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INTRODUCTORY NOTE

This is the twelfth and final instalment of the Encyclopedia of Public International Law. The instalment contains 96 articles devoted to geographic issues. In most cases, the entries relate to contemporary issues where significant international legal questions have arisen in the context of a particular locality or region of the world. A few articles also deal with subjects which are more of historical interest, albeit still of sufficient importance from the perspective of international law to warrant inclusion. As a matter of principle it was decided that no attempt should be made to include an article on every State or territory in the world. The inclusion, the omission or the treatment of a particular issue in this instalment does not necessarily imply the expression of any political or legal opinion whatsoever on the part of the editor or publisher of the Encyclopedia. Throughout the Encyclopedia, the responsibility for what is said and left unsaid in a particular article rests with the author or authors of that article.

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

At the end of this instalment there is a complete updated list of articles for the entire set of instalments of the Encyclopedia. All titles in the list are followed by a number in brackets identifying the instalment in which the article in question may be found.

Most of the manuscripts for this instalment were finalized in the course of 1989.

Now that the twelve instalments of the work have been completed, the publication of the consolidated library edition of the Encyclopedia of Public International Law will begin shortly. In this edition all articles will be arranged alphabetically in four volumes, with supplementary textual material and updated bibliographical references where necessary, and a few new articles on topics of particular importance will also be included. A fifth volume will contain indexes and additional information.

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LIST OF ENTRIES

LIST OF ABBREVIATIONS

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

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

Strupp-Schlochauer, Wörterbuch	Strupp-Schlochauer, Wörterbuch des Völkerrechts (2nd ed., 1960/62)
Supp.	Supplement
Texas ILJ	Texas International Law Journal
UN	United Nations
UN Doc.	United Nations Document
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
UST	United States Treaties and Other International Agreements
WEU	Western European Union
WHO	World Health Organization
WMO	World Meteorological Organization
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

AALAND ISLANDS

1. General Background

The Aaland autonomous province (Finland) consists of more than 6500 → islands and skerries in the → Baltic Sea with a surface area of 1505 square kilometres (sea territory excluded) of which 1481 square kilometres are land. The population amounts to some 23 200 persons.

During the Swedish period of Finnish history, the Aaland islands were administered by the governor in Åbo. The islands were renounced by Sweden to Russia under the peace treaty of Fredrikshamn, September 17, 1809 (BFSP, Vol. 1, p. 338), together with the rest of Finland. During the Russian period (1809 to 1917), the Aaland islands continued to form a part of the Åbo and Björneborg county (*län*), but were a separate jurisdictional district (*härad*). After Finland's independence, this district was transformed into a separate county by decree of June 13, 1918. Under the Aaland Autonomy Act of May 6, 1920, the autonomous province (*landskap*) of Aaland was created, distinguished from the normal county division of Finland without autonomy.

The border of the province of Aaland in the west, towards Sweden, follows the State frontier fixed by the peace treaty of Fredrikshamn and the Frontier Treaty of November 20, 1810 (BFSP, Vol. 8, p. 750), revised in 1888; in the east, towards the Åbo and Björneborg county, the province border follows the jurisdictional and later county boundary of Aaland. Most recently, the frontier line between Finland (Aaland) and Sweden was revised by a treaty of November 1, 1982 (Finlands författningssamling 1985: 527–528).

The strategic importance and the particular ethnic character of the Aaland islands explain their special position under international law and Finnish domestic law.

2. Demilitarization

During the first decades of Russian rule in Finland, the Aaland islands were heavily fortified. The most important fortress was Bomarsund castle, which sometimes had a garrison of 10 000 soldiers. During the → Crimean war British-French naval operations were carried out in the Baltic Sea. Among other targets, Bomarsund castle was attacked and destroyed and the Russian units surrendered to the enemy. To the → Paris Peace Treaty (1856) was joined a convention of March 30, 1856 (BFSP, Vol. 46, p. 23), obliging Russia to leave the Aaland islands unfortified and not in the future to install any military or navy units on the islands (→ Demilitarization).

The Aaland convention of 1856 was duly observed by Russia. In 1905 to 1906, during the Japanese war, a military unit of some 750 men was, however, sent to Aaland. The Baltic declaration of April 23, 1908 (BFSP, Vol. 101, p. 974), signed by Denmark, Germany, Russia and Sweden, aimed at maintaining the → *status quo* in the Baltic area, including the Aaland islands.

During World War I the risk of a German occupation of the Aaland islands motivated the Russians to send a considerable military unit to the islands in 1915 and to start fortification works. After the March revolution in 1917, a Swedish military corps was sent to the Aaland islands, later to be replaced by German units as Germany intervened in the Finnish war of independence in 1918. Under the → Brest-Litovsk peace treaty of March 3, 1918 (Martens NRG3, Vol. 10, p. 773), Russia agreed to evacuate Finland (and Aaland) and also agreed to the demolition of the fortifications in the islands. After the White victory in the Finnish war of independence in 1918, Germany, Sweden and Finland decided to demolish the Russian-built fortifications in the islands. The German defeat in 1918 resulted in the demolition being executed only by Finland and Sweden in April to October 1919.

