Friedmann, O. Lissitzyn & R. Pugh, *Cases and Materials On International Law* 301-04 (1969) [hereinafter referred to as Friedmann].

24. Harvard Research, *supra,* note 19, at 693-95.

25. Mann, *The Law Governing State Contracts,* 1944 BRIT. Y.B. INT'L L. 11, 28.

26. Vienna Convention, Art. 1.

27. *Id.* at Art. 6.

ternational law. The creation of international organizations and agencies and the growth of the idea that individuals can be subjects of international law raises the possibility, however, that international organizations, and perhaps even individuals, can be parties to international agreements. International organizations, particularly agencies of the U.N., have entered into treaties with states. [28] The 1949 decision of the International Court of Justice in the *Reparations for Injuries Suffered in the Service of the United Nations* [29] case established the fact that the U.N. possesses legal capacity to bring a claim against a state for failing adequately to protect a U.N. employee. In this opinion, the Court stated that ". . . the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." [30] The question as to the ability of international organizations to enter into treaties is still not fully settled, and the Vienna Convention makes no attempt to resolve this issue. However, Article 5 of the Convention provides that it applies to ". . . any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization." Moreover, Article 3 states that the fact that the Convention does not apply to international agreements between states and other subjects of international law will not affect the legal force of such agreements and will not prevent the application to these agreements of the rules of the Convention to which they would be subjected in the Convention's absence; i.e., customary treaty law. [31]

b. States. The Vienna Convention also does not deal expressly with the issue of the capacity of states within a federal system to enter into treaties, leaving this question to existing law. Essentially, such capacity depends initially upon the constitutional law of the state in question. Some constituent states, such as those of the Federal Republic of Germany and Switzerland, may conclude treaties among themselves without the consent of the government. [32] Some, like those of the Soviet Union, are recognized as subjects of international law by the Constitution and are permitted to become members of the U.N. and parties to multilateral international agreements. [33] Others, like the United States, are forbidden to enter into "any agreement or compact" without the approval of Congress. [34] If a state in a federal union concludes a treaty in violation of its municipal law, its legitimacy under international jurisprudence is uncertain. If another state reasonably relies on the state's representations, an estoppel might arise, as when a head of state falsely represents that he has constitutional authority to bind his state. [35]

c. Other entities. Protectorate or dependent states normally lack the capacity to enter into international agreements. However, the terms of the protectorate may admit an international capacity to make treaties, as did that of France over Algeria and Tunisia after World War II. [36] Where territories have not yet achieved statehood, as with colonial states engaged in the process of decolonization or in wars of "national liberation," international capacity is sometimes recognized by other states. [37] Self-governing territories are generally considered to have less treaty-making capacity than protected states, although realistically,

> . . . [p]erhaps the only limitation on the possession and exercise of treaty-making capacity by a political subdivision is lack of consent to the exercise of such capacity by the dominant (or 'sovereign') entity to which the subdivision is subordinate. [38]

d. Private entities. There is an increasing trend for corporations, both public and private, to enter into international agreements. The *Island of Palmas Arbitration* case of 1928 involved a challenge to the validity of political contracts between the Dutch East India Company and native rulers. The arbitrator held that the company's acts should be "assimilated to acts of the Netherlands," and thus it was "entitled to create situations recognized by international law." [39] However, the fact that the company was entitled, as agent for a state, to enter into such agreements, did not necessarily determine its capacity to make treaties on its own.

e. The capacity of individuals to make international agreements is doubtful, although the peculiar interests of individuals in agreements involving, for example, human rights or individual property rights, might properly lead to recognition of their capacity to enter such agreements.

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28. Some 20 percent of the multilateral treaties new in force include international organizations as parties. *See S. Rosenne, The Law of Treaties: A Guide to the Legislative History of the Vienna Convention 105* (1970).

29. [1949] I.C.J. 174.

30. *Id.* at 179.

31. The U.N. General Assembly, by resolution on November 12, 1969, recommended that the International Law Commission continue its study on relations between states and international organizations, in conjunction with the related issues of state succession and responsibility, and prepare a draft of suitable articles to supplement the Vienna Convention.

32. I. Oppenheim, *supra,* note 8 at 176-77.

33. See V. Aspaturian, *The Union Republics in Soviet Diplomacy 40,* 173-77 (1960); M. Whiteman, *Digest of International Law 406-13* (1963).

34. U.S. Const., Art. I, § 10; Art. II, § 3. U.S. states do sometimes enter into agreement with foreign states, such as agreements with the bordering states of Canada or Mexico concerning joint construction or maintenance of international highways or bridges. See *Friedmann, supra,* note 23 at 309. Although Congress has generally approved these agreements, there have been cases in which sanction was withheld on the ground that the proposed agreements would infringe federal treaty making powers. See e.g., 5 G. Hackworth, *Digest of International Law* 24-5 (1940) (hereinafter cited as G. Hackworth).

35. See Legal Status of Eastern Greenland Case Denmark v. Norway), [1933] P.C.I.J., ser. A/B, No. 53.

36. 5 G. Hackworth, *supra,* note 34 at 153.

37. See Friedmann, *supra,* note 23 at 310.

38. Lissitzyn, *Efforts to Codify or Restate the Law of Treaties,* 62 *Colum. L. Rev.* 1166, 1183 (1962).

39. Island of Palmas Case (United States v. The Netherlands), 2 U.N.R.I.A.A. 829 (1928).

Section III. THE CONCLUSION OF INTERNATIONAL AGREEMENTS

8-6. Formal Requirements. *a.* Traditional methods. The traditional procedure for the conclusion of an international agreement was for the parties to record their common intention, arrived at after negotiation through diplomatic or other channels or at a conference of interested states, in a single formal instrument. This is still the normal procedure for those agreements, especially multilateral arrangements, that regulate matters of political or economic importance. One of the conspicuous modern developments in treaty-making procedure, however, has been the rapid increase in the number and frequency of agreements recorded in simplified form. Probably a majority of the agreements currently concluded are effected by the simple exchange of diplomatic notes recording the terms of the proposed agreement and the consent of each state concerned to be bound thereby. The chief advantages of agreements effected by an exchange of notes are the speed with which they may be concluded, as well as the possibility that under the law of some states, legislative approval may be unnecessary. [40] A treaty relationship may also be created by indirect manifestations of consent, as when states consent to the compulsory jurisdiction of the International Court of Justice by means of unilateral declarations deposited with common reference to Article 36(2) of the Court's statute. The exchange or deposit of *notes verbales* may also give rise to a treaty relationship.

b. Oral agreements. The validity of oral agreements is widely admitted, whether they are later reduced to writing or not. Although Article 2 of the Convention requires that treaties be "in written form," Article 3 provides that the fact that a treaty is not in written form shall not affect the legal force of the agreement. Thus, under existing international law, there is nothing to prevent an international agreement from being made orally, although difficulties of proof make it a less desirable method. In the *Eastern Greenland Case,* the Norwegian Minister for Foreign Affairs orally informed a Danish minister that the Norwegian government ". . . would not make any difficulties in settlement of this question. . . ." in reply to Sweden's request for recognition of Denmark's claim of sovereignty over Greenland. The Permanent Court of International Justice found the oral statement to be unconditional and definitive, therefore binding upon Norway. [41]

c. The generally favored view is that the written instrument alone should be regarded as "the treaty." Thus, akin to the "parole evidence" rule in municipal law, working papers and other evidence of the drafters' intent may not be used to modify the clear words of the written document. [42] However, when there are ambiguities in a treaty, working papers and other guides to interpretation may be consulted. [43]

8-7. Authority to Negotiate and Sign. *a. Historical.* At a time when travel and communications were slower and less dependable than they are today, states often found it convenient to furnish their plenipotentiaries with documents known as "full powers" for the purpose of accrediting them as competent to negotiate and express the state's final consent to be bound by a treaty. As years passed and communications improved, such an instrument came to signify only authority to negotiate and to authenticate the test of a treaty—not authority to bind the state. Today, there are important exceptions to the requirement of full powers. Certain classes of international agreements, e.g., those effected by an informal exchange of notes or in some other manner not requiring ratification, are usually concluded in practice without a demand for the production by each plenipotentiary of an instrument of full powers. [44]

b. Modern practice. Article 7 of the Vienna Convention governs the authority of a representative to adopt a treaty on behalf of his state. A person is considered as representing a state if:

(a) he produces appropriate full powers; or (b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers."

Certain officials need not produce evidence of their full powers: Heads of State and of Government and Ministers for Foreign Affairs for acts concluding a treaty; heads of diplomatic missions for adopting the text of a treaty with the state to which they are accredited; and representatives accredited by states to an international conference or organization for adopting the text of a treaty in that conference or organization. [45]

8-8. Consent to Be Bound by an International Agreement. *a.* Generally. The text of a treaty is considered to be adopted upon the consent of all states participating in its drafting or, at an international conference, by the vote of two-thirds of the states present and voting, unless, by the same majority, they shall decide to apply a different rule. [46]

Consent may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or any other means if the treaty so provides or it is agreed upon by the states involved. [47] Initialing of a test is a sufficient signature if so agreed, and the signature *ad referendum* of a treaty by a representative, if confirmed by his state, constitutes a full sig-

40. Weinstein, *Exchange of Notes, Brit. Y.B. Int'l L. 205* (1952).

41. Eastern Greenland Case, supra note 35.

42. See Harvard Research, *supra,* note 19; Jurisdiction of the Commission of the Oder [1929] P.C.I.J., ser. A, No. 23, at 42. *But see* H. Lauterpacht, *The Development of International Law by the International Court* 136-37 (1958).

43. See *H. Briggs, The Law of Nations* 838 (1952).

44. See *Blix, Treaty-Making Power* 49-50 (1960).

45. Vienna Convention, Art. 7(2).

46. *Id.* at Art. 9.

47. *Id.* at Arts. 11-15.

nature. [48] Once a state has signed or exchanged instruments subject to ratification, acceptance, or approval, or has expressed its consent to be bound pending entry into force of the treaty, it must refrain from acts which would defeat the object and purpose of the agreement. [49]

b. Increasing numbers of treaties provide for "acceptance" or "approval" as a substitute for one or more of the other procedures—signature, ratification, accession,—by which a state consents to be bound by a multilateral treaty. The significance of a provision requiring "acceptance" or "approval" is that the latter terms imply less formality than "ratification." Additionally, they may allow a government

> . . . a further opportunity to examine the treaty when it is not necessarily obliged to submit it to the State's constitutional procedure for obtaining ratification. [50]

c. "Ratification" is the process by which the Head of State asserts that *this is the agreement* to which the State assents. As previously noted, prior to the modern period of rapid communication and travel, representatives of the Head of State, "plenipotentiaries," frequently signed treaties without the final concurrence of their Heads of State, thereafter going home and obtaining ratification. Today, this is generally not necessary. However, further steps at home may be required when the treaty-making power is not possessed solely by the executive officer. In the U.S., for example, the Senate's "advice and consent" must be obtained before the President can ratify a treaty.

d. Deposit of instruments of consent. The initial step after ratification is usually the deposit of the ratification at a predesignated depositary. Prior to the Convention, a state was not considered bound by an agreement until deposit was made. [51] After the creation of the League of Nations, registration of treaties in the archives of designated agencies or organizations assumed special legal importance. Under League practice, a treaty was not regarded as binding unless so registered. [52] The United Nations Charter adopted a less drastic formula, however, forbidding a party to an unregistered treaty from invoking it before any organ of the U.N. [53] The Vienna Convention provides that, unless otherwise stated in a treaty, instruments of ratification, acceptance, approval, or accession establish the consent of a state to be bound upon their exchange between the contracting states, their deposit with the depositary, or their notification to the contracting states or depositary. [54]

8-9. Entry into Force of an International Agreement. *a.* Modern international agreements, especially general multilateral conventions, commonly provide, in some detail, for the time and manner in which the agreement shall enter into force for those states which have consented to be bound. Such an agreement typically becomes effective when a specified number or proportion of states has deposited ratification or transmitted acts of approval or acceptance. [55] In the absence of this form of arrangement, the Convention provides that a treaty becomes effective as soon as consent to be bound has been established for *all* of the negotiating states. [56] If a state's consent to be bound is established on a date *after* the treaty has come into force, it becomes effective for that state on that date. [57]

b. The provisions of a treaty regulating matters necessarily arising before the entry into force of the treaty, such as authentication of text and the functions of the depositary, apply from the time of the adoption of its text. As previously stated, [58] signature or initialing of the text can be the agreed-upon method of adoption, and thus these kinds of provisions would apply from the time of signature if this were the agreed-upon method of adoption.

c. A treaty may be applied provisionally, pending its entry into force, if this is provided for in the treaty or agreed upon by the negotiating states, but provisional application is terminated if a state notifies the other states of its intention not to become a party. [59]

8-10. Depositaries. In keeping with Articles 76 and 77 of the Convention, multilateral treaties often provide that the government of a state or an organ of an international organization shall act as the depositary of the treaty. Such depositaries are charged with a number of tasks relating to the administration of the treaty, many of which must be performed before the treaty has entered into force. Ratifications and other instruments of acceptance or approval, for example, are typically communicated to the depositary, which then informs the contracting states of the deposit of such instruments and their effect on the treaty's status. [60]

8-11. Reservations to International Agreements. *a.* General. A reservation is

> . . . a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State. [61]

In the context of bilateral agreements, a reservation is closely analogous to a counteroffer by the reserving state,

48. *Id.* at Art. 12.

49. *Id.* at Art. 18.

50. 2 Y.B. Int'l L.C. 198 (1966).

51. An example of this fact can be seen in a U.S. Department of State decision that a treaty approved by the Senate, but never deposited as required in the American Embassy in Paris due to the intervention of World War I, was not completed and thus could be revoked by the President without action by the Senate. 5 *G. Hackworth, supra,* note 14 at 54.

52. See Hudson, *Legal Effect of Unregistered Treaties in Practice under article 18 of the Covenant,* 28 *Am. J. Int'l L.* 564 (1934).

53. *U.N. Charter,* Art. 102.

54. Vienna Convention, Art. 16.

55. *See,* e.g., the Provisions collected in Office of Legal Affairs, Handbook of Final Clauses 21-38, U.N. Doc. ST/LEG/6 (1957).

56. Vienna Convention, Art. 24(1) and (2).

57. *Id.* at Art. 24(3).

58. See para 8-9*a, supra.*

59. Vienna Convention, Art. 25.

60. Vienna Convention, Arts. 76-78.

61. *Id.* at Art. 2(d).

and the legal situation is clear as to whether the reservation is accepted or rejected by the other state. [62] The most difficult problems concerning reservations, however, have arisen when one or more of the parties to a multilateral treaty objects to another state's attempt to become a party subject to one or more reservations. With the increased use of multilateral treaties in the 20th century, states have sometimes found themselves in essential agreement on a treaty, but in disagreement on particular provisions. This results from the fact that multilateral treaties are often the product of a complex negotiation process in which the views of all parties may not be accommodated. The ratification process can also encourage the imposition of reservations, particularly when, as in the U.S., the legislative branch has a role in ratification. A legislature may take a "second look" at a treaty entered into by the executive and refuse to give its consent to certain provisions.

b. The traditional rule in international law was that a reservation was possible only if all parties to a treaty accepted it. [63] However, in 1932 the Pan American Union adopted a modified rule as to reservations. The Dominican Republic had entered reservations to a number of provisions in a Pan American Treaty on Consuls. Some parties claimed that this amounted to a rejection of the treaty. Others found no objection to it, contending that the power to make reservations was inherent in sovereignty. The governing board of the Union adopted a resolution providing that a treaty was to be considered in force in the form in which it was signed as between the states which ratified it without reservations; in force as modified by the reservations between states which made reservations and those which accepted them; and not in force between a state which made reservations and those which did not accept them. [64] In 1951, the International Court of Justice issued an Advisory Opinion concerning reservations made by states to the 1948 Genocide Convention. After some 43 states had signed the Convention, a dispute arose among the parties regarding certain reservations made by some of the states. The Secretary-General asked the General Assembly for guidance, and this body referred the matter to the I.C.J. The Court declared that ". . . a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention, but not by others, can be regarded as being a party to the Convention *if the reservation is compatible with the object and purpose of the Convention.*" (Emphasis added.) It further stated that ". . . if a party to the Convention objects to a reservation which is considered to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention." [65] Finally, it advised that an objection to a reservation made by a signatory state which has not yet ratified the Convention can prevent the reserving state from being regarded as a party if the reservation is not compatible with the object and purpose of the Convention, but that until ratification by the reserving state, the objection merely serves as notice of its attitude.

c. The Vienna Convention follows essentially the International Court's advisory opinion. Articles 19 and 20 establish the following rules:

(1) A state may make a reservation *unless* the treaty either prohibits it or provides that only specified reservations, which do not include this reservation, may be made. If a reservation is expressly authorized by a treaty, subsequent acceptance by the other contracting states is not required unless the treaty so provides.

(2) If the treaty neither prohibits reservations nor provides for specified reservations which do not include this reservation, a state may make a reservation *unless* it is incompatible with the object and purpose of the treaty.

(3) When the treaty is a constituent instrument of an international organization, a reservation must be accepted by the competent organ of that organization unless the treaty provides otherwise.

(4) In cases not falling under the preceding paragraphs, and unless the treaty otherwise provides:

(*a*) *Acceptance* by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state. Acceptance is assumed if no objection is raised by the end of twelve months after a state was notified of the reservation, or the date on which it expressed its consent to be bound by the treaty, whichever is later.

(*b*) *Objection* by another contracting state to a reservation does not preclude the entry into force of the treaty *unless* a contrary intention is definitely expressed by the objecting state.

(*c*) An act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting state has accepted the reservation.

d. Article 21 provides that a reservation established in accordance with Articles 19 and 20 modifies the provisions of the treaty to which the reservation relates as between the reserving state and other parties. It does not modify the provisions of the treaty for the other parties to the treaty between themselves. When an objecting state does not oppose the entry into force of a treaty between itself and the reserving state, the provisions to which the reservation relates do not apply to the extent of the reservation as between the two states. It is not expressly stated in the Convention whether an objecting state may declare

62. *Restatement, Second, Foreign Relations Law of the United States,* § 126 (1965) [hereinafter cited as *Restatement, Second*].

63. *I. Brownlie, Principles of Public International Law* (1966).

64. Reservations to Multilateral Conventions, Report of the Secretary-General, U.N. Doc. A/1372, p. 11 (1950).

65. Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15.

that its objection precludes treaty relations only as to a part of the treaty. One authority believes this is possible, however, on the ground that ". . . there would appear to be no reason why an objection to a reservation may not produce this effect, provided the treaty is of such a nature that separability of its provisions is a practical proposition." [66]

e. Articles 22 and 23 provide procedures for making and withdrawing reservations, acceptances, and objections. A reservation or objection may be withdrawn at any time and must be in writing. Withdrawal does not require consent of a state which has accepted it, and becomes operative when notice of it is received by the other contracting state. However, withdrawal of an objection to a reservation becomes operative only when notice of it is received by the reserving state. If a reservation was made when signing the treaty subject to ratification, acceptance, or approval, it must be formally confirmed by the reserving state when expressing its consent to be bound and shall be considered as having been made on the date of its confirmation.

Soviet doctrine has favored a liberal reservations rule, holding that ". . . a signatory to a multilateral treaty has an undeniable right to make such reservations to the treaty as it deems necessary, and that this right, which stems from the sovereignty of a state, can be limited only by the state itself." [67] Notwithstanding this fact, Soviet writers have expressed their approval of the I.C.J.'s advisory opinion concerning the Genocide Convention. [68]

Section IV. THE VALIDITY AND EFFECT OF INTERNATIONAL AGREEMENTS

8-12. The Binding Force of International Agreements. An international agreement is basically a contract between states, and elements of obligation akin to those found in municipal contract law are present. However, as discussed in Part I, a treaty is not a contract in the common law sense of an agreement requiring consideration. It is the *assent to be bound* and not reciprocity or *quid pro quo* that obligates the parties. As one writer has observed, ". . . it is merely a question of fact whether, in a concrete instance, a subject of international law has made a declaration of intention, which in the circumstances, can be considered by other international persons or by international organs as meant to produce legal consequences in international law." [69]

8-13. Pacta Sunt Servanda. *a.* Legal ordering could not be achieved in international law if states were free to disregard their treaty agreements. However, due to the absence of effective enforcement mechanisms within the international community, there has been some doubt as to the scope and effectiveness of the doctrine of *pacta sunt servanda* (treaties are to be observed). It has been said by some to require that agreements be performed "in good faith," while others, in reliance upon a differing interpretation of the Latin, maintain that the doctrine requires that performance must be "with utmost fidelity." [70] Article 26 of the Vienna Convention adopted the former interpretation, stating: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Some delegates had wanted this article to state that only "valid treaties in force" should be binding, while others wanted to confine it to "treaties in force in conformity with the Convention." This latter approach, while perhaps desirable, would have raised a problem of retroactivity. [71] The Convention thus took a middle position, neither requiring a stricter standard of performance than good faith nor limiting the doctrine to absolute requirements of "in force" and "in conformity with the Convention." It also provides specifically that ". . . a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." [72]

b. One of the most troubling aspects of the *pacta sunt servanda* doctrine concerns the period of time a treaty is to remain in force. A countervailing doctrine, *Rebus sic stantibus* (basically, change of circumstances), permits noncompliance with a treaty when a change of circumstances has been so extreme as to violate the intentions of the parties. This will be discussed in the section of the chapter dealing with termination and modification of agreements. [73]

8-14. Validity and Invalidity of International Agreements. *a. Agreements Concluded in Violation of Municipal Law.* Disagreement has existed in the past as to whether a state could invalidate its consent to a treaty on the grounds that it was given in violation of the state's own municipal law. [74] Article 46 of the Vienna Convention states that

> . . . a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

A violation is said to be "manifest" if it would be objectively evident to a negotiating state acting in accordance with normal practice and in good faith. Article 47 of the Convention further stipulates that if the authority of a representative to express the consent of his state is subject to

66. *I. Sinclair, The Vienna Convention on the Law of Treaties* 49 (1973) [hereinafter cited as Sinclair].

67. *J. Triska and R. Slusser, The Theory, Law, and Policy of Soviet Treaties* 84 (1962).

68. *Id.* at 87-88.

69. *G. Schwarzenberger, A Manual of International Law* 224 (1960).

70. *N. Leech, C. Oliver & J. Sweeney, The International Legal System: Cases and Materials* 931-32 (1973).

71. *Id.* at 932.

72. Vienna Convention, art. 27.

73. *Infra,* para.

74. *Sinclair, supra,* note 66 at 22-23; 30-31; 64; 89-91.

a specific restriction, his failure to observe that restriction may not be invoked to invalidate consent unless it was notified to the other negotiating states prior to his expressing consent.

b. Mistake, Fraud, and Illegality. Nearly all the recorded instances of treaties concluded with reference to an assumed state of facts later discovered to be materially different or nonexistent have concerned geographical errors, especially errors in maps. [75] In instances of error, Article 48 of the Convention provides that a state may only invoke error in a treaty to invalidate its consent if the error relates to a fact or situation which was assumed by it to exist at the time the treaty was concluded and which formed an essential basis of its consent to be bound. Error will not invalidate consent, however, if the state contributed to it by its own conduct or if the circumstances were such as to put it on notice of a possible error. Errors relating only to the wording of the text of the treaty do not affect its validity and are dealt with by Article 79 which provides procedures for notifying other states of errors in text and for their correction.

(1) No instances of the actual use of fraud in the conclusion of treaties are known, nor are there any known cases in which one of the parties to a treaty alleged fraud on the part of the others as a basis for termination of the agreement. [76] Article 49 of the Convention permits a state to invoke fraud as invalidating its consent if it was induced to conclude the treaty by the fraudulent conduct of another negotiating state.

(2) Although examples of corruption of state representatives are said also to be nonexistent, [77] Article 50 provides that this cause may be invoked to invalidate consent. An objection by several states regarding the vagueness of this standard did not prevent its adoption. [78]

8-15. Jus Cogens. Treaties normally supersede, as between the parties, conflicting rules of international law. However, just as the municipal law of many states declares that certain contracts are void as contrary to public policy, the question has often been raised as to whether there exists in international law rules having the character of *jus cogens*, i.e., norms with which all treaties must be consistent. In dealing with this issue, Article 53 of the Convention declares a treaty to be void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). This article was the subject of considerable debate at the conference, earlier drafts of the article being criticized as lacking norms by which *jus cogens* could be identified. [79] Eastern European delegations characterized it in such diverse and political terms as

> . . . principles of non-aggression and non-interference in the internal affairs of States, sovereign equality, national self-determination, the maintenance of peace among peoples, the struggle against colonial domination and the sovereignty of States. [80]

A limiting definition was finally adopted, defining a peremptory norm as ". . . a norm accepted and recognized 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." [81]

8-16. Coercion and Duress. Under traditional international law doctrine, consent to a treaty could not be invalidated on the basis of coercion of a state or its representative. [82] However, the prohibition against the threat or use of force in international relations contained in the Covenant of the League of Nations, the Pact of Paris, and Article 2(4) of the U.N. Charter and the post-World War II war crimes trials for conduct of aggressive war have made coercion an improper method by which to acquire consent to a treaty under international law. Article 51 of the Convention provides that coercion of a representative through acts or threats against him which procured a state's consent to a treaty voids such consent. Article 52 has a much broader application, 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.

An amendment proposed by nineteen Afro-Asian and Latin American states which defined "force" as including "economic or political pressure" was withdrawn after intense opposition by many Western delegations. [83] The reference to "the principles of international law embodied in" the U.N. Charter was said by its drafters ". . . to specify the *time element* for the effect of the prohibition of resort to the threat or use of force," that is, at least from the date of the U.N. Charter. [84] Thus, although Article 4 provides that the Convention applies only to treaties concluded after entry into force of the Convention, the contention has been made that it would be possible to invoke the rule stated in Article 52 with respect to a treaty concluded since the establishment of the modern law prohibiting the threat or use of force. [85]

8-17. Registration and Effect of Nonregistration. Article 102 of the U.N. Charter requires that every treaty and international agreement entered into by any U.N. member following the entry into force of the Charter must be registered as soon as possible with the

75. Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session (1966), 21 U.N. GAOR Supp. 9 at 43-44, U.N. Doc. A/6309/Rev. 1 (1966) [hereinafter cited as [1966] I.L.C. Reports]; cf. Cukwurah, *The Settlement of Boundary Disputes in International Law 181* (1967).

76. [1966] I.L.C. Reports 73.

77. 2 Y.B. Int'l L.C. 245 (1966).

78. [1966] I.L.C. Reports 19, 94.

79. *Sinclair, supra* note 66 at 126-27.

80. *Id.* at 90.

81. *Id.* at 91.

82. [1966] I.L.C. Reports 96.

83. *Id.* at 75.

84. *Sinclair, supra,* note 66 at 98.

85. *Id.* at 100.

U.N. Secretariat. [86] If an agreement is not so registered, no party to the agreement may invoke it before any organ of the U.N. Article 80 of the Convention simply reaffirms the obligation on the part of states party to a treaty to transmit it to the U.N. Secretariat for registration and publication.

8-18. International Agreements in Internal Law. *a.* Approaches toward the status of treaties under internal law. Although the Vienna Convention provides that ". . . a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating states," a treaty may not necessarily possess legal effect under a state's own municipal law. States take different approaches regarding the status of treaties under internal law. The two principal positions are *incorporation* (or *adoption*), an approach holding that treaties automatically become part of internal law without a specific act of acceptance, and "*transformation*," a theory maintaining that treaties are only part of internal law insofar as they are accepted by specific acts of the legislature and/or courts. [87] The approach taken may have an impact upon the likelihood of compliance with and implementation of a treaty. Moreover, it may also affect a state's interpretation of treaties, as states adhering to the transformation theory tend to maintain that once a treaty has been transformed into municipal law, its interpretation and application rest with municipal courts. [88]

b. The "transformation" approach followed in the United Kingdom makes a functional distinction between treaties and customary international jurisprudence. It has long been held in Great Britain that customary international law is part of its internal law, as stated in the 1905 case of *West Rand Mining Co. v. The King:*

[W]hatever has received the common consent of civilized nations must have received that assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals to decide questions to which doctrines of international law may be relevant. [89]

However, the making of treaties is a prerogative power of the Executive in England, to be exercised without the concurrence of Parliament (in contrast to the U.S. where the President must obtain the advice and consent of the Senate). In order to prevent executive tyranny, treaties are not self-executing and do not become part of municipal law until enabling legislation is passed by Parliament. [90]

c. Incorporation. By contrast, the French Constitution calls for the direct "incorporation" of treaties into French municipal law and provides that they can only be modified or abrogated by an act of equal authority, i.e., an international act. The Constitution also recognizes the superior authority of treaties over conflicting legislation, prior or subsequent. [91] Another section makes the superiority of a treaty dependent on its application by the other party, however, thus importing an element of reciprocity into the incorporation process.

8-19. Agreement-Making Power in the United States. *a.* Generally.

UNITED STATES CONSTITUTION

Article I, Section 10

No State shall enter into any Treaty, Alliance or Confederations. . . .

No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . .

Article II, Section 2

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur. . . .

Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

"Ratification" of treaties is not mentioned in the Constitution. In practice, treaties are ratified by the President after the Senate has given its advice and consent. It is incorrect, therefore, to refer to the action of the Senate as "ratification." The President is under no duty to proceed with the ratification, or exchange of ratifications, of a treaty after the Senate has given its advice and consent, since the latter is not a binding directive. As noted above, Article VI, paragraph 2 of the Constitution provides that treaties made under the authority of the U.S., together with the Constitution and laws of the U.S. made in pursuance thereof, ". . . shall be the supreme Law of the Land." Thus, treaties are automatically a part of American municipal law. No acts of "transformation" by the courts or Congress are necessary. Notwithstanding this fact, however, there exist several basic questions regarding the agreement-making power in the United States.

b. What is the status of a treaty that conflicts with a provision of the Constitution? In the leading case in which this issue was raised, the Supreme Court gave recognition to a very broad treaty making power.

MISSOURI v. HOLLAND
Supreme Court of the United States, 1920
252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed

86. *See Brandon, Analysis of the Terms 'Treaty' and 'International Agreements' for Purposes of Registration Under Article 102 of the United Nations Charter,* 47 *Am. J. Int'l L.* 49 (1953).

87. *See I. Brownlie, supra,* note 63 at 106.

88. *See J. Brierly, supra,* note 21 at 91-93.

89. [1905] 2 K.B. 391.

90. *J. Brierly, supra,* note 21 at 89-90.

91. *K. Holloway, Modern Trends in Treaty Law* 255 (1967).

that the two powers would take or propose to their lawmaking bodies that necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migrating birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812, 1863 . . . [T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the power of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. United States v. Shauver, 214 F. 154. United States v. McCullagh, 221 F. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not likely to be assumed that, in matters requiring national act, "a power which must belong to and somewhere reside in every civilized government" is not to be found. . . .

The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what the amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. . . . If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

. . . .

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. . . .

No treaty has ever been held unconstitutional by the Supreme Court. [92] The Court has, however, in companion cases greatly affecting certain aspects of military justice, emphatically declared that both treaties and laws enacted pursuant to them *must* comply with the provisioning of the Constitution.

REID v. COVERT
KINSELLA v. KRUEGER
Supreme Court of the United States, 1957
354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148

[Two wives of American servicemen stationed in the United Kingdom and Japan respectively had been convicted by United States military courts of the murder of their husbands. The Supreme Court held that civilian dependents accompanying members of the armed forces overseas in time of peace could not be constitutionally tried by military courts.]

BLACK, J. . . . At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. For its part, the United States agreed that these military courts would be willing and able to try and to punish all offenses against the laws of Great Britain by such persons. In all material respects, the same situation existed in Japan when Mrs. Smith killed her husband. Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that article 2(11) of UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

Article VI, the Supremacy Clause of the Constitution, declares:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; . . .

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in "pursuance" of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the

92. *But cf., Byrd, Treaties and Executive Agreements in The United States* (1960).

Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. . . .

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

There is nothing in State of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. . . .

c. One further aspect of the incorporation of treaties into American municipal law is the inherent limitation upon the subject matter of these agreements. Former Chief Justice Charles Evans Hughes stated in 1929 that the treaty-making power ". . . is to deal with Foreign nations with regard to matters of international concern . . ." and is not to be exercised ". . . with respect to matters that have no relation to international concerns." [93] The U.S. Department of State has recognized this limitation, stating in 1955, "[T]reaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." [94] Whether the Executive branch, acting through the State Department, has, in practice, recognized the constitutional limitations placed on the agreement-making power has been and continues to be a much debated issue. The following material will hopefully provide the reader with greater insight into the Executive agreement-making power.

8-20. The Executive Agreement-Making Power. *a.* Historical. Although Article II, section 2, of the Constitution limits the Presidential treaty-making power by requiring "the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur," it does not state that no other form of international agreement is permissible. Thus, from the earliest days of the American Republic, Presidents have entered into agreements (which fall short of treaties) with foreign governments either on their own authority or upon the authority of an act of Congress passed by majority vote in each House of Congress. Materials of particular importance to the issue of executive agreements follow.

RESTATEMENT, SECOND, FOREIGN RELATIONS LAW OF THE UNITED STATES (1965)

§ 117. Scope of International Agreements

(1) The United States has the power under the Constitution to make an international agreement if

(a) the matter is of international concern, and

(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States.

§ 119. Scope of Executive Agreement Pursuant to Treaty

An international agreement made as an executive agreement pursuant to a treaty to which the United States is a party may deal with any matter that satisfies the requirements indicated in §117 and will carry out the purposes of the treaty.

§ 120. Scope of Executive Agreement Authorized by Act of Congress

An international agreement made by the United States as an executive agreement authorized by an act of Congress may, subject to the limitations indicated in §117 deal with any matter that falls within any of the powers of the Congress and the President under the Constitution, even if the matter also falls within the treaty power.

Comment:

a. Scope of agreement. An executive agreement of the kind described in this Section must be within the powers that are delegated to the Congress and the President under the Constitution. When the President makes an executive agreement pursuant to congressional authorization, the scope of the agreement is limited by the scope of the collective powers of the Congress and of the President. The occasion for the use of executive agreements of this type arises from the President's position as the officer of the United States who is constitutionally authorized to conduct foreign relations. The Congress may enact legislation which for its implementation requires an agreement with a foreign state. To carry out the legislation, the agreement with the foreign state must be concluded under the authority of the President.

Reporters' Note:

. . . Since the treaty power is an independent power under the Constitution and is not limited by other delegated powers, it might be argued that it is more extensive than the expressly delegated powers of Congress. See §118 of the Restatement of this Subject. However, delegated powers of the Congress under the Constitution are so extensive and so broadly interpreted by the courts as to suggest that Congress, acting under such powers (including the "necessary and proper" clause of Article I, Section 8) can authorize the President to make an executive agreement relating to any matter of international concern.

§ 121. Scope of Executive Agreement Pursuant to President's Constitutional Authority

An international agreement made by the United States as an executive agreement without reference to a treaty or act of Congress may, subject to the limitations indicated in §117, deal with any matter that under the Constitution falls within the independent powers of the President.

Comment:

a. General. The authority of the President to make executive agreements in the field of foreign relations is based on the following provisions of the Constitution:

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, §1;

93. Remarks of Charles Evans Hughes Before the American Society of International Law, [1929] *Am. Soc. Int'l. Proc.* 194.

94. U.S. Dept. of State Circular No. 175 (1955), reprinted in 50 *Am. J. Int'l L.* 784 (1956). For a discussion of this circular and its meaning, *see* Bilder, *The Office of the Legal Advisor, Department of State,* 56 *Am. J. Int'l L.* 633, 651-653 (1962).

"The President shall be Commander in Chief of the Army and Navy. . . ." U.S. Const. art. II, §2;

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . .; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . ." U.S. Const. art. II, §2;

"[H]e shall take Care that the Laws be faithfully executed. . . ." U.S. Const. art. II, §3.

These expressed powers afford the President a broad area in which to make international agreements. Under the "executive power," the President has authority to conduct the foreign relations of the United States; that power provides a broad constitutional basis for the making of executive agreements.

UNITED STATES DEPARTMENT OF STATE CIRCULAR NUMBER 175

Procedures

On July 24, 1974, the Department of State approved a revised Circular 175 Procedure (Foreign Affairs Manual, Volume 11, Chapter 700). Circular 175 provides internal guidelines and information to be followed to facilitate the application of orderly procedures in the negotiation, signature, publication, and registration of treaties and other international agreements of the United States.

The revision was initially undertaken (1) to meet requests by members of the Senate Committee on Foreign Relations to clarify the guidelines to be considered in determining whether a particular international agreement should be concluded as a treaty to be brought into force with the advice and consent of the Senate or as an international agreement to be brought into force on some other basis; (2) to clarify and strengthen provisions on consultation with the Congress; and (3) to call attention to the requirements of the Case Act, P.L. 92-403; 86 Stat. 619; 1 U.S.C. 112b (see the 1973 *Digest*, Ch. 5, § 5, pp. 185-188) regarding the transmission of international agreements other than treaties to the Congress. These changes are reflected in Sections 720.2c, 720.2h, 721, 722.3, and 724.

Another change, permitting public comment on the treaty or agreement being negotiated, signed or acceded to, is reflected in Sections 720.2d, 722.3c, and 723.1g.

The only other substantive change, which in effect is intended to clarify more precisely the intended effect of the Circular 175 Procedure, is the disclaimer included in Section 711. The revisions in Section 710, at the beginning of Section 720.2, at the beginning of Section 721.3 and Section 723.1, in Section 723.1g and i, in Section 723.4, and in Section 723.5 are in conformity with this change.

The other revisions, including all those in the Sections beginning with 723.6, are of a purely editorial character, involving some rearrangement of Sections to place them in a more logical order and restructuring of language for purposes of clarity.

The new Circular 175 follows, with one asterisk indicating a revision, and two asterisks indicating new material:

*710 Purpose

a. The purpose of this chapter is to facilitate the application of orderly and uniform measures and procedures in the negotiation, signature, publication, and registration of treaties and other international agreements of the United States. It is also designed to facilitate the maintenance of complete and accurate records on treaties and agreements and the publication of authoritative information regarding them.

b. The chapter is not a catalog of all the essential guidelines or information pertaining to the making and application of international agreements. It is limited to guidelines or information necessary for general guidance. *

**711 Disclaimer

This chapter is intended solely as a general outline of measures and procedures ordinarily followed which, it is recognized, cannot anticipate all circumstances or situations that may arise. Deviation or derogation from the provisions of this chapter will not invalidate actions taken by officers nor affect the validity of negotiations engaged in or of treaties or other agreements concluded. **

720 Negotiation and Signature

720.1 *Circular 175 Procedure*

This subchapter is a codification of the substance of Department Circular No. 175, December 13, 1955, as amended, on the negotiation and signature of treaties and other international agreements. It may be referred to for convenience and continuity as the "Circular 175 Procedure."

720.2 *General Objectives*

The objectives are:

a. That the making of Treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits;

b. That the objectives to be sought in the negotiation of particular treaties and other international agreements are approved by the Secretary or an officer specifically authorized by him for that purpose;

**c. That timely and appropriate consultation is had with congressional leaders and committees on treaties and other international agreements;

d. That where, in the opinion of the Secretary of State or his designee, the circumstances permit, the public be given an opportunity to comment on treaties and other international agreements; **

*e. That firm positions departing from authorized positions are not undertaken without the approval of the Legal Adviser and interested assistant secretaries or their deputies;

f. That the final texts developed are approved by the Legal Adviser and the interested assistant secretaries or their deputies and, when required, brought a reasonable time before signature to the attention of the Secretary or an officer specifically designated by him for that purpose; *

g. That authorization to sign the final text is obtained and appropriate arrangements for signature are made;

**h. That there is compliance with the requirements of Public Law 92-403 on the transmission of the texts of international agreements other than treaties to the Congress (see section 724); the law on the publication of treaties and other international agreements (see section 725); and treaty provisions on registration (see section 750.3-3). **

**721 Exercise of the International Agreement Power

721.1 *Determination of Type of Agreement*

The following considerations will be taken into account along with other relevant factors in determining whether an international agreement shall be dealt with by the United States as a treaty to be brought into force with the advice and consent of the Senate, or as an agreement to be brought into force on some other constitutional basis.

721.2 *Constitutional Requirements*

There are two procedures under the Constitution through which the United States becomes a party to international agreements. Those procedures and the constitutional parameters of each are:

a. *Treaties*

International agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent are "treaties." The President, with the advice and consent of two-thirds of

the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations, so long as the agreement does not contravene the United States Constitution; and

b. *International Agreements Other Than Treaties*

International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are "international agreements other than treaties." (The term "executive agreement" is appropriately reserved for agreements made solely on the basis of the constitutional authority of the President.) There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one or more of these constitutional bases:

(1) *Agreements Pursuant to Treaty*

The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress;

(2) *Agreements Pursuant to Legislation*

The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

(3) *Agreements Pursuant to the Constitutional Authority of the President*

The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

(a) The President's authority as Chief Executive to represent the nation in foreign affairs;

(b) The President's authority to receive ambassadors and other public ministers;

(c) The President's authority as "Commander-in-Chief"; and

(d) The President's authority to "take care that the laws be faithfully executed."

721.3 *Considerations for Selecting Among Constitutionally Authorized Procedures*

In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors along with those in section 721.2:

a. The extent to which the agreement involves commitments or risks affecting the nation as a whole; **

**b. Whether the agreement is intended to affect State laws;

c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

d. Past United States practice with respect to similar agreements;

e. The preference of the Congress with respect to a particular type of agreement;

f. The degree of formality desired for an agreement;

g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

h. The general international practice with respect to similar agreements.

In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President.

721.4 *Questions as to Type of Agreement To Be Used; Consultation With Congress*

a. All legal memorandums accompanying Circular 175 requests (see section 722.3e) will discuss thoroughly the bases for the type of agreement recommended.

b. When there is any question whether an international agreement should be concluded as a treaty or as an international agreement other than a treaty, the matter is brought to the attention of the Legal Adviser of the Department. If the Legal Adviser considers the question to be a serious one that may warrant congressional consultation, a memorandum will be transmitted to the Assistant Secretary for Congressional Relations and other officers concerned. Upon receiving their views on the subject, the Legal Adviser shall, if the matter has not been resolved, transmit a memorandum thereon to the Secretary for his decision. Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last-minute consideration.

c. Consultations on such questions will be held with congressional leaders and committees as may be appropriate. Arrangements for such consultations shall be made by the Assistant Secretary for Congressional Relations and shall be held with the assistance of the Office of the Legal Adviser and such other offices as may be determined. Nothing in this section shall be taken as derogating from the requirement of appropriate consultations with the Congress in accordance with section 723.1e in connection with the initiation of, and developments during, negotiations for international agreements, particularly where the agreements are of special interest to the Congress. **

*722 Action Required in Negotiation and/or Signature of Treaties and Agreements

722.1 *Authorization Required to Undertake Negotiations*

Negotiations of treaties, or other international agreements on matters of substance, or for their extensions or revision are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government, until authorized in writing by the Secretary or an officer specifically authorized by him for that purpose. Notification of termination of any treaty or other international agreement on matters of substance requires similar authorization *

722.2 *Scope of Authorization*

Approval of a request for authorization to negotiate a treaty or other international agreement does not constitute advance approval of the text nor authorization to agree upon a date for signature or to sign the treaty or agreement. Authorization to agree upon a given date for, and to proceed with, signature must be specifically requested in writing as provided in section 722.3. This applies to treaties and other agreements to be signed abroad as well as those to be signed at Washington. Special instructions may be required, because of the special circumstances involved, with the respect to multilateral conventions or agreements to be signed at international conferences.

*722.3 *Request for Authorization to Negotiate and/or Sign; Action Memorandum*

a. A request for authorization to negotiate and/or sign a treaty or other international agreement takes the form of an action memorandum addressed to the Secretary and cleared with the Office of the Legal Adviser, the Office of the Assistant Secretary for Congressional Relations, other appropriate bureaus, and any other agency (such as Defense, Commerce, etc.) which has primary responsibility or a substantial interest in the subject matter. It is submitted through the Executive Secretariat.

b. The action memorandum may request one of the following: (1) authority to negotiate, (2) authority to sign, or (3) authority to negotiate and sign. The request in each instance states that any substantive changes in the draft text will be cleared with the Office of the Legal Adviser and other specified regional and/or functional bureaus before definitive agreement is reached. Drafting offices consult closely with the Office of the Legal Adviser to insure that all legal requirements are met.

c. The action memorandum indicates what arrangements are planned with respect to (1) congressional consultation, and (2) opportunity for public comment on the treaty or agreement being negotiated, signed, or acceded to.

d. Where it appears that there may be obstacles to the immediate public disclosure of the text upon its entry into force, the action memorandum shall include an explanation thereof (see sections 722.2 and 723.3).

e. The action memorandum is accompanied by (1) the draft, if available, of any agreement or other instrument intended to be negotiated, (2) the text of any agreement and related exchange of notes, agreed minutes or other document to be signed, and (3) a memorandum of law prepared in the Office of the Legal Adviser. *

722.4 *Separate Authorizations*

*When authorization is sought with respect to a particular treaty or other agreement, either multilateral or bilateral, the action memorandum for this purpose outlines briefly and clearly the principal features of the proposed treaty or other agreement, indicates any special problems which may be encountered, and, if possible, the contemplated solutions of those problems. *

722.5 *Blanket Authorizations*

*In general, blanket authorizations are appropriate *only* in those instances where, in carrying out or giving effect to provisions of law or policy decisions, a series of agreements of the same general type is contemplated; that is, a number of agreements to be negotiated according to a more or less standard formula (for example, Public Law 480 Agricultural Commodities Agreements; Educational Exchanges Agreements; Investment Guaranty Agreements; Weather Station Agreements, etc.) or a number of treaties to be negotiated according to a more or less standard formula (for example, consular conventions, extradition treaties, etc.). Each request for blanket authorization shall specify the office or officers to whom the authority is to be delegated. The basic precepts under section 722.3 and 722.4 apply equally to requests for blanket authorizations. *

722.6 *Certificate on Foreign-Language Text*

a. Before any treaty or other agreement containing a foreign-language text is laid before the Secretary (or any person authorized by the Secretary) for signature, either in the Department or at a post, a signed memorandum must be obtained from a responsible language officer of the Department certifying that the foreign-language text and the English-language text are in conformity with each other and that both texts have the same meaning in all substantive respects. A similar certification must be obtained for exchanges of notes that set forth the term of an agreement in two languages.

b. In exceptional circumstances the Department can authorize the certification to be made at a post.

722.7 *Transmission of Texts to the Secretary*

The texts of treaties and other international agreements must be completed and approved in writing by all responsible officers concerned sufficiently in advance to give the Secretary, or the person to whom authority to approve the text had been delegated, adequate time before the date of signing to examine the text and dispose of any questions that arise. Posts must transmit the texts to the Department as expeditiously as feasible to assure adequate time for such consideration. Except as otherwise specifically authorized by the Secretary, a complete text of a treaty or other international agreement must be delivered to the Secretary, or other person authorized to approve the text, before any such text is agreed upon as final or any date is agreed upon for its signature.

723 Responsibility of Office or Officer Conducting Negotiations

723.1 *Conduct of Negotiations*

*The office or officer responsible for any negotiations keeps in mind:

a. That during the negotiations no position is communicated to a foreign government or to an international organization as a U.S. position that goes beyond any existing authorization or instructions;

b. That no proposal is made or position is agreed to beyond the original authorization without appropriate clearance (see section 722.3a);

c. That all significant policy-determining memorandums and instructions to the field on the subject of the negotiations have appropriate clearance (see section 722.3a);

d. That the Secretary is kept informed in writing of important policy decisions and developments, including any particularly significant departures from substantially standard drafts that have been evolved;

e. That with the advice and assistance of the Assistant Secretary for Congressional Relations, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement. Where the proposal for any especially important treaty or other international agreement is contemplated, the Office of the Assistant Secretary for Congressional Relations will be informed as early as possible by the office responsible for the subject;*

f. That the interest of the public be taken into account and, where in the opinion of the Secretary of State or his designee the circumstances permit, the public be given an opportunity to comment;

**g. That in no case, after accord has been reached on the substance and wording of the texts to be signed, do the negotiators sign an agreement or exchange notes constituting an agreement until a request under section 722.3 for authorization to sign has been approved and, if at a post abroad, until finally instructed by the Department to do so as stated in section 730.3. If an agreement is to be signed in two languages, each language text must be cleared in full with the Language Services Division or, if at a post abroad, with the Department before signature, as stated in section 722.6;

h. That due consideration is given also to the provisions of sections 723.2 through 723.9, 730.3, and 731 of this chapter; and **

*i. That, in any case where any other department or agency is to play a primary or significant role or has a major interest in negotiation of an international agreement, the appropriate official or officials in such department or agency are informed of the provisions of this subchapter. *

723.2 Avoiding Obstacles to Publication and Registration

The necessity of avoiding any commitment incompatible with the law requiring publication (1 U.S.C. 112a) and with the treaty provisions requiring registration (see section 750.3-3) should be borne in mind by U.S. negotiators. Although negotiations may be conducted on a confidential basis, * every practicable effort must be made to assure that * any definitive agreement or commitment entered into will be devoid of any aspect which would prevent the publication and registration of the agreement.

723.3 *Questions on Immediate Public Disclosure*

In any instance where it appears to the * officer or office in the Department responsible for the negotiations or to the * U.S. representatives that the immediate public disclosure upon its entry into force of an agreement under negotiation would be prejudicial to the national security of the United States, the pertinent circumstances shall be reported to the Secretary of State and his decision awaited before any further action is taken. Where such circumstances are known before authorization to negotiate or to sign is requested, they shall be included in the request for authorization. All such reports and requests are to be cleared with the Office of the Legal Adviser.

723.4 *Public Statements*

*No public statement is to be made indicating that agreement on a text has been reached, or that negotiations have been successfully completed, before authorization is granted to sign the treaty or other agreement. If such authorization has been granted subject to a condition that no substantive change in the proposed text is made without appropriate clearance (see section 722.3a). No such public statement is to be made until definitive agreement on the text has been reached and such clearance has been received. Normally, such a public statement is made only at the time a treaty or other agreement is actually signed, inasmuch as it remains possible that last-minute changes will be made in the text. Any such statement prior to that time must have the appropriate clearance, and the approval of the Secretary or the Department principal who originally approved the action memorandum request under "Circular 175 Procedure." *

723.5 *English-Language Text*

Negotiators will assure that every bilateral treaty or other international agreement to be signed for the United States contains an English-language text. If the language of the other country concerned is one other than English the text is done in English and, if desired by the other country, in the language of that country. A U.S. note that con-

stitutes part of an international agreement effected by exchange of notes is always in the English language. * If it quotes in full a foreign office note, the quotation is to be rendered in English translation. A U.S. note is not in any language in addition to English, unless specifically authorized. * The note of the other government concerned may be in whatever language that government desires.

723.6 * *Transmission of Signed Texts to Assistant Legal Adviser for Treaty Affairs* *

a. The officer responsible for the negotiation of a treaty or other agreement at any post is responsible for insuring the most expeditious transmission of the signed original text, together with all accompanying papers such as agreed minutes, exchanges of notes, plans, etc., to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs: *Provided,* That where originals are not available accurate certified copies are obtained and transmitted as in the case of the original. * (See sections 723.7, 723.8, and 723.9.) The transmittal is by airgram, *not* by transmittal slip or operations memorandum. *

b. Any officer in the Department having possession of or receiving from any source a signed original or certified copy of a treaty or agreement or of a note or other document constituting a part of a treaty or agreement must forward such documents immediately to the Assistant Legal Adviser for Treaty Affairs.

723.7 *Transmission of Certified Copies to the Department*

When an exchange of diplomatic notes between the mission and a foreign government constitutes an agreement or has the effect of extending, modifying, or terminating an agreement to which the United States is a party, a properly certified copy of the note from the mission to the foreign government, and the signed original of the note from the foreign government,are sent, as soon as practiable, to the Department for the attention of the Assistant Legal Adviser for Treaty Affairs. *The transmittal is by airgram, *not* by transmittal slip or operations memorandum. *

Likewise, if, in addition to the treaty or other agreement signed, notes related thereto are exchanged (either at the same time, beforehand, or thereafter), a properly certified copy (copies) of the note(s) from the mission to the foreign government are transmitted with the signed original(s) of the note(s) from the foreign government.

In each instance, the mission retains for its files certified copies of the note exchanged. The U.S. note is prepared in accordance with the rules prescribed in the Correspondence Handbook. The note of the foreign government is prepared in accordance with the style of the foreign office and usually in the language of that country. Whenever practicable, arrangements are made for the notes to bear the same date.

723.8 *Certification of Copies*

If a copy of a note is a part of an international agreement, such copy is certified by a duly commissioned and qualified Foreign Service officer either (a) by a certification on the document itself, or (b) by a separate certification attached to the document. A certification on the document itself is placed at the end of the document. It indicates, either typed or rubber stamped, that the document is a true copy of the original signed (or initialed) by (*insert full name of signing officer*), and it is signed by the certifying officer. If a certification is typed on a separate sheet of paper, it briefly describes the document certified and states that it is a true copy of the original signed (or initialed) by (*full name*) and it is signed by the certifying officer. The certification may be stapled to the copy of the note.

723.9 *Preparation of Copies for Certification*

For purposes of accuracy of the Department's records and publication and registration, a certified copy must be an exact copy of the signed original. It must be made either by typewriter (ribbon or carbon copy) or by facsimile reproduction on white durable paper (not by the duplimat method) and must be *clearly legible.* In the case of notes, the copy shows the letterhead, the date and, if signed, an indication of the signature or, if merely initialed, the initials which appear on the original. It is suggested that, in the case of a note from the mission to the foreign government, the copy for certification and transmission to the Department be made at the same time the original is prepared. If the copy is made at the same time, the certificate prescribed in section 723.8 may state that the document is a true and correct copy of the signed original. If it is not possible to make a copy at the same time the original is prepared, the certificate indicates that the document is a true and correct copy of the copy on file in the mission. The word "(Copy)" is not placed on the document which is being certified; the word "(Signed)" is not placed before the indication of signatures. Moreover, a reference to the transmitting airgram, such as "Enclosure 1 to Airgram No. 18 (etc.)," is not placed on the certified document. The identification of such a document as an enclosure to an airgram may be typed on a separate slip of paper and attached to the document, but in such a manner that it may be easily removed without defacing the document.

**724 Transmission of International Agreements Other Than Treaties to Congress; Compliance With Public Law 92-403

All officers will be especially diligent in cooperating to assure compliance with Public Law 92-403 "An Act To require that international agreements other than treaties, hereafter entered into by the United States, be transmitted to the Congress within sixty days after the execution thereof." That Act, approved August 22, 1972 (86 Stat. 619; 1 U.S.C. 112b), provides as follows:

"The Secretary of State shall transmit to the Congress the text of any international agreement other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President." **

**725 Publication of Treaties and Other International Agreements of the United States

The attention of all officers is directed to the requirements of the Act of September 23, 1950 (64 Stat. 979; 1 U.S.C. 112a), which provides as follows:

"The Secretary of State shall cause to be compiled, edited, indexed, and published, beginning as of January 1, 1950, a compilation entitled 'United States Treaties and Other International Agreements,' which shall contain all treaties to which the United States is a party that have been proclaimed during each calendar year, and all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other final formality has been executed, during each calendar year. The said United States Treaties and Other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States." **

b. Initially, it must be emphasized that the continuous debate regarding the legitimacy of certain executive agreements does not center around the issue of the international authority of executive agreements, as opposed to treaties. Under international law, treaties and executive agreements are viewed as interchangeable and are generally considered to be equally binding. The debatable issue concerns itself with the constitutional authority of the President, the President and Senate, and the President and Congress to enter into international agreements other than treaties in a manner not specifically spoken to in the Constitution.

8-21. Constitutional Authority. *a.* General. Article II, Section 2, of the Constitution provides the President with the authority to enter into treaties by and with the advice

and consent of two-thirds of the Senate. Thus, this specific Executive-Senate procedure can be affected to conclude any international agreement concerning subject matter within the treaty-making power, which is admittedly a power difficult to define in precise terms. The records of the Constitutional Convention clearly demonstrate that this "treaty power" is jointly entrusted to the President and the Senate. There is, however, nothing in this record that stipulates what is meant by a "treaty" or that forecloses alternative Constitutional procedure for concluding international agreements. The Supreme Court has, in fact, consistently upheld the validity of international agreements other than treaties. [95] Thus, the key question is not *whether* the President, or the President and Congress, may constitutionally enter into Executive agreements with other states, but what the *scope* of this executive agreement-making power is.

b. The scope of this power is generally defined by means of a "subject matter test." Under this particular approach, the extent of both Presidential and Congressional authority to conclude an Executive agreement is dependent upon the constitutional authority of the President and Congress to deal with the subject matter of the specific agreement in question. For example, an executive agreement concluded solely on Presidential authority, i.e., a Presidential agreement, [96] must be based on the President's power as Chief Executive of the Nation; Commander-in-Chief of the Army, Navy, and Air Force; the diplomatic representatives of the state; or some other general Presidential power.

As a result of determining the scope of the Presidential or the Presidential-Congressional authority to enter into Executive agreements by means of the "subject matter test," three distinct categories of Executive agreements may be identified:

(1) *Executive Agreement Pursuant to a Treaty*—An Executive agreement expressly or impliedly authorized by a valid treaty.

(2) *Congressional-Executive Agreement*—An Executive agreement expressly or impliedly authorized by prior legislation or subsequently approved on any subject within Congressional legislative competence and genuinely a concern of foreign relations.

(3) *Presidential Agreement*—An Executive agreement concluded solely on the basis of Presidential authority, on any subject within his independent authority and genuinely a concern of foreign relations.

c. It is at once apparent that some Executive agreements may be entered into by several of the methods mentioned above and that such agreements can be constitutionally supported as valid and binding. The President thus has a choice with regard to the method by which he concludes an Executive agreement. Several of the factors influencing the President's choice of methodology would of course be the political considerations involved, the necessity for Congressional participation in the form of implementing legislation, appropriations, and the degree of formality desired. It is important to note that there are, in fact, various constitutional modes for concluding Executive agreements and that the Presidential Agreement is only one example. The vast majority of Executive agreements are concluded either pursuant to a treaty or are authorized by prior or subsequent legislation. [97]

d. Executive agreements concerning military matters are based at least in part on the President's power as Commander-in-Chief of the Armed Forces. [98] This includes not only purely military agreements, such as practical arrangements for cooperation with other nations in defense matters, but also, for example, agreements on condition of armistice, including the administration of occupied territory pending conclusion of a peace treaty. [99]

e. The President's authority to conclude Executive agreements may also derive from his treaty powers. Although treaties can be made only by and with the advice and consent of the Senate, it is the President alone who negotiates, [100] and the process of negotiation may include the conclusion of protocols which represent stages in those negotiations, or a *modus vivendi* in limited terms designed to serve as a temporary measure pending the conclusion of a treaty. [101] The power to "receive Ambassadors and other public Ministers" has also served as a partial basis for Executive agreements incident to the recognition of foreign governments, including such matters as the settlement of foreign claims. [102] Moreover, the provision empowering the President to "take Care that the Laws be faithfully executed" provides a basis for agreements designed to implement certain provisions of the Constitution, statutes, and treaties, as well as other international

95. *See* U.S. v. Belmont, 301 U.S. 324 (1937), and U.S. v. Pink, 315 U.S. 203 (1942). These cases also stand for the proposition that even Presidential agreements (which are one of three forms of Executive agreements) are controlling law when concluded within an area of Presidential authority. The various forms of Executive agreements are discussed at p. 8-11, *supra.*

96. As noted above, the "Presidential agreement" is one of three forms of Executive agreements.

97. *See Bishop, supra,* note 16 at 110-120.

98. See Opinion of the Attorney General regarding the Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, *30 Op. Atty. Gen.* 484, 486 (1940); Borchard, *Treaties and Executive Agreements—A Reply,* 54 *YALE L. J.* 616, 649 (1945).

99. McDougal and Lans, *Treaties and Congressional—Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 *Yale L. J.* 246-47 (1945).

100. U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

101. *Corwin, The Constitution of the United States of America, Analysis and Interpretation,* S. Doc. 170, 82d Cong., 1st sess., 433 (1952), *repeated in* 1964 ed., S. Doc. 39, 88th Cong., 1st sess., 485 (1964) (hereinafter cited as *Corwin*).

102. U.S. v. Belmont, 301 U.S. 324 (1937); U.S. v. Pink, 315 U.S. 203 (1942); McDougal and Lans, *supra,* note 99 at 247-48.

obligations of the United States. [103]

f. More generally, and under the authority of the Executive power clause, the President acts as "the sole organ of the nation in its external relations and its sole representative with foreign nations." [104] This role is not insignificant in nature, as the normal conduct of foreign relations continually requires the conclusion of agreements of various sorts to settle differences with other governments or regulate matters of mutual concern, thus insuring the satisfactory continuation of diplomatic relations. [105]

g. With respect to agreements concerning military matters, such as those under which rights are acquired to use defense-related facilities abroad, the agreement-making authority of the President flows at least in part from his powers as Commander-in-Chief. [106] At the same time, however, Congress also has extensive powers in the defense area. In particular, under Article I, Section 8, of the Constitution, the Congress is given the explicit powers:

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Capture on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;

In addition, of course, Congress has the general power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or offices thereof.

Agreements relating to military and defense matters thus involve a broad area of responsibility in which certain constitutional powers are shared between the Chief Executive and Congress. This results in a rather complex legal situation in which the lines of constitutional authority are somewhat unclear. Congress undoubtedly has the constitutional authority to legislate on any subject which is a genuine concern of foreign affairs and which is not specifically granted to the President. Thus, this means Congress can terminate a prior delegation of Congressional authority to the President to conclude Executive agreements and can also terminate either treaties or Executive agreements by enacting subsequent inconsistent legislation. [107] Finally, Congress is always in a position to substantially effect executive agreements through the appropriation process. As has been noted, however, the "separation of power" doctrine prevents Congressional encroachment upon any powers exclusively reserved to the President.

8-22. Modern Developments. *a.* In 1972, as a result of the heightened controversy surrounding the precise constitutional authority of the President and Congress concerning Executive agreements, Congress passed the Case Act. [108] Under this Act, the Secretary of State is required to transmit to the Congress the text of any international agreement other than a treaty, to which the United States has become a party, no later than 60 days after its entry into force. As of May, 1975, the Department of State had transmitted the texts of 657 Executive agreements to the Congress. Although not required by law to do so, the Department of State had also transmitted with each agreement a background statement setting forth in some detail the context of the agreement, its purpose, negotiating history, and effect. [109]

b. The Case Act makes special provision for the transmittal of agreements ". . . the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States. . . ." These agreements are transmitted to the Senate Committee on Foreign Relations and the House Committee on International Relations under ". . . an appropriate injunction of secrecy to be removed only upon due notice from the President." As of May, 1975, the Executive branch had entered into and the Department of State had transmitted to the Congress 29 agreements under this category. [110]

c. A second recent development of major importance in the area of executive agreements has been the revision of the Department of State's circular 175 procedure. [111] This revised procedure has two objectives: (1) to meet requests by members of the Senate Committee on Foreign Relations for clarification of the guidelines to be considered in determining whether a particular international agreement should be concluded as a treaty or as another form of an international agreement; and (2) to strengthen provisions on consultation with the Congress. With respect to the consultation provisions, Section 723.1(a) of the Circular 175 procedure now requires those responsible for negotiating significant new international agreements to advise appropriate congressional leaders and committees of the President's intention to negotiate such agreements, to consult during the course of any negotiations, and to keep Congress informed of developments affecting them, including whether any legislation is considered necessary or desirable for the implementation of

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103. 1 *Op. Atty. Gen.* 566, 570-71 (1822); McDougal and Lans, *supra,* note 99 at 248; *Corwin, supra,* note 101, 1952 ed. at 441-45, 1964 ed. at 492-97.

104. U.S. v. Curtiss-Wright Export Corp., *supra,* note 100 at 319.

105. McDougal and Lans, *supra,* note 99 at 247-252; *CORWIN, supra,* note 101, 1952 ed. at 433, 1964 ed. at 484-85.

106. *See* 39 *Op. Atty. Gen.* 484, 486 (1940).

107. This action might well run afoul of international law, of course, especially in the areas of treaty obligations and state responsibility.

108. 1 U.S.C.A. 1126.

109. Testimony of Monroe Leigh, Legal Adviser of the Department of State before the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary, 13 May 1975, *reprinted in 69 Am. J. Int'l L.* 865 (1975).

110. *Id.*

111. This procedure is outlined on p. 8-12, *supra.*

the new treaty or agreement. The procedure also requires consultation with the Congress when there is a question whether an agreement should be concluded as a treaty or in some other form. Efforts at further clarification of executive and congressional powers regarding Executive agreements continue. The Department of Defense established procedures to implement the Case Act as it applies to organizations within and personnel of that Department in a directive dated 3 November 1976. [112]

8-23. "Self-Executing" Agreements. *a.* General. Whether a given treaty is "self-executing" or requires special implementing legislation in order to give force and effect to its provisions, through the aid of the courts, presents primarily a domestic question of construction for the courts. It is difficult, however, to extract any clear principle for judicial guidance from the cases discussing this subject. A careful study of the decisions dealing with this problem indicates certain recurring factors which have been considered by the courts to be controlling.

(1) Where a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting states, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing, and subsequent legislation must be enacted before such a treaty is enforceable by the courts. Inasmuch as treaties calling for expenditure of funds are ineffective without an accompanying appropriation, they are uniformly considered to not be self-executing. On the other hand, where a treaty is full and complete, it is generally considered to be self-executing by the courts, especially when the treaty is concerned with granting equal treatment to aliens in the field of commerce and trade between the signatory powers to such treaties. [113]

(2) Restatement, Second, in reference to self-executing agreements, provides:

(1) Whether an international agreement of the United States is or is not self-executing is finally determined as a matter of interpretation by courts in the United States if the issue arises in litigation.

(2) When an international agreement to which the United States is a party manifests an intention that its provisions shall be effective under the domestic law of the parties at the time it comes into effect, the agreement is normally interpreted by the courts as self-executing under the law of the United States subject to the constitutional limitations indicated in § 141(3). [114]

b. If difficulties are expected in the process of implementing the provisions of an international agreement, the executive of a state may take certain precautions in order to avoid international responsibility for defaulting on the obligations imposed by the agreement. For example, Section 34 of the Convention of the Privileges and Immunities of the United Nations [115] provides: "It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention." Even more protective in nature, section 15 of the Tracking Stations Agreement between the United States and Spain [116] states: "It is understood that, to the extent the implementation of this agreement will depend on funds appropriated by the Congress of the United States, it is subject to the availability of such funds."

8-24. Conflict of Agreement with Internal Law.

WHITNEY v. ROBERTSON
Supreme Court of the United States, 1888
124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386

[Plaintiff sued to recover amounts paid under protest to the Collector of Customs at New York in satisfaction of duties assessed upon plaintiff's shipments of sugar from the Dominican Republic. Plaintiff alleged that sugar from the Hawaiian Islands was admitted free of duty into the United States, and claimed that a clause of the treaty between the United States and the Dominican Republic guaranteed that no higher duty would be assessed upon goods imported into the United States from the Dominican Republic than was assessed upon goods imported from any other foreign country. Judgment was entered for the Collector of Customs upon the latter's demurrer, and plaintiff appealed. The Supreme Court, in an opinion by Mr. Justice Field, just held that the treaty could not be interpreted to foreclose the extension by the United States of special privileges to countries such as the Hawaiian Islands which were willing in return to extend special privileges to the United States.]

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act of Congress under which the duties were collected, authorized their extraction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provision, so far as they bind the United States, or supersede them altogether. By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our

112. DOD Directive 5530.3, *International Agreements* (3 Nov 1976).

113. Aerovias Interamericanas de Panama, S.A. v. Board of County Commissioners of Dade County, Florida, 197 F. Supp. 230 (1961).

114. *Restatement, Second,* § 154.

115. 1 U.N.T.S. 15 (1946).

116. 15 U.S.T. 153, 511 U.N.T.S. 61 (1964).

country was justified in its legislation, are not matters for judicial cognizance. . . .

Judgment affirmed.

In a Memorandum prepared for President Harding, Secretary of State Charles Evan Hughes stated, "Congress [by passing inconsistent legislation] has the power to violate treaties, but if they are violated, the nation will be none the less exposed to all the international consequences of such a violation because the action is taken by the legislative branch of the Government." [117] Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the courts have held that the one later in point of time must prevail. While this is necessarily true as a matter of municipal law, it does not follow that a treaty is repealed or abrogated by a later inconsistent statute. The treaty continues to subsist as an international obligation, even though it may not be enforceable by the courts or administrative authorities. [118] However, a treaty will not be deemed to have been abrogated or modified by a later statute unless such a purpose on the part of Congress has been clearly expressed. [119]

8-25. Effect of International Agreements for States Not Parties. *a.* The customary rule of international law expressed in the maxim *pacta treatiis nec nocent nec prosunt* has been codified by Article 34 of the Vienna Convention, which provides that "a treaty does not create either obligations or rights for a third party." This rule must admit of exceptions, however, as there are situations in which states not parties to an agreement consent to be bound by it, or are intended by the parties to derive benefits from the agreement. Articles 34 and 35 of the Convention apply to these two situations. Article 35 provides that an obligation arises for a third state if the parties to a treaty intend for its provisions to establish an obligation for a third state and this state expressly accepts such obligation in writing. Thus, the juridical basis of the third state's obligation is not the treaty but the collateral agreement by which it has accepted the obligation. Article 36 deals with the converse situation of rights in a third party derived from a treaty. It provides that a right arises if parties to an agreement to accord certain rights to a third state and the third state assents thereto. The third state's assent is presumed unless the contrary is indicated or the treaty provides otherwise. However, a third state exercising such a derived right must comply with the conditions provided in the treaty for its exercise.

b. Article 37 of the Convention concerns revocation or modification of obligations or rights of third states. An obligation may be revoked or modified only with the consent of the parties to the treaty and the third state, unless otherwise agreed. Moreover, a right may not be revoked or modified by the parties if it was intended not to be revoked or modified without the consent of the third state. Also, Article 38 provides that ". . . [n]othing in Article 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such." This article was adopted despite differences of opinion as to the source of the binding force of rules in a treaty on third parties. [120]

c. An example of rights conferred on third parties recognized by custom is the right of free passage through interoceanic canals. One writer has noted that: "[T]he privilege of free passage through the three major interoceanic canals—Suez, Panama, and Kiel—has been created in each case by a treaty to which the territorial sovereign, acting freely or under the pressure of other powers, has been a party." [121] The right of third parties in such situation has been analogized to the doctrine of "international servitudes" and "third-party beneficiary" concepts drawn from municipal law. [122] Baxter argues that "the preferable theory concerning the rights of nonsignatories is that a state may, in whole or in part, dedicate a waterway to international use, which dedication, if relied upon, creates legally enforceable rights in favor of the shipping of the international community." [123]

The U.N. Charter raises a special situation as to the binding force of multiparty constitutive agreements on nonmember states. Article 2, paragraph 6, of the Charter requires that the U.N. ensure that nonmember states act in conformity with the principles of the Charter in order to further international peace and security. Thus, it is arguable that, as a condition precedent to international dealings, states now run the risk that their actions will not escape the sanction of the U.N., [124] and that Article 2, paragraph 6, as evidence of a trend to create in the Charter a law affecting both members and nonmembers. [125] The I.C.J.'s reasoning in its Advisory Opinion Concerning Reparations for Injuries in the Service of the United Nations reflects this tendency, referring to the purposes of and large number of signatories to the U.N. Charter, in deciding that a claim could be pressed by the U.N. against a nonmember. [126] The Antarctic Treaty of December 1, 1959, [127] is a further example of an attempt by signatories to influence the behavior of nonsignatories, stating: "Each of the contracting parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in

117. 5 *G. Hackworth, supra* note 14 at 324-25.

118. *Id.* at 185-86. See also, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 20 L.Ed. 227 (1871).

119. Cook v. United States, 288 U.S. 102, 120, 53 S.Ct. 305, 311, 77 L.Ed. 641 (1933).

120. *Sinclair, supra* note 66 at 8-10.

121. *R. Baxter, The Law of International Waterways 168-69* (1964) (hereinafter cited as Baxter).

122. *See Friedmann, supra,* note 23 at 600.

123. *Baxter, supra,* note 121 at 182.

124. *See McNair, The Law of Treaties 268-71* (1961).

125. *See Falk, The Authority of the United Nations to Control Non-Members,* 19 *Rutgers L. Rev.* 591 (1966).

126. Advisory Opinion Concerning Reparations for Injuries in the Service of the United Nations [1949] I.C.J. 174.

127. 12 U.S.T. 794, 402 U.N.T.S. 71.

Antarctica contrary to the principles or purposes of the present treaty."

8-26. Retroactive and Successive Treaties. When a treaty is signed, there is often a question as to whether it applies retroactively or to successive treaties on the same subject matter. Article 28 of the Vienna Convention provides that, unless a different intention appears from the treaty or elsewhere, an agreement is not retroactive, that is ". . . its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty." As regards successive treaties, Article 30 provides that a treaty may specify either that it is subject to or that it is not to be considered as incompatible with an earlier or a later treaty. However, if the earlier treaty does not specify the above and is not terminated or suspended, it then applies ". . . only to the extent that its provisions are compatible with those of the later treaty . . ." when the parties to the agreement are the same. When the signatories are different, the earlier treaty applies as between states which are parties to both, to the extent this agreement is compatible with the later treaty. However, as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both are parties governs.

8-27. General Rule of Interpretation. Article 31 of the Vienna Convention establishes the rule that ". . . [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The meaning of "context" for the purposes of this rule includes the text, its preamble and annexes, as well as:

(1) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, and

(2) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 31 further provides that in addition to the context of the agreement, the following should be taken into account for purposes of interpretation:

(1) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(2) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and

(3) Any relevant rules of international law applicable in the relations between the parties.

8-28. Supplementary Means of Interpretation. *a.* Article 32 of the Convention permits recourse to "supplementary means of interpretation in order to confirm the meaning resulting from the application of the general rule of interpretation articulated in article 31." These supplementary means may also be utilized when the interpretation accorded an agreement under the general rule results in an ambiguous or obscure meaning, or leads to a result which is manifestly absurd or unreasonable. Such means of interpretation include "the preparatory work of the treaty and the circumstances of its conclusion."

b. There was considerable debate at the conference drafting the Vienna Convention over the propriety of recourse to materials concerning the preparatory work of the treaty, the *travaux préparatoires.* [128] A literal reading of the text, in referring to such materials a "supplementary means of interpretation," gives the indication that they are limited to a minor role. However, under customary international law, drafting history is not subordinated to textual analysis. One authority maintains that reference to the preparatory work as a supplemental interpretative means was not intended to place such works in a subordinate status and that ". . . discriminating recourse to *travaux préparatoires* in order to throw illumination on the meaning of terms employed in the text of a treaty is permitted." [129]

8-29. Treaties Authenticated in Two or More Languages. Article 33 of the Convention provides that when a treaty has been authenticated in two or more languages, the text is equally authoritative in each unless the treaty provides, or the parties agree, that a particular text will prevail when conflicts occur. The terms of the treaty are presumed to have the same meaning in each authentic text. Thus, a version of agreement in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. When a comparison of the authentic texts discloses a difference of meaning which cannot be removed by applying the general rule and supplementary means of interpretation, the meaning which best reconciles the texts shall be adopted, with due regard given to the object and purpose of the treaty.

8-30. Summary. In closing this discussion of treaty interpretation, it is essential to note that, as in the municipal law of contracts, there are a variety of approaches to the interpretation of an international agreement. "Black letter" rules of construction are frequently inadequate to solve the variety of problems and situations which call for interpretations. However, the I.C.J., in rendering its decision in the *Second Admissions Case,* [130] reaffirmed the general rule of interpretation when it stated that ". . . [w]hen the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."

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128. Briggs, *The Travaux Préparatoires of the Vienna Convention on the Law of Treaties,* 65 *Am. J. Int'l L. 705, 709* (1971).

129. *Id.* at 712.

130. Second Admissions Case [1950] I.C.J. 8.

Section V. TERMINATION AND MODIFICATION OF INTERNATIONAL AGREEMENTS

8-31. Denunciation of or Withdrawal From a Treaty. *a.* General. The Vienna Convention states that a treaty may be terminated, a party may withdraw from it, or its operation in regard to a party may be suspended if this is provided for in the treaty or if all the parties consent to those terms. [131] Unless it so provides, a multilateral treaty will not be terminated automatically when the number of signatories to it falls below the number necessary for its entry into force. [132] Parties to a multilateral treaty may agree to suspend its operation, temporarily and as between themselves alone, if provided for by the treaty or if suspension is not prohibited by the treaty and does not affect the rights or obligations of other parties. However, a suspension of an agreement's operation must be compatible with its object and purpose. [133]

b. Despite the doctrine of *pacta sunt servanda,* under customary international law, states have been permitted to withdraw from certain types of treaties which contain no express provision regarding termination. Treaties of political alliance and commercial arrangements are generally regarded as agreements of this type. [134] Article 56 of the Convention states that a treaty containing no provision regarding termination is not subject to denunciation or withdrawal unless:

(1) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(2) A right of denunciation or withdrawal may be implied by the nature of the treaty.

A party must give not less than twelve months' notice of its intent to denounce or withdraw under these conditions.

8-32. Termination or Suspension of Treaty Due to Breach or Impossibility of Performance. *a.* Article 60 of the Convention provides that:

"... [a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

A material breach of a multilateral treaty by one of the parties permits:

(1) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either as between themselves and the defaulting state or between all the parties;

(2) A party specially affected by the breach to invoke it to suspend the operation of the treaty in whole or in part as between itself and the defaulting state;

(3) Any party other than the defaulting state to invoke the breach to suspend the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. [135]

b. The term "material breach" is defined as a repudiation of the treaty not sanctioned by the Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Because of concern that the right of unilateral denunciation due to breach would seriously undercut law-making treaties, a paragraph was added to Article 60 which provides that material breach by a party does not permit termination or suspension of provisions "... of an agreement relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties." [136]

Article 61 permits a party to terminate or withdraw from a treaty on the ground of impossibility of performance "... if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty." However, if the impossibility is temporary, it justifies only suspension of the operation of the treaty. If the impossibility is the result of a party's own breach of an obligation under the treaty or any other international obligation owed to another party to the agreement, the party may not invoke it as grounds for termination, withdrawal, or suspension.

8-33. Fundamental Change of Circumstance. *a. Rebus sic stantibus.* The doctrine of *rebus sic stantibus* (change of circumstances) fell into disrepute as a result of indiscriminate invocation by states prior to 1914 in order to escape from inconvenient treaty obligations. [137] Article 62 of the Vienna Convention states the doctrine in negative terms, holding that a fundamental change in circumstances not foreseen by the parties may *not* be invoked to terminate or withdraw from a treaty *unless:*

(1) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(2) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

b. Even if the exceptions stated in the above paragraph are met, a fundamental change in circumstances may not be invoked for terminating or withdrawing from a treaty if the agreement establishes a boundary or if the change is the result of a breach by the party invoking it either of an obligation under the treaty or of any international obligation owed to any other party to the agreement. [138]

131. Vienna Convention, Arts. 54 and 57.

132. *Id.* at Art. 55.

133. *Id.* at Art. 59.

134. *G. Fitzmaurice, Second Report on the Law of Treaties,* U.N. Doc. A/CN 4/107 (15 March 1967).

135. Vienna Convention, Art. 60(2).

136. *Id.* at Art. 60(5). Agreements of this nature would include the Hague Regulations and Geneva Conventions Regulating Armed Conflict.

137. *Sinclair, supra,* note 66 at 106.

138. For a thorough analysis of this concept, see *Friedmann, supra,* note 23 at 413-21.

8-34. War Between Contracting Parties. *a.* No international tribunal has had occasion to decide a case involving the question of the effect of war upon treaties, and national court decisions relating to the problem are concerned only with the effect of treaties as domestic law. It is thus difficult to draw any conclusions as to the present state of customary international law with respect to the problem under consideration. [139] An excerpt from *Karnuth v. United States,* [140] a leading case dealing with this subject, follows.

> The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." 5 Moore's Digest of International Law, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force; stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which "is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. Id., p. 383, quoting Calvo, Droit Int. (4th Ed.), IV.65 § 1931.

b. Some multilateral conventions provide for their effect in time of war. For example, Article 89 of the Convention on International Civil Aviation [141] specifies that: "In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or neutrals. . . ." Moreover, it is important to note that treaties which regulate the conduct of hostilities are not affected by the outbreak of war.

Section VI. STATE SUCCESSION

8-35. General Principles. *a.* The transfer of territory from one state to another creates numerous legal problems. These transfers, which may be thought of as a change in sovereignty or in international status, have occurred frequently in history, and their extent and consequences have often been drastic. Transfers of territory or change of sovereignty over territory, or change in international status, may come about in several ways, which fall into three main categories: (1) the attainment of independence by a territory or entity which was previously under the sovereignty, suzerainty, protectorate, mandate, trusteeship, or other form of legal control exercised by another state or states, or which was in a federal or other "real" union with other international entities; (2) the loss of statehood or independence through annexation by another entity, merger with another entity or entities, or coming under the protectorate of, or some other legal control by, one or more other states; and (3) the transfer of sovereignty or other form of legal control over an area from one state to another existing state through cession or unilateral annexation. Whatever the formal differences between these modes, the changes have one feature in common: one state ceases to rule in, or have legal control over, a territory, and another state assumes legal control. The essential issue in the "law of state succession" is to what extent the state replacing the former sovereign assumes the rights and duties of the former sovereign. Within each of the three main categories of change, the legal consequences of different types of change are not necessarily similar; for example, the establishment of a protectorate may have consequences different from those of annexation by another state.

b. Whatever form the change of sovereignty or legal control takes, it represents a disruption of continuity, and a body of law, known as the "law of state succession," has developed to determine the extent and consequences of this discontinuity. The use of the imprecise term "state succession" may appear to beg the question, that is, to what extent the state which acquires sovereignty or control over a specific territory becomes "heir" to the juridical consequences of the acts of its predecessor. The terms "successor" and "succession" designate the new sovereign and the process of acquiring sovereignty or legal control, and do not necessarily imply a juridical substitution of the "successor" state in all the rights and duties possessed by its predecessor. [142]

c. One dimension of the consequences of change of sovereignty is the extent to which sovereignty over territory is affected. If the legal identity of the territory is completely changed, as in the independence of a new state, the change is denominated "total" succession. If some aspects of legal control change hands, but international legal personality remains relatively unimpaired, as in the establishment of a protectorate, the process is called "partial" succession, because the degree to which the "protected" state surrenders legal control over its internal affairs, and its international relations, may vary, and as a consequence the extent to which the protecting state assumes legal responsibility for the consequences of acts prior to the establishment of the protectorate may vary. Similarly, when the protected state resumes full control over its internal and external affairs, the extent to which it

139. For a comparative study, see Rank, *Modern War and the Validity of Treaties,* 38 *Cornell L. Q.* 321, 511 (1953).

140. 279 U.S. 231 at 236 (1929).

141. 15 U.N.T.S. 295, 356.

142. See Jones, *State Succession in the Matter of Treaties,* [1947] *Brit. Y.B. I.L. 360.*

may or must succeed to international rights and obligations may vary with the degree of control it retained over these matters when it was a protectorate. [143]

d. Since World War II, state succession has most frequently taken place not in the context of annexation, cession, or federation, but in the context of independence or secession of former colonial territories. When the classical writers of international law dealt with the problem of the effects of change of sovereignty, they introduced the Roman law concept of succession after death. [144] This became known as the theory of "universal" succession, as it resulted in the view that the successor state inherited all the treaties, debts, and contracts of its predecessor. In the nineteenth and early twentieth centuries, many writers and governments reacted strongly against this approach, and arrived at the opposite conclusion: that new, or successor, states did not, as a matter of international law, inherit any of the rights or obligations of the predecessor state (with the possible exception of "dispositive" or "localized" treaties). [145] This became known as the "clean slate" theory. [146] Neither theory appears to accord with present state practice, nor does either, in its extreme form, result in a satisfactory solution of the problems arising from a change in international status. The practice of states in the matter of succession is inconsistent, and it is impossible to arrive at a general theory or set of rules applicable to all categories of legal relationships.

e. Although a "new" state generally succeeds to some international agreements, it is not charged with meeting all of the international obligations of the predecessor state unless it enters into a devolution agreement. Under this arrangement, the new state succeeds to all of the treaty obligations of the former. These agreements appear to have two purposes: (1) to relieve the former colonial power from the performance of treaty obligations in a territory to which it had previously applied the treaty, but over which it no longer exercises legal control, and (2) to bind the newly independent state to perform the obligations imposed by the treaties and to enable it to enjoy rights under treaties. [147]

Devolution agreements have had the effect of preventing undesirable discontinuities. However, new states have been increasingly reluctant of late to use this device, apparently because they fear they may commit themselves to abiding by agreements of which they might not have been aware, or which they do not fully understand.

f. Traditionally, a special category of treaties, usually denominated "dispositive" or "localized," was regarded as automatically binding on a new state. [148] A "dispositive" or "localized" treaty is one which imposes restrictions of a continuing and permanent character on the territory of a state, or which is by its character related to a specific territory, or applied to a specific territory. The categorization of these treaties has not been clearly defined. Illustrations often employed include boundary treaties and treaties creating "international servitude" such as transit rights, rights with request to rivers, customs, free zones, and demilitarized zones. The traditional view that automatic succession takes place with regard to "dispositive" or "localized" treaties is not completely borne out by recent practice. Treaties for military bases, for example, which were thought to fall within this category, have often been renegotiated. [149] Moreover, boundary treaties, which more clearly come within this classification, have not been uniformly inherited. [150]

g. Actual state practice with regard to succession to treaties since World War II has been neither consistent nor coherent. None of the traditional doctrines satisfactorily explains contemporary approaches toward state succession. At least two policies, however, seem to be paramount. First, most new states (with the exception of Israel, the Philippines, South Korea, Upper Volta, and Algeria) have not applied the "clean slate" doctrine in all its rigidity. They have sought to avoid the sudden, complete, and automatic discontinuity in treaty relations that would result from a total application of the doctrine. Second, most new states have not expressly rejected the "clean slate" doctrine and have not adhered to any other general rule, such as one of "universal" succession. They have tended, on the other hand, to adopt techniques which would give them the freedom to pick and choose the treaty rights and obligations they wish to retain. Most of the older states have refrained from attempting to coerce newer states into acceptance of any general doctrine and have accepted this "pick and choose" method of treaty succession.

8-36. Summary. As has been noted, international agreements are now the most important source of codified international jurisprudence. Military attorneys stationed overseas are responsible for providing legal advice in an environment almost completely controlled by agreements between the host and sending states. For these reasons, it is essential that the attorney possess a basic understanding of the particular norms which comprise "treaty law." The contents of this chapter should provide this degree of familiarity.

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143. *See,* e.g., Nationality Decrees in Tunis and Morocco [1923] P.C.I.J., ser. B, No. 4 at 30,; Rights of Nationals of the United States of America in Morocco, [1952] I.C.J. 176.

144. *See H. Lauterpacht, Private Law Sources and Analogies of International Law* 125 (1927).

145. These types of agreements are discussed in chap. 7, *supra.*

146. *See Keith, The Theory of State Succession* (1907).

147. *See* Lauterpacht, *State Succession and Agreements for the Inheritance of Treaties,* 7 *Int'l Comp. L.Q.* 524-30 (1958).

148. 2 O'Connell, *State Succession in Municipal Law and International Law* 231-72 (1967).

149. *See* Esgain, *Military Servitudes and the New Nations,* in *The New Nations in International Law and Diplomacy* 52-97 (O'Brien ed. 1963).

150. *International Law Association, The Effect of Independence on Treaties* 354-55, 361-62, 364-65, 371-73 (1965).

CHAPTER 9
INTERNATIONAL ORGANIZATIONS

Section I. THE UNITED NATIONS [1]

9-1. The Beginnings of the United Nations. The United Nations represents the second attempt on the part of the states of the world to organize themselves into a true community of states, wherein the security of each member would be safeguarded not by itself alone but by the whole community. The first attempt at such a goal was the League of Nations. With the start of World War II there was general agreement that the League experiment was a failure. However, such a realization did not amount to an abandonment of the idea of an international organization to ensure world security. The reverse was true. On 12 June 1941 Great Britain, Canada, Australia, New Zealand, the Union of South Africa, and a number of European governments-in-exile issued the *London Declaration*. The Declaration declared that:

The only true basis of enduring peace is the willing cooperation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security.

The theme was repeated a few months later in the *Atlantic Charter* of 14 August 1941. In it the United States and the United Kingdom stated:

Clause C. After the final destruction of Nazi tyranny, we hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.

There was nothing specific in either the *London Declaration* or the *Atlantic Charter* about the mechanics of preserving peace among the states following the end of the war. This was left to the *Moscow Declaration* of December 1943. In it China, the United States, United Kingdom and U.S.S.R. stated:

We recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

This was the first positive announcement of the intention to establish a new collective security organization after the war. It amounted to an abandonment of the League. At the time of the Moscow Declaration in 1943 the League was still in existence, though not functioning. The League, after the Moscow Declaration, had no part to play in the postwar world.

At *Dumbarton Oaks*, Washington DC, in 1944 the four signers of the Moscow Declaration met to draw up a detailed plan for the new organization. The first phase of the conference was between the representatives of the U.S.S.R., the United Kingdom, and the United States from August 21 to September 28, 1944. The second phase was between the representatives of China, the United Kingdom, and the United States from September 29 to October 7. This splitting of the conference served to respect U.S.S.R. neutrality in the war against Japan. On February 11, 1945 the conference made the following announcement:

We have agreed that a conference of United Nations should be called to meet at San Francisco in the United States on the twenty-fifth April 1945, to prepare the charter of such an organization, along the lines proposed in the informal conversations of Dumbarton Oaks.