The peace treaty of Dorpat between Finland and the Soviet Union, October 14, 1920 (BFSP, Vol. 113, p. 977) does not mention the Aaland islands.

The Russian March revolution of 1917, which led to the fall of the empire, caused a separatist movement to arise in the Aaland islands. The disintegration of the empire was exploited by the Finns and by the Aalanders to achieve the detachment of their territory. Just as the Finns aimed at the independence of their country (including Aaland), so the Aalanders in turn wanted their islands to be detached from Finland and put under Swedish → sovereignty as a means of creating a more secure future. An important argument in favour of this plan was the fact that

the ethnic character of Aaland, together with other parts of Finland, is Swedish.

Sweden responded positively to the initiative, motivated also by the strategic advantages the possession of the islands meant for the defence of Sweden. As Finland declined to give up the Aaland islands and the Paris Peace Conference of 1919/1920 (→ Peace Treaties after World War I) was not willing to take any decision on the matter, the Aaland question was submitted to the newly founded → League of Nations, under Art. 15 of the Covenant of June 28, 1919. According to the view of the committee of jurists appointed by the Council of the League, the Council considered itself competent to decide on the matter, since Finland had only recently become an independent State and its borders therefore had not yet been stabilized. As to the substance of the dispute, the Council, accepting the views of the commission of rapporteurs appointed by the Council, expressed by its decision of June 24, 1921, the opinion that "the sovereignty of the Åland islands is recognised to belong to Finland" (LoN, Official Journal, Vol. 21 (1921 II) p. 699).

This sovereignty was, however, to be restricted in two respects: arrangements should be made for the non-fortification and → neutralization of the islands, and the ethnic character of the islands should be protected. Finland and Sweden accepted this decision which was followed by two treaties concerning these matters.

A convention on the non-fortification and neutralization of the Aaland islands was concluded between Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Poland, Sweden and the United Kingdom on October 20, 1921 (Martens NRG3, Vol. 12, p. 65). Under this treaty Finland agreed not to fortify the Aaland islands or to maintain any military presence there. In the case of → war, however, Finland could temporarily proceed to military actions to defend the islands until the parties to the Convention were able to intervene. The Council of the League of Nations was to guarantee the treaty. The Soviet Union was not a party: The 1856 convention was regarded as still in force.

As the risk of a new war became obvious, Finland and Sweden began negotiations in 1938 on the fortification of the Aaland islands. The "Stockholm plan" did not, however, materialize because of Soviet opposition.

The Soviet attack on Finland in 1939 motivated the stationing of a Finnish military presence in the Aaland islands that was not opposed by the other parties to the 1921 convention. A re-demilitarization was, however, claimed by the Soviet Union, after the war of 1939 to 1940. On October 11, 1940, a treaty concerning the Aaland islands was concluded between Finland and the Soviet Union (BFSP, Vol. 144, p. 395). In this treaty Finland agreed to the demilitarization of the islands and agreed also not to give any foreign power military access to the islands. These obligations were repeated both in the Armistice treaty of September 19, 1944, following the Finnish-Soviet war of 1941 to 1944, and in the Peace Treaty of February 10, 1947 (UNTS, Vol. 48, p. 203; → Peace Treaties of 1947; → Armistice). On April 17, 1948, the re-entry into force of the Aalands demilitarization treaty of October 11, 1940, was formally promulgated in Helsinki (Finlands Författningssamlings Fördragsserie (1949) p. 137).

The 1940 demilitarization treaty is still in force and actively upheld by the presence in Mariehamn of a Soviet consulate. The 1921 convention can also possibly be regarded as still valid, in any case between Finland and Sweden, although the guarantee of the League of Nations was not continued by the → United Nations.

A consequence of the demilitarization of the Aaland islands is that the male population of the islands is exempted from military service.

3. Protection of Ethnic Character

The Council of the League of Nations decided on June 24, 1921 that further guarantees should be given for the protection of the islanders and that these guarantees should be "discussed and agreed to by the Representatives of Finland with those of Sweden" (LoN, Official Journal, Vol. 21 (1921 II) p. 699). These negotiations resulted in a text containing an agreement reached by the two parties. The Council approved this agreement on June 27, 1921, and it was accordingly published (Minutes of the 13th Session of the LoN, Geneva, June 17 to June 28, 1921, p. 52).

Under the agreement, the Landsting of Aaland (provincial parliament) and the municipalities have no obligation to support or subsidize any other schools than those in which the language of instruction is Swedish. State schools shall instruct

only in Sweden. When real property in the islands is sold to outsiders, it can be bought in by Aalanders, the municipality concerned or the provincial government. Immigrants to the islands can acquire municipal and provincial franchise only after five years of domicile. The Governor of the province shall be nominated by the President of Finland in agreement with the president of the Landsting. The Aaland province has the right to 50 per cent of the land tax revenues. The agreement was to be guaranteed by the Council of the League of Nations.