Fifty nations answered the invitation of the Big Four to meet at San Francisco. These nations worked on the Dumbarton Oaks proposals from 25 April to 26 June 1945. From this conference came the *Charter of the United Nations* and the Statute of the new *International Court of Justice*. The United Nations Charter is a multilateral treaty. The United Nations organization created by the treaty is an international person, independent of its members, possessing sufficient international personality to enable it to fulfill its purposes. [2]

While the United Nations started out with fifty members, its membership has increased along with the increasing number of nations which make up the world community. During the 1976 fall session of the General Assembly, membership had expanded to 145 nations, and plans were made to build facilities for a future membership of 170 nations. The Charter has been amended two times. First, in 1963 Articles 23 and 27 were amended changing the size and membership of the Security Council. Then, in 1973 Article 61 was amended changing the size of the Economic and Social Council. Both changes were made in view of the expanding membership of the United Nations.

9-2. The Structure of the United Nations. The United Nations is divided into six organs:

1. The Secretariat
2. The Security Council

[1]. For information on the steps which led to the adoption of the United Nations Charter *see Everyman's United Nations*, 2-9 (7th ed. 1964), and Goodrich & Hambro, *Charter of the United Nations*, 3-84 (2d. ed. (1949)). The Text of The Charter may be found in DA Pamphlet 27-24, *Selected International Agreements*, Vol. II (Dec. 1976), pp. 3-1 to 3-21.

[2]. On the international personality of the United Nations Organization see the advisory opinion of the International Court of Justice on 11 April 1949, concerning Reparations for Injuries Suffered in the Service of the United Nations (1949) I.C.J. Rep. 174. The U.N. Organization is given personality for its activities *within* member states by virtue of articles 104 and 105 of the Charter.

3. The General Assembly
4. The Trusteeship Council
5. The Economic and Social Council
6. The International Court of Justice

a. The Secretariat. The Secretariat is composed of a Secretary General and such staff as is required for him to perform his functions. [3] He is appointed by the General Assembly upon the recommendation of the Security Council. [4] His term of office is not set out in the Charter, but is usually specified at the time of his appointment. To date the Secretary Generals have been serving for five-year periods, which may be renewed. He is the chief administrative officer of the United Nations. [5] He also performs such other functions as are entrusted to him by the Security Council, General Assembly, Trusteeship Council, and the Economic and Social Council. [6] The office has increased in importance since 1945, principally through the use of the Secretary General by the Security Council and General Assembly in its interventions in the Middle East and in the Congo.

b. The Security Council. The Security Council is composed of fifteen members, five of whom are permanent members. [7] The remaining ten are elected by a two-thirds vote of the General Assembly for a term of two years. [8] The five permanent members are the U.S.A., U.S.S.R., The People's Republic of China, France, and the United Kingdom. The Security Council has the primary responsibility for the maintenance of international peace. [9] Each of the five permanent members has a "veto power" over the actions of the Security Council because of the voting procedure. No action can be taken which is not procedural unless it is concurred in by seven members, five of whom must be permanent members. [10]

c. The General Assembly. The General Assembly consists of all the members of the United Nations. [11] Each has one vote. [12] It discusses almost all world problems that are called to its attention. In itself it does not have the power of action. Most of its resolutions are recommendations. Besides acting as a world forum, it also supervises the activity of the Economic and Social Council and the Trusteeship Council. [13] Together with the Security Council, it is responsible for the admission and the suspension of members. [14] Further important functions are the control of the purse strings of the United Nations, [15] and the election of members to positions on the other organs of the United Nations. [16]

d. The Trusteeship Council. Following the end of World War I, former German and Turkish colonies were turned into mandated territories under the general supervision of the League of Nations and under the direct administration of several of the victorious powers. These territories were classified as A, B, and C mandates depending on their degree of advancement toward self-government. By the time the United Nations was created the A and most of the B mandated territories had achieved their independence. The mandatory powers which administered the remainder were invited to turn them into trust territories under the supervision of the U.N. All have done so with the exception of the Union of South Africa in regard to Southwest Africa. The former German island possessions in the Pacific which Japan administered for the League after World War I were transferred to the administration of the United States. These islands are now held as a "strategic trust." [17] Such a trust differs from other trust territories in that it is supervised by the Security Council rather than by the General Assembly and the Trusteeship Council. [18]

The Trusteeship Council is the organ of the U.N. which supervises the administration of the trust territories. The council is composed of three different groups, (1) those members of the U.N. who administer territories, (2) those five members who have permanent seats on the Security Council, and (3) as many other members of the U.N. as are necessary to make the membership of the council evenly divided between those members who administer trust territories and those who do not. [19] This third group is elected for a three-year term by a two-thirds vote of the General Assembly. [20]

The chief function of the Council is to see that the administering power looks after the welfare of the people of the trust territory in accordance with the trusteeship agreement under which the administering power exercises its authority. [21] The importance of the Trusteeship Council

3. U.N. Charter Art. 97.
4. *Id.*
5. *Id.*
6. U.N. Charter Art. 98.
7. U.N. Charter Art. 23, para. 1. (1973 Text).
8. U.N. Charter Art. 23, para. 2.
9. U.N. Charter Art. 24, para. 1.
10. U.N. Charter Art. 27, paras. 2 and 3.
11. U.N. Charter Art. 9, para. 1.
12. U.N. Charter Art. 18, para. 1. Voting is either by a simple majority or a two-thirds majority of those present. The latter system is reserved for "important questions." Questions considered important are those listed in Article 18 para. 2, and any other questions considered important by a majority of those present. Art. 18, para. 3.
13. U.N. Charter Arts. 16, 60, 63, 64 and 66, para. 3.
14. U.N. Charter Art. 5.
15. U.N. Charter Art. 17.
16. U.N. Charter Art. 23, para. 1 on the election of the nonpermanent members of the Security Council; art. 97 concerning the election, in conjunction with the Security Council, of the Secretary General; STAT. INT'L JUST. art. 4 on the election of the judges of the I.C.J., in conjunction with the Security Council; art. 61(1) concerning membership in the Economic and Social Council; and art. 86(1)(c) on the election of the nonpermanent members to the Trusteeship Council.
17. U.N. Charter Art. 82 permits the designation of certain trust territories as strategic areas. The United States is the only power which administers such a "strategic trust."
18. U.N. Charter Art. 83, para. 1.
19. U.N. Charter Art. 86, para. 1.
20. U.N. Charter Art. 86, subpara. 1(c); art. 18, para. 2.
21. U.N. Charter Arts. 75 and 76.

has decreased due to the fact that most of the territories originally supervised have gradually over the years gained independence. The last important trust territory still considered as such is the Trust Territory of the Pacific Islands, which is administered by the United States. Plans are being made for the independence of these islands, but they are hampered by the fact that some of the islands would prefer a continued relation with the United States and others would not. In 1975 a covenant to establish a commonwealth of the Northern Mariana Islands was signed at Saipan by representatives of the United States and the Northern Mariana Islands. Under the agreement, the Northern Mariana Islands will achieve self-governing commonwealth status under United States sovereignty. It will come into force at the time the United States terminates the Trusteeship Agreement it has with the Security Council. The United States has informed the United Nations Trusteeship Council that it will terminate this agreement simultaneously for all parts of the Trust Territory. Since plans for the rest of the Trust Territory have not yet been settled, it may be some time before this takes place. [22]

It should be noted that the problem of non-self-governing territories has expanded from what was originally contemplated in the Trusteeship provisions. In 1960, the General Assembly adopted in resolution 1514, a "Declaration on the Granting of Independence to Colonial Countries and People," and in 1961, established a 17-member special committee to make suggestions and recommendations on the programs and extent of the implementation of this 1960 Declaration. The committee was enlarged in 1962 to 24 members. It annually considers those territories which have not, in the view of the General Assembly, achieved independence. Until the independence of the Portuguese colonies, these territories in Africa were a major concern. It is still concerned with Namibia or South-West Africa and to some extent even with a state such as Rhodesia which is considered as controlled by a minority government not truly representatives of the majority of the population. United States Territories such as the Virgin Islands, American Samoa, and Guam have also been considered.

e. Economic and Social Council. One of the purposes of the U.N. is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character. [23] The League was successful in this endeavor, far more so than it was in the settling of serious international political disputes. [24] The way had been prepared for cooperation of this sort during the 19th Century. Such organizations as Universal Postal Union, the International Bureau of Weights and Measures, and the Rhine and Danube River Commissions showed the feasibility of international economic cooperation.

The Economic and Social Council consists of 54 members elected by the General Assembly. [25] Members are elected for a term of 3 years with one-third of the membership of the Council being replaced each year. Besides initiating studies and conventions dealing with its field of interest, [26] it also brings into cooperation with the U.N. the numerous governmental and private international economic and social organizations which already exist. If the organization is intergovernmental, it must enter into an agreement with the Economic and Social Council defining the terms on which the organization shall be brought into relationship with the U.N. [27] The Council may make such arrangements with private international organizations as may be suitable to both parties concerned. [28]

f. The International Court of Justice. The Permanent Court of International Justice was created in 1920 shortly after the League of Nations. However, it never became an organic part of the League. When the decision was made during World War II to create a new international organization to replace the League of Nations, it was thought best, despite the commendable reputation which the court enjoyed, also to create a new court and to make this new court an organic part of the new organization. Such was done in articles 92-96 of the Charter of the United Nations.

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present charter.

The Statute of the International Court referred to in article 92 was copied almost in its entirety from the Statute of its predecessor, the Permanent Court of International Justice. This was done because the Statute of the Permanent Court was highly regarded in international legal circles. Its Statute was never subject to the same criticism as was the Covenant of the League of Nations. [29]

The organization of the Court and the opinions it has rendered since its creation will be discussed in section II below.

9-3. The Settlement of Disputes by the United Nations. Article 1, paragraph 1 of the Charter declares that one of the four purposes of the United Nations is:

22. See *Digest of United States Practice in International Law* at 97. (Dept. of State 1975).

23. U.N. Charter Art. 1, para. 3.

24. See II Walters, *A History of the League of Nations,* chap. 60 (1952) for a description of the renaissance of the economic and social agencies of the League during the period 1935-1939 which culminated in the Bruce Report of August 1939 which recommended an organ for the League closely resembling the Economic and Social Council of the U.N.

25. U.N. Charter Art. 61, para. 1 (1973 text).

26. U.N. Charter Art. 62.

27. U.N. Charter Arts. 57, para. 1, and 63, para. 1.

28. U.N. Charter Art. 71.

29. See Goodrich & Hambro, *op. cit. supra* note 1, at 476-478 for a discussion of the debates surrounding the decision to discontinue the Permanent Court of International Justice.

To maintain international peace and security, and to that end [1] to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and [2] to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Article 1, paragraph 1 outlines two methods for the maintenance of peace, the first is by collective measures when there is a threat to the peace, breach of the peace, or act of aggression; the second is by peaceful settlement of disputes. Chapter VI (arts. 33-38) contains the pacific settlement provisions of the Charter. These will be discussed before the collective peace enforcement measures are examined.

a. The Pacific Settlement of Disputes. Chapter VI of the Charter (Arts. 33-38) outlines the procedure for the pacific settlement of disputes. This procedure is as follows:

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means.

Article 33 calls upon the parties themselves to seek a solution to any dispute "the continuance of which is likely to endanger the maintenance of international peace and security." This is the key to the procedure of peaceful settlement. [30] The primary duty is placed upon the parties themselves. The means offered are many. The first listed is negotiation. Negotiation is the direct intercourse between two or more states initiated and directed for the purpose of either effecting an understanding between them or settling a dispute. Enquiry is a method of determining the facts of a disputed incident, and of itself is not meant to fix any responsibility that may result from the facts. Mediation is the intervention of a third sovereign who offers his objective solution in an endeavor to bring the two disputing states to an understanding. Conciliation differs from mediation in the fact that the solution is recommended by an impartial body of experts. It is an improvement on both enquiry and mediation. Enquiry alone offers no solution. Mediation by a sovereign may be influenced by national self-interest. Conciliation also has some advantages over arbitration. Its solution is only a recommendation and therefore not binding as is an arbitrator's award. In addition the conciliators are not bound by the narrow legal limits that usually are made the authority of an arbitrator.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. . . . .

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

The Security Council affirmatively enters the dispute in articles 34-38. In Article 34 the Security Council may, on its own, conduct an investigation to determine if a "dispute" or a "situation" is one likely to endanger the maintenance of international peace and security. Article 35, paragraph 1, furnishes another means of getting a "dispute" or "situation" before the General Assembly or the Security Council. Article 35, paragraph 3, was inserted in order to keep distinct the separate roles of the General Assembly and the Security Council. Article 11 permits the General Assembly to discuss matters relating to international peace and security and to make recommendations with regard to any such question to the state or states concerned or to the Security Council. Article 12 prohibits the General Assembly from recommending a solution to a dispute which the Security Council is then considering, unless the Security Council requests such a recommendation.

Articles 36, 37, and 38 contain the positive peacemaker rules that can be exercised by the Security Council if such a "dispute" or "situation" exists. Under article 36 it may recommend the procedure for settlement, be it arbitration, conciliation, or adjudication. For example, in the 1946 Corfu Channel dispute between Albania and the United Kingdom, the Security Council recommended that the parties go before the International Court of Justice. [31] If the parties themselves cannot settle their disputes they are obliged to refer it to the Security Council who may, under article 37, either recommend a procedure for settlement or recommend the actual terms of settlement. Article 38 permits the Security Council to make recommendations to the parties at any stage of a dispute if the parties so request. Article 36 places the Security Council in the role of a mediator. In articles 37 and 38, the Security Council is given the authority of a conciliator. Mediation and conciliation, the two nonjudicial means of settling disputes, are therefore put at the disposal of the Security Council.

30. Eagleton, International Government 499 (3d ed. 1957).

31. *Id.* at 360, 506, 507.

The weakness in chapter VI is that nowhere are the parties actually obliged to settle the dispute. [32] Article 33 only imposes upon them the burden to seek a solution. If they cannot find a solution, article 37 requires them to refer the matter to the Security Council. However, the Security Council can only recommend a solution to them. Neither party is bound to accept this recommendation.

If the procedure of pacific settlement is exhausted by the stages described above the Security Council may under the enforcement action of chapter VII apply sanctions if the unsolved situation constitutes a breach of the peace, a threat to the peace, or an act of aggression.

b. The Forcible Settlement of Disputes

(1) *The Charter Provisions.* Chapter VII (Articles 39-50) outlines measures which are to be adopted by the United Nations in the event of (1) a threat to the peace, (2) breach of the peace, or (3) an act of aggression. Before setting forth chapter VII, it is necessary to quote three articles of the Charter which precede it and which throw light upon the chapter's meaning.

Article 2(7)

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under chapter VII.

Article 24(1)

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

CHAPTER VII
ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Two developments not contemplated at San Francisco in 1945 have altered somewhat the method which the drafters of the Charter outlined in chapter VII. The first was the failure of all members to enter into any agreements which would place armed forces at the call of the Security Council. The second was the cold war and the rise of anticolonial sentiment which prevented, to a great extent, the unanimity of action required of the permanent members before the Security Council could take effective action. The result has not been inaction on the part of the World Organization. It has reacted to crises with the forces at hand, and through the organ or organs best adapted at the moment to deal with the situation. For example, the Security Council was the first to react in Korea in 1950, followed by the General Assembly when the Security Council was no longer able to function effectively. In Suez in 1956 it was the General Assembly alone. In 1960 both the Security Council and the General Assembly played roles in this crisis. In addition, the Secretariat took over the functions originally contemplated by the Military Staff Committee established under Article 47 to advise the Security Council on all questions relating to its military requirements and the armed forces that were to be at its dis-

[32]. Eagleton, *op. cit. supra* note 29, at 502.

posal. A partial survey of United Nations practice in peace keeping will illustrate the actual operation of the Charter provisions.

(2) *United Nations Practice.*

(*a*) *Korea.* Hostilities in Korea commenced on June 24, 1950. On June 25 the Security Council was convened at the request of the United States to consider the matter. The Security Council, under Article 39, determined by a vote of 9-0, with one abstention, and one member absent (U.S.S.R.), that a breach of the peace had occurred. Under Article 40, the Security Council then called for an immediate cessation of hostilities and the withdrawal of North Korean forces to the 38th parallel. [33] On June 27, when the Security Council again met, it was evident that the North Korean forces had not complied with the provisional measures of the day before. The Security Council was then faced with a problem. It had no forces at its disposal because no agreements under article 43 to place national forces at the disposal of the Security Council had ever been entered into by any member. The Security Council therefore under Article 42, made the following recommendation on June 27:

The Security Council . . . recommends that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area. [34]

Lacking any real military command structure for directing the efforts of the member states who complied with the recommendation on June 27, the Security Council on July 7 further recommended that:

All members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States. [35]

The United States, therefore, acted as the agent of the United Nations in Korea. General MacArthur was appointed by the President of the United States to command this unified command. However, it was the United States which directed the unified command. The United States did so in compliance with the Security Council's recommendation on July 7. The unified command was formed by a series of bilateral agreements between the contributing members and the United States.

When the Soviet Union returned to the Security Council the Council was unable to take further effective action. The Soviet Union was absent because of its boycott of the Council over the Council's refusal to seat the Red Chinese Government. The U.S.S.R. was under the mistaken impression that its absence amounted to a veto of Security Council actions. The arena of UN activity then switched to the General Assembly. Under its now famous "Uniting for Peace Resolution" the General Assembly made the following statement:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security [the General Assembly may] make appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed forces when necessary, to maintain or restore international peace and security. [36]

The General Assembly assumed this secondary responsibility for the maintenance of peace under articles 10 and 11 of the Charter which permit it to make recommendations to members of the U.N. It was hotly debated at the time of the General Assembly actually had such authority. [37] However, subsequent events in the Middle East and the Congo have confirmed in practice and law the existence of such authority. [38]

Before examining these situations, however, it should be noted that the United Nations Command in Korea still fulfills its functions although it is the United States which carries out these functions on behalf of the United Nations. In 1975, the United States informed the U.N. Security Council that it was ready to terminate the U.N. Command in Korea provided that an alternative arrangement could be made for maintaining the 1953 armistice accord. In the same year, the U.N. General Assembly adopted two competing resolutions on Korea. Resolution 3390 A, supported by the United States, called for negotiations to find an alternative arrangement for preserving the Korean armistice by the nations directly involved—North and South Korea, China, and the United States. Resolution 3390 B called for a dissolution of the U.N. Command, withdrawal of all foreign troops from South Korea, and for a peace agreement between the "real parties to the armistice." [39] The Korean situation awaits future developments and a final settlement, but this has not altered the historical fact of United Nations intervention and its authority to do so.

(*b*) *The Middle East.* When fighting broke out on 29 October 1956 between Egypt and Israel, the Security Council attempted to pass a resolution calling for a cease fire under article 40. [40] This resolution was vetoed by England and France. Here then was the first difference between the U.N. action in the Middle East and in Korea.

33. 5 U.N. SCOR (473rd mtg.) 7, 13-14 S/1501 (1950).

34. 5 U.N. SCOR (474 mtg) S/1511 (1950).

35. 5 U.N. GAOR Supp. (No. 2) 25 A/1361, U.N. Doc. S/1583, 9 U.N. Bull. No. 3, 96 (1950).

36. U.N. Gen. Ass. Off. Rec. 5th Sess. Supp. No. 20, 10 (A/1775) (1950).

37. See Stone, *Legal Controls of International Conflict* 268-278 (1959) for a synopsis of the argument for and against the legality under articles 10 and 11 of the "Uniting for Peace" Resolution.

38. Advisory Opinion on Certain Expenses of the United Nations, (1962) I.C.J. 151.

39. *Digest of United States Practice in International Law* 820-827 (Dept. of State 1975).

40. 11 U.N. SCOR S/3710 (Oct - Nov - Dec 1956).

The Security Council could not act at all. On November 2, the General Assembly then took up the matter. It called for a cease fire. [41] None of the parties to the hostilities, which now included England and France, carried out immediately the terms of the General Assembly call for a cease fire. On November 4, the General Assembly, under section A of its Uniting for Peace Resolution, called for a voluntary U.N. Force to restore peace and security in the area. [42] The General Assembly intended to call for an entirely new force and not to utilize the Unified Command which had been organized at the start of the Korean War and which was still in existence in Korea. England announced that she would welcome such a force if Egypt agreed that such a force could enter her territory. [43] On November 7 all hostilities had ceased. Therefore, the force which the General Assembly intended to send did not have the mission of restoring peace, but of maintaining it. Peace had already been restored. The force could be small. Therefore, instead of working through a big power agent as was done in Korea, the General Assembly authorized the Secretary General to gather such a force entitled The United Nations Emergency Force. [44] The General Assembly formed an Advisory Committee on 7 November 1956 to assist the Secretary General. [45] The Secretary General, after consulting with the Advisory Committee, issued regulations for this United Nations Emergency Force on 20 February 1957. [46] These regulations defined the relationship between the Force and the host state, the relationship between the contributing members and the Force, and the relationship between the Force and the United Nations.

The United Nations Emergency Force was more an emergency police force, than it was an emergency military force. It could not compare in power to the Unified Command in Korea. It did serve to help maintain the peace for eleven years. In 1967, the United Arab Republic requested the withdrawal of UN troops from its territory. Secretary General U Thant ordered the withdrawal, and the 1967 Middle East War followed.

(*c*) *The Congo.* On 12 July 1960, the President and the Prime Minister of the Republic of the Congo addressed to the Secretary General a message requesting military assistance because of the dispatch of troops from Belgium to the Congo. [47] There was at the same time a breakdown of internal order in the Congo. However, this fact did not prompt the request for assistance. On July 13 the Congo leaders made it clear to the Secretary General that the purpose of the request was to protect the Congo from Belgian military intervention.

The Secretary General requested an urgent meeting of the Security Council and presented to it the requests he had received from the Congo Republic. No threat of veto stood in the way of any action the Security Council decided to order. The Security Council adopted two basic resolutions. The first on 14 July "called upon" the Government of Belgium to withdraw its troops from the territory of the Congo and authorized the Secretary General:

To take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance, as may be necessary, until, through the efforts of the Congo Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks. [48]

There was an interplay at the beginning between the presence of Belgian troops and the breakdown of law and order. Belgium originally intervened because law and order had broken down. Therefore, in order to hasten the withdrawal of Belgian troops, the Security Council authorized the Secretary General to use U.N. troops to assist the local authorities in restoring law and order.

The Secretary General, under authority of the Security Council Resolution of July 14, 1960, proceeded to organize a force based as far as possible upon his experience in the Middle East. However, there was one basic difference. In 1956 the United Nations Emergency Force was established by the General Assembly as a subsidiary organ with a United Nations Commander appointed by the Assembly, who has acted under the instructions and guidance of the Secretary General. The force authorized for the Congo was exclusively under the command of the Secretary General as the agent of the Security Council.

On July 22, 1960, the Security Council passed a second resolution which stated that the complete restoration of law and order in the Republic of the Congo would contribute to the maintenance of international peace and security. [49] With the passage of this resolution, the mission of the U.N. in the Congo became twofold, (1) to hasten the withdrawal of the Belgian troops and (2) to restore law and order. The requests of the Congo on July 12 and 13 only applied to the first. However, on July 29, 1960, the Government of the Republic of the Congo agreed with the Secretary General that it "will be guided, in good faith, by the fact that it has requested military assistance from the United Nations and by its acceptance

41. U.N. GAOR (1st Emg. Sp. Sess. Supp. No. 1, Res. 997) (ES-1) (1956).

42. *Id.* at Resolution 998 (ES-1).

43. Reply by the British Gov't to Mr. Hammarskjold's cable of Nov. 4, 1956, Nov. 5, 1956.

44. U.N. GAOR (1st Emg. Sp. Sess. Supp. No. 1, Res. 1000) (ES-1) (1956).

45. *Id.* at Resolution 1001 (ES-1).

46. ST/Secretary-General's Bulletin, United Nations Emergency Force, No. 1, dated 20 February 1957.

47. U.N. Doc. S/4382 (1960).

48. U.N. Doc. S/4387, text of which is contained in 43 Dep't State Bull. 161 (1 August 1960).

49. U.N. Doc. S/4405, text of which is contained in 43 Dep't State Bull. 223 (8 August 1960).

of the resolutions of the Security Council of July 14 and 22, 1960." [50]

On November 27, 1961 regulations somewhat similar to those for the United Nations Emergency Force in the Middle East were adopted for the United Nations Force in the Congo. The force included at its greatest extent 20,000 soldiers from a number of participating nations. It remained in the Congo from July of 1960 until June of 1964. The purpose of the force was to maintain law and order, to prevent foreign intervention, and to help unify the country. With United States support it was largely responsible for defeating the attempt of the province of Katanga to be independent. After resistance in Katanga had been eliminated, the U.N. force was withdrawn. This proved to be premature. The leader of the Katanga recessionist movement, Thsombe, returned. A full-scale civil war ensued. At one point, the United States supported Belgium in a paratroop operation to rescue several hundred white persons held as hostages. [51]

(d) Other Situations and Future Prospects. Another situation which should be mentioned was the creation of a United Nations peace-keeping force in Cyprus in 1964. This force was never, however, made large enough to accomplish any other purpose than contributing to the negotiation between the rival parties. Due to negative reaction against the Congo operation, the U.N. force in Cyprus was deliberately kept small to avoid taking any side in the conflict. Firepower was not used except for self-defense. Meanwhile, the United Nations called for negotiation and settlement. It was to no avail. Turkey intervened and partitioned the island by force. A final settlement is still awaited.

The Korean situation was an example of the fact that effective action could be taken where enough of the members of the United Nations support it. While the fact that the USSR was not present in the Security Council to block initial action may be unique, the Uniting for Peace Resolution still stands as a possible means for the United Nations to take military action to keep the peace even where the members of the Security Council disagree. To what extent it will act in the future is doubtful.

In the Suez, United Nations intervention was only effective while the support remained to keep the force there. The fact that it was so quickly withdrawn indicated lack of support for its presence. The Congo operation resulted in a feeling by many states that the United Nations should not become directly involved in disputes through military intervention. It may be impossible not to support either one side or the other. Direct U.N. military intervention has since that time remained on a low level as in the Cyprus situation. And while the United Nations has actively debated almost every conflict which occurs in the world, the major peace movements have taken place outside of its control. The Vietnam war ended with an agreement negotiated mainly between the United States and North Vietnam. [52] The latest Arab-Israeli hostilities were with an agreement between Egypt and Israel with the United States agreeing to station a small civilian force to monitor the peace. [53] It seems that there is an increasing tendency for peace keeping to take place either as the result of the individual relations of the parties involved or through the intervention of one of the great powers. This does not mean that this tendency will continue, nor that any conflict situation should be examined without reference to United Nations settlement requirements or effort.

The fact that the United Nations may take effective action in the future remains a definite possibility. Also, the United Nations seems to be taking an increasingly important role in the settlement of disputes by its influence on world opinion as to when force may or may not be justified on the part of a state. After many years of study, the United Nations issued, in 1974, Resolution 3314, which defined Aggression. It has also issued many other resolutions, such as Resolution 2625 on The Principles of International Law concerning Friendly Relations and Co-Operation Among States (Adopted in 1970). The study of these resolutions involve the legality of the use of force and should be studied in detail in relation to the law of war. However, it has become a function of the United Nations to define and interpret rules of international law even though it cannot make law. If the member states are convinced of the illegality of the acts of any particular state, all of the peace keeping powers enumerated in the Charter may be utilized.

Section II. THE INTERNATIONAL COURT OF JUSTICE

9-4. The Judges of the Court. The Court consists of 15 judges, elected for nine-year terms no two of whom are nationals of the same state. [54] Vacancies are filled by a complicated procedure. The Secretary General of the United Nations addresses a written request to the members of the Permanent Court of Arbitration inviting them to nominate candidates for the position. [55] Each state group on the Permanent Court of Arbitration nominates not more than two persons if one seat is to be filled. If

50. U.N. Doc. S/4389, Add. 5 (1960).

51. *See* "The Question of the Congo" in *Everyman's United Nations. supra,* n. 1 at 143.

52. Agreement on Ending the War in Vietnam, 1973, United States - North Vietnam, 24 U.S.T. 1, T.I.A.S. No. 7542.

53. *Peace Agreement and U.S. Proposal,* 1975, Egypt-Israel, in Dept. of State Bull. LXXIII, No. 1982, Sep. 29, 1975, pp. 466-470.

54. Stat. Int'l Ct. Just. art. 3, para. 1.

55. Stat. Int'l Ct. Just. art. 5, para. 1. The Permanent Court of Arbitration was formed in 1899. It is not a court in the institutional sense of the term, but rather a list of from 150 to 200 persons from whom a panel of arbitrators may be selected. Panels drawn from this list have handled 20 cases, many of which were extremely important. The Court, though not used since 1940, is still in existence.

more than one seat is to be filled, each group may nominate up to four, no two of whom are of its own nationality. [56] In making up its list, each national group is urged to consult its highest court of justice, schools of law, and national academies. [57] The Secretary General places all nominations on one list, a copy of which he sends to the Security Council and the General Assembly. [58] The candidate or candidates who obtain an absolute majority of votes in the separate elections which are held in the General Assembly and in the Security Council shall be considered elected for a nine-year term. [59] The members of the Security Council and General Assembly are urged before the election to bear in mind that the court should represent the principal legal systems of the world. [60] In this way two Communist judges are usually elected to the Court despite the fact that Communist states will not utilize the Court as applicants or allow themselves to be brought before it as respondents.

9-5. The Law Applied by the Court.

Article 33

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of article 59 [article 59 provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case"], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

9-6. The Jurisdiction of the Court. It must be born in mind at the outset that only states may be parties before the International Court of Justice. [61] The Court assumes jurisdiction of a dispute or disagreement in two ways. The first is with the consent of the states concerned. These are usually called "contentious cases" because there are two parties actually in a dispute before the court. The *second* type of case is an "advisory opinion" requested by an authorized international organization. [62]

a. Contentious Cases. Two members of the United Nations may agree to take a certain dispute which has arisen between them before the International Court. They may do this on *ad hoc* basis [63] or may agree beforehand that in the future the Court will have jurisdiction in certain cases. [64] This latter method is provided by the so-called "optional clause" of the Statute of the Court. This clause is as follows:

Article 36(2). The states parties to the present Statute may at any time declare that they recognize 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.

The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

All members of the United Nations are automatically parties to the International Court. [65] This fact, however, does not permit one U.N. member to bring another before the International Court unless that member consents, either beforehand by accepting the "optional clause", at the time by an *ad hoc* agreement between the parties con-

56. Stat. Int'l Ct. Just. art. 5, para. 4 and art. 14.

57. *Id.* art. 6. See Baxter, *The Procedure Employed in Connection with the United States Nominations for the International Court in 1960,* 55 Am. J. Int'l L. 545 (1961), for an account of the actual operation in the United States of article 6.

58. Stat. Int'l Ct. Just. art. 7.

59. *Id.* at arts. 10 and 13.

60. *Id.* at arts. 10 and 13.

61. *Id.* at art. 34, para. 1.

62. The following organs and agencies are at present authorized to request advisory opinions:
United Nations:
General Assembly,
Security Council,
Economic and Social Council,
Trusteeship Council,
Interim Committee of the General Assembly,
Committee on Applications for Review of Administrative Tribunal Judgements;
International Labour Organization;
Food and Agriculture Organization of the United Nations;
United Nations Educational, Scientific and Cultural Organization;
World Health Organization;
International Bank for Reconstruction and Development;
International Finance Corporation;
International Development Association;
International Monetary Fund;
International Civil Aviation Organization;
International Telecommunication Union;
World Meteorological Organization;
Inter-Governmental Maritime Consultative Organization;
International Atomic Energy Agency.

63. Stat. Int'l Ct. Just. art. 36, para. 1.

64. *Id.* at art. 36, para. 2.

65. U.N. Charter art. 93, para. 1.

cerned, or beforehand by a separate agreement.

A majority of the members of the United Nations has not accepted the "optional clause". [66] Those that have, have usually done so with reservations. The United States has accepted the "optional clause" with a reservation which reserves from the jurisdiction of the court. "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." [67] This reservation would, on the whole, be innocuous but for the addition to it of the now well-known "Connally Reservation." To this phrase Senator Connally added the words "as determined by the United States." The legal difficulty created by this addition is that article 36, paragraph 6, of the Statute of the International Court requires:

In the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the Court.

The Court has not yet been required to pass upon the compatibility of the Connally Reservation with the requirements of article 36, paragraph 6.

b. Advisory Opinions. The rendering of advisory opinions by the International Court is governed by Article 96 of the Charter of the United Nations and by Articles 65-68 of the Statute of the Court. Article 96 of the Charter authorized the General Assembly or the Security Council to request the International Court of Justice to give an advisory opinion on any legal question. The General Assembly has taken advantage of this opportunity twelve times. The Security Council has asked the Court for only one advisory opinion. A brief analysis of the advisory opinions rendered by the Court follows.

9-7. Cases Before the Court. The International Court, as any court, can best be understood and evaluated by analyzing and understanding the disputes with which it has dealt, and the effect it has had upon their solution. Therefore, it will be the purpose of the remainder of this chapter to present the cases upon which the court has rendered an opinion. The *contentious* cases are presented under four general headings: Disputes relating to Territorial Rights; Disputes relating to Violation of Airspace; Disputes relating to Nationals; and Disputes of a Commercial Nature. [68] Within each topic area the cases are generally presented chronologically according to the date the dispute was presented to the Court. The *advisory* opinions are also generally presented in chronological order according to the date the Court is requested [69] to render the opinion.

a. Contentious Cases.

(1) *Disputes relating to territorial rights.* [70]

The *Corfu Channel* Case (United Kingdom v. Albania) (1947-1949). [71] In 1946 several British warships were fired upon by Albania shore batteries while proceeding through the Corfu Channel which lies within the territorial waters of Albania. Great Britain protested and announced that she was sending warships again through the Channel with instructions to fire if fired upon. No fire came from the Albanian shore batteries. However, two of the ships struck mines which caused considerable damage and loss of life. Great Britain then, against the protests of Albania, swept the Channel clear of mines.

Albania, along with all other Communist states, had not accepted the "optional clause" in any form. However, upon the urging of the Security Council both Great Britain and Albania agreed to submit the dispute to the International Court. After agreeing to submit the case, Albania challenged the jurisdiction of the Court to award damages against it, on the ground that it had only agreed to a limited submission to the jurisdiction of the Court. This objection was overruled.

The Court considered that it could not hold a state automatically responsible for everything that occurs within its territory. However, the evidence of this case certainly showed that Albania had knowledge of the existence of the mines. Therefore, Albania was liable to Great Britain for the damages sustained if Great Britain had a right to use the Corfu Channel. The Court held that since it was a shipping lane connecting two open bodies of water all states had a right to it in time of peace for innocent passage. The Court refused to distinguish between major and minor shipping lanes for the purposes of the right of innocent passage. It also refused to say that Great Britain's second passage was not innocent merely because it was performed to test Albania's hostile intentions. However, Great Britain's third entry into the channel in order to sweep it of mines was not for the purpose of passage. Therefore, it amounted to an unauthorized invasion of Albanian territory. Albania was ordered to pay a total sum of 844,000 pounds for the damage caused to the ships and

66. As of August 15, 1960, 38 states accepted the "optional clause," U.N. Off. of Public Information, The International Court of Justice, 9 (2d ed. 1960). This figure was unchanged as of Jan. 1, 1963, Dep't State, Treaties in Force 280 (1963).

67. Res. 196, Aug. 2, 1946. Text of the United States declaration at the time of its adherence to the compulsory jurisdiction of the Int'l Ct. Just. on Aug. 26, 1946 is contained in 15 Dep't State Bull. 452-453 (1946) and in 61 Stat. 1218 (1946).

68. Where a particular decision may have connections with several topic areas, a cross-reference has been made. Additionally, several advisory opinions have been cross-referenced into the contentions cases.

69. *See supra* note 9.

70. For related "contentions" case, see *Appeal Relating to the Jurisdiction of the ICAO Council, infra* note 63; for related advisory opinion, *see International States of Southwest Africa, infra* note 100; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), infra* note 108 and *Western Sahara, infra* note 113.

71. The case was heard in three phases by the Court: Corfu Channel Case (Preliminary Objection) [1947] I.C.J. Rep. 7, 15; Corfu Channel Case (Merits) [1947] I.C.J. Rep. 4; Corfu Channel Case (Assessment of the Amount of Compensation) [1949] I.C.J. Rep. 237. Cases are reported in 42 *Am. J. Int'l L.* 690 (1948); 43 *Am. J. Int'l* 558 (1949); and in 44 *Am. J. Int'l L.* 579 (1950).

as compensation for the deaths of the members of the crews and for personal injuries. Albania refused to take part in the hearing on the amount of the damages and has ignored the order to pay Great Britain.

The Security Council played a role in this case that from subsequent cases, has been somewhat unique. It was the Security Council which recommended, pursuant to its authority under article 36, paragraph 1, of the Charter that the parties take their disputes to the International Court. It was also the Security Council to which Great Britain, under article 95, paragraph 2, of the Charter, brought its complaint of Albania's refusal to pay the assessed damages.

The *Fisheries* Case (United Kingdom v. Norway) (1949-1951).[72] In 1935 Norway enacted a decree by which it measured its territorial waters outward from a series of straight base lines which were drawn between points along its famous rock rampart. This rampart is formed by numerous small islands lying off almost the entire length of the Norwegian Coast. By such a method Norway was able to include within its territorial waters certain fishing grounds for the exclusive use of its own fishermen to the detriment of British fishermen. Great Britain challenged the validity of this system of measurement, contending that a time-honored rule of international law required that territorial seas be measured from the coast. The Court did not dispute the general applicability of the rule contended for by Great Britain, but qualified it in this case because of the geographical peculiarities of the Norwegian Coast.

The *Minquiers and Ecrehos* Case (France v. United Kingdom)[73] (1951-1953).[74] Minquiers and Ecrehos are two small groups of islets lying off the coast of France. Both were claimed by Great Britain and France. Under a special agreement between France and the United Kingdom, the Court was asked to determine which of the parties had produced a more convincing proof of title. The decision of the Court reveals its approach to ownership of territory. It gave little weight to titles founded on documents drawn up in the Middle Ages. It was more concerned with the direct evidence of possession and the actual exercise of sovereignty. Both sides contended for certain "critical dates" at which their titles became vested. They then sought to exclude evidence of the exercise of sovereignty by the other which might have occurred after their proposed "critical date." The Court avoided setting such a date, noting that Great Britain had exercised almost uninterrupted sovereignty over both islets. On that basis title in Great Britain was affirmed. The Court gave no weight in and of itself to the fact that the islets were geographically closer to France than they were to England.

The *Antarctica* Case (United Kingdom v. Argentina) (1955-1956).[75] The government of the United Kingdom instituted this proceeding against the government of Argentina seeking a resolution of a dispute as to the sovereignty of certain islands and lands in the Antarctic. Since the government of Argentina did not consent to the jurisdiction of the court, the case was removed from the Court's list without decision.[76]

The *Antarctica* Case (United Kingdom v. Republic of Chile) (1955-1956).[77] The government of the United Kingdom instituted this proceeding against the government of Chile seeking a resolution of a dispute as to the sovereignty of certain islands and lands in the Antarctic. Since the government of Chile did not consent to the jurisdiction of the court, the case was removed from the Court's list without decision.[78]

The *Right of Passage over Indian Territory* Case (Portugal v. India) (1955-1960).[79] Portugal possessed in India, at some distance inland from the Portuguese port of Daman, the two enclaves of Dadia and Nagar-Aveli. Portugal contended that the right of passage to and between these enclaves sufficient for the exercise of its sovereignty had been denied by India. Portugal based its right of passage on agreements entered into in the 18th century, local custom since that time, and on general international law concerning enclaves. The Court found that Portugal had in 1954 the right of passage claimed by it but that such right was limited to the passage of private persons, civil officials, and goods in general and did not extend to armed forces, armed police, arms, and ammunition. The Court found that the control so far exercised by India did not restrict Portugal in the exercise of its legitimate limited right of passage. In deciding the case, the Court acknowledged the existence of binding custom of local application distinct from general customary international law. India contested vigorously the Court's jurisdiction in this case. On December 18, 1961, seventeen months after this opinion was delivered, India seized all Portuguese territory on the subcontinent of India.[80]

The *Sovereignty over Certain Frontier Land* Case (Belgium v. The Netherlands) (1957-1959).[81] The Belgian commune of Baerle-Duc and the Netherlands commune of Baarle-Nassau adjoin. A Communal Minute drawn up about 1838 attributed the now disputed land to

72. [1951] I.C.J. Rep. 3; reported in 46 *Am. J. Int'l L.* 348 (1952). cf, *North Sea Continental Shelf, infra* note 39 and *Fisheries Jurisdiction infra* notes 42 and 44.

73. In proceedings instituted by means of a special agreement, the names of the parties are separated by an oblique line.

74. [1953] I.C.J. Rep. 4; reported in 48 *Am. J. Int'l L.* 316 (1954).

75. [1956] I.C.J. Rep. 12; digested in 51 *Am. J. Int'l L.* 11 (1957).

76. See [1955-1956] I.C.J.Y.B. 77.

77. [1956] I.C.J. Rep. 15; digested in 51 *Am. J. Int'l L.* 11 (1957).

78. See [1955-1956] I.C.J.Y.B. 77.

79. [1960] I.C.J. Rep. 6; digested in *Am. J. Int'l L.* 673 (1960).

80. For a legal analysis of this seizure see Wright, *The GOA Incident,* 56 *Am. J. Int'l L.* 617 (1962).

81. [1958] I.C.J. Rep. 209; digested in 53 *Am. J. Int'l L.* 937 (1959).

Baarle-Nassau. The Descriptive Minute and the Boundary Convention of 1843 attributed the land to Baerle-Duc. The Netherlands claimed that this was a clerical mistake because the Descriptive Minute was supposed to be similar to the Communal Minute. The Court did not find sufficient evidence that a mistake had actually been made. Therefore, in 1843 the land belonged to Belgium. Since 1843 the Court did not find sufficient exercise of sovereignty on the part of the Netherlands to replace the title already vested in Belgium.

The Court's reasoning here should be compared to that in the *Minquiers and Ecrehos Case.* [82] Had the Netherlands been able to put forward as strong a case as did Great Britain for the exercise of its sovereignty over the disputed land the result *might* have been different. It is not possible to say so with any great assurance because the extent of adverse possession in international law is not clear. In the *Minquiers and Ecrehos Case* the Court never concluded that France at any time had title to the islets. Therefore, Great Britain's exercise of sovereignty was not adverse to any other title holder.

The *Arbitral Award Made by the King of Spain on 23 December 1906* Case (Honduras v. Nicaragua) (1958-1960). [83] On October 7, 1894, Honduras and Nicaragua signed a convention for the demarcation of the boundary between the two countries. In October 1904, the King of Spain was asked to determine that part of the frontier line on which the two countries had been unable to reach agreement. The King gave his arbitral award on December 23, 1906. Nicaragua refused to comply with it on the grounds that no reasons were given for the determinations made, that the King of Spain had no authority to make the award, and that the award was not clear. The Court rejected these objections, holding that Nicaragua must comply with the award. The Court was not asked to re-examine the actual basis of the award or to draw a new boundary itself.

The case illustrates the difficulties that arise when the basis of an arbiter's award is attacked. Naturally an arbitrator's powers are limited and if he exceeds them his award may be invalid. The difficulty is establishing suitable procedures for determining if the power has actually been exceeded. It was only resolved in this case after a resolution of the Organization of American States requested the parties to take the dispute to the International Court of Justice.

The *Temple of Preah Vihear* Case (Cambodia v. Thailand) (1959-1962). [84] The merits of the case involve a dispute as to territorial sovereignty over the region of the Temple of Preah Vihear and its precincts. It represents the kind of dispute the World Court is capable of solving. It awarded the disputed territory to Cambodia, and Thailand announced its willingness to abide by the decision. In the preliminary objections Thailand argued forcefully that its adherence to the compulsory jurisdiction of the International Court made on 26 May 1950, was ineffective because it had intended to renew its 1940 adherence to the Permanent Court. Under the reasoning of the Court in the *Aerial Incident of 27 July 1955* between Israel and Bulgaria, [85] the Court held that adherences, such as Bulgaria's, had lapsed when the World Court was discontinued. Thailand maintained that hers was similar to Bulgaria's. Therefore she could not "renew" something that had lapsed five years previously. The Court refused to extend the rule to Thailand because it looked upon Thailand's 1950 adherence as a straightforward adherence and not as a renewal. The Court then went to the merits.

According to the Treaty of 13 February 1904 between France and Siam the frontier was to follow the watershed line. In the autumn of 1907 the Thai (then Siamese) Government, which had no mapping service, requested the French to map the frontier region. The French did so. The map supplied the Siamese Government showed the Temple on the Cambodian side of the Frontier.

Thai officials said nothing. It was not until 1958 that they maintained that the Temple region was on the Thai side of the watershed. Therefore, under the Treaty of 1904, the territory belongs to Thailand, the map being unofficial and not part of the treaty document.

The Court agreed that it was not part of the treaty. The Court also said that it did not have to decide if the map was inconsistent with the treaty because Thailand had shown by its silence that it accepted the map as accurate. Thailand explained her silence by contending that her local officers in fact had been in possession of the Temple from the beginning. The Court rejected the effect of local Thai acts around the Temple which appeared to be in conflict with the view of the Thai Central Government. For example, when the Prince of Siam visited the Temple in 1930, he was welcomed there by the French President of Cambodia province. No protest of comment was made.

The case is interesting for its discussion of mistake. Again, the court, as in the *Frontier Case* [86] was slow to say that mistake will negate consent. Also, the acts of sovereignty of local officials will not be sufficient if not clearly reflecting central authority. In the *Minquiers* and *Ecrehos* case, [87] the acts performed did reflect the views of the British Government.

The *South West Africa* Case (Ethiopia v. South Africa; Liberia v. South Africa) (1960-1966). [88] The governments of Ethiopia and Liberia filed separate actions (which

82. See *supra* note 21.

83. [1960] I.C.J. Rep. 192; digested in 55 *Am. J. Int'l L.* 478 (1961).

84. [1962] I.C.J. Rep. 6; digested in 56 *Am. J. Int'l L.* 1033 (1962).

85. See *infra* note 55.

86. See *supra* note 28.

87. See *supra* note 21.

88. [1966] I.C.J. Rep. 6; reported in 61 *Am. J. Int'l L.* 116 (1967).

were consolidated by the Court) concerning the status of the League of Nations mandate for South West Africa and whether South Africa had breached certain limitations of the mandate (e.g., alleged "military training of the natives," alleged erection of military installations in the territory, etc.), as well as certain responsibilities. After considering many arguments by Ethiopia and Liberia with regard to their standing to raise issues concerning the existence of the mandate and South Africa's conduct thereunder, the Court declined to decide the case on the merits finding that (notwithstanding the nonexistence of a body, e.g., the Council of the League of Nations, that could properly bring into question the conduct of a mandatory) the applicants had not established any right to raise the issues in question to the Court. As a result, the Court rejected the claims. [89]

The *Northern Cameroons* Case (Cameroon v. United Kingdom) (1961-1963). [90] This dispute concerned the Cameroons which were part of the territory renounced by Germany in the Treaty of Versailles and which were placed under two League of Nations mandates—one under France and one under the United Kingdom. The United Kingdom further divided its mandate into Northern Cameroons (administered as a part of Nigeria) and Southern Cameroons (administered separately from Nigeria). Upon the creation of the United Nations, the Cameroons mandates were included in the trusteeship system of the United Nations. In 1960, French-administered Cameroons gained its independence and became the Republic of Cameroon. On the recommendation of the United Nations General Assembly, the United Kingdom held plebiscites to determine the wishes of the inhabitants of its mandated territory. In early 1961, Southern Cameroons voted to join the Republic of Cameroon, and Northern Cameroons voted to join the Federation of Nigeria. The United Nations General Assembly approved these results (the Republic of Cameroon voting against the approving resolution) in April 1961 and ordered the trusteeships of the United Kingdom be terminated upon Northern Cameroons joining Nigeria and Southern Cameroons joining Cameroon. In May 1961, the Republic of Cameroon instituted proceedings before the Court claiming that the United Kingdom had breached the provisions of its trusteeship with respect to Northern Cameroons (e.g., alleged irregularities in holding the plebiscites). Southern Cameroon joined the Republic of Cameroon in October 1961, and Northern Cameroons became a part of the Federation of Nigeria in 1961. The opinion of the Court was handed down in December 1963. The Court stated that it was not required to hear every case in which it has jurisdiction, as a decision of the Court must have some practical impact and continuing applicability. In the case at hand, the Court found that while a dispute capable of adjudication might have been present when the proceedings were commenced (May 1961), the dispute had been overcome by intervening events, i.e., Northern Cameroons had ceased to exist when it became part of the Republic of Nigeria in June 1961, thus terminating the trusteeship under the order of the United Nations General Assembly (April 1961). A declaratory judgment to the effect that prior to the termination of the trusteeship of Northern Cameroons the United Kingdom had breached its obligations would, the Court declared, be without purpose. At a result, the Court determined that it would not decide the merits of the claims of the Republic of Cameroon. [91]

The *North Sea Continental Shelf* Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (1967-1969). [92] In 1967 Denmark, the Netherlands, and the Federal Republic of Germany (FRG) submitted by agreement to the Court the issue of how a portion of the North Sea Shelf should be divided among the three countries. (The claims of the United Kingdom to a portion of the North Sea Shelf had been resolved prior to these proceedings by agreement of the four parties.) Since the North Sea is relatively shallow, it lends itself to exploration for hydrocarbon deposits. Denmark and the Netherlands argued for a division of the disputed Shelf area on the "equidistance principle" which would give to each country those portions of the Shelf that were nearer to its coast than to any point on the coast of any other country. Because of the nature of the Danish/Netherlands Coasts (protruding in the North Sea) and the German Coast (recessing inland), such a theory could have worked to the disadvantage of the FRG. The FRG argued that a "just and equitable share" (based on sea frontage) approach should be adopted. Article 6 of the 1958 Geneva Convention on the Continental Shelf, the Court observed, adopts the "equidistance rule" unless the parties agreed otherwise or "special circumstances" existed. The FRG argued that "special circumstances" did exist in the case i.e., the peculiar formation of the German Coast. The Court refused to apply either principle advanced by the parties. The "equidistance rule," the Court found, was not binding under the 1958 Geneva Convention because the FRG, although a signatory, had never formally ratified it and the FRG had not operated under it in a way that could give rise to an estoppel argument by Denmark or the Netherlands. Additionally, since the Convention allowed reservations with respect to Article 6, the "equidistance rule" could not be regarded as an emerging principle of customary international law. Likewise, the Court discarded the German proposal (the "equitable share" principle) by finding that it would be inconsistent to the fundamental rule that "a coastal state's rights in respect of the continental shelf constituting a

89. See [1965-1966] I.C.J.Y.B. 83.

90. [1963] I.C.J. Rep. 15; reported in 58 *Am. J. Int'l L.* 488 (1964).

91. See [1963-1964] I.C.J.Y.B. 95.

92. [1969] I.C.J. Rep. 3; reported in 63 *Am. J. Int'l L.* 591 (1969).

natural prolongation of its territory, exist *pro facto* and *ab initio* by virtue of its sovereignty over the adjacent land." [93] The Court concluded by delineating its solution: "[T]he boundary lines were to be drawn by agreements reached through good faith and meaningful negotiations, on the basis of equitable principles and taking into account the following particular factors; the general configuration of the parties' coastlines and any special or unusual features thereof; so far as known or readily ascertainable, the physical and geological structure and natural resources of the continental shelf area involved; and the element of a reasonable degree of proportionality between the extent of the continental shelf area appertaining to each party and the length of its coast measured in the general direction of the coastline, taking into account the actual or prospective effects of any other continental shelf delimitations in the same region." [94]

The end result, the Court said, should be that each country would receive the natural prolongations of its territory, with any overlap worked out by agreement, either as by a division or by joint exploration.

The *Fisheries Jurisdiction* Case (United Kingdom v. Iceland) (1972-1974). [95] In this proceeding the United Kingdom protested Iceland's extension of its exclusive fisheries jurisdiction from 12 miles to 50 miles. Iceland did not take part in the proceedings, even though invited to on several occasions. (The Court declined to join this case with that of the Federal Republic of Germany (FRG) against Iceland because, although the basic issues were similar, the United Kingdom and the FRG took different positions with respect to their submissions; see next case.) The Court found that it had jurisdiction to render a judgment, despite the absence of Iceland's participation, because it had before it the necessary facts and law: In 1961 the United Kingdom and Iceland agreed by an Exchange of Notes (which the Court considered a treaty) that the United Kingdom would no longer contest a 12-mile fishing zone and that Iceland, while working on an extension of its fisheries jurisdiction under the 1959 policy of its Parliament ("Recognition should be obtained of Iceland's right to the entire Continental Shelf area"), would not extend the zone without six months notice to the United Kingdom; if a dispute were to arise, the matter would be referred to the International Court of Justice. In 1971 Iceland announced to the United Kingdom that the 1961 agreement would be terminated and that the 12-mile limit would be extended to 50 miles. The United Kingdom disputed the right of Iceland to unilaterally terminate the 1961 agreement. After a number of incidents, the two countries in 1973 entered into a two year agreement by an Exchange of Notes which provided for interim provisions "pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either government in relation thereto." The United Kingdom sought a determination of four issues: Was Iceland's claim to a 50 mile exclusive fisheries zone founded in international law? Was Iceland entitled, as against the United Kingdom, to extend the zone beyond the 12 miles agreed to in the 1961 agreement? Was Iceland entitled unilaterally to exclude or impose restrictions on United Kingdom ships beyond the 12 mile zone? And were the United Kingdom and Iceland under a duty to enter into negotiations with respect to conservation of the fisheries? Before addressing these matters on the merits, the Court concluded that the existence of the interim 1973 agreements was not a bar to its reaching a decision since the dispute was still ongoing. The Court recognized several principles of customary international law: the acceptance of a 12-mile exclusive fisheries zone and preferential fishing rights for the coastal state in the water immediately contiguous to the exclusive zone in situations of special dependence. The Court also quoted Article 2 of the 1958 Convention of the High Seas which declares that the principle of freedom of fishing is to "be exercised by all states with *reasonable regard* to the interests of other states in their exercise of the freedom of the high seas." (Emphasis added.) Notwithstanding Iceland's preferential fishing rights, the Court concluded that Iceland could not extinguish the concurrent rights of the United Kingdom in the adjacent waters beyond the 12-mile limit agreed to in 1961. The United Kingdom had traditional fishing rights in and a certain dependence on the same waters. The attempt by Iceland to extend, as against the United Kingdom, its 12-mile limit to a 50-mile limit disregarded the exchange of notes in 1961, the interests of the United Kingdom, and was an infringement on the "reasonableness" principle of Article 2 of the 1958 Convention of the High Seas. Therefore, the Court concluded that Iceland could not unilaterally exclude or impose restrictions on United Kingdom ships beyond the 12-mile limit; however, the United Kingdom was under an obligation in the 12-50 mile zone to take into consideration conservation of the fisheries resources. Iceland and the United Kingdom were found by the Court to be under an obligation to negotiate a solution for the fishing rights in the 12 to 50 mile zone, taking into consideration five factors: Iceland's preferential fishing rights as a specially dependent coastal state; the traditional fishing rights and dependence of the United Kingdom in these waters; the interests of conservation; the fishing rights of both Iceland and the United Kingdom should be maximized, consonant with conservation considerations; and a continuing obligation to review the resources and the appropriate conservation measures. [96]

The *Fisheries Jurisdiction* Case (Federal Republic of Ger-

93. Himel, *Decisions of International and Foreign Tribunals*, 4 Int'l Lawyer 920, 922 (1970).

94. *Id.*

95. [1974] I.C.J. Rep. 3; reported in 69 *Am. J. Int'l L.* 154 (1975).

96. *See* [1973-1974] I.C.J.Y.B. 109.

many v. Iceland) (1972-1974).[97] In this proceeding the Federal Republic of Germany (FRG) protested Iceland's extension of its exclusive fisheries from 12 miles to 50 miles, arising out of the same facts as the immediately preceding case. The Court declined to join this case with that brought by the United Kingdom, because the FRG case had an additional element, i.e., the FRG sought a determination that "the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany were unlawful under international law and that Iceland was under an obligation to make compensation therefore to the Federal Republic.[98] Other than for this additional item, the decision in this case mirrored that issued in the United Kingdom case (see immediately preceding case). With respect to the damages issued, the Court held that because of the abstract form of the claim, it was unable to render a decision because of insufficient evidence.

The *Nuclear Tests* Case (Australia v. France) (1973-1974).[99] The *Nuclear Tests* Case (New Zealand v. France) (1973-1974).[100] In 1973 Australia and New Zealand instituted proceedings in the Court to obtain a determination that France's atmospheric nuclear testing in the South Pacific Ocean was inconsistent with international law. During 1974, the French government made various representations that it intended to cease such testing (e.g., Communiqué of the Office of the President of the French Republic, dated 8 June 1974; note from French Embassy to New Zealand Ministry of Foreign Affairs, dated 10 June 1974; and various other statements made by French officials, President of the Republic (25 July 1974), Minister of Defense (16 August 1974) and Minister of Foreign Affairs in the United Nations General Assembly (25 Sep 74)). Considering the totality of all the French pronouncements, the Court concluded that it was France's intention to terminate the tests and that they "constituted an undertaking possessing legal effect,"[101] notwithstanding they were of a unilateral nature without a *quid pro quo.* The Court refused to speculate whether at some future time France would not comply with its commitment. Such being the case, the Court found that "no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto,* once it has reached the conclusion that the merits of the case no longer are to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment."[102]

(2) *Disputes relating to Violation of Airspace.*[103]

The *Aerial Incident of 10 March 1953* Case (United States v. Czechoslovakia) (1955-1956).[104] In 1955 the United States instituted proceedings before the Court to complain of "certain wrongful acts committed by MIG-type aircraft from Czechoslovakia within the United States zone of occupation in Germany on March 10, 1953."[105] Since Czechoslovakia did not consent to the jurisdiction of the Court, the case was removed from the List of the Court without decision.

The *Aerial Incident of 7 October 1952* Case (United States v. U.S.S.R.) (1955-1956).[106] In 1955 the United States instituted proceedings before the Court to complain of certain willful acts committed by fighter aircraft of the Soviet government against a United States Air Force B-29 aircraft and its crew off Hokkaido, Japan, on October 7, 1952.[107] Since the U.S.S.R. did not consent to the jurisdiction of the Court, the case was removed from the List of the Court without decision.

The *Aerial Incident of 27 July 1955* Case (Israel v. Bulgaria) (1957-1959).[108] Bulgarian fighter craft shot down an Israeli civilian commercial airliner with the loss of life of all passengers. Israel attempted to bring Bulgaria before the International Court in order to obtain a judgment awarding it damages for the incident. The case aroused interest because no Communist country has accepted in any way the jurisdiction of the Court. However, Bulgaria had accepted for an unlimited period the jurisdiction of the Permanent Court before World War II. Article 36(5) of the present Court's Statute provides:

> Declarations made under Art. 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed . . . to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run. . . .

Israel contended that Bulgaria was still bound by its 1921 acceptance. The Court disagreed with this argument. It restricted the application of article 36(5) to the original members of the U.N. Since Bulgaria did not become a member until 1955 its adherence to the Permanent Court had lapsed and could not now be revived. Israel's case was dismissed.

The *Aerial Incident of 27 July 1955* Case (United States v. Bulgaria) (1957-1959).[109]

The *Aerial Incident of 27 July 1955* Case (United

97. [1974] I.C.J. Rep. 175; reported in 69 *Am. J. Int'l L.* 154 (1975).

98. [1973-1974] I.C.J.Y.B. 116, 117.

99. [1973] I.C.J. Rep. 99; reported in 67 *Am. J. Int'l L.* 778 (1973).

100. [1973] I.C.J. 135; reported in 67 *Am. J. Int'l L.* 778 (1973).

101. *Nuclear Test Cases, Int'l Lawyer* 563, 571 (1975), quoting I.C.J. opinion.

102. *Id.* at 573.

103. For related "contentions" cases *see Treatment in Hungary of Aircraft and Crew of the United States, infra* notes 73 and 74 and *Nuclear Tests, supra* notes 46 and 47.

104. [1956] I.C.J. Rep. 6; digested in 51 *Am. J. Int'l L.* 11 (1957).

105. [1955-1956] I.C.J.Y.B. 73.

106. [1956] I.C.J. Rep. 9; digested in 51 *Am. J. Int'l L.* 12 (1957).

107. [1955-1956] I.C.J.Y.B. 75.

108. [1959] I.C.J. Rep. 127; digested in 53 *Am. J. Int'l L.* 923 (1959), *cf, Temple of Preah Vihear, supra* note 31.

109. [1960] I.C.J. Rep. 146.

Kingdom v. Bulgaria) (1957-1959).[110] In 1957 the United States (and the United Kingdom) instituted proceedings before the Court "against the government of the Peoples Republic of Bulgaria with regard to the damage suffered by American [and United Kingdom] nationals, passengers on board an aircraft of El Al Israel Airlines, Ltd., which was destroyed on 27 July 1955 by a Bulgarian fighter aircraft.[111] Several years later the United States (and the United Kingdom), after the judgment of the Court involving proceedings brought by Israel against Bulgaria out of the same incident was decided adverse to Israel (see immediately preceding case), requested discontinuance of the case(s). The request(s) were granted and the case(s) were removed from the List of the Court without decision.

The *Aerial Incident of 4 September 1954* Case (United States v. U.S.S.R.) (1958).[112] In 1958 the United States instituted proceedings before the Court against "certain willful acts committed by military aircraft of the Soviet government on September 4, 1954, in the international air space over the Sea of Japan against a United States Navy P2-V-type aircraft, commonly known as a Neptune type, and against its crew."[113] Since the U.S.S.R. did not consent to the jurisdiction of the Court, the case was removed from the List of the Court without decision.

The *Aerial Incident of 7 November 1954* Case (United States v. U.S.S.R.) (1959).[114] In 1959 the United States instituted proceedings before the Court against the Soviet government "on account of the destruction on November 7, 1954, of a United States Air Force B-29 aircraft [by Soviet fighter planes] in the Japanese territorial air space over Hokkaido, Japan.[115] Since the U.S.S.R. did not consent to the jurisdiction of the Court, the case was removed from the List of the Court without decision.

The Appeal *Relating to the Jurisdiction of the ICAO Council* Case (India v. Pakistan) (1971-1972).[116] Under the International Civil Aviation Convention and the International Air Services Transit Agreement, both signed by Pakistan and India in 1944, civilian aircraft of Pakistan had the right to overfly Indian territory. After the hostilities of 1965 between Pakistan and India had subsided, the two countries agreed in 1966 that overflights should continue on the same basis as before. Pakistan took this to mean under the 1944 Convention and Treaty, while India maintained the two treaties had been suspended and never revived; i.e., Pakistan overflights would be permitted only after specific permission was granted by India. In 1971 an Indian aircraft was hijacked to Pakistan; thereafter, India refused any overflights by Pakistani civilian aircraft. Pakistan submitted the dispute to the International Civil Aviation Organization (ICAO) alleging that India was in breach of the two treaties. The ICAO found that it had jurisdiction to hear the dispute; India appealed from this ruling to the Court. After discussing Pakistan's objections to the Court hearing the appeal and overruling the objections, the Court upheld the competence of the ICAO to hear the complaint.[117]

(3) *Disputes relating to Nationals.*[118]

The *Protection of French Nationals and Protected Persons in Egypt* Case (France v. Egypt) (1949-1950).[119] In 1948 France instituted proceedings against Egypt before the Court to complain of "certain measures [taken] against the persons and property, rights and interests of certain French nationals and protected persons in Egypt."[120] Two years later, the French government notified the Court that the dispute had been settled by Egypt ceasing to take the complained of measures and requested the Court to discontinue the proceedings. There being no objection from Egypt, the case was removed from the List of the Court without decision.

The *Asylum* Case (Columbia v. Peru) (1949-1950).[121]

The *Request for Interpretation of the Judgment of 20 November 1950* in the *Asylum* Case (Columbia v. Peru) (1950).[122]

The *Haya de la Torre* Case (Columbia v. Peru) (1950-1951).[123] The Pan-American Havana Convention on Asylum of 1928, of which both Peru and Colombia were parties, provided (1) that political asylum could be granted in a foreign embassy to political offenders in an emergency, and (2) that asylum could not be granted to common criminals who, if found in an embassy, must be turned over to the local authorities.

In 1949 Haya de la Torre, claiming to be a political offender, sought asylum in the Colombian embassy in Peru. Peru demanded his release. Colombia refused. The parties to the dispute asked the court very narrow questions, the answers to which failed to resolve all the problems connected with the case. The questions and answers at the first hearing are as follows:

110. [1959] I.C.J. Rep. 264.
111. [1959-1960] I.C.J.Y.B. 93.
112. [1958] I.C.J. Rep. 158.
113. [1958-1959] I.C.J.Y.B. 90.
114. [1959] I.C.J. Rep. 276.
115. [1959-1960] I.C.J.Y.B. 85, 86.
116. [1972] I.C.J. Rep. 46; reported in 67 *Am. J. Int'l L.* 127 (1973).
117. [1972-1973] I.C.J.Y.B. 111.
118. For related "contentions" cases, *see Corfu Channel, supra* note 18; *South West Africa, supra* note 35; *Aerial Incident of 27 July 1955, supra* notes 55 to 58; and *Barcelona Traction, Light and Power Company, Limited, infra* notes 91 and 92. For related advisory opinions *see Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, infra* note 99; *International Status of Southwest Africa, infra,* note 100; and *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, infra* note 103.
119. [1950] I.C.J. Rep. 59.
120. [1949-1950] I.C.J.Y.B. 68.
121. [1950] I.C.J. Rep. 266; reported in 51 *Am. J. Int'l L.* 179, 781 (1951).
122. [1950] I.C.J. Rep. 395.
123. [1951] I.C.J. Rep. 4.

1. Can the state granting the asylum unilaterally determine if the refugee is a political offender or a common criminal?

   No, here Colombia cannot make, under the treaty, such a unilateral determination. However, Peru has not proven that de la Torre is a common criminal.
2. If de la Torre is a political offender lawfully in the Colombian embassy, must Peru afford the necessary guarantees to enable him to leave the country in safety?

   No. The 1928 treaty only provides for asylum in an embassy, not for immunity while going from the embassy to the border of the country.
3. If de la Torre is a political offender, was the asylum granted according to the terms of the 1928 treaty?

   No, because no emergency appears to have existed.

Peru then called upon Colombia to surrender the refugee. Colombia refused to do so, maintaining that the Court's judgment did not place it under an obligation to surrender de la Torre to the Peruvian authorities. A second hearing was held at which the Court agreed with Colombia. The 1928 Havana Convention provided only for the surrender of common criminals. No such obligation existed in regard to political offenders. The Court reasoned that Colombia was under an obligation to terminate the asylum. Surrender of the refugee to the local authorities is only one method of terminating an asylum. Colombia was not restricted to that single method.

Throughout the case the Court was careful to point out that the granting of asylum in an embassy is a derogation of the sovereignty of the local state, and that such derogation, if made by treaty, must be strictly construed. It found no evidence of any Latin American customary international law which would permit the granting of asylum in the absence of a treaty.

The *Rights of Nationals of the United States of America in Morocco* Case (France v. United States) (1950-1952).[124] In 1836 the United States and Morocco entered into a treaty which granted the United States "most favored nation privileges" and certain extraterritorial rights in Morocco. In 1906 Morocco became a protectorate of France. In the General Act of Algeciras, of that year, France agreed to continue foreign rights in Morocco.

By a decree of December 30, 1948, the French authorities in the Moroccan Protectorate imposed a system of license control on certain imports. The United States maintained that such controls did not apply to United States nationals in Morocco because, (1) they were discriminatory in favor of France contrary to the General Act of Algeciras, and (2) the extraterritorial rights of the United States in Morocco were such that no Moroccan law or regulations could be applied to United States nationals in Morocco without its previous consent.

The Court considered that the controls were discriminatory and therefore contrary to U.S. treaty rights. The second contention of the U.S. gave the Court an opportunity to explore the extent of U.S. consular court jurisdiction. Such jurisdiction was formerly very common. Under treaties known as "Capitulations" various states in the 19th century secured special immunities from local jurisdiction for their citizens living in African or Asiatic countries. The Court here dealt with such a treaty on its merits and by implication saw nothing contrary to international law in them. Now practically all "capitulation" treaties have been terminated.

The *Nottebohm* Case (Liechtenstein v. Guatemala) (1951-1955).[125] By the Application filed on December 17th, 1951, the Government of Liechtenstein instituted proceedings before the Court in which it claimed restitution and compensation on the ground that the Government of Guatemala had "acted toward the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law." In its Counter-Memorial, the Government of Guatemala contended that this claim was inadmissible on a number of grounds, and one of its objections to the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seized the Court.

Nottebohm was originally a German citizen. In 1905 he went to Guatemala, established his center of business there, and established a residency on and off, for a period of 34 years. In October, 1939, he applied for Liechtenstein citizenship and after paying certain sums of money as waivers, and receiving preferential treatment, received his citizenship in that same month. He then returned to Guatemala. In 1943 Nottebohm was removed to the United States by Guatemala in a war measure on the basis of his being a citizen of a belligerent state. Guatemala then proceeded against his property as an enemy alien.

The case is of fundamental importance. Diplomatic protection can only be exercised by a state on behalf of its own nationals. Nationality is conferred by a state under its own laws. International law does not lay down any criteria which a state must meet before it can confer its nationality on an individual. Such is left to the domestic law of each state. However, here the real issue was not whether Nottebohm was a national of Liechtenstein under the laws of Liechtenstein, but whether he was the type of national for whom Liechtenstein had an international right to protect from the actions of other states. This international right requires not merely nationality, but nationality coupled with a real connection of interests.

Under the circumstances, the Court found that Guatemala was under no obligation to recognize the

124. [1952] I.C.J. Rep. 1975; reported in 47 *Am. J. Int'l L.* 136 (1953).

125. [1955] I.C.J. Rep. 4; reported in 49 *Am. J. Int'l L.* 396 (1955).

Liechtenstein citizenship; as a consequence, Liechtenstein was not entitled to extend its protection to Nottebohm and the claim must fail.

The *Treatment in Hungary of Aircraft and Crew of the United States* Case (United States v. Hungary) (1954).[126]

The *Treatment in Hungary of Aircraft and Crew of the United States of America* (United States v. U.S.S.R.) (1954).[127] In 1954 the United States instituted proceedings before the Court "against the Hungarian People's Republic and against the U.S.S.R., on account of certain actions of the Hungarian Government in concert with the Government of the U.S.S.R."[128] Since neither Hungary nor the U.S.S.R. consented to be jurisdiction of the Court, the cases were removed from the list of the Court without decision.

The *Certain Norwegian Loans* Case (France v. Norway) (1955-1957).[129] Certain Norwegian loans had been floated in France between the years 1885 and 1909. By their terms these loans were convertible into gold as well as various national currencies. Norway then suspended the convertibility into gold. France, exercising its right of diplomatic protection on behalf of its nationals, sought to compel Norway to redeem the bonds in gold. France had adhered to the Court's jurisdiction under the optional clause with a reservation similar to the U.S. Connally Reservation.

Under conditions of reciprocity, both parties are entitled to take advantage of any reservations the other has made. Norway, therefore, maintained that the case involved a matter exclusively within the domestic jurisdiction of Norway as determined by Norway. The Court therefore dismissed the case. It was not forced to rule on the validity of France's reservation because neither party contested it. Rather both were committed to argue for its validity, France in order to be a proper plaintiff before the Court, and Norway in order to use the reservation to defeat France's claim. Since this case France has withdrawn its reservation.

The *Application of the Convention of 1902 governing the Guardianship of Infants* Case (Netherlands v. Sweden) (1957-1958).[130] In 1902 Sweden and the Netherlands became parties to the Hague Convention on the guardianship of infants. The Swedish authorities placed an infant of Netherlands nationality residing in Sweden under the regime of protective upbringing instituted by Swedish law. The Netherlands maintained that the 1902 Convention required that the child be brought up according to Dutch law. The Court held that the Swedish law was outside the scope of the treaty and therefore not in violation of it.

The *Interhandel* Case (Switzerland v. United States) (1957-1959).[131] In 1942, the United States appropriated almost all the shares, estimated at $150,000,000, of the General Aniline and Film Corporation, an American Corporation, on the ground that these shares, though in the name of Interhandel, were in reality owned by I.G. Farben, a German corporation. Interhandel, a Swiss corporation, contested such a finding, maintaining that it was the real owner of the shares and not merely a holder in trust for I.G. Farben. While Interhandel's case was proceeding through the United States Courts, Switzerland, exercising its right of diplomatic protection, asked the International Court of Justice to declare that the United States Government was under an obligation to restore to Interhandel its property. It also asked interim measures of protection for the seized property. The Court saw no need for interim measures and refused to impose them.[132] The United States defended on the grounds that (1) Interhandel had not exhausted its local remedies in the U.S. Courts and (2) that certain actions taken against the American Corporation were within the exclusive domestic jurisdiction of the U.S., as determined by the U.S. The Court disposed of the case on the first ground, that Interhandel had not exhausted its local remedies, a prerequisite for the exercise of diplomatic protection. It passed no judgment on the controversial domestic jurisdiction implications of the second defense of the United States.

In April 1964 U.S. District Judge David A. Pine lifted an injunction he imposed in 1963 and thereby cleared the way for the Justice Department to sell General Aniline and Film Corporation, thus ending the long litigation, both national and international, surrounding the legality of the seizure by the American government in 1942.

The *Trial of Pakistani Prisoners of War* Case (Pakistan v. India) (1973).[133] In 1973 Pakistan instituted proceedings before the Court against India because "India was proposing to hand over 195 Pakistani prisoners of war to the Government of Bangladesh, which intended to try them for acts of genocide and crimes against humanity."[134] Before the Court could schedule arguments on the jurisdiction of the Court to hear the dispute, Pakistan informed the Court of negotiations between India and Pakistan and requested that the proceeding be discontinued. As a result, the case was removed from the list of the Court without decision.

126. [1954] I.C.J. Rep. 103.
127. [1954] I.C.J. Rep. 99.
128. [1953-1954] I.C.J.Y.B. 92.
129. [1957] I.C.J. Rep. 9; digested in 51 *Am. J. Int'l L.* 777 (1957).
130. [1958] I.C.J. Rep. 55; digested in 53 *Am. J. Int'l L.* 436 (1959).
131. [1959] I.C.J. Rep. 6; digested in 53 *Am. J. Int'l L.* 671 (1959).
132. [1957] I.C.J. Rep. 105; digested in 52 *Am. J. Int'l L.* 320 (1958).
133. [1973] I.C.J. Rep. 347.
134. [1973-1974] I.C.J.Y.B. 123.

(4) *Disputes of a Commercial Nature.* [135]

The *Ambatielos* Case (Greece v. United Kingdom) (1951-1953). [136] In 1919, Ambatielos, a Greek shipowner, entered into a contract for the purchase of ships with the Government of the United Kingdom. Because of a delay in the delivery of the ships, Ambatielos claimed he suffered pecuniary damage. He took his case through the British courts and lost. He then maintained that the judgments of the British courts were contrary to international law because they amounted to a denial of justice. The Greek Government, exercising its right of diplomatic protection, took up the case of its national and sought to compel Great Britain to arbitrate under arbitration agreements between the two countries. The sole question presented to the Court was whether Great Britain must arbitrate. The Court was not called upon to decide the merits. The British position was that this was not the type of dispute included in the arbitration agreement. The question for the Court was a difficult one because to hold a dispute as to whether a case should be arbitrated a matter for arbitration would tend to make any matter subject to arbitration upon the insistence of one party to the agreement. The Court held that Great Britain should arbitrate. In the arbitration on the merits, which followed in 1956 the decision of the I.C.J., the Greek Government was unsuccessful in sustaining Ambatielos' claim. [137]

The *Anglo-Iranian Oil Co.* Case (United Kingdom v. Iran) (1951-1952). [138] In 1932 Iran adhered to the "optional clause" of the Permanent Court of International Justice, with the reservation that such adherence only applied to disputes based on treaties concluded by Iran after that date. In 1933 Iran entered into an agreement with the Anglo-Iranian Oil Company. Iran's 1932 limited adherence to the jurisdiction of the Permanent Court had been transferred to the International Court in 1945. In 1951 Iran nationalized the properties of the Oil Company. The Company maintained that such nationalization was contrary to the 1933 agreement. Great Britain sought before the International Court of Justice to enforce the rights of the Oil Company under the 1933 agreement. Iran contested the jurisdiction of the Court. Great Britain requested that the court order Iran to cease its measures against the Company pending the outcome of the contest over jurisdiction. The Court granted this request over the protests of Iran. Iran refused to comply with these interim measures.

The Court then dismissed the case for lack of jurisdiction because Iran had only agreed that the Court would have jurisdiction over treaties entered into after 1932. The 1933 agreement was not a treaty between states. Anglo-Iranian Oil was a private company despite the fact that most of its shares were owned by Great Britain. The legality under international law of Iran's nationalization decrees was never decided by the Court. Since this case Iran has withdrawn entirely its submission to the compulsory jurisdiction of the Court.

The *Monetary Gold from Rome in 1943* Case (Italy v. France, United Kingdom and United States) (1953-1954). [139] In 1943 Germany removed from Rome to Germany certain gold belonging to Albania. Both Italy and Great Britain claimed the gold, Italy for satisfaction of a claim against Albania and Great Britain for a satisfaction of the still outstanding Corfu Channel [140] judgment it held against Albania. Acting under a 1946 agreement, France, U.S.A., and Great Britain decided jointly that the gold should go to Great Britain. Under a separate provision of the same treaty, Italy challenged the decision and took the matter to the International Court. The Court ruled that it had no jurisdiction to adjudge Italy's right to the gold because to do so would involve the merits of Italy's claim against Albania. Since Albania was not a party to the proceedings and could not without its consent be made a party the Court had no alternative but to dismiss the case.

The *"Electricite de Beyrouth" Company* Case (France v. Lebanon) (1953-1954). [141]

The *Compagnie du Port, des Quais et des Entre pots de Beyrouth and Societe Radio - Orient* Case (France v. Lebanon (1959-1960). [142] In 1948 the Governments of France and Lebanon entered into an agreement, which purported to settle all the financial problems resulting from the liquidation of the past and at the same time the monetary and financial relations of the two countries for the future. It included an undertaking by the Lebanese Government relating to concessions of the French companies and companies with French capital in Lebanon. It also contained in its Article 23 a clause granting jurisdiction to the Court. [143] "Electricite de Beyrouth Company" considered that measures taken by Lebanon were contrary to the 1948 agreement, and it was able to persuade the Government of France in 1953 to institute proceedings before the Court against Lebanon. Before arguments

135. For related "contention" cases, *see Fisheries Jurisdiction, supra* notes 42 and 44; *Certain Norwegian Loans, supra* note 76; and *Interhandel, supra* note 78. For related advisory opinions, see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, infra* note 104; *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco; infra* note 105; *Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization, infra* note 106; and *Application for Review of Judgment [sic] No. 158 of the United Nations Administrative Tribunal, infra* note 111.

136. [1953] I.C.J. Rep. 10; digested in 46 *Am. J. Int'l L.* 733 (1952).

137. Opinion of the Arbital Commission is digested in 50 *Am. J. Int'l L.* 674 (1956).

138. [1952] I.C.J. Rep. 13; reported in 45 *Am. J. Int'l L.* 789 (1951).

139. [1954] I.C.J. Rep. 4; reported in 48 *Am. J. Int'l L.* 649 (1954).

140. See *supra* note 18.

141. [1954] I.C.J. Rep. 13.

142. [1960] I.C.J. Rep. 3.

143. [1954-1955] I.C.J.Y.B. 75; *see also* [1960-1961] I.C.J.Y.B. 83.

could be heard, the Government of Lebanon and "Electricite de Beyrouth Company" negotiated a settlement; the case was discontinued and removed from the list of the Court in 1954. In 1959 the Government of France again instituted proceedings before the Court against Lebanon with regard to the "Compagnie du Port des Quais et des Entre pots de Beyrouth and the Societe Radio - Orient," but within a year and a half it was also removed from the list of the Court by request of the parties.

The *Barcelona Traction, Light and Power Company, Limited* Case (Belgium v. Spain) (1958-1961). [144]

The *Barcelona Traction, Light and Power Company, Limited (New Application)* Case (Belgium v. Spain) (1962-1970). [145] In 1958 Belgium instituted proceedings before the Court against Spain with regard to the Barcelona Traction, Light and Power Company, Limited. In 1961 the Belgian government with a view toward negotiation requested that the matter be discontinued and then removed from the list of the Court. This was done, but in 1962 Belgium filed a new application concerning Barcelona Traction with the Court when negotiations failed. Barcelona Traction was incorporated in 1911 in Canada and, primarily through subsidiaries, supplied electricity in Spain. Between WWI and WWII it was alleged that Belgian citizens acquired a large percentage of Barcelona Traction stocks/bonds. With the start of the Spanish Civil War, the company suffered financial difficulties and in 1948 was declared bankrupt by a Spanish Court. The claim submitted to the Court was presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in Barcelona Traction, a company incorporated in Canada and having its head office there. The object of the Application was to obtain reparation for damage allegedly caused to those persons by conduct, said to be contrary to international law, of various organs of the Spanish State towards that company. [146] Spain objected to the application, *inter alia,* because Belgium lacked capacity to seek redress from injuries done to a *Canadian* company, even if the shareholders were Belgian. The Court found that where "it was a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorized the national state of the company alone to exercise diplomatic protection for the purpose of seeking redress. No rule of general international law expressly conferred such a right in the shareholder's national state." [147] After considering several situations (e.g., nonexistence of the company or protecting State lacks capacity to take action) that might be considered "special circumstances" demanding a different result and finding no such circumstances involved in the case before it, the Court rejected Belgium's claim. Likewise, the Court refused to adopt a special equity rule that would permit a State "to take up the protection of its nationals, shareholders in a company, which had been the victim of a violation law. . . . [, as such a proposition] would create an atmosphere of insecurity in international economic relations." [148]

b. Advisory Opinions

The *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* Opinion (1947-1949). [149] Article 4(1) of the United Nations Charter contains three criteria for membership in the United Nations. The applicant states (1) must be peace-loving, (2) must accept the obligations contained in the Charter, and (3) in the judgment of the United Nations must be able and willing to carry out the Charter obligations.

Since the creation of the United Nations some 12 states had unsuccessfully applied for admission. Their applications were vetoed in the Security Council. A proposal was then made for the admission of all candidates at once. Such a proposal certainly implied that some states would only be admitted on the condition that others would be admitted also. The General Assembly questioned the imposition by the Security Council of conditions for admission not contained in the Charter. The General Assembly asked the Court for an advisory opinion. The Court declared that conditions laid down in Article 4 for the admission of states were exhaustive and that if these conditions were fulfilled by a state which was a candidate, the Security Council ought to recommend to the General Assembly that such a state be admitted. The Court added, however, that it was up to the subjective judgment of each member whether or not the conditions for admission had been met.

The *Competence of the General Assembly for the Admission of a State to the United Nations* Opinion (1949-1950). [150] The immediately preceding case decided by the Court did not lead to a settlement of the problem of admissions in the Security Council. The General Assembly then sought an advisory opinion from the Court as to whether it could on its own, admit a candidate in cases where the Security Council failed to recommend the candidate to it.

The Court refused to permit the Charter to be construed to permit such authority in the General Assembly. It held that Article 4(2) was clear in its requirements.

> Art. 4(2). The admission of any such state to membership in the United Nations will be effected by [1] a decision of the General Assembly [2] upon recommendation of the Security Council.

The only recommendation contemplated by the

144. [1961] I.C.J. Rep. 9.
145. [1970] I.C.J. Rep. 3.
146. [1969-1970] I.C.J.Y.B. 107, 109.
147. *Id.* at 110.
148. *Id.* at 111.
149. [1948] I.C.J. Rep. 9, 57; reported in 42 *Am. J. Int'l L.* 927 (1948).
150. [1950] I.C.J. Rep. 4; digested in 44 *Am. J. Int'l L.* 582 (1950).

Charter was a favorable recommendation. The lack of a favorable recommendation on the part of the Security Council cannot be construed by the General Assembly as an unfavorable recommendation, permitting it to proceed with its own vote on the admission. To do so would deprive the Security Council of an important function assigned to it by the Charter.

The *Reparation for Injuries Suffered in the Service of the United Nations* Opinion (1948-1949).[151] As a consequence of the assassination in Palestine of Count Bernadotte, the United Nations Palestine Mediator, the General Assembly asked the Court two important legal questions. (1) Does the United Nations have the international legal capacity to bring an international claim against Israel for damages caused to the United Nations by the assassination?; (2) Does the United Nations have the international legal capacity to bring an international claim against Israel on behalf of the relatives of the victim? The first question raised not only the nature of the U.N. but further its relation to nonmember states. The Court said that the U.N. not only had sufficient legal capacity to bring an international claim against a state, but could even bring such claim against a nonmember. The U.N. had international existence not only in the eyes of its members, but even in the eyes of nonmembers because of its purposes and because of the great majority of states which make it up. The second question raised the problem of diplomatic protection. Ordinarily a state can only bring a claim on behalf of its own nationals. The Court permitted the U.N. to sponsor such a claim, reasoning that the risk of possible duplication between the U.N. and the victim's national state could be eliminated either by means of a general convention or by a particular agreement in any individual case.

The *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* Opinion (1949-1950).[152] In the 1949 peace treaties with the Allied States, Bulgaria, Hungary and Romania agreed, among other things, to respect certain freedoms of individuals in their territories. In the event a dispute arose over the performance of the peace treaties each side was to appoint a representative to an arbitral board. The two representatives were to choose a third member.

The Allied States accused Bulgaria, Hungary and Romania of denying to some of their citizens the freedoms guaranteed by the treaties. The allegation was denied. The Allied States then asked for the appointment of commissioners to arbitrate the dispute. Bulgaria, Hungary and Romania refused to appoint a commissioner. The General Assembly asked the Court if the three Balkan countries were bound to do so. The Court, on March 30, 1950, replied that they were. Upon the continued refusal of Bulgaria, Hungary, and Romania to appoint a commissioner, the General Assembly asked the Court whether the Secretary General, who by the terms of the treaties was authorized to appoint the third member *in the absence of agreement between the commissioners on his selection,* could proceed to make this appointment, where one of the parties failed to appoint its commissioner. The Court, on July 18, 1950, replied that the Secretary General could not do so under the terms of the treaties of peace.

The problem before the Court was one of treaty interpretation. By denying the Secretary the authority to appoint the third commissioner the Court in effect construed the treaty in such a fashion that the deliberate failure of one side to appoint a commissioner could render the entire arbitration machinery ineffective. The Court realized that a treaty should, if possible, be so interpreted as to be effective. However, it also realized that a treaty should not be rewritten by a court under the guise of interpretation in order to improve its operation.

The *International Status of Southwest Africa* Opinion (1949-1950).[153] The Court on June 11, 1950, held that South-West Africa was impressed with an international status when it became a mandate under the League of Nations. The death of the League did not affect that status. Therefore, the Union of South Africa, as the mandatory power, could not unilaterally cancel that international status and annex South-West Africa. It was not under an obligation to convert the mandate into a trust territory under the U.N., but it was obligated to report to the General Assembly on South-West Africa as it had done to the League. This opinion permitted the U.N. to become an inheritor of certain prerogatives possessed by its predecessor. The Court, however, stated that the United Nations was to exercise this prerogative subject to the same restrictions imposed upon the League of Nations. This restriction was the central issue in the two following advisory opinions.

The *Voting Procedure on Questions to Reports and Petitions Concerning the Territory of Southwest Africa* Opinion (1954-1955).[154] On June 7, 1955, the Court, at the request of the General Assembly, decided that the voting procedures adopted by the General Assembly in dealing with matters pertaining to South-West Africa were procedural in nature and therefore did not amount to supervision in excess of that performed by the League of Nations over South-West Africa. The Court was forced to reconcile the more liberal voting procedure in the General Assembly with its earlier opinion which restricted the U.N.'s supervision of South-West Africa to that exercised by the League of Nations.

151. [1949] I.C.J. Rep. 174; digested in 43 *Am. J. Int'l L.* 589 (1949).

152. [1950] I.C.J. Rep. 65, 121, 221; digested in 44 *Am. J. Int'l L.* 742, 752 (1950).

153. [1950] I.C.J. 128; digested in 44 *Am. J. Int'l L.* 757 (1950).

154. [1955] I.C.J. Rep. 67; digested in 49 *Am. J. Int'l L.* 565 (1955).

The *Admissibility of Hearings of Petitioners by the Committee on Southwest Africa Opinion* (1955-1956).[155] On June 1, 1956, the Court again had to reconcile the restrictive provisions of its first opinion with the practice of the General Assembly in permitting oral hearings on South-West Africa. The League had only utilized written petitions. The Court said that nothing prevented the League from having oral hearings. Furthermore, the refusal of the Union of South Africa to cooperate with the General Assembly made oral hearings useful in keeping the General Assembly informed of events in South-West Africa.

The *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Opinion (1950-1951).[156] Reservations to multilateral treaties had long presented a problem. The Latin American nations, starting about 1926, developed the practice of permitting reservations. A reserving state was a party to the convention as to those signatories which accepted the reservation, it was not a party as to those which did not. The League of Nations on the other hand pursued a policy that all signatories must agree to the reservation before the reserving state can become a party to the treaty.

The Genocide Convention was drafted under the auspices of the U.N. When it was opened for signature several states signed with reservations. The General Assembly asked the Court what practice it should follow. On May 18, 1951, the Court replied that reservations are permitted if they do not go to the main objecuves of the convention. It is up to each signatory to judge for itself if the reservation is compatible with the convention. The reserving state is a party to the treaty as to those states which consider the reservation compatible with the main objects of the treaty, it is not a party as to those states which do not think the reservation compatible. The result is almost the same as the Latin American practice. The Court rejected the League policy which required unanimity of acceptance by all signatories. This freedom to make reservations was purchased at the price of the unity and internal coherence of mulitlateral treaties.

The *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* Opinion (1953-1954).[157] The employment contracts of several American employees of the Office of the Secretary General were terminated by the Secretary General without their consent. The United States was desirous of the termination because of suspected disloyalty to the United States. These employees appealed to the United Nations Administrative Tribunal, which had previously been established by the General Assembly to hear employment contract disputes. This tribunal restored the employees to their position.

The General Assembly asked the Court if it was bound by such a decision of a tribunal it had created, or whether it could look upon such a decision as a recommendation. The Court replied that the General Assembly had created an independent and truly judicial body pronouncing final judgments without appeal and that its judgments were therefore binding on the General Assembly.

The *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO* Opinion (1955-1956).[158] The ILO (International Labor Organization) had established an administrative tribunal to settle disputes between ILO and its employees. UNESCO accepted the jurisdiction of this tribunal. The tribunal gave four judgments in favor of four American employees of UNESCO who had refused to answer a questionnaire form or to appear before the International Organization Employees' Loyalty Board of the U.S. Civil Service. The statute setting up the tribunal permitted its decision as to its own jurisdiction to be challenged by the using agency. In the event of such a challenge the dispute would be settled by the International Court. UNESCO challenged the jurisdiction of the tribunal on the ground that the employees had no legal right to a renewal of their contracts and hence there was no nonobservance of the terms of the contracts.

The Court held that the tribunal did have jurisdiction to hear the complaints in question because UNESCO had told its employees that fixed term contracts would be renewed.

The case is interesting because it shows an instance of the Court acting as an appellate tribunal in an actual dispute between an international organization and private individuals. The general rule is that only states may be parties before the Court. Here, the practical effect of the Court's willingness to give an advisory opinion in the circumstances of this case is to relax that general rule.

The *Constitution of the Maritime Consultative Organization* Opinion (1959-1960).[159] Under Article 28(a) of the Inter-Governmental Maritime Consultative Organization, a Maritime Safety Committee of 14 members was to be elected. Not less than eight of those elected were to be from "the largest ship-owning nations." When the first election was held on January 15, 1959, neither Panama nor Liberia was elected although both were in the first eight of the nations with the largest registered tonnage.

The Court refused to permit the Inter-Governmental Maritime Consultative Organization to look behind the registered tonnage to actual ownership. It was evident that many ships were merely registered in Liberia and Panama

155. [1956] I.C.J. Rep. 23; digested in 50 *Am. J. Int'l L.* 954 (1956).

156. [1951] I.C.J. Rep. 15; reported in 45 *Am. J. Int'l L.* 579 (1951).

157. [1954] I.C.J. Rep. 46; digested in 48 *Am. J. Int'l L.* 655 (1954).

158. [1956] I.C.J. Rep. 77; digested in 51 *Am. J. Int'l L.* 410 (1957).

159. [1960] I.C.J. Rep. 150; digested in 54 *Am. J. Int'l L.* 884 (1960).

as a matter of convenience. There was little or no real connection between the ships and these states. If the Court followed the trend of its reasoning in the *Nottebohm* case and looked for a real connection or community of interests it might have ruled against Liberia and Panama. However, it based its decision on its interpretation of the intent of the drafters of Article 28(a) of the convention. It held that the intent of the drafters was that registered tonnage was to be the criterion. Therefore, Liberia and Panama should have been elected to the Maritime Safety Committee.

The *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* Opinion (1961-1962).[160] This advisory opinion involved legal issues of fundamental importance to the United Nations. The United Nations is a collective security organization. One of its primary purposes is to keep the peace. It has put three forces into the field, the Unified Command in Korea, the United Nations Emergency Force in Gaza, and the United Nations force in the Congo. Several members refused to pay their allotted share of the costs for the latter two operations for various reasons. Some thought that a United Nations member was only compelled to pay "regular costs" and not "special assessments." Others, including the Soviet Union, contended that since these actions were taken or implemented under the "Uniting for Peace" Resolution of the General Assembly they were contrary to the United Nations Charter which placed responsibility for the use of force solely in the Security Council. Therefore the General Assembly was without authority to pass such resolutions. The court held that these were legitimate assessments and all members are required to bear their share.

The *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276* Opinion (1970-1971).[161] In 1970 the United Nations Security Council requested an advisory opinion of the Court on: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"[162] Resolution 276 had been adopted by the Security Council in 1970 and declared that South Africa's continued presence in Namibia was illegal. After refusing to grant challenges for cause against three members of the Court, the Court was of the opinion:

by 13 votes to 2,

(1) that, the continued presence of South Africa in Namibia being illegal South Africa was under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;

by 11 votes to 4,

(2) that States Members of the United Nations were under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

(3) that it was incumbent upon States which were not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which had been taken by the United Nations with regard to Namibia.[163]

The *Application for Review of Judgment* [*sic*] *No. 158 of the United Nations Administrative Tribunal* Opinion (1972-1973).[164] Mr. Mohamed Fasla, an official of the United Nations on a fixed-term contract, was not rehired at the end of his contract. He appealed this decision to the United Nations Administrative Tribunal which found against him. Mr. Fasla requested the Tribunal, which it did in 1972, to seek an advisory opinion from the Court to determine whether the Tribunal had failed to exercise proper jurisdiction or had committed a fundamental error in procedure. The Court found proper exercise of jurisdiction and no fundamental error in procedure.[165]

The *Western Sahara* Opinion (1974-1975).[166] In 1974 the United States General Assembly requested an opinion from the Court on two questions:

1. Was Western Sahara at the time of colonization by Spain (1884) a territory belonging to no one (*terra nullius*)?
2. If the answer to question 1 is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian Entity?[167]

After refusing to find that the General Assembly was attempting to accomplish by advisory opinion (for which no consent is required) what could not be done by a "contentions" case (since Spain would not consent to the jurisdiction of the Court), the Court found unanimously that Western Sahara was *not* a territory belonging to no one at the time of Spanish Colonization, with regard to the second question before the Court, the Court advised in the penultimate paragraph of its opinion:

The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the

160. [1962] I.C.J. Rep. 151; digested in 56 *Am. J. Int'l L.* 1053 (1962).

161. [1971] I.C.J. Rep. 16; reported in 66 *Am. J. Int'l L.* 145 (1972).

162. [1970-1971] I.C.J.Y.B 100.

163. *Id.* at 108.

164. [1973] I.C.J. Rep. 166; reported in 68 *Am. J. Int'l L.* 340 (1974).

165. See [1972-1973] I.C.J.Y.B. 125.

166. [1975] I.C.J. Rep. 6.

167. *Questions Concerning Western Sahara,* 10 *Int'l Lawyer* 199, 199 (1976).

Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory. [168]

9-8. Conclusion. A great many of the cases before the International Court, along with its predecessor the Permanent Court, have concerned the interpretation of treaties. The International Court has resisted any interpretation which would, in effect, redraft or improve the treaty. It has left the parties with the treaties as they wrote them. This is evident in the *Asylum case, the Rights of U.S. Nationals in Morocco, Sovereignty over certain Frontier Land, the U.N. admission cases, Balkan Peace Treaties, and the Constitution of the Maritime Safety Committee.*

The cases discussed in this chapter have not emphasized the treaties involved, but have been grouped according to the general subject matter which gave rise to the particular dispute. Such a classification is useful in evaluating the effectiveness of the court in settling a particular type of dispute. For example, resort to the court has been more beneficial in cases dealing with titles to territory and with routine international matters than it has in disputes growing out of the vestiges of colonialism.

An opinion of the International Court influences the future behavior of states not a party to the contention. It also establishes an interpretation of international law which is considered by other courts and tribunals whenever a similar question of law is presented for determination. Therefore, all I.C.J. cases, no matter what their origin or their actual effect in settling the particular disputes which gave rise to them, makes a valuable contribution to a fund of law.

In recent years the court has been called upon less frequently than in the first years of its existence for advisory opinions. This decline, together with the fact that accessions to the optional clause have not increased with the increase in U.N. membership, could affect materially the workload of the court, and consequently the development of international law by this judicial body.

168. *Id.*

CHAPTER 10
STATUS OF VISITING FORCES IN INTERNATIONAL LAW

Section I. COLLECTIVE SECURITY SYSTEMS

10-1. Collective Self-Defense Under the United Nations Charter. The collective security system envisaged in the United Nations Charter has been affected by the "Cold War." [1] The resulting deep ideological split among the members of the United Nations has forced many states to turn from a world-wide collective security system and to seek security in defense alliances and in regional arrangements. [2] Both of these methods are authorized by Articles 51 and 52 of the United Nations Charter. Regional arrangements have for their primary purpose the settlement among the members themselves of their local disputes. This chapter will not be devoted to this type of a local arrangement. Collective self-defense, on the other hand, has for its purpose the protection of each member of the group from outside attacks. It is Article 51 rather than Article 52 which has given rise to the defense alliances so prevalent in the world today. [3] The collective self-defense system of which the United States is a party is world-wide and is commonly termed "The United States Mutual Defense System."

10-2. The United States Mutual Defense System. *a.* The Inter-American Treaty of Reciprocal Assistance (The Rio Pact). By this treaty, signed by Rio de Janeiro in September 1947, the signatory nations agreed that an "armed attack by any state against an American state shall be considered as an attack against all American states" and pledged each state to assist the others in repelling such an attack. The area defined in the treaty included all of North and South America, the Aleutians and Greenland, much of the Arctic and Antarctic regions, and vast ocean areas considerably broadening the definition of the western hemisphere. [5] Although Canada was not a party to the treaty, she was included in the protective cordon thrown around the hemisphere. The treaty entered into force for the U.S. on 3 December 1948. The members were at that time:

United States	Dominican Republic	Peru
Cuba	Costa Rica	Bolivia
Honduras	Panama	Paraguay
Mexico	Venezuela	Brazil
Guatemala	Ecuador	Chile
El Salvador	Colombia	Argentina
Nicaragua	Haiti	Uruguay

b. The North Atlantic Treaty Organization (NATO Treaty). [6] The treaty, signed at Washington 4 April 1949, entered into force for the U.S. on 24 August 1949. It officially acknowledges that the destinies of Western Europe are inextricably linked with those of the larger geographical area, commonly termed the North Atlantic Community. The treaty created an operational organization which has provided multinational armed forces deployed across Europe to oppose any act of agression emanating from the "iron curtain." The members agree to regard an attack on one as an attack on all, and are to aid the one attacked. The members are:

United States	West Germany
Canada	Belgium
Iceland	Luxembourg
Norway	Italy
United Kingdom	Portugal
Netherlands	France
Denmark	Greece
Turkey	

c. Security Treaty with Australia and New Zealand (ANZUS Pact). [7] The ANZUS Pact was signed at San Francisco, 1 September 1951, and entered into force for the U.S. on 29 April 1952. This treaty acknowledges that an attack in the Pacific against any will involve all and the parties agree to "act to meet the common danger." The members are:

Australia
New Zealand
United States

d. Southeast Asia Treaty Organization (SEATO). [8] The Southeast Asia Collective Defense Treaty and Protocol were signed at Manila on 8 September 1954 and entered into force for the U.S. on 19 February 1955. These documents set up the Southeast Asia Treaty Organization covering the "general area of Southeast Asia" and the western Pacific. In case of aggression its members are to

1. Collective security is an often misunderstood phrase. It means that every state in the organization looks to *all others* in that organization for protection against the aggressive acts of a *fellow* member. Blocs, favoritism, etc., have no place in such a security system. *See K. Organski, International Politics* 378-81 (1958) for a criticism of the collective security concept.

2. Dr. Stikker of the Netherlands at the signing of the North Atlantic Treaty in 1949 remarked: "The treaty we are about to sign marks the end of an illusion: the hope that the United Nations would by itself ensure international peace. Suddenly, in retrospect, the signing of the Charter of San Francisco only four years ago is seen as a charming dream from which we had awakened gradually into a grey reality." N.Y. Times, Apr. 9, 1949 *commented on* in *J. Stone, Legal Controls Of International Conflict* 279 (1959).

3. *L. Goodrich & E. Hambro, Charter of the United Nations* 304-08 (rev. ed. 1949); *C. Eagleton, International Government* 548-50 (3d ed. 1957).

4. T.I.A.S. No. 1838, 62 Stat. 1681, 17 *Dep't State Bull.* 565-67 (1947), *commented on* by Allen, *The Inter-American Treaty of Reciprocal Assistance,* 17 *Dep't State Bull.* 983-87 (1947).

5. *Inter-American Treaty of Reciprocal Assistance,* art. 4.

6. T.I.A.S. No. 1964, 62 Stat. 2241, 20 *Dep't State Bull.* 339 (1949), *commented on* by Bohler, *The North Atlantic Pact: A Historic Step in the Development of American Foreign Relations,* 20 *Dep't State Bull.* 428-30 (1949).

7. [1952] 3 U.S.T. 3420, T.I.A.S. No. 2493.

8. [1955] 6 U.S.T. 81, T.I.A.S. No. 3170.

"consult immediately in order to agree to measures which should be taken for common defense." The members are:

Australia	France
New Zealand	Pakistan
Philippines	Thailand
United Kingdom	United States

e. Declaration relating to the Baghdad Pact.[9] The declaration was signed at London, 28 July 1958. The Baghdad Pact was signed at Baghdad on 24 February 1955 and provided that the parties would cooperate for their security and defense.[10] Parties to the Baghdad Pact were Iran, Iraq, Pakistan, Turkey, and the United Kingdom. In the London Declaration the parties, with the exception of Iraq, reaffirmed the pact made at Baghdad, and the United States agreed to cooperate with them in their mutual defense. The Baghdad Pact has been known since 1959 as the Central Treaty Organization (CENTO).[11] The United States has maintained an observer status in regard to CENTO.[12]

f. Bilateral treaties of mutual assistance. Primary examples of bilateral treaties of mutual assistance in Asia are:

(1) *Republic of China.* Mutual defense treaty was signed at Washington, 2 December 1954 and entered into force for the U.S. 3 March 1955.[13]

(2) *Japan.* Mutual cooperation and security treaty was signed at Washington, 19 January 1960 and entered into force for the U.S. 23 June 1960.[14]

(3) *Korea.* Mutual defense treaty was signed at Washington, 1 October 1953 and entered into force for the U.S. 17 November 1954.[15]

(4) *Philippines.* Mutual defense treaty was signed at Washington, 30 August 1951 and entered into force for the U.S. 27 August 1952.[16]

g. This collective self-defense system, authorized under Article 51, has assumed proportions not anticipated at the time of the drafting of the U.N. Charter.[17] To be effective under modern conditions of warfare this collective self-defense must be established during peace. It demands a close peacetime cooperation including in some instances the stationing of troops in foreign, allied and friendly states. This stationing of troops in foreign countries in time of peace has been the occasion of the many status of forces agreements which specify the rights and duties of the receiving (host) State and the sending (guest) State. The matters covered vary in scope and in detail. In addition to criminal jurisdiction, other items usually regulated are civil juisdiction, claims, taxes, duties, and the procurement of local supplies and employees. The criminal jurisdiction features of many of these treaties will now be examined.

10-3. Jurisdictional Immunity of Visiting Forces. *a. Historical Concept.* Although the rights and obligations of most United States military personnel performing duties in foreign countries are now specified by international agreements, some writers and courts thought that under customary international law a foreign force, invited into a State without conditions, is by implication immune from the jurisdiction of the receiving (host) State. Until recently writers and judges have cited in support of this rule of implied agreement the *dictum* of Chief Justice Marshall in the case of *The Schooner Exchange v. McFaddon.*[18]

b. Modern View. Recently, however, in the companion cases of *Reid v. Covert* and *Kinsella v. Krueger,*[19] and in the case of *Wilson v. Girard,*[20] the Supreme Court of the United States in effect denied the existence of a customary international rule of implied waiver of jurisdiction by the host State when such an implied waiver is sought to be based solely on an unconditional invitation from the host State. The court held, citing *The Schooner Exchange v. McFaddon,*[21] that "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders unless it expressly or impliedly consents to surrender its jurisdiction,"[22] and that generally the only jurisdiction which United States military authorities could exercise over its military personnel in foreign countries was that which was permitted by the express consent of the foreign government concerned. The United States has sought to negotiate detailed agreements with all foreign countries where its forces are to be stationed.

c. Types of Agreements. There are three general types of agreements which are concerned with the status of United States military personnel who are stationed in foreign countries. First, there are what may be called Status of Forces Agreements (SOFA), examples of which are the NATO SOFA and the Japanese Administrative Agreement; second, Mission Agreements such as those with Nicaragua[23] and many other Latin-American countries; and third, Mutual Defense Assistance Agreements under which Military Assistance Advisory Groups (MAAG) operate.[24] With the exception of military attachés who enjoy full diplomatic immunity, and U.S.

9. [1958] 9 U.S.T. 1077, T.I.A.S. No. 4084.
10. *Royal Institute on International Affairs, Documents on International Affairs,* 1955, 287-89 (1958).
11. *See* 41 *Dep't State Bull.* 487, 581 (1959).
12. 44 *Dep't State Bull.* 780 (1961).
13. [1955] 6 U.S.T. 433, T.I.A.S. No. 3178.
14. [1960] 11 U.S.T. 1632, T.I.A.S. No. 4509.
15. [1954] 5 U.S.T. 2368, T.I.A.S. No. 3097.
16. [1952] 3 U.S.T. 3947, T.I.A.S. No. 2529.
17. *Eagleton, supra* note 3, at 551.
18. 11 U.S. (7 CRANCH) 116 (1812). A discussion of Justice Marshall's comment appears at paragraph 4-2*a, supra. See also* Coleman v. Tennessee, 97 U.S. 509 (1878); Dow v. Johnson, 100 U.S. 158 (1879). For an examination of the customary law in the absence of a status of forces treaty *see* Re, *The NATO Status of Forces Agreement and International Law,* 50 *NW U.L. Rev.* 349 (1955).
19. 354 U.S. 1 (1957).
20. 354 U.S. 524 (1957).
21. 11 U.S. (CRANCH) 116 (1812).
22. 354 U.S. at 529.
23. [1953] 4 U.S.T. 2238, T.I.A.S. No. 2876.
24. [1954] 5 U.S.T. 852, T.I.A.S. No. 2976.

forces in West Berlin, the rights and obligations of all United States military personnel performing duty in foreign territory are reflected in one of these three types of agreements.

d. Extent of Privileges. Generally, it may be said that those who perform duties contemplated by Mutual Defense Assistance Agreements enjoy more rights and privileges than are enjoyed by military personnel who perform duties under status of forces agreements and under mission agreements. This special status of the personnel of the various Military Assistance Advisory Groups (MAAG) is attributable to the fact that those groups generally operate as an integral part of the Embassy of the United States. However, the scope of the privileges and immunities vary from country to country. For example, MAAG personnel in Italy have little immunity from the jurisdiction of local courts.

Section II. CRIMINAL JURISDICTION UNDER STATUS OF FORCES AGREEMENTS

10-4. The NATO Status of Forces Agreement. The NATO Status of Forces Agreement [25] (NATO SOFA) is a multilateral treaty to which the following members of the North Atlantic Treaty organization are parties:

Belgium	Canada
Denmark	France
Germany	Greece
Italy	Luxembourg
Netherlands	Norway
Portugal	Turkey
United Kingdom	United States

Of the 15 NATO member states only Iceland is not a party to this agreement. This section of the chapter will be devoted to an article-by-article analysis of the criminal jurisdiction provisions of the treaty.

a. Persons protected by NATO SOFA. (1) *Member of the "Force" of the Sending State.*

Article I(a): "Force" means the personnel belonging to the land, sea, or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connection with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or include in a "force" for the purposes of the present Agreement; . . . .

A "force," therefore, includes that part of the armed forces of one contracting party stationed in the territory of another. However, it should be noted that the agreement is also applicable to personnel who are sent to a NATO country on temporary duty, and to personnel who may be in transit through a NATO country on official duty. Personnel who are AWOL or who are on authorized leave also are covered by the agreement so long as they remain in the country in which they are stationed, for their presence in that country is clearly in connection with their official duties. However, should a soldier who is AWOL or who is on authorized leave commit an offense in a NATO country other than the one in which he is stationed, a different situation is presented. The definition of a force would not include such personnel, and they would be subject to the rules of law applicable in the absence of a treaty. In practice, France has been willing to apply the provisions of the SOFA to personnel who are in a leave status without regard to the location of their permanent duty station. In Germany, a special agreement extends to persons on leave in European and North African countries the status of members of the force for certain purposes. [26]

(a) In contrast to the NATO SOFA, the comparable provision of the U.S. agreement with Japan does not contain the limiting phrase "in connection with their official duties." [27] Accordingly, the reason for the presence of particular individuals in Japan is not material to their inclusion within the definition of a force. [28]

(b) In Germany, except in cases of military exigency, the sending states have agreed not to station in the territory of the Federal Republic as members of a force persons who are solely German. One of the reasons for this agreement is that, under Article 16 of the German Basic Law (Constitution), Germany may not extradite a German national to a foreign state. Exercise of criminal jurisdiction by a sending State over a German national soldier of that State within Germany is considered to be a form of extradition which is repugnant to the concept of the Basic Law.

(2) *Dependents of Members of the Force and Civilian Component.*

Article I(c): "Dependent" means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support; . . .

(a) Definition. Under this definition, a relative other than a spouse or other than a child of a member dependent on him for support is excluded. Parents and other close relatives, for example, are excluded even though they may be dependent on the member for support and even though they may enjoy, under U.S. Forces military regulations, status as dependents. The definition fails to indicate at what age, if any, a child ceases to be treated as a child for the purposes of the agreement. Because of the restricted definition of a dependent contained in the NATO SOFA, the United States has encountered some practical difficulty in securing a liberal interpretation on

25. [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846. It must be remembered that this agreement is as operative in war and in hostilities short of formal war as it is in peace. Article XV provides for a "review" in the event of hostilities.

26. *Status of Persons on Leave,* [1959] 14 U.S.T. 694, T.I.A.S. No. 5352.

27. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510 (Art. I(a)).

28. The preceding agreement, which governed the status of U.S. Forces from 1952 to 1960, also did not contain the qualifying phrase "in connection with their official duty." [1952] 3 U.S.T. 3341, T.I.A.S. No. 2492.

the part of the authorities of the receiving State. A more liberal definition of dependent is contained in the NATO Status of Forces Supplementary Agreement [29] applicable in Germany and in the Chinese, [30] Japanese, [31] Korean, [32] Spanish, [33] and Turkish [34] SOFAs.

(b) U.S. military jurisdiction over dependents abroad.

Kinsella v. Singleton [35] and
Grisham v. Hagan [36]

This direct appeal tests the constitutional validity of peacetime court-martial trials of civilian persons "accompanying the armed forces without the continental limits of the United States" and charged with noncapital offenses under the Uniform Code of Military Justice, 10 U.S.C. section 802, 70A Stat. 37. Appellee contends that the dependent wife of a soldier can be tried only in a court that affords her the safeguards of Article III and of the Fifth and Sixth Amendments to the Constitution. . . .

The appellee is the mother of Mrs. Joanna S. Dial, the wife of a soldier who was assigned to a tank battalion of the United States Army. The Dials and their three children lived in government housing quarters at Baumholder, Germany. In consequences of the death of one of their children, both the Dials were charged with unpremeditated murder under Article 118(2) of the Uniform Code of Military Justice, 10 U.S.C.A. section 918(2). Upon the Dials' offer to plead guilty to involuntary manslaughter under Article 119 of the Code, 10 U.S.C.A. section 919, both charges were withdrawn and new ones charging them separately with the lesser offense were returned. They were then tried together before a general court-martial at Baumholder. . . .

As has been noted, the jurisdiction of the court-martial was based upon the provisions of Article 2(11) of the Code. The Congress enacted that article in an effort to extend, for disciplinary reasons, the coverage of the Uniform Code of Military Justice to the classes of persons therein enumerated. The jurisdiction of the Code only attached, however, when and if its applicability in a given foreign territory was sanctioned under "any treaty or agreement to which the United States is or may be a party" with the foreign sovereignty, or under "any accepted rule of international law." The existence of such an agreement here is admitted. The constitutionality of Article 2(11) as it applies in time of peace to civilian dependents charged with noncapital offenses under the Code is the sole issue to be decided. . . .

In this field, United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), cited with approval by a majority in the second *Covert* case, 351 U.S. 487 is a landmark. Likewise, of course, we must consider the effect of the latter case on our problem. We therefore turn to their teachings. The *Toth* case involved a discharged soldier who was tried by court-martial after his discharge from the Army, for an offense committed before his discharge. It was said there that the Clause 14 "provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards," 350 U.S. at pages 21-22, and that military tribunals must be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service," *id.*, 350 U.S. at page 22. We brushed aside the thought that "considerations of discipline" could provide an excuse for "new *expansion* of court-martial jurisdiction at the expense of normal and constitutionally preferable systems of trial by jury." *Id.*, at 22-23. (Italics supplied.) We were therefore "not willing to hold that power to circumvent these safeguards should be inferred through the Necessary and Proper Clause." *Id.*, at 22. The holding of the case may be summed up in its own words, namely, that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.*, at 15. The test for jurisdiction, it follows, is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces." The Court concluded that civilian dependents charged with capital offenses were not included within such authority, the concurring Justices expressing the view that they did not think "that the proximity, physical and social, of these women to the 'land and naval Forces' is, with due regard to all that has been put before us, so clearly demanded by the effective "Government and Regulation" of those forces as reasonably to demonstrate a justification for court-martial jurisdiction over capital offenses." Concurring opinion, 354 U.S. at 46-47.

Moreover, in the critical areas of occupation other legal grounds may exist for court-martial jurisdiction as claimed by the Government in No. 37, Wilson v. Bohlender, 361 U.S. 281. *See* Madsen v. Kinsella, 343 U.S. 341 (1952). Another serious obstacle to permitting prosecution of noncapital offenses, while rejecting capital ones, is that it would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections. By allowing this assumption of "the garb of mercy," we would be depriving a capital offender of his constitutional means of defense and in effect would nullify the second *Covert* case. We do know that in one case, Wilson v. Girard, 354 U.S. 524 (1957), the Government insisted and we agreed that it had the power to turn over the case of an American soldier to Japanese civil authorities for trial on an offense committed while on duty. We have no information as to the impact of that trial on civilian dependents. Strangely, this itself might prove to be quite an effective deterrent. Moreover, the immediate return to the United States permanently of such civilian dependents, or their subsequent prosecution for the more serious offenses in the United States when authorized by the Congress, might well be the answer to the disciplinary problem. Certainly such trials would not involve as much expense nor be as difficult of successful prosectuion as capital offenses. . . .

We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible. The judgment must therefore be AFFIRMED.

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29. [1963] 14 U.S.T. 53, T.I.A.S. No. 535. Paragraph 2(a), article 2, provides "A close relative of a member of a force or of a civilian component not falling within the definition contained in subparagraph (c) of paragraph 1 of Article I of the NATO Status of Forces Agreement who is financially or for reasons of health dependent on, and is supported by, such member, who shares the quarters occupied by such member, and who is present in the Federal territories with the consent of the authorities of the force shall be considered to be, and treated as, a dependent within the meaning of that provision."

30. [1966] 17 U.S.T. 373, T.I.A.S. No. 5986. "'Dependents' means (i) spouse and children under 21; (ii) parents, children over 21, or other relatives dependent for over half their support upon a member of the United States armed forces or civilian component." *Id.* at art. I(c).

31. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510. The language of article 1(c) defines 'dependents' as in note 30, *supra.*

32. [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.

33. [1970] 21 U.S.T. 2259, T.I.A.S. No. 6977. "Dependents. This term means members of the families [of military personnel and civilian employees] who depend upon such persons for their support and who are in Spain, and, in any case, the spouse and minor children in Spain of such persons." *Id.* at para. 2a(4).

34. [1954] 5 U.S.T. 1465, T.I.A.S. No. 3020. "All persons who are relatives of, and in accordance with United States law or regulations, depending for support upon and actually residing with any member of a United States force or the civilian component, except those who are not United States citizens, shall be considered dependents and will be treated in all respects as those presons defined in Article I, paragraph 1, subparagraph c, of the aforesaid NATO [Status of Forces] Agreement." *Id.* at para. 1.

35. 361 U.S. 234 (1960).

36. 361 U.S. 278 (1960).

(3) *Members of the "Civilian Component" of the Sending State.*

Article I (b): "Civilian component" means the civilian personnel accompanying a force of a Contracting Party who is in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located; . . .

(a) Definition. This definition does not include stateless persons, nationals of a state not a party to the NATO, nationals of the receiving State, and persons ordinarily resident in the receiving State. It also does not include Red Cross personnel, and technical representatives of contractors. This deficiency has been overcome in Turkey where, by bilateral agreement with the United States, [37] such personnel are expressly included as members of the civilian component. Further, in this connection, the agreement with Japan includes within the definition of the civilian component United States nationals who are ". . . in the employ of, serving with, or accompanying the United States armed forces in Japan, . . ." [38] In Germany, the Supplementary Agreement specifically extends to certain personnel (e.g., Red Cross and technical experts) the privilege of members of the civilian component (Arts. 71, 72, and 73). The exclusion of stateless persons and persons who are nationals of a state which is not a member of NATO would seem to present few practical difficulties. First, aside from labor groups formed of stateless persons, [39] there are probably very few civilian employees who fall into either class of persons. Second, the exclusion of these two classes of persons seems to have been the result of a desire to prevent them from entering the receiving State. [40] If such persons are admitted, there would seem to be no compelling reason why they should be excluded from the operation of the agreement. Where a sending State employs resident nationals of the receiving State, it is obviously in the special interests of the receiving State to insure that such persons remain fully under its jurisdiction and protection. To this extent the exclusion of nationals of the receiving State from the definition of a civilian component is based on sound reasons of public policy. However, the special interests of the receiving State weaken when the nations in question had emigrated and were returned to their native country as employees of the sending State, and completely disappear in cases where the person has also acquired the nationality of the sending State. A more realistic approach to the problem of the dual national is contained in the status of forces agreement with Japan, where it is stated: "For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States Nationals." [41] Another potential problem area is the result of the exclusion of persons "ordinarily resident" in the receiving State from the definition of civilian component. The reasons for such exclusion are apparent in cases involving resident aliens generally, but some difficulty could be presented by the fact that no exception is made for those resident aliens who are nationals of the sending State. In Germany, for example, command policy precludes the appointment to appropriated or nonappropriated fund positions of American nationals who are normally resident in Germany. The treaty protection afforded members of the civilian component, as far as criminal jurisdiction is concerned, has been affected by recent pronouncements of the United States Supreme Court. [42] These opinions settle the law somewhat but at the same time challenge the jurisdictional assumptions accepted as valid when the NATO SOFA was negotiated.

(b) U.S. Military Jurisdiction Over U.S. Civilian Employees Abroad.

McElroy v. Guagliardo (No. 21) and
Wilson v. Bohlender (No. 37) [43]

Mr. Justice Clark delivered the opinion of the Court.

These are companion cases to No. 22, *Kinsella v. Singleton, supra,* p. 234, and No. 58, *Grisham v. Hagan, supra,* p. 278, both decided today. All the cases involved the application of Article 2(11) of the Uniform Code of Military Justice. Here its application to noncapital offenses committed by civilian employees of the armed forces while stationed overseas is tested.

In No. 21 the respondent, a civilian employee of the Air Force performing the duties of an electrical lineman, was convicted by court-martial at the Nouasseur Air Depot near Casablanca, Morrocco, of larceny and conspiracy to commit larceny from the supply house at the Depot. Before being transferred to the United States Disciplinary Barracks, New Cumberland, Pennsylvania, respondent filed a petition for a writ of habeas corpus in the District Court for the District of Columbia alleging that the military authorities had no jurisdiction to try him by court-martial. . . .

In No. 37, petitioner, a civilian auditor employed by the United States Army and stationed in Berlin, was convicted by a general court-martial on a plea of guilty to three acts of sodomy. . . .

We believe that these cases involving the applicability of Article 2(11) to employees of the armed services while serving outside the United States are controlled by our opinion in Kinsella v. Singleton, 80 S.Ct. 297, and Grisham v. Hagan, 80 S.Ct. 310, announced today. In *Singleton* we refused, in the light of Reid v. Covert, 1957, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148, to apply the provisions of the article to noncapital offenses committed by dependents of soldiers in the armed services while overseas; in *Grisham* we held that there was no constitutional distinction for purposes of court-martial jurisdiction between dependents and employees insofar as application of the death penalty is concerned. The rationale of those cases applies here.

Although it is true that there are materials supporting prosecution of sutlers and other civilians by courts-martial, these materials are "too episodic, too meager, to form a solid basis in history, preceding and con-

37. [1954] 5 U.S.T. 1465, T.I.A.S. No. 3020.

38. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510, art. 1(b).

39. Personnel of Labor Service and Civilian Labor Guard units in Germany, composed primarily of Polish and other Eastern European stateless persons, are also not included.

40. *J. Snee & A. Pye, Status of Forces Agreement: Criminal Jurisdiction* 17 (1957).

41. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510, art. I(b). A similar provision is contained in the *Korean Status of Forces Agreement,* [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.

42. *See* McElroy v. Guagliardo and Wilson v. Bohlender, 361 U.S. 281 (1960).

43. *Id.*

temporaneous with the framing of the Constitution, for Constitutional adjudication." . . .

In the consideration of the constitutional question here we believe it should be pointed out that, in addition to the alternative types of procedure available to the Government in the prosecution of civilian dependents and mentioned in *Kinsella v. Singleton, supra,* additional practical alternatives have been suggested in the case of employees of the armed service. One solution might possibly be to follow a procedure along the line of that provided for paymasters' clerks as approved in *Ex parte Reed, supra.* Another would incorporate those civilian employees who are to be stationed outside of the United States directly into the armed services, either by compulsory induction or by voluntary enlistment. If a doctor or dentist may be "drafted" into the armed services, 50 U.S.C. Appendix section 454(i), extended, 73 Stat. 13, 50 U.S.C.A. Appendix section 454 (i); Orloff v. Willoughby, 1953, 345, U.S. 83, 84; 73 S.Ct. 534, 97 L.Ed. 842, there should be no legal objection to the organization and recruitment of other civilian specialists needed by the armed services.

Moreover, the armed services presently have sufficient authority to set up a system for the voluntary enlistment of "specialists." This was done with much success during the Second World War. "The Navy's Construction Battalions, popularly known as the Seabees, were established to meet the wartime need for uniformed men to perform construction work in combat areas." 1 *Building the Navy's Bases in World War II* (1947) 133. Just as electricians, clerks, draftsmen, and surveyors were enlisted as "specialists" in the Seabees, *id.*, at 136, provisions can be made for the voluntary enlistment of an electrician (Guagliardo), an auditor (Wilson), or an accountant (Grisham). It likewise appears entirely possible that the present "Specialist" program conducted by the Deparmtent of the Army could be utilized to replace civilian employees if disciplinary problems required military control. Although some workers might hesitate to give up their civilian status for government employment overseas, it is unlikely that the armed forces would be unable to obtain a sufficient number of volunteers to meet their requirements. The increased cost to maintain these employees in a military status is the price the Government must pay to comply with constitutional requirements.

The judgment in No. 21 [Guagliardo] is affirmed and the judgment in No. 37 [Wilson] is reversed.

An attempt to exercise jurisdiction over a civilian accompanying the U.S. forces in Vietnam under Article 2(10), UCMJ, was rejected in *United States v. Averette* [44] which held that the phase "in time of war" means a "declared war."

b. Application to Political Subdivisions. Article I(2) is applicable to those states which are organized along Federal lines, such as the United States and Canada. Normally the powers of such a state are divided between the Federal Government and the political subdivisions. Such is not the case in unitary states such as Denmark and Ireland. Article I(2) was inserted in order to make it clear that all subdivisions of each state are bound by the treaty, not merely the Federal Government. Article I(2) is clear as to that objective. However, it raises certain other problems. Does it purport to give each subdivision that has autonomy within the Federal structure a direct voice in the administration of the treaty; Normally in a Federal State the Federal Government alone represents the State in foreign relations. It alone has signed the NATO SOFA. It alone is responsible to the other signatory states for the obligations it assumed under the treaty. It would seem that other signatory states would expect to be bound finally by the determination of each subdivision in such matters as requests for waivers, etc. [45] See in this respect the Supplementary Agreement with Germany [46] wherein the initial determinations with respect to exercise of criminal jurisdiction are made by the German States (*Laender*).

c. Personal Obligation to Respect Local Law (Article II). If a member of the force of the sending State violates a law of the receiving State, Article VII of the NATO SOFA will be the guide in determining if the receiving State will try the member. The question still arises, however, whether a violation of the local law under Article II is *ipso facto* an offense under Article 134 of the UCMJ so that he may be tried by the sending State. If the receiving State tries him, the problem of double jeopardy arises in any attempt by the sending State also to exercise jurisdiction. [47] If the receiving State does not try the individual then the problem is twofold. (1) Every violation of one of U.S. local State laws is not in itself an offense under the Uniform Code; there must be some service discrediting facts and circumstances attendant to the violation. [48] Therefore, reasoning by analogy, if the individual is not triable under any other article of the Code, the foreign infraction does not automatically cause him to violate Article 134. (2) If, however, the charge is based not on a violation of the law of the receiving State, but upon a violation by an individual of Article II of the treaty then the question is whether a violation of a treaty, which is the supreme law of the land under our Constitution, is in itself a federal criminal offense. One aspect of this question came before the Court of Military Appeals in *United States v. Ekenstam.* [49] In that case the accused was charged with a violation of Article 134 under a specification which alleged that he had violated a provision of the Administrative Agreement with Japan by selling nonappropriated fund merchandise to a Japanese national. The court acquitted him on the ground that the specification did not state an offense under the Code. One judge held that the Admininstrative Agreement with Japan bound the signatory governments and not individuals, and that

44. 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970); *accord,* U.S. v. Zamora & Williams, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970).

45. 1 *L. Oppenheim, International Law* 175-79 (8th ed. Lauterpacht 1955) analyzes the problems in international law presented by a Federal State whose Federal Government sometimes does not speak in international affairs for all of its component parts. *See,* e.g., The Attorney General of Canada v. The Attorney General of Ontario and Others, 53 T.L.R. 325 (1937) wherein the limited power of The Government in International Affairs is clearly illustrated.

46. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, [1963] 14 U.S.T. 531, T.I.A.S. No. 535.

47. Art. VII, § 8.

48. United States v. Grosso, 7 U.S.C.M.A. 566, 20 C.M.R. 30 (1957); United States v. Hughes, 7 C.M.R. 803 (1953).

49. 7 U.S.C.M.A. 168, 21 C.M.R. 294 (1956).

in any event an individual could not commit a military offense by violating a treaty. The court cited *Over the Top,* [50] which held that the Federal criminal code cannot be enlarged by treaty. If it could then a Federal criminal law can be made without the participation of the House of Representatives. Two years later in *United States v. Curtin,* [51] the Court of Military Appeals again held that the Japanese Administrative Agreement did not bind individuals. The exact point has not been raised in regard to the NATO SOFA. If it is raised and it is determined that Article II, NATO SOFA, does bind individuals then the Court will be faced with its *dictum* in *Ekenstam* that such a violation of a treaty is not a violation of a Federal criminal law.

d. The Division of Jurisdictional Competence Between the Sending and the Receiving State. The right to exercise jurisdiction as between the receiving State and the sending State is governed by the jurisdictional formula of Article VII of the NATO SOFA. This formula characterizes offenses as being subject to the exclusive jurisdiction of the sending State, to the exclusive jurisdiction of the receiving State, and to concurrent jurisdiction.

(1) *Exclusive Jurisdiction.*

(*a*) *Exclusive Jurisdiction in the Sending State.* Most offenses over which the United States would have exclusive jurisdiction would be purely military type offenses, such as AWOL, desertion, disrespect, etc. Offenses relating to security are treason, sabotage, and espionage against the United States, offenses with which the receiving State is nor particularly concerned. The *Krueger* and *Covert,* [52] the *Guaglirado* and *Bohlender,* [53] and the *Singleton* [54] cases have restricted the exclusive jurisdiction of the United States as a sending State by eliminating dependents and U.S. civilian employees from the category of "persons subject to the military law" of the United States.

(*b*) *Exclusive Jurisdiction in the Receiving State.* If Article 134, UCMJ, and Article II, NATO SOFA, were construed to make any act which is punishable by the receiving State also punishable by the United States as a sending State there would be no exclusive jurisdiction in the receiving State. The *Grosso* and *Ekenstam* cases discussed above in regard to Article II also have reference to Article VII. They indicate the formulation of a rule that would prevent the expansion of Article 134, UCMJ, in a way that would change the effect of the exclusive jurisdiction provisions of Article VII. It is doubtful if the exclusive jurisdiction of the receiving State can be reduced through the application of Article 134, UCMJ. On the other hand, however, the practical result of the loss of court-martial jurisdiction over accompanying dependents and civilian employees is to expand the scope of the exclusive jurisdiction of the receiving State.

(2) *Concurrent Jurisdiction.*

(*a*) *Primary Right in the Sending State or Receiving State.* Having determined that an offense is subject to concurrent jurisdiction (i.e., that it is punishable both under the law of the receiving State and under the UCMJ), the question arises as to which State has the primary right to exercise jurisdiction. This determination is governed by the jurisdictional formula of Article VII, NATO SOFA, which provides that the receiving State has the primary right to exercise jurisdiction over all concurrent jurisdiction offenses except those solely against the properly or security of the sending State or solely against the person or property of another member of the force or civilian component or of a dependent or those arising out of any act or omission done in the performance of official duty. Problems which frequently arise in connection with concurrent jurisdiction are concerned with that portion of Article VII which provides that the sending State has the primary right in cases involving "offenses arising out of any act or omission done in the performance of official duty." These problems fall generally into two groups. First, there is the question as to whether the particular offense arose out of the performance of official duty, and, second, the question as to who has the right to make the final determination of whether or not it arose out of the performance of official duty. Initially, it should be noted that the phrase "performance of official duty" is not intended to refer to a legal concept which is peculiar to one particular nation. Consistent with United States policy of asserting jurisdiction over its personnel whenever possible, the United States military authorities construe this phrase broadly. In France, the United States successfully maintained that traveling to and from work is the performance of official duty. On the other hand, France maintained that offenses requiring specific intent could not arise out of the performance of official duty. The Korean Status of Forces Agreement [55] has attempted to delineate more precisely the concept of "official duty" as it is used in its jurisdictional formula. The Agreed Minutes Re Article 22 provide:

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50. 5 F.2d 838 (D.Conn. 1925).

51. 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958). Judge Ferguson, speaking for the majority stated:

> [w]e held in that case [EKENSTAM], that the Adminsitrative was intended to define the rights and obligations of the signatory governments rather than to prescribe the conduct of individuals or organizations subject to their authority and thus the specification failed to state the offense.

For other cases on the application of treaties directly to individuals, *see Jurisdiction Over the Courts of Danzig,* [1928] P.C.I.J. ser. B, No. 15 *digested in* 5 *G. Hackworth, Digest of International Law* 171; United States v. Rauscher, 119 U.S. 407 (1886); The *Over the Top,* 5 F.2d 838 (1925); United States v. Sinigar, 6 U.S.C.M.A. 330, 29 C.M.R. 46 (1955).

52. 354 U.S. 1 (1957).

53. 361 U.S. 281 (1960).

54. Kinsella v. Singleton, 361 U.S. 234 (1960).

55. [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.

The term "official duty" as used in this Article and Agreed Minutes is not meant to include all acts by members of the United States armed forces and the civilian component during periods when they are on duty, but is meant to apply only to acts which are required to be done as functions of those duties which the individuals are performing.

Similarly, the Agreed Official Minutes Regarding Article XIII of the Philippines Bases Agreement as Revised [56] contains language identical to the Korean Agreement. The Philippine Agreement, however, precedes the above language by a provision that "[t]he term 'official duty' . . . is understood to be any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage." The celebrated *Girard* case [57] arose out of a dispute between the Japanese and United States authorities as to whether the offense involved arose out of the performance of official duty.

(b) Wilson v. Girard. [58]

. . .

A Security Treaty between Japan and the United States, signed September 8, 1951, was ratified by the Senate on March 20, 1952, and proclaimed by the President effective April 28, 152 [TIAS 2491]. Article III of the Treaty authorized the making of Administrative Agreements between the two Governments concerning "[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan." Expressly acting under this provision, the two Nations, on February 28, 1952, signed an Administrative Agreement covering, among other matters, the jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces, and providing that jurisdiction in any case might be waived by the United States [TIAS 2492]. This Agreement became effective on the same date as the Security Treaty (April 28, 1952) and was considered by the Senate before consent was given to the Treaty.

Article XVII, paragraph 1 of the Administrative Agreement provided that upon the coming into effect of the "Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces," [TIAS 2846] signed June 19, 1951, the United States would conclude with Japan an agreement on criminal jurisdiction similar to the corresponding provisions of the NATO Agreement. The NATO Agreement became effective August 23, 1953, and the United States and Japan signed on September 29, 1953, effective October 29, 1953, a Protocol Agreement [TIAS 2898] pursuant to the covenant in paragraph 1 of Article XVII.

Girard, a Specialist Third Class in the United States Army, was engaged on January 30, 1957, with members of his cavalry regiment in a small unit exercise at Camp Weir range area, Japan. Japanese civilians were present in the area, retrieving expended cartridge cases. Girard and another Specialist Third Class were ordered to guard a machine gun and some items of clothing that had been left nearby. Girard had a grenade launcher on his rifle. He placed an expended 30 caliber cartridge case in the grenade launcher and projected it by firing a blank. The expended cartridge case penetrated the back of a Japanese women gathering expended cartridge cases and caused her death.

The United States claimed the right to try Girard upon the ground that his act, as certified by his commanding officer, was "done in the performance of official duty" and therefore the United States had primary jurisdiction. Japan insisted that it had proof that Girard's action was without the scope of his official duty and therefore that Japan had the primary right to try him.

Article XXVI of the Administrative Agreement established a Joint Committee of representatives of the United States and Japan to consult on all matters requiring mutual consultation regarding the implementation of the Agreement; and provided that if the Committee ". . . is unable to resolve any matter, it shall refer that matter to the respective governments for further consideration through appropriate channels."

The Joint Committee, after prolonged deliberation, was unable to agree. The issue was referred to higher authority which authorized the United States representatives on the Joint Committee to notify the appropriate Japanese authorities, in accordance with paragraph 3(c) of the Protocol, that the United States had decided not to exercise, but to waive, whatever jurisdiction it might have in the case. The Secretary of State and the Secretary of Defense decided that this determination should be carried out. The President confirmed their joint conclusion.

"A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." Schooner Exchange v. McFaddon, 7 Cranch 116, 136. Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned by the covenant of Article XVII, section 3, paragraph (c) of the Protocol that

> . . . The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where the other State considers such waiver to be of particular importance.

The issue for our decision is therefore narrowed to the question whether, upon the record before us, the Constitution or legislation subsequent to the Security Treaty prohibited the carrying out of this provision authorized by the Treaty for waiver of the qualified jurisdiction granted by Japan. We find no constitutional or statutory barrier to the encroachments, the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.

(c) "Official Duty" in NATO Countries. A deficiency of the jurisdictional arrangements of the NATO SOFA and of the Japanese Administrative Agreement which in Japan gave rise to the jurisdictional dispute in the *Girard* case, is the fact that the treaty does not specify who may determine definitely whether a given offense arose out of the performance of official duty. The authorities, both official and unofficial, are divided on this point. In spite of the absence of definitive provisions in the NATO SOFA, serious disputes regarding official duty determinations have been avoided by means of the acceptance by the receiving State of the certificate of the United States authorities as to performance of official duty, and by the judicious use of the waiver provisions of the Agreement. Thus, a Turkish statute makes the United States certificate determinative. [59] In France, a circular of the French Ministry of Justice provides that the determination of the sending State will be accepted as conclusive if it is rendered by a staff judge advocate or legal officer. [60] This, however, has not been the practice in the United Kingdom. The Supplementary Agreement (Article 18) with the Federal Republic of Germany provides that this determination shall be made in accordance with sending State law and that the German court or authority "shall make its decision in conformity with" the certificate of the military authorities in this respect. In effect, then, the German authorities do, in the first instance, accept the certifi-

56. [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851.

57. Wilson v. Girard, 354 U.S. 524 (1957).

58. *Id. See* Baldwin, *Foreign Jurisdiction and the American Soldier,* 1958 *Wis. L. Rev.* 52, for a review of official duty determination problems.

59. *See Snee & Pye, supra* note 40, at 52.

60. *Id.* at 51.

cate as conclusive. Another article provides, however, that in exceptional cases the certificate may be made the subject of review at the request of the German court or authority, through the medium of discussions between the Federal Republic and the United States Embassy. The Korean Status of Forces Agreement provides that a certificate of official duty by competent U.S. authorities is sufficient. Where the Chief Prosecutor disagrees with the certificate, it will be made the subject of review by the Government of the Republic of Korea and the U.S. Embassy.

(d) Waiver of Primary Right. 1. Waiver by Failure to Prosecute. What conduct on the part of the State having the primary right amounts to a decision not to exercise jurisdiction is not altogether clear. For example, suppose the sending State has primary jurisdiction and, after an Article 32 investigation, decides that a trial by court-martial is not warranted. Is such an investigation and determination an exercise of jurisdiction or a decision not to exercise jurisdiction? There is no definitive answer to the question. It is important because a determination that any action short of a trial is a decision not to exercise jurisdiction will force the State with the primary right into choosing the alternative of trial or waiver. It may for good reason wish to do neither.

2. Waiver at the Request of the Other Contracting Party. The U.S. Forces' policy is to request waivers in all cases subject to concurrent jurisdiction. Current military directives [61] require the designated commanding officer, in each foreign country in which United States military units are regularly stationed, to assure that effective liaison is developed and maintained with appropriate officials of the foreign country concerned to the end that through the use of local procedures a maximum number of waivers of jurisdiction can be obtained. Constant effort is therefore made to establish relationships and methods of operations which, in the light of local judicial procedures, will most likely result in waivers. In practice, these directives make the submission of informal requests for waivers at the local level a matter of routine. The response to these routine waivers has varied from country to country. It should be noted that the request for waiver need not be and in most cases is not predicated on the fact that there is a danger the accused will not receive the safeguards accorded him under the U.S. Constitution. Therefore, a denial of a waiver request is seldom the occasion for intervention by the Department of State.

3. The Effect of a Waiver of Primary Right (The Whitley Case). Suppose a waiver is granted by the State with the primary right. Must the requesting State try the individual in order to prevent the State with the primary right for reasserting its right? The *Whitley* case answers this question as far as France is concerned. [62] In November, 1953, Major Whitley, an Air Force officer stationed in France with a NATO headquarters suffered a blowout while driving to his home from Paris where he had attended a social function. The car crashed into a tree and a passenger, a Canadian officer, attached to the same NATO headquarters, was killed. The cause of the blowout was never established. Pursuant to a request of Air Force authorities the public prosecutor agreed to waive French jurisdiction over the incident. An informal Air Force investigation, not conducted under Article 32 of the Uniform Code of Military Justice, concluded that evidence was insufficient to warrant court-martial charges against Major Whitley for the death of the Canadian officer. Whitley's insurance company refused the demand of the Canadian officer's widow for compensation on the ground that civil liability was not established. The widow, who under Canadian law could receive no pension if the husband was not killed while on duty, therefore initiated a mixed civil-criminal action against Major Whitley in the French criminal court relying upon a provision of the French Code permitting such mixed actions. [63] Among the issues considered by the French Court was the effect of the French prosecutor's initial waiver of jurisdiction. It was agrued on behalf of Major Whitley that a waiver divested the criminal jurisdiction of the French courts. The *Tribunal Correctionnel* of Corbeil rejected this argument holding that a waiver is not irrevocable, and that since the United States did not try Major Whitley for his alleged offense the French court could try him without securing a waiver from the United States. The *Tribunal Correctionnel* in the *Whitley* case, moreover, took a more extreme position. It held that a waiver of jurisdiction never affects the right of a civil party to initiate a mixed civil-criminal action. The decision of the *Tribunal Correctionnel,* as affirmed by the *Cour d'Appel* of Paris, was one month's imprisonment (suspended) and a 50,000 franc fine. Major Whitley appealed to the *Cour de Cassation.* The *Cour de Cassation* annulled the judgment against Major Whitley. The basis of the decision of the *Cour de Cassation* was the irrevocability of waivers granted pursuant to Article VII 3(c) of the NATO SOFA holding to the effect that a waiver so granted was binding on all tribunals of the waiving state regardless of whether the action was brought by the public prosecutor or the *partie civile.* The court stated, in substance, that where the authorities of the state which has the primary right to exercise jurisdiction under the NATO SOFA has waived that right at the request of the other state, the decision is final and precludes the criminal courts of the former state from taking cognizance of the facts on which the decision to waive

61. AR 27-50/SECNAVINST 5820.4D/AFR 110-112.

62. *See* JALS 250 19/58, "A Chronicle of Recent Developments in Military Law of Immediate Importance to Army Judge Advocates," a letter setting forth the facts of the Whitley case.

63. *See* appendix A, *infra.*

was based. The court further held that it is immaterial whether the state in whose favor the right is waived thereafter institutes criminal proceedings in its own courts against the individual involved, and that an exception to the principle of the irrevocability of waivers can arise only if the state in whose favor the waiver was granted expressly states that it waives back the right to exercise jurisdiction and returns it to the authorities of the other state. In Germany, intermediate appellate courts have held that, once the German authorities have failed to withdraw the general waiver of jurisdiction following notification under the provisions of Article 19 of the Supplementary Agreement, they may not subsequently exercise jurisdiction in the event that the sending State determines not to try the accused by court-martial.

(e) Trial in the Courts of the Receiving State. 1. Treaty safeguards. Article VII, 9 of the NATO SOFA contains the following fair trial guarantees:

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;

(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

2. The Safeguards in United States Senate Resolution. If the receiving State has exclusive jurisdiction or refuses to waive its primary right and proceeds to trial, the Senate Resolution of July 15, 1953, [64] which accompanied its advice and consent to ratification of the NATO SOFA comes into operation. It requires that the criminal laws of a country where U.S. servicemen are tried by such foreign courts be examined with reference to the procedural safeguards contained in the U.S. Constitution. [65] If there is danger that the accused will not be protected because of a denial of or absence of such a constitutional right the Department of State shall be requested to press for a waiver of jurisdiction. In addition, an observer will attend the trial of all servicemen in foreign courts in order to see that the treaty safeguards set forth in Article VII, subparagraph 9, are observed.

(3) *Implementation of the Senate Resolution by the Department of Defense.* [66] The implementing Department of Defense Directive provides:

....

C. Designated Commanding Officer

Formal invocation of the Senate Resolution procedure shall be the responsibility of a single military commander in each foreign country in which United States military forces are regularly stationed (attaché personnel and other military personnel serving under the direction of a chief of a diplomatic mission will not be considered United States military forces for this purpose), *i.e.,*

1. In the geographic areas for which a unified command exists, the commander thereof will designate within each country, the "Commanding Officer" referred to in the Senate Resolution.

2. In other areas for which a unified command does not exist, a commanding officer in each country shall be nominated by the military departments whose recommendations shall be forwarded by the Judge Advocate General of the Army to the Secretary of Defense, for implementation through the Office of the Assistant Secretary of Defense (International Security Affairs). In designating the commanding officer to act for all the military departments, consideration should be given to the availability of legal officers and readiness of access to the seat of the foreign government. Such an officer may also be appointed by the military departments for countries where no military forces are regularly stationed.

....

D. Country Law Studies

For each foreign country in which United States military forces are subject to the criminal jurisdiction of foreign authorities, the designated commanding officer for such country shall make and maintain a current study of the laws and legal procedures in effect. Studies of the laws of other countries shall be made as directed. This study shall be a general examination of the substantive and procedural criminal law of the foreign country, and shall contain a comparison thereof with the procedural safeguards of a fair trial in the State courts of the United States. Copies of these studies should be forwarded to each of the Judge Advocates General of the Services. Principal emphasis is to be placed on those safeguards which are of such a fundamental nature as to be guaranteed by the Constitution of the United States in all criminal trials in State courts of the United States. (See Appendix B for enumeration of safeguards deemed particularly important.) These country law studies shall be subject to a continuing review, and whenever in any country there is a significant change in its criminal law, the change shall be forwarded by the designated commanding officer to each of the Service Judge Advocates General.

E. Waivers of Local Jurisdiction — Military Personnel

1. In cases where it appears probable that (a) release of jurisdiction over United States military personnel will not be obtained and (b) that the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the accused will communicate directly with the designated commanding officer, reporting the full facts of the case and supplying his recommendation.

2. The designated commanding officer will determine, in the light of legal procedures in effect in that country, whether there is danger that the accused will not receive a fair trial. A trial shall not be deemed unfair solely for the reason that it may not be identical with trials held in the United States. Due regard, however, should be had to those United States trial rights listed in Appendix B which are relevant to the particular facts and circumstances of the trial in question.

3. If he determines that there is such danger, he will then decide, after consultation with the Chief of the Diplomatic Mission, whether to press a request for waiver of jurisdiction through diplomatic channels. If

64. [1953] 4 U.S.T. 1828.

65. For a listing of procedural safeguards contained in the Constitution, see Memorandum of 17 November 1953 prepared by the Inter-Service Legal Committee, *reproduced in Hearings on Status of Forces Agreements before the House Comm. on Foreign Affairs,* 84th Cong., 1st Sess., part 1, 249 *et seq.* (1956).

66. *Status of Forces Policies and Information,* DoD Directive 5525.1, Jan. 22, 1966. This directive has been implemented by a tri-service regulation, AR 27-50/SECNAVINST 5820.4D/AFR 110-12, Sept. 5, 1974.

he so decides, he shall submit his recommendation through the unified commander, if any, and The Judge Advocate General of the accused's service to the Office of the Secretary of Defense. The objective in each case is to see that United States military personnel obtain a fair trial in the receiving state under all the circumstances.

. . . .

G. Trial Observers and Trial Observer Reports

1. The designated commanding officer shall submit to the Chief of Diplomatic Mission a list of persons qualified to serve as United States observers at trials before courts of the receiving state. Nominees will be lawyers, and shall be selected for maturity of judgment. The list will include, where possible, representatives of all Services whose personnel are stationed in that country, to enable the Chief of Diplomatic Mission to appoint an observer from the same Service as the accused. The requirement that nominees will be lawyers may be waived in cases of minor offenses. Incidents which result in serious personal injury or extensive property damage, or which would normally result in sentences to confinement, whether or not suspended, will not be considered minor offenses.

2. Trial observers shall attend and shall prepare formal reports in all cases of trials of United States personnel by foreign courts or tribunals except minor offenses. In cases of minor offenses, the observer shall attend the trial, if any, at the discretion of the designated commanding officer, but shall not be required to make a formal report. These reports need not be classified, but shall be treated as documents for OFFICIAL USE ONLY, and shall be forwarded intact to the designated commanding officer through such agencies as the designated commanding officer may prescribe, for transmission to the Judge Advocate General of the accused's Service commander. These reports will be forwarded immediately upon the completion of the trial in the lower court, and will not be delayed because of the possibility of a new trial, rehearing, or appeal, reports of which will be forwarded in the same manner. Copies shall also be forwarded to the unified commander, if any, and to the Chief of Diplomatic Mission.

3. The Trial Observer Report shall contain a factual description or summary of the trial proceedings. It should be prepared keeping in mind that its main purpose is to permit an informed judgment to be made regarding (1) whether there was any failure to comply with the procedural safeguards secured by a pertinent status of forces agreement, and (2) whether the accused received a fair trial under all the circumstances. The report shall specify the conclusions of the Trial Observer with respect to (1), and shall state in detail the basis for his conclusions. Unless the designated commanding officer directs otherwise, the Report shall not contain conclusions with respect to (2).

4. The designated commanding officer, upon receipt of a Trial Observer Report, shall have the responsibility for determining (1) whether there was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement, and (2) whether the accused received a fair trial under all the circumstances. Due regard should be had to those fair trial rights listed in Appendix B hereto which are relevant to the particular facts and circumstances of the trial in question. However, a trial shall not be deemed unfair for the sole reason that the conduct thereof was not identical with trials held in the United States. If the designated commanding officer is of the opinion that the procedural safeguards specified in pertinent agreements were denied or that the trial was otherwise unjust, he shall submit to the Office of the Secretary of Defense, through the unified commander and the Judge Advocate General of the service concerned, his recommendations as to appropriate action to rectify the trial deficiencies and otherwise to protect the rights or interests of the accused. This shall include a statement of efforts taken or to be taken at the local level to protect the rights of the accused. An information copy of the recommendation of the designated commanding officer shall be forwarded by him to the diplomatic or consular mission in the country concerned.

(4) *Employment of Local Attorney for Accused. (a.). Criminal Cases.* Representation by civilian counsel at government expense of United States military personnel tried in foreign criminal courts is furnished in accordance with 10 U.S.C. 1037 when such action is deemed to be in the best interests of the United States. [67] Implementation of this statute is subject to service regulations. [68] The tri-service regulation provides that any person subject to court-martial jurisdiction who is cited to appear before a foreign tribunal, civil or criminal, is eligible to submit a request for the appointment of counsel. For Army personnel, the request is to be submitted to the officer exercising general court-martial jurisdiction over him. That officer may approve the request: (1) if it is an official duty offense; (2) where the sentence which is normally imposed included confinement—whether or not suspended; (3) in capital cases; (4) in appeals from proceedings which apparently denied some substantial right of the accused, and (5) where conviction of the offense alleged could later form the basis for administrative discharge proceedings for misconduct as a result of civil court disposition (e.g., eliminations actions pursuant to AR 635-120 and AR 635-206.) With respect to cases not meeting any of the five criteria, he may approve the request if he considers the case to have a significant impact upon our relations with the foreign country, or if he considers the case to involve a particular United States interest.

(*b.*) *Civil Cases.* In civil cases, the criteria for approval of requests are two: (1) where the suit is based on an act which occurred in the performance of official duty, or (2) where the suit has a significant impact on United States relations with the foreign country, or involves a particular United States interest.

(*c.*) *Procedures.* Once his request has been approved, the individual is free to select his counsel from a list furnished him of those civilian attorneys who are qualified and admitted to practice before the courts of the foreign country involved. After he has selected his attorney, the attorney is asked to sign a contract of employment with the United States in which he agrees to represent the individual diligently and to pay all necessary costs and expenses, and in which the United States agrees to pay him for his services and to reimburse him for those necessary out-of-pocket costs and expenses. If a conviction with confinement results from the trial, the service-

67. 10 U.S.C. 1037 is in part as follows:

(a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice. So far as practicable, these regulations shall be uniform for all armed forces.

(b) The person on whose behalf a payment is made under the section is not liable to reimburse the United States for that payment, unless he is responsible for forfeiture of bail under subsection (a).

68. Chapter 2, AR 27/50/SECNAVINST 5820.4D/AFR 110-12, Sept. 5, 1974.

man is not forgotten. DOD Directive 5525.1 provides in paragraph IV(I) as follows:

I. *Treatment of United States Personnel Confined in Foreign Penal Institutions.*

1. Insofar as practicable and subject to the laws and regulations of the country concerned and the provisions of any agreement therewith, the Department of Defense seeks to assure that United States military personnel (1) when in the custody of foreign authorities are fairly treated at all times and (2) when confined (pretrial and post-trial) in foreign penal institutions are accorded the treatment and are entitled to all the rights, privileges and protections of personnel confined in United States military facitlites. Such rights, priviliges and protections are enunciated in present Service directives and regulations, and include, but are not limited to, legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies.

2. In consonance with this policy, United States military personnel confined in foreign penal institutions shall be visited at least every thirty days, at which time the conditions of confinement as well as other matter relating to their health and welfare will be observed. The Services will maintain on a current basis records of these visits as reported by their respective commands. Records of each visit should contain the following information.

a. Names of personnel conducting visit and date of visit.

b. Name of each prisoner visited, serial number, and sentence for which he is serving imprisonment.

c. Name and location of prison.

d. Treatment of the individual prisoner by prison warden and other personnel (include a short description of the rehabilitation program, if any, as applied to the prisoner).

e. Conditions existing in the prison, *i.e.,* light, heat, sanitation, food, recreation, religious activities.

f. Change in status of prisoner, conditions of confinement or transfer to another institution.

g. Condition of prisoner, physical and mental.

h. Assistance given to prisoner, *i.e.,* legal, medical, food, bedding, clothing, and health and comfort supplies.

i. Action taken to have any deficiencies corrected, either by the local commander or through diplomatic or consular mission.

j. Designation of command responsible for prisoner's welfare and reporting of visits.

k. Information as to discharge of a prisoner from the service or termination of confinement.

3. Should it not be practicable for the individual's commanding officer or his representative to make visits, the designated commanding officer should be requested to arrange that another unit be responsible for such visits or to request that the appropriate diplomatic or consular mission assume responsibility therefor. Whenever necessary, a medical officer should participate in the visits and record the results of his examination. If reasonable requests for permission to visit United States military personnel are arbitrarily denied, or it is ascertained that the individual is being mistreated or that the conditions of his custody or confinement are substandard, the case should be referred to the diplomatic or consular mission concerned for appropriate action.

4. To the extent possible, military commanders should seek to conclude local arrangements whereby the United States military authorities may be permitted to accord United States military personnel confined in foreign institutions treatment, rights, privileges, and protection similar to those accorded such personnel confined in United States military facilities. The details of such arrangements should be submitted to the Judge Advocates General of the Services.

5. The military authorities shall make appropriate arrangements with foreign authorities whereby custody of individuals who are members of the armed forces shall, when they are released from confinement by foreign authorities, be turned over to the United States military authorities. In appropriate cases, diplomatic or consular officers should be requested to keep the military authorities advised as to the anticipated date of the release of such persons by the foreign authorities.

6. In cooperation with the appropriate diplomatic or consular mission, military commanders will, insofar as possible, assure that dependents of United States military personnel, nationals of the United States serving with, employed by and accompanying the armed forces, and dependents of such nationals when in the custody of foreign authorities, or when confined (pre-trial and post-trial) in foreign penal institutions receive the same treatment, rights and support as would be extended to United States military personnel in comparable situations pursuant to the other provisions of Section IV.I.

This paragraph of the DOD Directive is implemented by Chapter 3, AR 27-50/SECNAVINST 5820.4D/AFR 110-12, September 5, 1974.

(f) Search and Seizure in the Receiving State. In the 1976 case of *United States v. Jordan* [69] the Court of Military Appeals extended the protection of the Fourth Amendment to American servicemen beyond that previously afforded by the rationale of the *DeLeo* [70] decision. In *Jordan* the serviceman involved was questioned by British police concerning several robberies which had occurred in the American housing area. Jordan acquiesced in a request by British police to search his area. The subsequent search was conducted, in the main, by the British civil authorities who were accompanied by two air policemen from Jordan's base. The air police took no part in the actual search except to unlock a padlock on Jordan's locker and look around the room. When incriminating evidence was discovered, the British police requested a photographer and Air Force personnel complied. Judge Fletcher, writing for the majority, articulated the court's rationale as follows:

"The temptation confronting American officials to avoid the Fourth Amendment by merely delegating primary search authority to those not subject to our Constitution coupled with the unending judicial dilemma of resolving what is and is not sufficient participation to trigger the Constitutional guarantee leads us to conclude that the *DeLeo* standard no longer is satisfactory to safeguard the constitutional rights of servicemen stationed in a foreign country. . . .

We therefore hold that for trials by court-martial commencing after [March 12, 1976], whenever American officials are present at the scene of a foreign search or, even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before fruits of the search may be admitted into evidence in a trial by court-martial." [71]

The court further restricted the court-martial use of evidence obtained from foreign officials.

If the government seeks to use evidence obtained either directly or indirectly from a search conducted solely by foreign authorities, a showing by the prosecution that the search by foreign officials was lawful, applying the law of their sovereign, shall be a prerequisite for its admission in evidence upon motion of the defense. [72]

Finally, the court stated that the trial judge had discretion to refuse to admit the evidence unless he was satisfied that the "foreign search does not shock the conscience of the

69. 24 U.S.C.M.A. 156, 51 C.M.R. 375 (1976).

70. 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954).

71. 24 U.S.C.M.A. at 158-59, 51 C.M.R. at 377-78.

72. *Id.* at 159 and 378.

court." [73] This broadened application of the exclusionary rule would appear to be at variance with recent Supreme Court decisions. [74]

(*g*) *The United States as a Receiving State.* The Service Courts of Friendly Foreign Forces Act was enacted in 1944 in order to permit the operation of allied military courts on U.S. soil. [75] The act is designed to come into operation by presidential proclamation. President Roosevelt issued the proclamation in 1944 shortly after the act was passed. The proclamation was withdrawn in 1955 inasmuch as Article VII permits the establishment of such courts. However, there is much more involved than courts. Such matters as the bearing of arms, licensing of vehicles, waivers, taxes, postal privileges, the role of the state and federal authorities, etc., all must be taken into account. [76]

10-5. Other Status of Forces Agreements.

a. Germany. [77] (1) *Origins.* Until 1 July 1963 the rights and obligations of the United States forces stationed in the Federal Republic of Germany were governed by the Bonn Conventions of 1952, as amended by the Paris Protocol of 1954. One of these Conventions, the "Convention on Relations Between the Three Powers and the Federal Republic of Germany," provided that three of the conventions, the "Finance Convention," the "Forces Convention," and the "Tax Agreement" would be replaced by the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) and such supplementary arrangements as might be required to meet special conditions within the Federal Republic. On 11 October 1955, the negotiation of the Supplementary Agreement began. On 3 August 1959, almost four years later, the Federal Republic of Germany and the NATO countries with armed forces stationed in Germany (the United States, Belgium, Canada, France, the Netherlands, and the United Kingdom) signed the agreement. [78] Because of delays incident to ratification, however, it did not come into force and effect until 1 July 1963. The Federal Republic of Germany became the 14th of the 15 NATO countries to be bound by the NATO SOFA. (Iceland is the only NATO country which is not a signatory to the NATO Status of Forces Agreement.)

(2) *The Supplementary Agreement.* The Supplementary Agreement is much more detailed and comprehensive than any previous or subsequent SOFA. It encompasses in one document matters which are generally treated in a variety of agreements. Its comprehensiveness is in part attributable to the fact that a Federal system of Government exists in Germany and, as such, a detailed agreement which would bind the 10 states (*Laender*) of the Federal Republic of Germany on a host of local matters was required. Similar arrangements have been the subject of general rather than detailed understanding in other countries where, in the absence of the Federal system, broad understandings can be centrally and uniformly administered. The Supplementary Agreement contains 83 articles which are concerned with such diverse matters as the personal status of the members of a visiting force, custody and jurisdiction (both criminal and civil), accommodations, taxation, customs, damage claims and maneuver rights, liability insurance, vehicle registration, the registration of deaths and births, social security, drivers' licenses, enforcement of judgments, aerial photography, procurement, and the like.

(3) *The Jurisdictional Formula and Automatic Waiver.* The item of greatest general interest is the arrangement pertaining to the exercise of criminal jurisdiction over members of the United States forces, the civilian component, and the dependents of both these categories of personnel. Under the superseded "Forces Convention," the United States had what amounted to exclusive criminal jurisdiction over all United States service connected personnel in Germany. This arrangement has been replaced by the jurisdictional formula of the NATO SOFA as modified in important particulars by the Supplementary Agreement. Under the NATO SOFA, most serious offenses committed by sending State personnel are subject to the concurrent jurisdiction of both the sending and the receiving States. Article VII of the NATO SOFA obligates the state having the primary right to exercise jurisdiction to give "sympathetic consideration" to a request from the other state for a waiver of that right in cases of particular importance to the latter. In Article 19 of the Supplementary Agreement, the Federal Republic of Germany has agreed to grant to a sending State, upon request, a general waiver of its primary right to exercise jurisdiction in cases under the NATO SOFA, subject, however, to the right of the German authorities to recall the waiver when they decide that, by reason of the circumstances of a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction. The significance of the difference between this commitment and the waiver language of the NATO SOFA is obvious. In order to implement the waiver arrangement in the Federal Republic of Germany, the United States requested that the general waiver be granted. (The requirement of a request for waiver was necessary because some

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73. *Id.*

74. *See,* e.g., United States v. Janis, 19 *Crim L. Rep* 3323. The Court, in discussing the inter-sovereign applicability of the exclusionary rule stated:

> It is well-established, of course, that the exclusionary rule as a deterrent sanction is not applicable where a private party or a foreign government commits the offending act. (emphasis added) *Id.* at 3330, n. 31.

75. 22 U.S.C. §§ 701-706 (1944).

76. *See* Ellert, *The United States as a Receiving State,* 63 DICK. L. REV. 75 (1959).

77. *See,* Esgain & Kenyon, *The North Atlantic Treaty Organization Status of Forces Agreement with the Federal Republic of Germany,* 10 *Fed. Bar* News 291 (1963).

78. [1963] 14 U.S.T. 531, T.I.A.S. No. 535; 41 *Dep't State Bull.* 293 (1959).

of the sending States, unlike the United States, were apparently not interested in securing any greater rights to exercise criminal jurisdiction than are provided in the NATO SOFA itself, and therefore did not desire a general waiver.) When an offense is committed by a U.S. serviceman over which the Federal Republic would have the primary right to exercise jurisdiction, the United States military authorities must notify the appropriate German authorities of the case. Within three weeks from receipt of the notification, the local German authorities may recall the waiver. Provision is made for discussion between the local German authorities and the local United States military authorities in cases of recall and, if there is disagreement on the propriety of the recall, for appeal to their counterparts at the *Land* (State) level. If the problem cannot be resolved at the *Land* level, the matter may be referred to the Mixed Commission established under Article 30 of the Supplementary Agreement. The German/American Mixed Commission consists of a representative of the German Federal Ministry of Justice and the Judge Advocate, United States Army, Europe and Seventh Army. Final appeal is to the United States Embassy and to the Federal Republic. The Government of the Federal Republic, however, has the right to resolve the matter unilaterally and finally. However, both the United States Embassy and the German government must give "sympathetic consideration" to any joint recommendation of the Mixed Commission. In an agreed minute, the Germans have indicated that the term "major interests of German administration of justice" includes such crimes as homicide, rape, and robbery. These criminal jurisdiction arrangements are much more favorable to the United States than are those of the NATO SOFA.

(4) *Arrest Powers.* Under the Bonn Conventions, the German police possessed only a very limited authority to arrest United States servicemen. Under the new agreements, the German police have plenary powers of arrest over servicemen.

(5) *Custody and Trial.* A United States serviceman who is to be tried for a crime by a German court may be retained in United States custody both before and during his trial. A United States serviceman who is charged by a German court may choose local defense counsel, who will be retained for him by the United States Army, which will normally pay for such counsel and for court cost, but not fines. The trial, of course, will be conducted in German but the accused is provided an interpreter. A United States trial observer (a JAGC officer or American civilian attorney on the staff of the command Staff Judge Advocate) will attend the trial of United States service-connected personnel by German courts and will report on the fairness of the trial and whether the accused's treaty rights were respected during the proceedings. An accused sentenced to confinement in a German prison will be regularly visited by United States representatives who will report on the conditions of confinement. Once tried by a German court, a serviceman cannot be tried again for the same offense by a court-martial in Germany.

(6) *Civilians and Dependents.* Civilian employees of the United States forces in Germany and dependents have not been subject to peacetime court-martial jurisdiction since the Supreme Court decisions on this subject in January 1960. Civilians in Germany, therefore, will continue to be fully subject to the jurisdiction of German courts for crimes committed in Germany. Trial safeguards in German courts for these civilians are the same as for United States servicemen.

(7) *Non-Criminal Jurisdiction.* United States personnel in Germany continue, under the new agreements as they were under the Bonn Conventions, to be subject to the non-criminal jurisdiction of German tribunals. They are not, however, subject to any proceedings for the enforcement of any judgment against them in Germany in a matter arising from their performance of official duties.

(8) *Further Implementation.* Most of the 83 articles of the Supplementary Agreement contemplate the making of further and more detailed implementing arrangements and Agreements. A Protocol of Signature accompanies the basic agreement and contains Agreed Minutes and Declarations relating both to the NATO SOFA and to the Supplementary Agreement. In addition, numerous administrative agreements have been concluded between the United States and Germany at the U.S. Embassy/German Foreign Office level implementing or amending specific articles of the NATO SOFA, the Supplementary Agreement and the Protocol of Signature. The Agreement, therefore, cannot be authoritatively interpreted without recourse to these materials.

b. Japan. As Japan was not a member of NATO the status of U.S. forces stationed in the home islands of Japan after the conclusion of the occupation was first governed by a 1952 Administrative Agreement. [79] This Administrative Agreement was one of several agreements which were executed in implementation of a 1952 Security Treaty [80] with Japan. Both the Security Treaty and the Administrative Agreement came into force the day the Peace Treaty [81] with Japan came into effect. With respect to criminal jurisdiction, the Administrative Agreement provided that the U.S. was to have the primary right to exercise jurisdiction in all cases. However, the agreement also contained a pledge to revise this criminal jurisdiction formula along the lines of the NATO SOFA when that latter agreement came into force for the United States. Therefore, when in 1953 the NATO SOFA became effective, the U.S. signed a protocol with Japan revising so much of the Administrative Agreement with Japan as pertained to the exercise of criminal jurisdiction—making it nearly identical with corresponding provi-

79. [1952] 3 U.S.T. 3341, T.I.A.S. No. 2492.
80. [1952] 3 U.S.T. 3329, T.I.A.S. No. 2491.
81. [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490.

sions of the NATO agreement. [82] The 1952 Security Treaty was superseded on 19 January 1960 by a Treaty of Mutual Cooperation and Security. [83] The new treaty (Article VI) requires that the status of forces be provided by an agreement separate from the 1952 Administrative Agreement. Article VI was immediately implemented by an agreement [84] which now controls the status of U.S. forces in Japan. It is substantially similar to the NATO SOFA.

c. Republic of Korea. With the exception of MAAG personnel, the status of U.S. forces in Korea was governed, until 9 February 1967, by a wartime executive agreement entered into in July of 1950. [85] That agreement, actually an exchange of notes between the ROK government and our embassy at Seoul, gave the United States exclusive criminal jurisdiction over "members of the United States Military Establishment in Korea." On 9 February 1967, the Korean Status of Forces Agreement, with agreed minutes, [86] came into effect. Based largely on the NATO SOFA, it established a jurisdictional formula similar to that contained in the NATO SOFA. Members of the force are defined as personnel on active duty with the armed services of the United States when in the territory of the Republic of Korea except Embassy and MAAG personnel. MAAG personnel and their dependents continue to enjoy the immunities of Embassy personnel as provided in the Mission Agreement of 26 January 1950. [87] The civilian component is defined as civilians of U.S. nationality who are in the employ of, serving with, or accompanying the U.S. Armed Forces except persons ordinarily resident in the Republic of Korea and "invited contractors." Invited contractors are treated as a special class and enjoy certain, but not all, of the rights accorded to members of the civilian component. For the purposes of the Agreement, dual nationals brought into Korea by the Armed Forces will be deemed to be U.S. nationals. Dependents are defined as the spouse and children under 21, as well as children over 21 and other relatives dependent for over one-half of their support on members of the forces or civilian component.

d. Philippine Islands. U.S. forces in the Philippines, principally Navy and Air Force, come under a Military Bases Agreement which has been in effect since 1947. [88] In 1965, Article XIII of the Agreement governing criminal jurisdiction was substantially revised. The revised Article XIII, [89] like the current provisions of the Japanese and Korean agreements, contains a jurisdictional formula similar to the NATO SOFA. With respect to those offenses over which the United States has primary jurisdiction, the Agreed Official Minutes Regarding Article XIII specifies such jurisdiction will apply "only to those persons subject to the military law of the United States regularly assigned to the Philippines or present in the Philippines in connection with the presence of the U.S. bases." Further, it specifies that the term "persons subject to the military law of the United States" does not apply to members of the civilian component or dependents "with respect to whom there is no effective military jurisdiction at the time this arrangement enters into force," thereby recognizing the recent United States court decisions [90] denying military jurisdiction over such personnel.

e. Okinawa (Ryukyu Islands). Under the terms of the Peace Treaty with Japan, the United States was granted "the right to exercise all and any powers of administration, legislation, and jurisdiction over the territory and inhabitants" of the Ryukyu Islands. [91] Exclusive criminal jurisdiction over all the Marines, Army, Navy, Air Force, and Coast Guard who are stationed at this defense bastion was thus vested in United States courts-martial. USCAR courts exercised jurisdiction over U.S. civilians who were either United States government employees or dependents. Since the entry into force of the Agreement for Reversion to Japan of the Ryukyu and Daito Islands, [92] jurisdiction over U.S. military and civilian personnel is governed by the Japanese Administrative Agreement. [93]

f. Saudi Arabia. Under earlier agreements (e.g., Dhahran Air Base Agreement [94] and the MAAG Agreement), [95] criminal jurisdiction was based on a geographical concept, i.e., offenses committed by military personnel in certain specified areas of the nation were subject to exclusive U.S. jurisdiction. Offenses committed by military personnel outside those areas and all offenses committed by civilians irrespective of where committed were subject to exclusive Saudi Arabian jurisdiction. In later agreements (e.g., the Construction of Military Facilities Agreement), [96] the concept was changed so as to provide that "the senior representative of the Corps (of Engineers) element in Saudi Arabia shall have the sole authority to maintain discipline and good order among the members of the Corps and their dependents and to assure their full respect for the laws of Saudi Arabia by taking appropriate

82. [1953] 4 U.S.T. 1846, T.I.A.S. No. 2848.
83. [1960] 11 U.S.T. 1632, T.I.A.S. No. 4509.
84. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510.
85. [1954] 5 U.S.T. 1408, T.I.A.S. No. 3012. *See* also [1952] 3 U.S.T. 4420, T.I.A.S. No. 2593.
86. [1966] 17 U.S.T. 1677, T.I.A.S. No. 6127.
87. [1952] 3 U.S.T. 2696, T.I.A.S. No. 2436.
88. 61 Stat. 4019, T.I.A.S. No. 1775. *See also* [1958] 9 U.S.T. 547, T.I.A.S. No. 4033 establishing a Mutual Defense Board to work out problems under the base agreement.
89. [1965] 16 U.S.T. 1090, T.I.A.S. No. 5851; [1971] 22 U.S.T. 1469, T.I.A.S. No. 7160.
90. *See* paras. 10-4*a*(2) and (3) *supra.*
91. [1952] 3 U.S.T. 3169, T.I.A.S. No. 2490.
92. [1972] 23 U.S.T. 446, T.I.A.S. No. 7314, entered into force May 15, 1972.
93. [1960] 11 U.S.T. 1652, T.I.A.S. No. 4510.
94. [1951] 2 U.S.T. 1466, T.I.A.S. No. 2290.
95. [1953] 4 U.S.T. 1482, T.I.A.S. No. 2812.
96. [1965] 16 U.S.T. 890, T.I.A.S. No. 5830.

action under United States law involving such persons." In the Agreement on Privileges and Immunities for United States Personnel Under F-5 Aircraft Maintenance and Training Program [97] and the National Guard Modernization Program Agreement, [98] identical treatment was extended to personnel under those programs.

g. Other Agreements. Mentioned earlier in Part I are the Rio Pact [99] effective 3 December 1948, including all the nations of North and South America except Canada; the SEATO Pact [100] [Southeast Asia Collective Defense Treaty] effective 19 February 1955, between the United States, the United Kingdom, France, New Zealand, Australia, Thailand, Pakistan, and the Philippines; the ANZUS Pact [101] of 29 April 1952, involving the United States, Australia, and New Zealand; and the CENTO Pact to which Iran, Pakistan, Turkey, and the United Kingdom are parties, and to which the United States has made a declaration. [102]

h. International Headquarters Agreements. (1) In addition to the multilateral and bilateral SOFAs governing the status of personnel assigned or attached to national military forces of a sending State within the territory of a receiving State, other agreements have been adopted governing the status of personnel assigned or attached to international organizations and international military headquarters in several states in which such international organizations or headquarters are located. Typical examples of such agreements are as follows:

(*a*) The Ottawa Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff. [103]

(*b*) Protocol on the Status of International Military Headquarters. [104]

(*c*) Agreement Regarding the Status of Personnel of Sending States Attached to an International Military Headquarters of NATO in the Federal Republic of Germany. [105]

(*d*) SHAPE/Belgian Agreement [106] (to be added).

(*e*) AFCENT/Netherlands Agreement [107] (to be added).

(2) The Ottawa Agreement, governing the status of the nonmilitary side of the North Atlantic Treaty Organization, provides that "[e]very person designated by a Member State as its principal permanent representative to the Organization in the territory of another Member State, and such members of his official staff resident in that territory as may be agreed between the State which has designated them and the Organization and between the Organization and the State in which they will be resident, shall enjoy the immunities and privileges accorded to diplomatic representatives and their official staff of comparable rank." [108] The Agreement further provides that any other representative, including advisers and technical experts of delegations, as well as official clerical staff accompanying a representative of a Member State shall, while present in the territory of another Member State for the discharge of his duties, be entitled to the same immunity from personal arrest or detention as that accorded to diplomatic personnel of comparable rank. [109] However, since the privileges and immunities accorded to these personnel are not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the North Atlantic Treaty, "a Member State not only has the right, but is under a duty to waive the immunity of its representatives and members of their staffs in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the purposes for which immunity is accorded." [110]

(3) The IMH Protocol, on the other hand, governs the status of the military side of the NATO complex, specifically to Supreme Headquarters Allied Powers in Europe (SHAPE), Headquarters, Supreme Allied Commander Atlantic (SACLANT), other equivalent international military headquarters set up pursuant to the North Atlantic Treaty (e.g., Allied Command Channel) and any other international military headquarters immediately subordinate to a Supreme Headquarters (the latter designated as "Allied Headquarters"). [111] Examples of "Allied Headquarters" are the three major subordinate international military headquarters assigned to SHAPE: Allied Forces Northern Europe (AFNORTH) located in Kolsaas, Norway; Allied Forces Central Europe (AFCENT) located in Brunssum, The Netherlands; and Allied Forces Southern Europe (AFSOUTH), located in Naples, Italy. From the standpoint of criminal jurisdiction, the Protocol applies the provisions of Article VII of NATO SOFA to the personnel of the national military elements assigned to the several international military headquarters "when such personnel are present in [the territory in which the headquarters is located] in connection with their official duties." [112] The IMH Protocol establishes basic relationships in consideration of the expectation that

97. [1972] 23 U.S.T. 1469, T.I.A.S. No. 7425.
98. [1973] 24 U.S.T. 1106, T.I.A.S. No. 7634.
99. 62 Stat. 1681, T.I.A.S. No. 1838 (1947).
100. [1955] 6 U.S.T. 81, T.I.A.S. No. 3170.
101. [1952] 3 U.S.T. 3420, T.I.A.S. No. 2943.
102. [1958] 9 U.S.T. 1077, T.I.A.S. No. 4084.
103. [1954] 5 U.S.T. 1087, T.I.A.S. No. 2992 [hereinafter referred to as Ottawa Agreement].
104. [1954] 5 U.S.T. 870, T.I.A.S. No. 2978 [hereinafter referred to as the I.M.H. Protocol].
105. [1967] 20 U.S.T. 4055, T.I.A.S. No. 6792 [hereinafter referred to as I.M.H. Agreement-Germany].
106. SHAPE/Belgium.
107. AFCENT Netherlands.
108. Ottawa Agreement, *supra* note 105, art. XII.
109. *Id.* at arts. XIII and XIV.
110. *Id.* at art. XV.
111. I.M.H. Protocol, *supra* note 106, at art. I.
112. *Id.* at art. II.

international military headquarters in addition to "Supreme Headquarters" and "Allied Headquarters" would be established, by separate agreement, in the territories of various member states. [113] Further, the IMH Protocol envisages the possibility of bilateral agreements between a receiving State and a Supreme Headquarters supplementing the IMH Protocol. [114] The agreements discussed below are examples of those separate national agreements.

(4) The IMH Agreement—Germany is a multilateral agreement between the signatories to the NATO Status of Forces Supplementary Agreement [115] conferring on the personnel of the signatory sending State elements of the international military headquarters in Germany the same status as those personnel would enjoy under the Supplementary Agreement. At the present time, the international military headquarters to which this agreement applies are NATO commands subordinate to Headquarters AFCENT. [116]

113. *Id.* at preamble.

114. *Id.* at para. 2, art. XVI.

115. Belgium, Canada, Germany, Netherlands, United Kingdom, and United States.

116. At the present time there are four International Military Headquarters in Germany; Headquarters Northern Army Group (NORTHAG) located in Muenchen-Gladbach; Headquarters Central Army Group (CENTAG) located in Seckinheim; Headquarters 2d Allied Tactical Air Force (2d ATAF) located at Meunchen-Gladbach; and Headquarters, 4th Allied Tactical Air Force (4th ATAF) located at Ramstain.

10-6. Conclusion. As should be apparent from the foregoing, the United States is a party to a multitude of agreements denominating the status of its military personnel, its civilian employees, and their respective dependents. It is important to note that the status of American citizens may differ even within the same receiving State, depending on the official purpose for their presence. For example, American military personnel in Germany may be subject to either the NATO SOFA or to an International Headquarters agreement and the privileges and immunities would vary accordingly. Further complicating the issue, the treatment accorded American personnel under the same agreement may vary. Under the Ottawa Agreement, certain personnel have diplomatic immunity while others do not. Further, the liaison authorities may also differ. The "designated commanding officer" who is responsible for U.S. forces and personnel according to the NATO SOFA is not the "responsible authority" under the Ottawa Agreement.

The aforementioned examples are inserted at this point to alert the military attorney to the complexity of the problems that may arise under the various agreements. Differences in result may apply not only to the jurisdictional status of personnel and their dependents but also to other rights and privileges.

CHAPTER 11
THE CIVIL LAW SYSTEM

11-1. Introduction. The legal status of members of the United States Armed Forces in foreign countries may to a great extent depend on the law of the country where the member is located. [1] The United States Supreme Court once stated that "[it] is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place." [2] This proposition is no longer accepted. The doctrine of "extra-territoriality," upon which the exemption of foreign troops from "territorial jurisdiction" was based, has been abandoned and is now obsolete. [3] The broad waiver once thought to be implicit in the grant of permission by a receiving State to station troops in its territory is no longer recognized by modern state practice or by authoritative text writers. [4] Accordingly, it is of practical importance that members of the United States Armed Forces appreciate the legal systems which they are likely to encounter outside the United States.

11-2. The Early European Models. *a.* In Western Europe, two prominent legal systems developed: the common law of the Anglo-Saxon contries, and the civil law of continental Europe. The effect of these two systems has been worldwide since many countries have used them as sources of their legal systems.

b. Roman origins. "Civil Law" can have several meanings. For example, it is used in contradistinction to criminal law or as a synonym for private law in general. Primarily the notation "civil law" is used to distinguish it from the common law. [5] The common law has its origins in the feudal system of England. The civil law system has a different origin and a different emphasis; the *jus civile* finds its basis in legislative codifications and its origins in Roman legal practice. Early in Roman history the *jus civile* applied only to citizens of Rome, while the *jus gentium* was developed for noncitizens. The Roman legal system contained relatively strict provisions which often resulted in excessive hardships. To resolve this harshness, the office of *praetor* was established to temper the *jus civile.* [6] The recent trend in the common law of combining "law" and "equity" functions in a single court closely resembles the consolidation that occurred in the civil law. [7] Through the centuries the prestige of the *praetors* increased and their opinions and advice were followed. Attempts to collect the work of the *praetors* culminated when Emperor Justinian caused Roman law to be compiled in Justinian's Code. In subsequent centuries the codified Roman law was alternately in and out of favor in Europe. During the 18th and 19th centuries it found increasing favor with prominent European jurists and the great codification movements of France and Germany occurred. These legislative codifications are the bases of the civil law system. [8]

11-3. Modern Civil Practice. When investigating a foreign custom or a manner of doing something that is different than what one is accustomed to, the temptation is to use the familiar as a standard of excellence and to seek to determine how much deviation exists between the familiar and the practice under investigation. The observations of a French jurist in the 1920's may reduce such a temptation:

> When a lawyer of the Continent comes for the first time to America, he is usually full of admiration for the administration of justice in the United States. He sees "efficiency" and "service" written and worshipped everywhere. His imagination begins to work, and he thinks immediately of American courts like small Ford factories, where rights are recognized, set in motion, sanctioned in less time than is necessary to build a "flivver." Then he enters into a courtroom. . . . Instead of looking at a trial conducted as a business meeting, with all the work prepared by well-trained specialists, what does he see? That nothing has been done before the trial to ascertain the facts; that oral evidence is seriously considered as reliable; nay! that such evidence is gathered not by a critical and impartial inquiry, but by squeezing the witness through the theatrical scheme of cross-examination; that the inquiry is conducted by lawyers who are not interested in the discovery of truth, but, to say the least, in a certain presentation of the facts; that abstract rules, called evidence (!!), decide a priori what is relevant or not, what can be proven or not; that a stenographer takes down all that is said at the trial and makes it eventually one of several volumes.[9]

To add to this confusion, consider the consternation of the civil lawyer who then realizes that the complicated facts must be unraveled and a decision reached by "ordinary" persons. A number of years ago, the civil law methodology was described thusly:

> In the civil system the Code is central; judges and case law have a distinctly inferior position, in comparison with common law jurisdictions. The controlling conceptualism of the civil law is contained within these written Code texts, which are authoritative because of their political

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1. *See* chap. 10, *supra.*

2. Coleman v. Tennessee, 97 U.S. 509, 515 (1878). "The sovereign is understood . . . to cede a portion of his territorial jurisdiction when he allows troops of a foreign prince to pass through his dominions." *Id.*

3. *See,* e.g., Lauritzen v. Larsen, 345 U.S. 571, 584-85 (1952), and Chung Chi Cheung v. The King [1938] A.C. 1960 (H.L. 1938).

4. For a survey of authorities and a comprehensive bibliography, *see* 99 *CONG. REC.* 9062-70 (1953) (statement of Attorney General Brownell).

5. *See* Zepos, *The Legacy of Civil Law,* 34 *La. L. Rev.* 895 (1974); *R. Schlesinger, Comparative Law,* 245, 251 (3d ed. 1970); *R. David & J. Brierly, Major Legal Systems in the World Today,* 18-53 (1968).

6. This introduced a concept similar to "equity" which was to develop centuries later in response to the hardships of the common law.

7. Dainow, *The Civil Law and Common Law: Some Points of Comparison,* 15 *AM. J. COMP. L.* 419, 423 (1967) [hereinafter referred to as Dainow].

8. *Id.* at 420, 21.

9. Pugh, *Cross-Observations on the Administration of Civil Justice in the United States and France,* 19 *U. Miami L. Rev.* 345, 346 (1965) *citing* LePaulle, *Administration of Justice in the United States,* 4 *West Pub. Co. Docket* 3192 (1928).

sanction. The Codes have unity and systematic arrangements; their texts have a logical interdependence and coherence born of careful, conscious legislative formulation. [10]

When conflicts occur and litigation becomes necessary, the first question is whether the problem is controlled by one or more Code articles. In the great majority of cases this will be so, and an elaborate apparatus of interpretation will be called into play. Regard will be had to the language of the text and the sense it conveys, the influence of other articles, considerations of the textual arrangement of the Code as a unit, historical factors, the clarifying effect of the *motifs* of obscure passages, and allowable areas within which the legislator has indicated that judicial discretion may be used in taking account of special factors. The whole import of the process is the ascertainment of the genuine significance of the Code text. [11]

It is always the Code itself to which the judge first turns; in no case does he allow himself to become insulated from the Code article by the doctrinal writing or the jurisprudence (decisions), both of which, however, are additional factors which may be said to possess persuasive influence. In some fields which have developed since the drafting of the Codes, these two factors are necessarily of considerable importance, and in these instances there may be said to be something approaching case law. There is, however, no doctrine of *stare decisis*, of interpretation or otherwise. [12]

In the absence of a controlling Code text, the civilian judge by no means discards his Code. It is realized that properly drafted Codes have what the civilian calls "organic harmony," and contain within themselves a social and legal point of view consistently maintained throughout. Legislative activity as expressed in Codes is deemed to be only the starting point for further bold activity on all fronts, and the basis for all the future legal development of the country, rather than as an exceptional phenomenon to be discouraged and stifled as in America. Therefore, the civilian protects and extends his legislative text to a great variety of situations not precisely within its scope by use of "analogy." This method of handling statutory material involves the decision of problems not covered in the Code, but analogous to those precisely covered, in a manner consistent with a point of view revealed in the Code's disposition of the problem specifically covered. The process consists of a determination of the projective value of Code articles. The contest is fought over whether the analogy should be accepted, or whether there is an argument *a contrario* or a competing analogy. Or the text may be *jus singulare*, possibly by expressed command of the legislation in which circumstances it may not be projected analogically. [13]

[A]s modern civilians have freely recognized, the process is a creative one, since the judge ultimately has the power to accept or reject the analogies, or to choose between them. Thus, in resorting to analogy, the judge is free of the legislator to a certain extent, yet it must be observed that, in this field of activity as well, the civilian juridical method is a socialized one, and one utilizing legislative, and not judicial conceptualism. . . . This means that the civilian system is assured of a point of departure for analogy which is more consistent with the demands of current society, because the texts of the Code reveal a social attitude as to the harmonization of competing social interests, established by a socialized ratchet [i.e., legislative] process and are freer than cases can be, under a system of precedents, from archiac and conceptualism and historical rubbish. . . . [14] If neither the texts of the Code nor their projection by use of analogy yields a solution, the civilian at least has a truly "unprovided-for case." The next step at this point will vary considerably. . . . [15]

This does not mean complete judicial freedom from authority—even where a "standard" is imposed, it is freedom only within limits. But it involves a recognition that there are some situations, and some whole fields of law, which lend themselves to individualized, discretionary action by judges, in rather administrative capacities. Yet this still involves no formation of judicial conceptualism, for the cases are to be truly individualized; since no subsequent judge will be bound to follow the individualized decision, and thus it shall have little future value. [16]

Of course the civil law methodology is furthered by the form of legal education in civil law countries. As might be expected, the legal education of a civil lawyer tends to focus on legislation and codification, rather than on cases as is the practice in the law schools in common law countries. The methodology of a civil law training has been stated as follows:

In civil law countries, the student starts his study with codes and textbooks. He learns about the Justinian codifications and their influence on his present day legal system. He is taught general principles and how to think in abstractions. It becomes part of his being to appreciate classification and coordination of subject matter, and to take for granted a comprehensiveness of the law as systematic and a whole. It is only recently in countries like France and Belgium that the law student has been required to read some decided cases, and he ususally attaches only secondary importance to the judicial decisions. He concentrates on the codes, the treaties, and the notes taken during the formal lectures by his professors. [17]

11-4. The Working Civil Model. *a.* To understand more fully how a criminal case is processed under the civil law, it is necessary to appreciate that the civil law procedure has a different perspective than that of the common law. This has often been explained in terms of an accusatorial system (common law) versus an inquisitorial system (civil law). [18]

b. The adversary model. An accusatorial (or adversary) procedure starts from the premise that it is being conducted between two sides, i.e., it is essentially a contest between the prosecutor and the defendant. As such, the participants generally frame the extent of the dispute by the pleadings and stipulations. The prosecutor, in partisan fashion, indicates what facts are necessary to "convict" the defendant, and attempts to prove such facts. The defendant, conversely, attempts to block those efforts. Under such a process the defendant cannot be forced to give evidence since to do so would destroy the "theoretical equality between the contestants." [19] The role of the finder of fact (whether judge or jury) is passive and he acts merely to determine who has prevailed in the contest. A judge is present to ensure that the parties abide by the rules applicable to the conflict. Consequently, a great number of technicalities can arise, with the result that an

10. Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation,* 17 *Tul. L. Rev.* 351, 548 (1943).
11. *Id.* at 549.
12. *Id.* at 549-50.
13. *Id.* at 552-53.
14. *Id.* at 553-54.
15. *Id.* at 554.
16. *Id.* at 555.
17. Dainow, *supra,* note 7, at 429.
18. For a discussion of the historical development of these different judicial concepts, *see* Damaska, *Evidentiary Barriers to Conviction and Two Modes of Criminal Procedure: A Comparative Study,* 121 *U. Pa. L. Rev.* 506 (1973) [hereinafter referred to as Damaska].
19. *Id.* at 563.

accusatorial process can become "over-lawyered." [20]

c. The inquisitorial model. On the other side, the civil law proceeds from a quite different perspective. In the civil law the processing of a criminal case is not viewed as a dispute but rather as an inquiry to find out if an offense has occurred, who committed it, and whether punishment should be imposed. Since the process is one to find out what has happened, it is inconsistent that the parties (i.e., the government and the accused) may limit the scope of inquiry. Determination of the facts is unfettered by rules of evidence. The factfinder seeks out *all* sources of reliable information, to include questioning the accused. Under such a system fewer technicalities arise and the role of the lawyer is reduced. [21]

d. Unfortunately, the contrast between the accusatorial (adversary) and the inquisitorial (nonadversary) procedures raise in the mind of a person accustomed to the common law, visions of the unfamiliar (i.e., the civil law system) at its historical worst. The civil law system is an alternative to the common law concept of due process and it should not be assumed that it necessarily must be based on

> [t]he horrors of a procedural system where charges are not specific, the accused is not accorded the benefit of doubt, his confession is coerced, his detention before trial is unlimited, he has no right to counsel, and is not advised of his constitutional rights. [22]

11-5. The Civil Process. *a. Investigation.* What occurs when there is reason to believe that an offense has taken place? An investigation, requested by an "accuser" (normally the public prosecutor), is conduted by an impartial official. Some civil law countries (e.g., France and Germany) make a distinction between the initial investigation and the special investigation, the former being conducted by the police, and the latter by an investigating judge. In modern civil law systems, some of the inquisitorial features of investigation have been deleted from the process and the accused is aware of all evidence before the trial begins. [23]

b. The Role of the Prosecutor. Once the investigation has been completed and the *dossier* compiled, the evidence is forwarded to the public prosecutor for a decision whether to prosecute or not. If the decision is made to proceed to trial, there is neither arraignment nor formal pleadings. The *dossier* is delivered to the judge who then convenes the trial in open court where the parties have an opportunity to present their arguments.

c. The Judge.

> The prevailing contemporary continental system is that of a unified bench in which the professional judge or judges are flanked by lay assessors. Even in France, after the reforms of 1941, the 'jurors' deliberate and vote with the professional judges, so that the system remains that of 'jury trial' in name only. Adjudication solely by professional judges, while not unkown . . . is usually employed in the disposition of minor offenses and is definitely not representative of the modern continental style. In sum, the continental law of evidence is most profitably examined against the background of trial by a mixed tribunal. [24]

In theory, the evidence produced by the investigation must be reexamined by the presiding judge who takes an active role in questioning witnesses and raising all inquiries relevant to the charge. He may even solicit evidence not previously requested by the parties. [25]

d. Exclusionary Rules. Under the civil law system evidence is generally not excluded because its credibility might be in doubt. Exclusionary rules which attempt to protect the factfinding process against potentially unreliable sources (e.g., heresay) are almost unanimously rejected by civil law countries. Civil law factfinders, whether lay or professional, give different weight to the evidence according to its credibility. [26] Thus, rules against hearsay, inflammatory, or gruesome evidence, and other rules of "auxilary probative policy" [27] are not found in most civil law systems. The defendant may also be freely questioned, although he is not sworn prior to his testimony. [28] Devices do exist, however, which allow a judge to exclude evidence from the factfinding process "even though it appears logically relevant and there is no specific exclusionary rule in point." [29] For example, a judge may refuse to hear evidence which he considers to be repetitious, and he may require the original source of the evidence to be brought before the court rather than relying on the secondary source contained in the *dossier.* [30] Further, the judge may refuse to allow evidence of uncharged crimes or prior convictions of the defendant to be heard unless the prior criminal conduct establishes a *modus operan-*

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20. *Id.*

21. *Id.* at 564.

22. *Id.* at 569. These are what Mr. Justice Frankfurter listed as the indicia of an "inquisitorial" procedure in *Watts v. Indiana,* 338 U.S. 49, 54-55 (1949). For a response to Mr. Justice Frankfurter's characterization, *see* Kunert, *Some Observation on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure,* 16 *Buffalo L. Rev.* 122 (1966) [hereinafter referred to as Kunert].

23. *For example,* some evidence is gathered in the presence of the accused; the importance of confessions has decreased, the accused is no longer required to answer questions; and the accused with counsel (if not before the investigation is completed at least at its conclusion) is entitled to review the entire file (or dossier) that has been compiled. Damaska, *supra,* note 18, at 558-59.

24. *Id.* at 510, n. 4.

25. *Id.* at 559.

26. *Id.* at 514.

27. *J. Wigmore, Evidence,* § 1171 (Chadbourne ed. 1972).

28. This has given rise to the observation that the defendant therefore has a "right to lie" since few, if any, legal consequences occur if a defendant does so. *See* Damaska, *supra,* note 18, at 528, n. 4.

29. *Id.* at 516.

30. Damaska refers to this as the "principle of immediacy" which may be viewed as a type of best evidence rule. *Id.* at 517. However, a precise definition of the concept is not possible as the principle varies from civil law system to civil law system. *See* H. Jescheck, *Germany,* in *The Accused: A Comparative Study,* 246, 247 (J. Coutts ed. 1966) for a discussion of the concept of the "principle of immediacy" and the problems that it raises.

di. [31] On the whole, it is fair to say that a prosecutor in a civil law system has less difficulty than his counterpart in common law countries in getting evidence before a court. One of the most important differences in this area is the ability of civil law prosecutors to get into evidence statements of witnesses made before trial, that is, declarations of witnesses made during the investigation, either to police or to the investigating judge. Such evidence may be used in practically all civil law jurisdictions for substantive purposes. This procedure allows a great deal of admissible evidence to be determined or "frozen" prior to trial. [32]

e. Confessions. In addition to exclusion of evidence on the basis that it may interfere with determining the truth, relevant material is often excluded for other reasons. [33] Although provisions exist in continental systems for the interrogation of the defendant, such provisions generally do not address the question of what occurs if the authorized procedures are not followed. [34] The doctrine of the "fruit of the poisonous tree" does not generally exist in civil law countries. Therefore, as one might expect, fewer motions are made in civil law proceedings to exclude "illegally" obtained evidence and acquittals based on exclusion of evidence are comparatively rare. [35]

f. Witnesses. The theory behind the evidence presented at a criminal proceeding differs greatly in the common law and the civil law. While each side in a common law trial presents *its* evidence, in the civil law the evidence belongs to the court. Thus, in theory at least, the case does not "belong" to the prosecutor or to the defendant. The bulk of the questioning of witnesses is done by the presiding judge.

> Continental systems distinguish, however, among defendants, expert witnesses and simple witnesses for the purposes of formulating procedural and evidentiary rules concerning, for example, the manner and formalities of interrogation, duty to take an oath, and so forth. Another important difference . . . concerns the continental rule of permitting all persons examined to give a narrative account first, before being subjected to questioning. This fact, coupled with the more general preference for using 'spontaneous' rather than 'coached' witnesses, is of relevance. . . . [36]

g. Self-Incrimination. As indicated, the defendant in a civil law criminal proceeding is also a source of evidence, but it is incorrect to say that no privilege against self-incrimination exists. [37] Although in theory a defendant may not decline to be interrogated, he may refuse to answer all or some of the questions posed by the judge. [38] Even though an adverse inference is not to be drawn from the defendant's silence, most civil law defendants choose to answer the questions rather than risk an unfavorable impression, especially in situations where a refusal to answer a particular question might raise an immediate adverse inference. Although the defendant is not sworn and no sanction is taken if the defendant is caught in a "contradiction," civil law systems believe that important information, such as demeanor and inconsistencies, can nevertheless be obtained from a defendant who testifies. In continental sytems, it is common for the defendant to be the first person interrogated. This is possible because there is no requirement that the prosecutor establish a *prima facie* case before the defense is called upon. There is little doubt that having the defendant appear before he has heard the other evidence is advantageous to the prosecutor. The defendant's story is thus placed on stage to be tested against the remainder of the evidence.

h. Corroboration. No rules exist in most civil law countries requiring facts to be proved by more than one piece of evidence; corroboration is not so crucial as in common law jurisdictions. Such a requirement would be thought of as negative in nature, and has been avoided in varying degrees for several hundred years. [39]

11-6. Pre-Trial Procedures: The *Dossier*. Probably one of the greatest differences between the civil law and the common law processes is pre-trial disclosure of evidence. As already indicated, in continental countries the defendant and his counsel have access to the entire investigative file (*dossier*) which contains, among other items, summaries of testimony, a record of all evidence obtained, the charge sheet and related documents. From the *dossier* the defendant can generally discover the prosecutor's theory of the case, as well as what evidence will be submitted to the court. On the other side, the pre-trial investigation will disclose much of the defendant's case, as it is unusual for the defendant to withhold information that ultimately will be introduced at trial. Additionally, the defendant's private papers can be forcibly produced and placed in the *dossier*. Therefore, the *dossier* will contain all the facts, good and bad, that can be ascertained before trial concern-

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31. *See* Damaska, *supra,* note 18, at 519. Uncharged crimes and prior convictions often will be contained in the dossier which the presiding judge reviews before trial. Thus, it is not unreasonable to assume that in a close situation this *ex parte* knowledge may affect the outcome. *Id.*

32. This procedure, depending on the jurisdiction, can influence the conduct of witnesses, pretrial discovery, and other aspects of a civil law trial.

33. *For example,* testimonial privileges (especially those involving the defendant himself) and matters involving search and seizure may be included. *See infra,* notes.

34. A small number of civil law systems have adopted exclusionary rules under such circumstances. *See e.g., German Code of Criminal Procedure,* § 136a; *French Code of Civil Procedure,* arts. 114, 118, 170. *See also,* Pieck, *The Accused's Privilege Against Self-Incrimination,* 11 *Am. J. Comp. L.* 585 (1962).

35. Damaska, *supra,* note 18, at 521-24.

36. *Id.* at 525, n. 38.

37. *See* Clapp, *Privileges Against Self-Incrimination,* 10 *Rutgers L. Rev.* 541, 548 (1956).

38. Damaska, *supra,* note 18, at 427.

This right of silence is of a relatively recent vintage on the Continent. The medieval inquisitorial procedure not only required the defendant to testify, but also permitted enforcement of this duty through torture. After the use of torture was outlawed toward the end of the 18th century, most continental procedural systems still provided that the defendant had the 'duty to answer' and even threatened punishment . . . for failure to obey it. *Id.* at 427, n. 1.

39. *Id.* at 530-31.

ing the defendant's involvement in the alleged offense. When the *dossier* is compiled, the testimony and evidence are "frozen" for use at trial. Such "full disclosure" before trial probably favors the prosecutor because once the material is included in the *dossier*, there are few, if any, obstacles in presenting the evidence to the court. [40]

11-7. The Decisionmaking Process. *a.* The decision process in a civil law proceeding is philosophically different than that found in the common law. There is, of course, a factfinding function, but a judge must still apply the evidence presented against the "law." Generally speaking the "law," in a common law sense includes constitutional provisions, statutes, and decided cases. Treatises and other secondary material also bear on the decisionmaking process. In civil law systems decisionmaking tends to go from the general to the specific, in a common law jurisdiction a judge often seeks initially for general guidance to govern the specific situation under consideration. Additionally, the points of reference are different: a continental judge looks to legislation (often broadly written to allow great interpretive leeway) while the common law counterpart looks to individualizing cases or statutes which, if applicable, provide the judge little discretionary power as to whether they should be applied. [41]

b. The influence of legislation. Not only is the judicial process philosophically different, but legislation in civil law countries also serves a different function. Of course both systems seek to balance competing values in various social situations. But beyond that, a codification in a civil law country attempts to indicate a philosophy of government "so as to furnish a legislative basis for juristic and judicial development along modern lines." [42] In some respects the codes might be considered as a counterpart to a constitution in a common law jurisdiction. Courts, if the question at hand is not specifically covered by one of the articles of the relevant code, will reach a solution by analogy from the legislative material at hand.

A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise. The nature of such a code naturally calls for a liberal interpretation in order that it may serve as the basis of decision for new situations. . . . There is a great respect and high regard for legislation as the basic source of the law. [43]

In the United States the function of legislation is generally not thought to be either philosophical or a source of analogies. [44]

11-8. Codification. *a.* General. Continental penal codes are often structured into a General Part and a Special Part. [45] The General Part contains provisions such as attempts, principals and participation, self-defense, suspension of sentence, and statute of limitations, which are applied uniformly to all offenses, while the Special Part deals with specific offenses.

b. In the civil law, if the judge is unable to find a provision in legislative sources, he handles the "unprovided-for-case" in a manner different than a jurist in the common law.

When the written law is silent or insufficient on an essential issue, . . .[the] judge cannot refuse to adjudicate under penalty of being guilty of a denial of justice. The various civil law countries have adopted different formulae to guide and instruct the judges in this respect. Article 1 of the Swiss Civil Code authorized the judge to render the decision which he would make if he were [a] legislator; in France and in Belgium, he is given only the instruction to adjudicate. . . . In Germany, the tradition is that the judge must fill gaps in the written law; one way of doing this is to make use of customary law as a source of law, or else to resort to general principles. Whatever the explanation given . . . or the technique used . . ., the civil law judges are not always limited to a mere application of the law; in effect they are obliged to make law. [46]

c. Stare Decisis. The supremacy of legislation in civil law systems does not mean, however, that there is no place for prior case decisions. While judicial decision are used from time to time in the common law to "fill the gaps" or to "make law" and can themselves become a source of law, case decisions in the civil law are generally used only as sources of legislative interpretation. No case, even though decided by a reasoned decision based on an interpretation of legislation, is binding in future cases, nor is it precedent. Although a similar result may be achieved in a future case, it is not based on any concept of *stare decisis,* but rather is reached because a similar reasoning process and legislative interpretation has occurred.

In some countries like France and Belgium, the practice has been consolidated that when a certain point has been consistently decided in the same way by an appreciable number of cases, it becomes *jurisprudence constante* and is considered binding in future cases. This serves to stabilize the interpretation of the law. . . .There is also an increasing tendency among attorneys to cite cases as well as codes and other legislative texts. [47]

Thus, while a common law judge may be constrained by his awareness of the potential effect of today's decision on the future, a civil law judge does not have to consider that a decision may tomorrow be an "echo from the past." [48]

40. *Id.* at 534-36. *See also,* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 *Yale L. J.* 1149, 1180-92 (1960).

41. Dainow, *supra,* note 7, at 431-32.

42. Pound, *Sources and Forms of Law,* 22 *Notre Dame Law* 1, 71 (1946).

43. Dainow, *supra,* note 7, at 424.

44. Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution,* 82 *Yale L. J.* 258, 279-80 (1972). For a discussion of the role of legislation in the common law system, *see* Dainow, *supra,* note 7, at 425-26.

45. *See* Angel, *The Collection of European Penal Codes and the Study of Comparative Law,* 106 U. *Pa. L. Rev.* 329 (1958).

46. Dainow, *supra,* note 7, at 433.

47. *Id.* at 426-27.

48. Rudden, *Courts and Codes in England, France, and Soviet Russia,* 48 *Tul. L. Rev.* 1010, 1017 (1974).

d. Legislative history. Legal research in the civil law is of necessity affected by the favored position of legislation. The legislative history, including the drafters comments, is quite important as are the "doctrinal" materials, i.e., treatises and commentaries of legal scholars. In the civil law,

> [D]octrine is an inherent part of the system and is indispensible to a systematic and analytical understanding of it. The doctrine is not a recognized source of law but it has exercised a great influence on the development of the law. It molds the minds of students, it gives direction to the work of the practitioners and to the deliberations of the judges, and it guides the legislators toward consistency and systematization. [49]

Thus, analysis of a legal problem in a civil law jurisdiction would begin with the codes and other legislation, progress through the doctrine, and finally, if required, peruse the judicial decisions for a possible interpretation. In common law countries, most analyses consist of syntheses of judicial decisions, rather than what can be called doctrine, i.e., "systematic expositions and . . . discussions about broad legal priniciples . . . [which] formulate general theories about the basic codes and legislation, in relation to the evolution of the legal system as a whole." [50]

11-9. Conclusion. It has been said that among

> . . . all the legal systems of the world, we thus distinguish between the two great families of the common law and the civil law, and within the latter the two groups of the French and German patterns. An American comparatist will thus have to acquaint himself with the legal system of France or Germany or both. He will then hold the key to any other legal system to which he may feel attracted. [51]

The French and the German civil law systems, as well as others, are discussed in more detail in appendix A, *infra.*

The foregoing has been a general survey of some of the major differences between the civil law and the common law systems. The works cited explore these differences in detail should the practicing lawyer require a more thorough knowledge of a particular system.

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49. Dainow, *supra,* note 7, at 428.

50. *Id.* at 430.

51. Rheinstein, *Comparative Law—Its Functions, Methods, and Usages,* 22 *Ark. L. Rev.* 415, 418 (1968).

APPENDIX

Section I. CRIMINAL LAW PROCEDURES IN FRANCE

A-1. General. In analyzing the criminal code of a civil jurisdiction, one must distinguish between the penal code and the code of criminal procedure. The former determines criminality while the latter indicates in what manner alleged criminal conduct will be processed. Overlap often occurs between the two. The French Penal Code has remained essentially unchanged since its codification in 1810. However, in 1958, a new French Code of Criminal Procedure was enacted which codified prior decisional law. The 1958 Code "retains the essentially secret and inquisitorial nature of the proceedings before the *juge d'instruction,* but places the accused, the victim, and the prosecutor upon a more equal footing in these proceedings." [1]

A-2. The Prosecutor in France. *a.* In addition to the 1958 Code of Criminal Procedure, France has passed other laws which have decriminalized certain conduct and liberalized procedures. While French civil proceedings are becoming more "adversarial" in nature, the French criminal process still maintains its "inquisitorial" nature. The prosecutor in France has discretion whether to pursue a criminal case or not.

b. As a check against abuse of discretion by the prosecutor (*procureur*), the French Code of Criminal Procedure also permits the victim of a crime (*partie civile*) to institute proceedings. [2] This may occur in several instances. The victim may either join in the proceeding initiated by the prosecutor or, if no prosecution is brought by the government, the *partie civile* may institute what amounts to a private prosecution. [3] The aim of this intervention is the same in either case, to recover damages.

Thus in one proceeding, civil and criminal liability may be, and frequently are, determined. Although an injured party may always assert his claim for civil relief in a separate civil proceeding, intervention in a pending criminal proceeding may be quite advantageous. By this means, he can take full advantage of the investigatory facilities and prosecuting personnel of the state, in the inquisitorial aspects of the proceedings, and the speed, economy, and more liberal rules of evidence characteristic of the criminal action. In addition, he reaps the psychological benefit resulting from his adversary's position as a criminally accused. [4]

Although the intervention by the victim in an ongoing criminal prosecution has its advantages, instigation by the victim of a private prosecution (*action civile*) does present some hazards, i.e., he may become liable to the accused for damages if the prosecution is not successful. This is, of course, a deterrent to the attempted prosecution of unfounded or frivolous criminal proceedings by private individuals.

A-3. Charging. *a. The Dossier.* When a charge is brought by the prosecutor, or by the victim, or the victim joins in a proceeding brought by the prosecutor, [5] a *dossier* is complied. Argument is based upon the *dossier.* While the defendant and even the clerk of the court also prepare *dossiers,* the most important is that prepared by the investigating magistrate [6] (*juge d'instruction*). Because of the importance of this *dossier,* the *juge d'instruction* is required to be neutral and is "obligated to develop for the *dossier* not merely facts favorable to the prosecution, but also those favorable to the defendant." [7] Therefore, the dossier contains among other things,

the reports prepared by both the police and the *juge d'instruction* detailing the nature of the crime, the date and place of the hearing, and a summary of the statements of each of the witnesses. At each phase of the investigation, considerable evidence relative to the character and personality of persons involved in the incident is received and made part of the *dossier.* Each time a witness is heard, such things as his age, occupation, address, employer, date and place of birth, parents, and number of children are summarized. Succinctly, presumably so that his declarations may be evaluated accordingly and further information concerning the witness may be obtained without undue difficulty. Extensive annotated photographs and maps are usually made and included. [8]

b. Witnesses and Suspects. Under French law, witnesses and suspects may be detained in custody for 24 hours and, under some circumstances, for 48 hours in order to facilitate questioning. [9] When the police conduct the questioning, a witness normally is not sworn but statements given to the examining magistrate generally are given under oath. Until a suspect "officially" becomes the defendant in the proceeding (the *inculpé*), he may be questioned numerous times. However, once he becomes the *inclupé,* he must be informed of that status in the investigation, [10] the nature of the charges, that he has a right to remain silent, [11] and that he has a right to counsel. [12]

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1. Pugh, *Administration of Criminal Justice in France: An Introductory Analysis,* 23, *La. L. Rev.* 1, 14 (1962) [hereinafter referred to as Pugh].

2. *French Code of Criminal Procedure,* art. 1 [hereinafter referred to as *Penal Code*]. Anyone claiming to be injured by a [crime] may constitute himself a *partie civile* by lodging a complaint with a competent [court]. *Id.* at Art. 85. See also Arts. 2, 31.

3. *Penal Code,* Art. 85. For a general discussion of the *action civile, see* Sullivan, *A Comparative Survey of Problems in Criminal Procedure,* 6 *St. Louis U. L. J.* 380, 340 (1961); Vouin, *The Protection of the Accused in French Criminal Procedure,* 5 *Int'l & Comp. L. Q.* 1, 7-11 (1956).

4. Pugh, *supra* note 1, at 12. Most personal injury suits involving car accidents are handled by such a process. *Id.*

5. *Pénal Code,* art. 373.

6. Pugh, *Cross Observations on the Administration of Civil Justice in the United States and France,* 19 *U. Miami L. Rev.* 345, 356-57 (1965).

7. Pugh, *supra* note 1, at 23.

8. *Id.* at 15.

9. *See Code De Procedure Penale,* Arts. 77 *et seq.* [hereinafter cited as *Proc. Code*].

10. *Id.* at Art. 115.

11. *Id.* at Art. 114. "The fact that such notice has been given must be recorded in the official records. This stage in the proceeding is called the first appearance." Pugh, *supra* note 1, at 16, n. 1.

12. *Id.*

This information is not necessarily given to the accused at the same time. More than likely, the sequence would be as follows. A suspect is questioned by the police and the examining magistrate. Once it is officially determined to characterize the person as "the defendant," he is so informed by the examining magistrate. He is further told that he has a right to remain silent and the nature of the charges against him. At this point, if the defendant wishes to make a statement, it may be taken. After the statement is given, a defendant is then informed of his right to counsel.

c. Confessions. It has been noted that in the vast majority of cases in France, defendants seem to "exhibit a quite spontaneous desire to confess all." [13] When one considers the great number of confessions in French proceedings, this statement would appear to be justified. [14] Article 428 of the French *Code of Criminal Procedure* provides that a confession, "like all elements of proof, shall be left to the free appraisal of the judges." As many confessions are obtained by the police, French law includes a mechanism to protect against coerced confessions. First, the law provides that a person being detained has a right to be examined after 24 hours of detention to determine his physical condition. The prosecutor may call for the examination prior to that time. [15] Second, it is a crime under French law for a police officer to use "unjustifiable force against a citizen" and discipline for misconduct may be imposed by the courts. [16]

A-4. Role of Counsel. After being informed of his right to counsel, a defendant is entitled to be represented at interrogations or confrontations. [17] To assist counsel in representing the defendant, the law provides that the attorney shall be entitled to review the dossier of the *juge d'instruction* at least 24 hours before any proceeding. [18] At such hearings, however, neither counsel for the state nor the defendant has the right to present any arguments, except when the court permits questions to be asked. [19] Under French investigatory procedure the defendant may be required to reenact the crime. The philosophy behind this requirement is that even the most accomplished liar will have difficulty remaining consistent if forced to relive the event in detail. Photographs of the enactment often are taken and then placed in the *dossier.* [20]

A-5. Burden of Proof. Although there appears to be no expressly stated standard of "presumption of innocence" with respect to a defendant, it has been noted that "the standard actually employed is much more defense-oriented than that used for grand jury indictment. . . . [and] if the *juge d'instruction* is not reasonably convinced of guilt . . . the Defendant does not go to trial. Generally, the burden of proof is clearly on the prosecution." [21]

A-6. Search and Seizure. When discussing the question of search and seizure under French law, one must consider that done by the police force before the start of the investigation, on the one hand, and that ordered by the investigating magistrate on the other. When a crime is discovered in progress, a search and seizure may occur without authority from a court. [22] However, in other cases, French police may not search a private home without judicial authorization. [23] Once the case has reached the investigatory stage, the investigating magistrate has the authority, within certain statutory limits, to conduct or have conducted compulsory searches and seizures. [24]

A-7. Pretrial Confinement. Although pretrial confinement is considered to be an "exceptional measure," [25] it appears that at least in serious cases it is the rule, rather than the exception, to place the defendant in preventive detention. [26] The French law allows or permits pretrial detention for a period not to exceed four months, but the examining magistrate has authority to extend the confinement for additional four month periods by an order which states the reason for the continued detention. [27] Even though a defendant may spend considerable time in pretrial confinement, such detention is, as a rule, deducted from any sentence imposed at the trial. [28]

A-8. Bail. Bail exists under French procedure upon giving security (*caution*) to the court. [29] However, little use of bail is made. If preventive detention is not deemed appropriate, the defendant is not required to use the *caution* system since he simply is not detained in the first place. [30]

A-9. The Judicial Process *a. General.* Even with the extensive investigation by the magistrate, the judicial system in France moves with reasonable speed. Once the investigation is completed and the investigating magistrate

13. Anton, *L'Instruction Criminelle,* 9 *Am. J. Comp. L.* 441, 448 (1960) [hereinafter referred to as Anton].

14. *See generally* Pugh, *supra* note 1, at 15-17; *Proc. Code* Art. 4.

15. *Id.* at 19; *Proc. Code,* Arts. 64 *et seq.*

16. *See French Penal Code,* art. 186, and *Proc. Code,* Arts. 224 *et seq.*

17. *Proc. Code* Art. 118. Such a right may, of course, be waived by the defendant.

18. *Id.*

19. *Id.* at Art. 120.

20. Anton, *supra* note 13, at 452.

21. Pugh, *supra* note 1, at 23-24.

22. *Proc. Code,* Arts 56 *et seq.* In some instances, this is limited to cases involving *délits* which are punishable by imprisonment. Pugh *supra* note 1, at 18, n. 119.

23. *Proc. Code,* Arts. 23, 76.

24. *Id.* at Arts. 94 *et seq.*, 151 *et seq.* For a discussion of search and seizure in general as the issue arises in French criminal procedure, *see G. Stenfani & G. Levasseur, Procedure Penale* (2d ed., Dalloz 1962).

25. *Proc. Code* Art. 137.

26. *Id.* at Arts. 138, 714 *et seq.* Article 138 limits detention to 5 days for first offenders who are charged with offenses for which punishment is less than 2-years imprisonment. *See also* Anton, *supra* note 13.

27. *Proc. Code* Art. 139.

28. *Penal Code* Art. 24.

29. *Proc. Code* Arts. 145 *et seq.*

30. Anton, *supra* note 13, at 454. For a discussion of bail, probation, and parole in various European countries, see Glos, a study in the Treatment of Crime and Law Enforcement in the United States as Compared to the European countries, 3 St. Marip L. J. 194-200 (1971) [hereinafter referred to as Glos].

has recommended trial, the *dossier* is forwarded to the appropriate court. The following summarizes the next step in the process:

> Generally, there is no guilty plea in French criminal proceedings. . . . [It] is for the judge and jury to determine guilt, not the defendant. . . . At the trial, after the charge is read, the defendant is usually the first party examined by the presiding judge. As is the custom for witnesses, he stands. In serious cases, with painstaking care, the presiding judge, who has studied the *dossier,* interrogates the defendant, asking him to affirm or deny the truth of the statements contained therein, both his own and those of others. The judge attempts to bring out the pertinent circumstances, both favorable and unfavorable. Questions by counsel for the defendant and civil party may be posed through the president of the court. After the defendant has testified, other persons are heard. French procedure makes a distinction between witnesses and those who simply give information. Persons affected with an interest, such as the defendant, the civil party, and those closely related to them by blood or affinity, are not permitted to testify under oath—although they may give statements and be questioned as though they were witnesses. As a result, these persons are not subject to prosecution for perjury. What they say is viewed with scepticism, in light of their interest. Persons under the age of 16, and certain individuals with past criminal records, are also prohibitied from giving testimony under oath. When permitted to take an oath as a witness, one swears to "tell all the truth and nothing but the truth." Persons other than the defendant usually give their testimony in narrative form, and are permitted to say whatever they feel is pertinent, uninterrupted by the objections of counsel. . . . After all testimony has been received, counsel for the state, the civil party (if there be one), and the *inculpé* [the defendant] deliver oral presentations, which are frequently eloquent and moving. The summation (or *réquisitorie*) by the *procureur* [the prosecutor] . . . is probably more restrained and judicious than its American counterpart. . . . Frequently, as a result of confessions confirmed beyond serious question by the fruits of the exhaustive pretrial research reflected in the *dossier,* the defense counsel does not contest his client's guilt, but instead elaborates on the psychological, sociological, and economic factors which prompted the commission of the infraction. . . .
>
> The judges are specifically prohibited from basing their decision on evidence other than that available at the trial. They may consider all matters within the *dossier* properly acquired, for it is felt that as trained professional magistrates, they can weigh the testimony and give it the value to which it is entitled. In arriving at their decision, the test to be employed is "inner conviction" (*intime conviction*) [of the guilt of the defendant]. [31]

Although it might seem that such a proceeding would be quite lengthy, this generally is not the case. The thoroughness of the *dossier* preparation and the fact that the judge and counsel have studied it in advance of the trial combine to make a French trial move through the various stages without great delay. In some particular circumstances, a French trial may proceed without the presence of the defendant. [32]

b. Types of Procedures. Under French law, offenses are divided according to their seriousness, and each type of offense has its own procedure and court. *Contraventions,* or petty offenses, are tried by a single judge without jury. [33] *Delits,* or intermediate criminal offenses, are tried by three judges without a jury. [34] *Crimes,* or serious offenses are tried by three judges and nine jurors. [35] In a case involving a *crime,* the *inculpé* must be adjudged guilty by 8 of 12 votes, i.e., a majority of the lay jurors must vote to convict. [36]

A-10. Appeals. Under French procedures, in those cases for which appeal or review is provided, [37] either the state or the defendant may initiate the appeal or review. Except for the most serious offenses, questions of law *and* fact are reconsidered by the appeals court (*Cour d'Appel*). After reviewing the record as a whole (i.e., the *dossier*), as well as any additional evidence thought necessary, the *Cour d'Appel* may substitute its judgment for that of the trial court. Obviously, this is a much broader review than is possible under the law as it exists in the United States. The appellate court apparently is permitted to substitute its judgment because the great part of the evidence before the trial court is written (i.e., the *dossier*) and hence the demeanor of witnesses assumes less significance than it does in American courts. If the appellate court substitutes its judgment, the decision is final, i.e., it is not remanded to the trial court for it to enter judgment. [38]

A-11. Sources of the Law. *a.* Under French law, as is the case with most civil law systems, legislation is the only source of civil law. If that is so, what position do judicial decisions play in the French legal system? It is quite clear the judicial decisions, or "jurisprudence" as they are frequently designated in civil law countries, are not a source of law, but are merely an authority in the civil law. This is consistent with the concept of the separation of governmental powers. Even an uninterrupted line of cases which has decided a particular point uniformly does not establish that jurisprudence as law. [39] Precedent is only one of several factors that may be taken into consideration before a decision is reached, "an influence, of varying intensity, but never legally imposed." [40] The influence that a particular jurisprudence may have upon the practicing bar and judge varies, as might be expected, according to the prestige of the rendering court.

b. Precedent. Notwithstanding the foregoing, jurisprudence still enjoys a privileged position because "the thesis in support of which it may be cited in litigation has the

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31. Pugh, *supra* note 1, at 26, 27.
32. *Proc. Code* arts. 410 *et seq.*, 487, 544, 627 *et seq.*
33. *Proc. Code* Arts. 521 *et seq.*
34. *Id.* at Arts. 381 *et seq.*
35. *Id.* at Arts. 214, 231, *et seq.*, 240 *et seq.*
36. *See* Patey, *Recent Reforms in French Criminal Law and Procedure,* 9 *Int'l and Comp. L. Q.* 383 (1960).
37. E.g., Crimes, which are tried by the *Cour d'Assises* or by recommendation of the *Chambre d'Accusation* which is similar to a grand jury in the United States.
38. *Proc. Code* Arts. 496 *et seq.*, 512 *et seq.*, 546 *et seq.* and the *Penal Code* Arts. 443 *et seq.*
39. Article 5 of the *Civil Code* states that in deciding cases submitted to them, judges are forbidden to lay down general rules of conduct. Further, the French *Penal Code* imposes forfeiture of office as a sanction against judges and judicial officers who "interfere in the exercise of legislative power." *Penal Code* Art. 127(1). *See also* Carbonnier, *Authorities in Civil Law: France* in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 95-96 (J. Dainow ed. 1974) [hereinafter referred to as Carbonnier].
40. Carbonnier, *supra* note 39, at 97.

greatest chance of becoming the law in fact." [41] Therefore, when speaking of the "law" of France (*droit*) one should include not ony the enacted law (*loi*) but also the judicial decisions (jurisprudence). Since jurisprudence does occupy a position of being a "privileged" authority in the civil law, practitioners and judges alike must be able to locate relevant judicial decisions. The decisions of lower French courts (e.g., *juges d'instances*/petty court judges) are rarely published. Only selected decisions of the intermediate level courts (*tribunaux de grande instance*) and the Courts of Appeal are available. However, all of the decisions of the highest court in France (the *Cour de Cassation*) are published. The official reports of the *Cour de Cassation* are published in two parts, one for the civil chambers, the other for the criminal chambers under the title, *Bulletin des arrêts de la Cour de Cassation.* A central index (*fichier central*) is available and is based upon a statutory system of subject headings (*Service de documentation et d'études de la Cour de Cassation*). Supplementing the official reports, periodic private reports are published. These generally contain, in addition to the selected cases, head notes and annotations on the decisions reported.

c. Doctrine. In addition to jurisprudence, doctrine, which includes "legal scholarship, the opinions of the authors of legal literature about the law such as they, as theoreticians, understand it . . . [i.e.,] the body of legal writing or literature," [42] also plays a role. During the nineteenth century, French commentators concentrated their scholarly efforts on the Code Civil by researching the legislative history of the various provisions. Modern doctrine tends to deal more with the interpretation of jurisprudence and with commenting on the civil law as a whole rather than on the specific section of the Code Civil. The commentators do not view their function as mere technicians but rather attempt to analyze jurisprudence and legislation from a critical point of view. As with jurisprudence, doctrine is not a source of civil law, but it definitely is an authority in the civil law. This means that

> [a] judge is never bound either by an isolated doctrinal view . . . or by a unanimously adopted view of doctrinal writers. . . . Moreover, even if a judge does adjudicate in a manner indicated by the doctrine, its mere citation is insufficient; he must adopt, and as his own, all the reasoning upon which it is based. . . . It is only to be expected, however, that greater weight will be given in the courts to jurisprudence than to doctrine. . . . Doctrine, on the other hand, may be of greatest influence in those areas precisely where there is no established jurisprudence. It has, however, sometimes, happened that persistent doctrinal criticism will prompt the abandonment of established jurisprudential positions. [43]

Section II. CRIMINAL LAW PROCEDURES IN THE FEDERAL REPUBLIC OF GERMANY

A-12. General. The law of Germany dealing with what can be called "criminal" conduct is divided into a number of separate enactments. [44]

a. Penal Code. The German Penal Code (hereinafter referred to as StGB), like other continental penal codes, is divided into two parts: the General Part and the Special Part. The former contains provisions that are applicable to all of the offenses contained in the latter. For example, sections dealing with attempts, principals, self-defense, and statutes of limitation are found in the General Part. Provisions dealing with treason, forgery, murder, manslaughter, and so forth, are found in the Special Part.

b. Regulatory Offenses. In 1968 Germany removed from the German Penal Code certain regulatory offenses, i.e., *Ordnungswidrigkeiten* (OWiG). The Regulatory Offenses Act of 1968 sought to decriminalize a number of penal offenses

> for minor infractions unworthy of punishment, partly by removing them from the ambit of the penal law and sanctioning them merely as so called regulatory offenses. . . . This has been put into operation mainly in the area of traffic violations, provided they did not cause or threaten life, limb, or valuable property. [45]

Under the OWiG, the primary punishment is a fine. [46] In addition to reducing the possible sanctions (in comparison with the StGB), procedures for regulatory offenses have been simplified, [47] the statutes of limitation are shorter, [48] and the procedure, to include imposition of fines, is an administrative process rather than a judicial one involving a judge. [49] As one might expect, appeals are possible but only under restricted conditions. [50] Although it would appear that the regulatory offenses have in some respect been removed from the StGB, there is an indication that the principles embodies in the "General Part" of the StGB still apply. [51]

c. Comparison. The offenses covered by the German Penal Code are, as a rule, more broadly defined than one would find in a similar enactment in the United States. As a result,

> German judges often engage in a great deal of statutory construction, for example, when the definition of an offense appears to be so wide as

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41. *Id.*

42. *Id.* at 104, n. 119.

43. *Id.* at 106-07.

44. *Strafgesetzbuch,* or *StGB,* is the penal code; *Jugendgerichtgesetz* or *JGG,* is the law for juvenile courts; and *Straffprozessordnung,* or *StPO,* is the law of criminal procedure. There are, likewise, other laws which deal with regulatory and administrative offenses.

45. Eser, *The Politics of Criminal Law Reform: Germany,* 21 *Am. J. Comp. L.* 245, 251 (1975) [hereinafter referred to as Eser].

46. The fine usually ranges from DM5 to DM1000. The fine is called a *Geldbusse* and the administrative order imposing the fine a *BUSSGELDBESCHEID. Id.*

47. *OWiG* § 47 (1).

48. *Id.* at § 27.

49. *Id.* at §§ 35(2), 35(35).

50. *Id.* at §§ 79, 80. *See also* Eser, *supra* note 45, at 250, 51; Robinson, *Arrest, Prosecution and Police Power in the Federal Republic of Germany,* 4 *Duquesne U.L. Rev.* 225, 276-77 (1965-66) [hereinafter referred to as Robinson].

51. D. LEE & T. ROBERTSON, *"Moral Order" and the Criminal Law: Reform Efforts for the United States and West Germany* 181 (1973) [hereinafter referred to as *Lee & Robertson*].

to include conduct not regarded as criminal. Strict construction of Penal statutes was never accepted in Germany. . . . The doctrine of extensive judicial construction is also used to broaden the definition of an offense if the interests of justice so require. [52]

In Germany, several levels of offenses are defined in the StGB. The most serious offenses, similar to what might be termed felonies in the U.S., are called *Verbrechen* and are defined as "illegal acts punishable as a minimum by a penalty of imprisonment for one year or more." [53] Other offenses are called *Vergehen* (misdemeanors) and are defined as "illegal acts which are punishable as a minimum by a lesser penalty of imprisonment [i.e., less than one year] or by a fine." [54] The concept of an illegal act under German law has been succinctly stated:

According to the established method of analysis of the criminal act (*Handlungslehre*), an offense under the Criminal Code [StGB] has three necessary constituent characteristics: the combination of elements constituting a particular crime according to a specific title of the criminal code (*Tatbestand*), illegality (*Rechtswidrigkeit*), and guilt (*Schuld*). This analysis is not defined in the Code (StGB), but has become established in a body of German criminal law concepts. The "General Part" of the Code defines the limits of the respective parts of this analysis.

The *Tatbestand* is what would correspond in Anglo-American law to the offense described under a particular Title of the Code. Given such an offense (*Tatbestand*), illegality (*Rechtswidrigkeit*) may be assumed if not excluded by reason of a justification (*Rechtfertigungsgrund*) such as: self-defense, consent, etc. Guilt (*Schuld*), in this system, means personal responsibility. Thus guilt cannot be established for an otherwise illegal act or the omission of a legally required act, where personal responsibility is precluded by: lack of intent, error, mental incapacity, or where the fulfillment of a required act would mean the assumption of an action above and beyond that which may be reasonably expected. [55]

A-13. The Prosecutor. *a. Generally.* In Germany the Prosecutor has no staff to investigate and must rely upon the Police to collect the information required for prosecution. For this reason, prosecutors in Germany have been described as being "a body without a head. They don't even have feet. They have to borrow the feet of the police." [56] Unlike their counterparts in the United States, German prosecutors are appointed and are organized as civil servants on the state level (*Land*) under the state Ministries of Justice. Within a particular *Land* a hierarchical system is created under the Ministry of Justice and each prosecutor must give way to those higher in the heirarchy in discretionary matters. As civil servants, prosecutors often are appointed to the bench and judges occasionally are used to fill positions in the hierarchy of the Ministry of Justice.

b. Prosecutorial Discretion. Germany attempts to control prosecutorial discretion through what has come to be called the *Legalitaetsprinzip* (legality principle) or more descriptively, "the rule of complusory prosecution."

Except as otherwise provided by law, the prosecutor is obliged to take action in the case of all acts which may be legally punished and prosecuted, provided there is sufficient factual evidence. [57]

What the *Legalitaetsprinzip* requires is that all nonpetty cases [58] the prosecutor must prosecute if evidence exists to prove the occurrence of the offense by the accused. No plea bargaining is permitted and charges are not to be withdrawn after the trial begins. However, the *Legalitaetsprinzip* is a two-sided sword; it also prevents undue pressure on the prosecutor not to take a case to trial. In practice, when doubt exists a prosecutor normally will send the matter to trial and force the judge to make the final decision. [59] Since the German prosecutor operates in a hierarchical system (i.e., one in which the Ministry of Justice may control his discretion), such protection is necessary to maintain the integrity of process. If a German prosecutor was ordered by a superior not to prosecute a case which fell within the *Legalitaetsprinzip,* he would be obligated, under penalty of criminal sanction, to disregard the order and bring the case to trial. [60]

c. Closing a Case. If, after reviewing the evidence which has been gathered, a prosecutor believes there is insufficient evidence to convict the accused, the case may be closed. However, to close a case he must have the approval of his superior. [61] If a case is closed, both the accused and the party reporting the crime are to be notified. If the reporting party is also the victim, he will be advised of his right to appeal the prosecutor's decision not to prosecute.

A-14. Rights of a Victim. The victim in such cases has two options: he can file a formal complaint which is decided by the Attorney General of the state (*Land*); or he can file a departmental complaint objecting to the decision of the prosecutor. If the formal complaint to the Attorney General is unsuccessful the victim may seek judicial review and request that the prosecutor be compelled to file the charge. Complaints to the prosecutor's departmental superiors are quite numerous, but the great majority are unsuccessful unless the victim can produce new evidence. If, however, the victim is successful in the court action, it is provided that he may participate in the ensuing trial as an "accusing litigant" (*Nebenklaeger*) to protect his case against the accused.

A-15. Supervision of the Prosecutorial Function. *a. General.* Integrity in the prosecutorial process is maintained by

Close supervision and cooperation in the local prosecution office. The head of the local office and the supervisors of its various sections control the work of their subordinates by personal contacts and review of the

52. Hermann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany,* 41 *U. Chi. L. Rev.* 468, 472 (1974) [hereinafter referred to as Hermann].

53. *StBG* § 12(1).

54. *Id.* at § 12(2).

55. *Lee & Robertson, supra* note 51, at 187-88.

56. Robinson, *supra* note 50, at 297.

57. *German Code of Criminal Procedure* §152(2) [hereinafter referred to as *StPO*].

58. *Cf., id.* § 153.

59. *See* Cox, *Discretion—A Twentieth Century Mutation,* 28 *Okla. L. Rev.* 311 (1975); *see also* Hermann, *supra* note 52, at 472.

60. Langbein, *Controlling Prosecutorial Discretion in Germany,* 41 *U. Chi. L. Rev.* 439, at 450 [hereinafter cited as Langbein].

61. Hermann, *supra* note 52, at 477.

files. Regular conferences are held to discuss individual cases and to work out general patterns for structuring prosecutorial discretion. [62]

For one group of offenses (e.g., minor crimes of trespass, insult, and bodily injury; minor damage to property) the prosecutor may only file a charge if it is in the "public interest." [63] Otherwise, the victim must file a "private complaint" in which the process is similar to that followed when charges are filed by the prosecutors. [64] In the case of misdemeanors, a prosecutor may decline to prosecute illegal conduct even though sufficient evidence exists to convict the offender, if "the guilt of the perpetrator is minor and there is no public interest in prosecuting the offense." [65] Before taking such action, however, the prosecutor must obtain the permission of the court which would have heard the case. Since misdemeanors in Germany include many offenses which would be classified as felonies [66] if they were committed in the United States, it might appear that by allowing a prosecutor not to pursue prosecution when guilt in "minor" or prosecution is not in the "public interest," prosecutors operate with great discretionary latitude. Such is not the case. In addition to the necessity for judicial approval of a decision not to prosecute, German prosecutors

regard complusory prosecution and restraint of discretion as over-riding principles. They generally agree that they should be reluctant to exercise their discretionary power, and they abort proceedings only in really trivial cases. [67]

Effective check on prosecutional discretion is provided by departmental supervision. Before a prosecutor drops a case, his decision will be reviewed by a superior. The procedure is similar to that involved in reviewing a decision not to prosecute for insufficient evidence.

b. Supervision of Minor Offenses. Another area of prosecutorial discretion involves appeals from fines imposed for administrative and regulatory offenses (e.g., traffic violations, health regulations, etc.). Such cases are prosecuted by, and the fines are imposed by, administrative agencies under the *Ordnungswidrigkeitengesetz* (Petty Infractions Code) rather than under the StBG. If the defendant files a complaint against the imposition of the administrative fine, the agency forwards it to the appropriate prosecutor. Before he sends it to a court for resolution, the prosecutor is "authorized not to prosecute." [68] This is rarely done, however, as most "prosecutors generally agree that after a complaint is filed a judge should make the final decision." [69]

A-16. The Code of Criminal Procedure (StPO). According to StPO § 403, if a prosecutor decides to file a charge, he should notify the victim, or his heirs, of the possibility of asserting a claim against the accused for indemnification. If the victim decides to intervene, the effect is the same as bringing a civil action. [70] Although this procedure for indemnification exists, apparently little use is made of it. One author has observed that the

[c]ourt can decide the civil claim only if the decision is for the complainant. (405) [referring to StPO § 405] If the case is appealed and the conviction reversed, the civil judgment is reversed automatically. (405 A-III) In addition, there are several practical considerations. At the time the criminal trial is held, usually the extent of the injury is not clear; a more liberal award is likely in a civil court; the civil action is not the main concern of the criminal trial judge and the time that may be given to expert testimony concerning the civil claim would be limited. [71]

A-17. The German Court System. When a criminal act as defined by the German Penal Code has been committed, accusations may be made to the prosecutor, the police, or to a district court (*Amtsgericht*). The German court system, in some respects, is simpler than that in the United States. No municipal courts exist and there are no federal courts on the trial level (except for high treason and several other political type offenses). The courts are controlled by the various states (*Laender*). The lowest courts are the district courts (*Amtsgerichte*) which are collected under the intermediate state courts called the *Landgerichte,* which are then grouped under the highest state courts (the *Oberlandesgerichte*). Matters tried in the *Amtsgerichte* are appealed to the *Landgerichte* and then to the *Oberlandesgerichte.* Matters which are tried initially in the intermediate state courts (*Landgerichte*) may be appealed only once, i.e., to the *Bundesgerichtshof,* a federal court. Generally, it can be said that misdemeanors are tried before the *Amtsgerichte* and felonies before the *Landgerichte,* except for those reserved for trial before the *Bundesgerichtshof.*

The combined effect of the federal codes and the state laws, practically identical from state to state, is to produce a uniform set of rules governing the prevention, repression and prosecution of offenses throughout the Federal Republic. When this structure is combined with German notions of service of process and venue, the state courts take on a national character. [72]

A-18. Duties of the Prosecutor. As soon as knowledge of an alleged crime reaches the prosecutor, he must in-

62. *Id.* at 478.

63. *StPO* § 376.

64. In actuality, private prosecutions play a very limited role in the German criminal system. *StPO* §§ 373-90. It should be noted that *StPO* § 377 allows the prosecutor to enter a private prosecution and to participate, but he is not required to do so, unless ordered by the courts. When the prosecutor does participate, he assumes control of the case and the private party is treated as an intervenor. As an intervenor (*Nebenklaeger*), the victim still has the "major rights of a party: to have witnesses called, to appear by counsel, to put questions at trial, to propose a judgment to the court, and to appeal against an unfavorable result." Langbein, *supra* note 60, at 462.

65. *StPO* § 153(2).

66. *See* Hermann, *supra* note 52, at 484.

67. *Id.*

68. *Id.* at 481.

69. *Id.*

70. *StPO* § 404.

71. Robinson, *supra* note 50, at 274.

72. Kaplan, von Mehren, and Schaeffer, *Phases of German Civil Procedure* I, *Harv. L. Rev.* 1193, 1443-1461 (1958). *See also W. Heyde, Administration of Justice in the Federal Republic of Germany* (1971).

vestigate to determine whether charges are to be preferred. During the investigation the prosecutor gathers all evidence pertaining to the offense, whether incriminating or exonerating. In addition to collecting information concerning the crime, the prosecutor is charged with extending his investigation to "circumstances which are important for the measure for punishment, for the suspension of punishment or probation, and for ordering measures of prevention and reform." [73] To complete his investigation, the prosecutor may request assistance from all public authorities and agencies, as well as the police, to conduct the necessary inquiries. The agencies and police are required by law to comply with the request of the prosecutor for assistance. [74]

A-19. Rights of the Accused. *a. General.* The rights of the accused are set out in the Code of Criminal Procedure in great detail. He is to be interviewed by the prosecutor prior to termination of the investigation and, if the accused requests that evidence be taken for his defense, the prosecutor is obligated to secure it if it is considered to be of significance. [75] At the initial interview the accused is to be advised of the offense charged, including the applicable section of the Penal Code. Additionally, he

shall be advised that the law grants him the right to respond to the accusation, or not to make any statements regarding the subject matter and even prior to his examination to consult with a defense counsel of his choice. [76]

b. Right to Counsel. The defendant is entitled to have a defense counsel at any state of the proceeding [77] and in certain cases, a defense counsel is mandatory. [78] Provision is also made for appointment of defense counsel. [79] In addition to the rights provided in the StPO, the Constitution of the Federal Republic of Germany, (1949) (*Grundgesetz*) guarantees certain procedural safeguards, e.g., exclusive jurisdictions of the judiciary in criminal matters, guarantee of an independent judiciary, prohibition of irregular courts, right of the defendant to be heard before a court, prohibition against double jeopardy, and special rights that are applicable to judicial actions which may result in deprivation of liberty. [80] In addition to the domestic guarantees provided by the Code of Criminal Procedure and the *Grundgesetz,* Germans (as do other persons resident within the territory of a convention signatory) have the legal remedy of applying to the European Commission of Human Rights in Strassbourg or the European Court of Human Rights if they believe that basic or human rights have been violated. [81]

Many of the decisions of these European organs have concerned cases of pretrial detention, in which the prisoner, who had been detained for an unreasonably long period, asserted the right to be set free during the pendency of the trial. [82]

In addition, section 136(a) of the procedural code (StPO) states that:

(1) The freedom of decision and voluntary manifestation of the accused's will shall not be impaired by ill treatment, fatigue, bodily interference, drugs, torture, deception, or hypnosis. . . . Threats with measures not permitted by the procedural provision or promise of an advantage not provided by the law are prohibited.
(2) Measures which impair the memory or the capacity of judgment of the accused are not permitted. . . .
(3) These prohibitions apply irrespective of the consent of the accused. Statements which were obtained by violation of this prohibition shall not be used, even if the accused agrees to their use.

A-20. Pretrial Confinement. During the investigation, a person may be placed in pretrial confinement if he is "strongly suspected of the act" and if the person has fled or is hiding or there is a danger the person would evade prosecution by fleeing; or if the person might destroy, alter, remove, suppress, or falsify evidence, to include improperly influencing co-defendents, witnesses, or experts (or cause others to do so); or if the person is accused of a felony involving morality or indecency, he might commit another offense; or if the person is suspected of a felony against life. [83] If the act is punishable only by imprisonment up to six months, pretrial detention is not permissible on the grounds of the danger of obscuring evidence, but only to prevent evasion of prosecution by flight. Pretrial detention is imposed by order of a judge who is also responsible for granting bail which can be furnished by depositing cash or bonds, by pledging property, or by furnishing suitable persons as sureties. If a person is caught in the commission of a crime, anyone is authorized to apprehend him temporarily, without a judicial order, if there is reason to suspect that the person will flee or if his identity cannot be immediately ascertaned. Also, under certain circumstances, police officials or the prosecutors are authorized to temporarily detain a person if a danger of delay exists. Review of pretrial confinement may be on motion of the accused or in the discretion of the court *sua sponte.*

A-21. The Defense Counsel. The defense counsel

has access to the prosecutor's entire file including the material to be introduced into evidence upon completion of the preliminary investigation. The defense counsel may even take the files to his office for study and preparation of his counter-argument. . . . But he does not have to reveal to the prosecutor the counter-proof which he plans to introduce at the trial other than the names and address of his witnesses and experts. [84]

A-22. Indicting. Once the prosecutor has investigated to the point where he believes that sufficient evidence exists for preferring public charges, he will do so either by mov-

73. *StPO* § 160(3).
74. *Id.* at § 161(1).
75. *Id.* at § 136.
76. *Id.* at § 163(a).
77. *Id.* at § 137.
78. *Id.* at § 140.
79. *Id.* at § 141.
80. *Grundgesetz,* Arts. 92, 97, 101, 103, 104.
81. *Id.* at Art. 48.
82. Jescheck, *Principles of German Criminal Procedure in Comparison with American Law,* 56 *VA. L. Rev.* 239, 242.
83. *StPO* § 112.
84. Jescheck, *supra* note 82, at 246.

ing for a preliminary judicial investigation (*Gerichtliche Voruntersuchung*), [85] or by submitting a bill of indictment to the appropriate court. In all other cases, he will terminate the proceeding. If a preliminary judicial proceeding is not held, whether the case goes to trial or not is decided by the competent court upon review of the bill of indictment which contains a motion by the prosecutor to open the "main proceedings." Along with the bill of indictment, the prosecutor furnishes his investigative file (i.e., his *dossier*). The court is to open the "main proceedings" if the evidence in the *dossier* indicates that the accused is "sufficiently suspected of the offense." [86] When a preliminary judicial investigation is held, it is not to extend any further than is necessary to arrive at a decision as to whether the "main proceedings" should be opened or the charges dismissed. [87] Upon completing the preliminary investigation, the examining judge (*Untersuchungsrichter*) returns the file to the prosecutor with his recommendation. If the prosecutor believes that the matter should go to trial, the file is sent to the appropriate court with a bill of indictment for the court's decision.

A-23. Charges. In Germany prosecutors generally charge an "entire transaction," i.e.,

> The entire criminal transaction is presented to the court, rather than merely those elements selected by the prosecutor. For example, if employees of a bank were taken as hostages and a police officer killed in the course of a bank robbery, the prosecutor presents all the facts to the court and files the charge for all possible offenses; he cannot choose to prosecute only one of the offenses and thereby bring a reduced charge. A final judgment of conviction or acquittal is res judicata as to the entire transaction described in the charge. The concept of the criminal transaction is not limited to acts committed in one place and at one time. A transaction may include several separable acts that can be considered one episode. A series of frauds committed in several cities by a traveling salesman, the writing of numerous bad checks, or the filing of several false tax returns have all been treated as one transaction. [88]

At this stage, the charges are before the trial court for the "main proceeding" (*Hauptverfahren*). Before discussing in detail the *Hauptverfahren,* it may be best to put the entire proceeding in perspective.

> Once a charge has been preferred, a German judge, using the file of the case, . . . will decide whether to authorize main proceedings (*Hauptverfahren*), the question being whether there is sufficient evidence of guilt of the person charged. The latter will first be heard. In addition the court can order supplementary judicial investigation of the case. It can also decline to open main proceedings. Furthermore, the presiding judge is responsible for the preparation of the main hearing of the case. In this way he decides whether to grant a defendant's application to obtain evidence. So on his own authority he may order the summoning of witnesses and experts, or the production of new evidence. He can also make out an order for an examination before designated or requested judges prior to the main hearing, as well as a judicial view to be taken by them. While preparing the main hearing, a judge is even permitted to get in touch with the defendant, the defense, witnesses and experts alike. During the main hearing he is in charge of the conduct of the trial, the examination of the defendant, and the eliciting of evidence. While cross-examination is provided for in the German Code of Criminal Procedure (StPO), it is rarely applied as neither prosecuting nor defending counsel are used to elicit[ing] evidence in court. . . . Where the proof of guilt of the defendant is insufficient, the prosecution will itself ask for an acquittal. Where a defendant has been wrongfully convicted, the prosecution will put forward an appeal for the restitution of his rights. This independent and impartial position of the state prosecutor is made possible by the judge bearing the responsibility for a complete and impartial examination of the evidence. This in turn presupposes the prior knowledge of the file [*dossier*] by the judge. So it is possible to claim that the prior access to the file is closely related to the structure of German criminal procedure. [89]

A-24. Composition of the Courts. If one factor could be chosen to explain the differences between the legal systems of Germany and the United States, it would have to be that in Germany there are no jury trials. Because there are no "jurors," German criminal procedure does not contain extensive exclusionary rules with respect to evidence. Although in earlier periods German trials were conducted by professional judges without the assistance of lay judges, the system as it operates today is a middle ground between trial by judge alone and a jury trial because it is conducted before a mixed bench of professional and lay judges. These lay judges are not merely "jurors" since they participate with the professional judge in deciding questions of law and fact. However, it should be noted that the lay judges have no prior knowledge of the file (*dossier*). They hear the evidence for the first time at the trial. [90]

A-25. The Exclusionary Rule in Germany. In addition to eliminating exclusionary rules (such as the heresay rule) which are, at least partially, based upon consideration of the lack of "sophistication" of jurors, the German system has also felt little urge to use exclusionary rules of evidence to discourage police and prosecutorial abuse. For example, although a confession obtained by illegal means might be excluded even if the defendant consents to its use, [91] Germany has not adopted the "fruit of the poisonous tree" doctrine. The Federal Supreme Court of Germany has held that

> failure to warn the defendant about his right to remain silent and his privilege to request an attorney before his interrogation does not render inadmissible the proof obtained as a result of his impermissible questioning. [92]

A-26. Conduct of the Trial. *a. General.* In a German criminal trial, there are no opening statements by defense counsel and prosecutor. The presiding judge calls the case and determines whether the defendant, counsel, and summoned witnesses and experts are present. If so, the

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85. A preliminary judicial investigation is required for cases going to the *Bundesgerichtshof,* the *Oberlandesgericht,* or the *Schwurgericht* for trial or where the prosecutor of defendant moves for such an investigation. The preliminary judicial investigation is opened and carried on by a special examining judge (*Untersuchungsrichter*). *See StPO* §§ 178-197.

86. *StPO* at § 203.

87. *Id.* at § 190.

88. Hermann, *supra* note 52, at 495.

89. Jescheck, *supra* note 82, at 246-47.

90. *Id.* at 249-252.

91. *StPO* § 136(a).

92. Jescheck, *supra* note 82, at 246.

witnesses leave the courtroom and the defendant is examined by the presiding judge regarding his personal situation. Thereafter, the prosecutor reads the accusation and, under certain circumstances, is permitted to present the legal evaluation on which the order to open the trial has been based and to express his own legal opinion. The defendant is advised of his right to remain silent. If he desires to speak, he is immediately examined by the presiding judge. At the conclusion of a defendant's statement, if any, both defense counsel and prosecutor are given an opportunity to question the defendant in order to supplement his testimony. This is not a cross-examination in the common law sense; the defendant is not allowed to testify under oath as a witness. Once the defendant has been questioned, if he desires to speak, the presiding judge receives the evidence in the case.

b. Introducing Evidence. In a German trial, evidence is received according to the *Instruktionsmaxime,* i.e., in order to determine the truth the court shall, upon its own motion, extend the taking of evidence to all facts and evidence which are important for the decision. The introduction of proof does not proceed on direct examination/cross-examination as in the United States. Rather, witnesses are allowed to testify as to what they know about the subject matter in a narrative form and only then are they questioned further. [93] After each witness, or after the introduction of each piece of written proof, the accused is asked if he has any statement to make and, upon request, the prosecutor and the defense counsel may make a statement. The court is not bound by the evidence presented by the prosecutor or by the defense counsel. In fact, it is fair to say that the prosecutor loses control of the case once formal charges have been filed. [94] He is not at liberty to drop the case without judicial concurrence, and the court is not bound by the prosecutor's theory of the case. It therefore follows that the prosecutor is not required to make out a *prima facie* case; nor is there a requirement that a particular fact be substantiated by more than one piece of evidence. In fulfilling the *Instrukstionsmaxime* a court is not bound by a defendant's confession and it may question as many witnesses as necessary to satisfy itself of the accused's guilt. The burden of disproving such exculpatory defenses as insanity, drunkenness, self-defense, or necessity is upon the government. However, the defendant has the burden of asserting the facts necessary to raise such a defense (*Darlegungslast*). If the government cannot meet its burden, the point is established by the presumption in the defendant's favor.

c. Closing Statements. At the conclusion of the evidence, the prosecutor and the accused have the right to make closing statements, with a right of reply in the prosecutor and the right to close in the defendant. Even if the defense counsel has spoken for the defendant, the defendant will be asked himself whether he has anything to add in his defense. Once closing arguments have been made, the court retires to deliberate its determination of guilt or innocence and to fix the sentence, if appropriate. The civil law system generally does not require a unanimous vote for a verdict of guilty.

A-27. Conviction and Sentencing. *a. Conviction.* The German Code of Criminal Procedure states that a "majority of two-thirds of the votes is required for any decision against an accused which concerns the question of guilt [or] assessment of punishment." [95]

b. Sentencing. A study of sentences authorized by the German Penal Code (StGB) and those actually imposed by German courts show that they are generally less severe than those in the United States. [96] In 1969, Germany enacted two reform acts which were not merely changes in criminal law, but actually revealed ". . . a new basic orientation: a beginning with de-mythologizing and humanizing criminal law." [97] Certain acts were made noncriminal and the concept of penal sanctions was reoriented. The law was divided into two parts, the first of which was less controversial and became effective on 1 April 1970. The second part, which included the General Part of the Penal Code, as well as the new concepts with respect to penalties, did not come into effect until 1 January 1975. The penal policy as enacted in these two pieces of legislation provides for uniform imprisonment for all prisoners, regardless of offense, thus doing away with the former sanction of penal servitude. The reform acts also restricted the use of "short-term" imprisonment (i.e., less than six months) except in unusual cases. The rules regarding parole and suspension of sentence were liberalized, thus placing formerly ineligible persons within the zone of consideration.

c. Fines. In these reform acts Germany also adopted the Scandinavian model of imposing fines in "daily increments." Under this model, a judge is not completely at loose ends in determining the fine to be imposed. It involves a 2-step calculation: first the judge must determine a "day"—multiplier appropriate for the particular offense, *e.g.,* 30 days for burglary. His next step is to calculate the amount for each day, having regard for the offender's personal and economic circumstances. Thus if our burglar's day tax is assessed at DM20, his fine would amount to DM600. [98]

d. Probation. In some instances involving minor offenses, a perpetrator's record may be "wiped clean" if a successful probation period is completed. The reform acts also introduced the concept of rehabilitating in "institutes

93. *StPO* §§ 69(1), 72.

94. Langbein, *supra* note 60, at 447.

95. *StPO* § 63(1).

96. *See generally* Hermann, *supra* note 52, at 473. For a comparison of criminal sanctions in various European countries see Glos, *A Study in the Treatment of Crime and Law Enforcement in the United States as Compared to the European Countries, 3 St. Mary's L. J.* 177, 179-201 (1971).

97. Eser, *supra* note 45, at 252.

98. *Id.* at 256.

of socio-therapy" four categories of offenders:

> persons with severe personality disfunction, persons suffering from dangerous impulses, youthful offenders who have already undergone correctional education without success and display a criminal inclination, and finally persons who would qualify for psychiatric hospitalization but might respond more adequately to the special therapy and social help of the new institution. [99]

These penal reforms provide German courts a wide range of sanctions to consider when deliberating and constructing an appropriate sentence.

A-28. Sources of Law. German judges view the continuity and development of the law as part of their responsibility. As with other civil law jurisdictions, judges are expected to "fill the gaps" of legislation by extending the legal principles expressed in legislation. When Bruno Heusinger stepped down as President of the German Supreme Court in 1968, he placed the role of the German judge in perspective:

> The highest jurisprudence, that of the Supreme Court, characterizes the law by emphasizing two special tasks: safeguarding both the uniformity and the development of the law. The Supreme Court, within its jurisdiction, has to provide a uniform application of the law throughout the Republic of Germany. That can only be achieved if the Supreme Court does not, without necessity, decide a similar case differently today than it did yesterday or the day before. This continuity is not reprehensible conservatism, but simply indispensable to guaranteed stability of the law. [100]

A-29. The Penal Order. Any consideration of German criminal procedure requires brief mention of the "penal order," or *Strafbefehl.* The penal order procedure is a type of prosecution and is thus consistent with the *Legalitaetsprinzip* (the rule of compulsory prosecution). However, a penal order could be described as a trial without a trial. It applies only to misdemeanors (*Vergehen*). When the prosecutor receives a case involving a misdemeanor, he may elect to handle the matter by applying to a district court judge (*Amtsrichter*) for a penal order. The application is to contain the facts of the case and a request for a specific penalty. [101] The judge may either issue the order, as requested, or deny it. He may not impose any other penalty than that requested by the prosecutor. If the order is denied, the judge may either return it to the prosecutor or order a trial. [102] When the order is issued it is sent to the defendant who has one week from the date of service of the order to raise objections with the district court to the procedure. If the defendant does not object within the time allowed, the penal order becomes a final judgment. [103] When an objection is raised within the time limit, the case is set for trial which then proceeds like any other trial unless the prosecutor decides to drop the matter or the objections by the defendant are withdrawn prior to trial. As may be seen, the purpose of the penal order is to avoid trial only where the offense is minor and the facts are undisputed.

> The similarity between the German penal order and the Anglo-American guilty plea is manifest: The prosecution invites the accused to waive any defenses and consent to the punishment propounded by the prosecution. There are, however, important differences. First, the penal order procedure applies only to misdemeanors, and even there only where relatively light sanctions are proposed. . . . The real parallel to the German penal order procedure is the short form American citation practice for traffic offenses: 'Pay this fine or appear in court.' . . . Second, the German penal order might be said to invite a plea, but not a bargain. . . . [The accused] is offered the sentence on take-it-or-leave-it terms. . . . Third, and most important, the penal order does not offer a lesser sanction in exchange for the guilty plea. The accused who objects to the order, demands trial, and loses is not likely to receive a stiffer sentence. . . . Hence, what the accused primarily risks in rejecting the penal order is not a greater sentence, but court costs and the notoriety of public trial. [104]

A-30. Conclusion. Having examined the prototypes of a civil law system as it has evolved in both France and Germany, a brief discussion of other civil law systems follows.

Section III. OTHER CIVIL LAW JURISDICTIONS [105]

A-31. Republic of Korea. [106] *a. Historical.* Before World War II, the criminal procedure of Japan was used to a large extent in Korea. After the War, Korea adopted its own law of criminal procedure.

b. The Prosecutor. Under the Korean system the prosecutor is permitted to institute charges. The prosecutor directs the investigation of the case, either by conducting the investigation himself or through police officials.

c. The Defendant. Normally the defendant is not arrested during the investigation.

(1) Need for an arrest warrant. If a person is arrested, a warrant must be issued by a district judge except when the person is caught *in flagrante delicto* or when there is insufficient time to obtain the warrant and it appears that the person will flee or destroy evidence in a case involving an offense punishable by death, penal servitude, or three or more years of imprisonment. In such a case, a warrant must be obtained within 48 hours from the dis-

99. Eser, *supra* note 45, at 257.

100. Larentz, *The Open Legal Development: Germany* in *The Role of Judicial Decisions and Doctrines in Civil Law and Mixed Jurisdictions* 139 (Dainow ed. 1974).

101. *StPO* §§ 407, 408. The only penalties that may be requested are minor in nature. *Id.*

102. *Id.* A judge might disagree because "he believes the matter should not be disposed of by penal order, such order is not justified by the law or the facts, or he disagrees with the punishment. . . . If the prosecutor disagrees he may appeal [to a higher court]. . . . However, in practice, such disagreement is rare." Robinson, *supra* note 50, at 275.

103. *StPO* § 410.

104. Langbein, *supra* note 60, at 456-57.

105. For a discussion of the legal system in Italy, see Merryman, *The Italian Legal System III: Interpretation* in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Dainow ed. 1974). *See also* Vassali, *The Reform of the Italian Penal Code,* 20 *Wayne L. Rev.* 1031 (1974). The Spanish system is adequately discussed in Murray, *A Survey of Criminal Procedure in Spain and Some Comparisons with Criminal Procedures in the United States,* 40 *Notre Dame L. Rev.* 1 (1964).

106. The following material has been condensed from a publication entitled *Korean Legal System* distributed by the Supreme Court of the Republic of Korea in 1964 [hereinafter referred to as KLS].

trict court or the person must be released and cannot be arrested again for the same offense without a warrant.

(2) Pretrial detention. If there is reasonable belief that a person has committed an offense and that the person has no "fixed dwelling place" or there is reason to believe the person may destroy evidence, or it is likely the person will try to escape, then he may be placed in pretrial confinement for a period of two months. The period of detention may be extended, if need be, for a maximum of six months. A suspect is placed in pretrial detention by a warrant of detention issued by a court at the request of the prosecutor. When the reason for detention ceases to exist, the person is to be released. If a person has been arrested under a warrant, a request may be made to an appropriate court by the person, his defense counsel, legal representative, brother, sister, or head of his family for a decision as to the legality of the arrest. [107] If appropriate, the court can order the release of the suspect.

d. Initiating Charges. There are two other ways in which a prosecution can be initiated:

(1) Trial of the accused by summary proceedings for petit offenses, and

(2) Where an Appellate Court overrules the decision of a prosecutor not to prosecute and orders the case to trial.

e. Petit Offenses. It would appear that for certain types of offenses, the chief of police may recommend that a summary trial procedure be used. If, however, the accused informs the chief of police who originally requested the summary trial of his objection to the procedure, then the records and evidence must be forwarded to the prosecutor for a public trial. This procedure for petit offenses must not be confused with the procedure for summary judgment.

f. Appellate Court Order. If a complainant (or informer) is dissatisfied because the prosecutor has decided not to prosecute a case, he may petition, within ten days of being notified of the decision not to prosecute, through the chief prosecutor of the district to the appropriate Appellate Court for review of the decision. The chief prosecutor may reverse the local (district) prosecutor and send the case to trial or send the file on to the office of the higher prosecutor (i.e., to the prosecutor who operates at the Appellate Court level) within seven days of receiving the petition. At this level, the case may be sent to trial or to an Appellate Court which then must decide, within 21 days whether to send the case to trial. If the petition is not dismissed and the case is set for trial, the matter is handled just as though the charges had been filed by the public prosecutor. The main departure from an action brought by the prosecutor is that an attorney (other than the prosecutor) will be appointed to handle the case.

> This lawyer is said to act in an official capacity while prosecuting the case; he merely steps into the shoes of the regular public prosecutor, and for this reason, he is paid by the government for his services. However, the lawyer is restricted in one respect: In directing the investigation by police officials, the appointed lawyer must limit the scope of the inquiry to those matters which the presiding judge [of the trial (district) court] has approved in advance. If at any time the court feels that the lawyer is not properly performing his duties, . . . the court can withdraw the appointment and designate some other lawyer to take his place. [108]

g. Bail. Under the Korean system, provision is made for bail:

> an accused who has been detained is [to be] released after he has been required to deposit with the court a sum of money which will be forfeited if he does not present himself when required to do so. [109]

In cases where the defendant is not entitled to bail, the court may, in its discretion, order bail. When a person is released on bail, the court may attach such conditions as it deems appropriate. [110]

h. Standard of Proof. The prosecutor files charges when he has

> reasonable grounds to believe that a crime has been committed by a particular person. However, the prosecutor can choose not to prosecute because of the age of the suspect, his character, his intelligence, his background, his motive, the manner in which the offense was committed, the result of the suspect's acts, and the suspect's attitude after the commission of the offense. [111]

Such "nonprosecution" is called a "suspension of indictment" and should be distinguished from an outright dismissal of the charges based, for example, on insufficient evidence or a failure to follow procedural requirements. [112]

i. Indictment. If the prosecutor determines that charges should go forward, he files a written indictment with the appropriate court or moves that the matter be disposed of by "summary judgment." The latter procedure is reserved for minor cases which may involve only a fine. An

> accused can request a formal trial within seven days from the receipt of notification of summary judgment. If the accused does not desire to request formal trial, or if he withdraws such a request, or if the court dismisses the request . . . and this decision is not appealed, the summary judgment becomes conclusive and has the same effect as a judgment by formal trial. [113]

When a case is recommended for trial, a copy of the indictment must be sent to the accused or his attorney at least five days in advance of the first session of court.

j. Right to Defense Counsel. The accused may retain a

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107. This would be akin to a habeas corpus action in the United States.

108. *KLS, supra* note 106, at 25.

109. *Id.* at 31.

110. For example, a court may restrict the individual to his dwelling place.

111. *KLS, supra* note 106, at 36.

112. *Id.* "If a person is suspected of having committed more than one offense the prosecutor can try all of the alleged offenses together or can try only the most serious first." *Id.*

113. *Id.* at 20. Compare this procedure with the concept of the penal order in the German system discussed *supra* at notes 101 through 104 and accompanying text.

defense counsel at any time, but if no counsel has been obtained by the time the case has been sent to trial, the court *sua sponte* must appoint counsel if the accused is: (1) a minor; (2) 70 years or more; (3) deaf or mute; (4) suspected of being mentally unsound; or, (5) unable to obtain counsel because of a lack of assets (or other reasons) and has requested counsel. [114] Additionally, if the offense is punishable by death, penal servitude, or imprisonment for more than three years, the court must appoint counsel. [115]

k. Introducing Evidence. In Korea there are certain restrictions on the introduction of evidence at trial. For example, coerced confessions, confessions without corroborating evidence, or hearsay testimony may not be introduced. However, the prosecutor's file (*dossier*), in whole or in part, may be admitted, if authenticated even though it contains statements by the defendant or other persons. At the trial both the prosecutor and the accused may present evidence and the court on its own motion may call for additional information. The accused may refuse to "answer any or all questions," but "the court must give him an opportunity to make a statement favorable to himself." [116]

l. Composition of the Court. In the trial process, there is no "provision in the constitution or in the laws for trial by jury." [117] Therefore, the trial is either before judge alone or a panel of judges. The proceedings in a Korean criminal trial may be summarized as follows:

> The presiding judge fixes the date for the first public session, although he is limited by the requirement . . . that the accused or his counsel receive the indictment at least five days before the trial begins. On the first day of the trial, the court summons the accused and notifies the prosecutor and the defense counsel. The court is convened in the presence of the judge or judges, the court clerk, the public prosecutor, and the accused. . . . Hearings are generally open to the public; the court, however, can exclude the public by decision if the proceedings are likely to disturb public order or be harmful to the public's moral welfare. . . . If the public is excluded, the court must state the reason for its decision.
>
> At the beginning of the trial . . . the presiding judge must confirm that the apparent accused is the true defendant by asking him his name, age, address, and occupation. The prosecutor then describes the nature of the alleged offense, as set forth in the indictment. Before proceeding further, the judge must give the accused an opportunity to make an opening statement in his own behalf; the defendant need not say anything, however.
>
> If the accused is willing to answer questions, the defense counsel and the prosecutor can examine him, in turn, regarding the alleged offense; then the presiding judge can interrogate him. Thereafter, an associate judge can ask questions of the defendant. . . . Even if the defendant has answered some questions, he can still refuse to answer others.
>
> After the examination of the accused, the prosecutor, the defense counsel, and the defendant can introduce documentary evidence or other evidence and can request that certain persons be called as witnesses, both experts and lay. . . . [The court may also investigate a particular matter on its own motion.] The prosecutor, the accused, or his counsel can object to the introduction of certain evidence; the court must then render a decision on the objection. After all the evidence has been examined by the court, the public prosecutor makes his summation in which he states his opinion of the facts proved and the applicable law, and suggests an appropriate punishment. The defense counsel can then make a final argument concerning both the facts and the law; the defendant can also make a statement in his own behalf. [118]

m. Appeals. If the accused is found guilty, any appeal must be filed in writing within seven days after the sentence is adjudged. In Korea, any party to the action may appeal, not only the prosecutor, the accused, and his legal counsel, but also a legal representative, spouse, lineal relation, brother, sister, or head of the family. Generally the Appellate Court only considers matters raised by the appellant, but it is permitted to raise certain matters on its own motion. [119] The Appellate Court may not impose a heavier sentence than that imposed by the trial court. The decision of the Appellate Court may then be appealed to the Supreme Court, which generally only decides questions of law. [120]

A-32. Japan *a. Historical Origins.* The Japanese legal system is a mixture of the civil and common law systems. The first Japanese Constitution (1889) was greatly influenced by German and Austrian law because the common law sytem was considered too "democratic" by the Japanese society in the latter half of the 19th century. [121] Initially, the Japanese drew heavily on the French legal system (e.g., the office of procurator or public prosecutor was established in 1872), but around 1880 the influence of French procedures dwindled and the German processes assumed preeminence. By the beginning of the 20th century, however, Anglo-American concepts were beginning to influence Japanese legal thinking. For example, the jury system was introduced in 1923. The common law did not make its full presence felt until after World War II, following the American occupation of the islands when the common law influence became more pervasive. [122]

> Examples of such superimpositions are the guarantee of freedom from discrimination in political, economic or social relations because of race, creed, sex, social status or family origin (Art. 14); the right of life, liberty, and the pursuit of happiness (Art. 13); the right of all persons to be secure in their homes, papers, and effects . . . (Art. 35); and especially the fact that the judiciary is to be independent in the exercise of their conscience and shall be bound only by this constitution and the laws. The judiciary is the final arbiter of all legal matters (Arts. 76, §§ 2 and 3). [123]

b. Modern. Although the Japanese Penal Code and the Japanese Code of Criminal Procedure retain characteristic features of the civil law, several significant points of the

114. *Id.* at 26.
115. *Id.*
116. *Id.* at 23.
117. *Id.* at 15.
118. *Id.* at 37-40.
119. For example, it can grant amnesty or abolish the penalty.
120. *KLS, supra* note 106, at 46, 47.
121. Kuribayashi, *The Japanese Legal System,* 36 *Australian L. J.* 437 (1963).
122. Note, *The Judicial System of Japan,* 6 *Case Western Reserve J. Int'l L.* 294, 295 (1974).
123. *Id.* at 397, n. 12. The citations are to the Japanese Constitution of 1946.

common law have been added. The Code of Criminal Procedure incorporates such Anglo-American features as the

requirement of a judicial warrant for every kind of compulsory measure, the proceeding for the indication of reasons for detention, restrictions on the use of evidence, . . . the increased use of the adversary party concept in the structure of public trial [, . . . the] abolition of the preliminary proceeding, the basic revision of the system of appeals, the prohibition against reopening the proceedings to the detriment of the accused, the restrictions placed on the system of summary proceedings, and the abolition of private actions collateral to public prosecutions. Details of procedure are provided by rule of court. [124]

The Japanese Penal Code retains its basic framework even though originally enacted in 1907. It has stood the test of time because it has provided the courts with flexibility by defining offenses broadly. Further, Japanese courts

are vested with a broad discretion in applying Code norms to individual cases, and judicial interpretations by the highest court . . . are usually followed by lower courts until the former changes its own previous view. Thus, the courts develop "case law" in many fields of criminal law, although law-making authority by courts has never been explicitly recognized in Japanese jurisprudence and judicial opinions are always based on the words of statutes and not on precedents. [125]

c. Rights of the Accused. In addition to the common law features in the Penal Code and the Code of Criminal Procedure, the Japanese Constitution of 1946 contains a number of "American-type" rights which are considered basic to defendants, e.g.:

due process, arrest, search and seizure, fair and speedy trial, confrontation of witnesses, right to counsel, coerced confession, and double jeopardy. [126]

d. Conclusion. Japan has blended the precepts of oriental law, civil law, and the common law and has attained a rather unique criminal legal system.

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[124]. *S. Dano, Japanese Criminal Procedure* 17, 18 (George ed. 1965).

[125]. Suzuki, *The Politics of Criminal Law Reform: Japan,* 21 *Am J. Comp. L.* 287, 294 (1973).

[126]. *Id.* at 287, citing *Japanese Constitution* Arts. 31, 33-35, 37-39.

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