This agreement was incorporated into Finnish domestic law by the Act of August 11, 1922. The autonomy legislation was renewed after the war (Act of December 28, 1951) and the provisions of the 1921 agreement were observed, except for the stipulation concerning control by the League of Nations.

The Aaland Autonomy Act provides for wide law-making and governmental powers for the Landsting and the provincial government (Landskapsstyrelse). The provincial government receives funds from the State to finance the services the province supplies in Aaland which in other parts of Finland belong to the competency of the State. In amendments to the Autonomy Act, the protection of the Swedish language and the Swedish culture in the Aaland islands have been further strengthened. For instance, real property can be acquired by an outsider only by a permit of the provincial government. Only an islander has the right to carry on a commercial business in Aaland. The Autonomy Act cannot be repealed or amended without the approval of the Landsting. Any such decision by the Finnish parliament (Riksdag) shall follow the specific rules regulating constitutional amendments. All public authorities in Aaland carry out their functions in the Swedish language.

The United Nations has not upheld the League of Nations' guarantee to the 1921 agreement. Being based upon a treaty between Finland and Sweden that has never been repealed by the parties, but was invoked by Sweden during the preparation of the present Autonomy Act and more recently by a statement of the Swedish foreign minister before Sweden's Parliament on November 20, 1986, the 1921 Agreement can still be regarded as valid between these two States.

4. The Nordic Council

The Province of Aaland is represented in the Nordic Council by two members appointed by and from the Landsting. Representatives of the provincial government also participate in the activities of the Council. These are members of the Finnish delegation to the Nordic Council (→ Nordic Council and Nordic Council of Ministers)

J.O.SÖDERHJELM, Démilitarisation et neutralisation des Iles d'Aland en 1856 et 1921 (1928).

T. SUONTAUSTA, La situation juridique des îles d'Aland, ZaöRV, Vol. 13 (1950-1951) 741–752.

E. CASTRÉN, Die Entmilitarisierung und Neutralisierung der Ålandinseln, in: Völkerrecht und rechtliches Weltbild, Festschrift für Alfred Verdross (1960) 107–116.

J. BARROS, The Aaland Islands Question: its Settlement by the League of Nations (1968).

T. MODEEN, De folkrättsliga garantierna för bevarandet av Ålandsöarnas nationella karaktär (1973).

T. MODEEN, Völkerrechtliche Probleme der Åland-Inseln, ZaöRV, Vol. 37 (1977) 604–619.

The Small Nations of the North: Similarities and Peculiarities, NordTIR, Vol. 51 (1982) 8–14.

TORE MODEEN

AEGEAN SEA

1. Introduction

The Aegean Sea is part of the eastern Mediterranean and is roughly contoured by the Greek mainland coast to the west and the north, the Turkish Anatolian coast in the east and the Greek Islands of Crete, Karpathos and Rhodes to the south. The Sea's name derives from the mythical figure, King Aegeus, who drowned himself in its waters according to Greek mythology. The Aegean is dotted with some 2800 → islands and islets ranging from the island of Crete, which covers a surface of 8331 square kilometres and contains a population of half a million people, to mere rocks and shoals. Over 98 per cent of these islands belong to Greece. The Aegean Sea is of vital importance to international navigation as the sole access to the → Black Sea through the → Dardanelles Strait at its north-eastern corner. The → sea-bed does not present a uniform picture. Most of it lies within a 500-metre isobath. However, north of Crete, the sea-bed reaches depths of over 2000 metres.

Following the fall of the Byzantine Empire in 1453, gradually all Aegean shores passed under the rule of the Ottoman Empire. After the successful struggle for independence by Greece, the London Protocol of February 3, 20, 1830 (BFSP, Vol. 17, p. 191) gave international → recognition to the Greek State which, at that time, consisted merely of one third of its present territory. The territory of Greece gradually expanded, especially during 1912 to 1913, when Macedonia and Thrace as well as such major eastern Aegean islands as Lemnos, Lesbos, Chios and Samos passed under Greek rule as a result of the → Balkan wars. Finally, after the Second World War, the Dodecanese islands, which from 1913 to 1949 were under Italian rule, became part of Greece. Since then the territorial status of the Aegean remains unchanged and, as far as the land area is concerned, unchallenged.

Since the 1970s a conflict has arisen between Greece and Turkey concerning the delimitation of the → continental shelf, the extension of → territorial sea (→ Maritime Boundaries, Delimitation), the Greek airspace (→ Sovereignty over Airspace), and the restrictions on militarization of certain Greek islands (→ Demilitarization). In January 1989, a further dispute broke out concerning the determination of Greek and Turkish search and rescue zones (→ Maritime Safety Regulations). These conflicts, some of which have gone through phases involving → negotiation, attempts at international adjudication, and hostile acts which brought the two neighbouring countries, members of the same military alliance (NATO; → North Atlantic Treaty Organization), to the brink of → war, remain unresolved. The → Cyprus problem has brought both States into confrontation as well and is politically linked to the Aegean issues.

2. *The Status of Certain Aegean Islands*

The islands of Lemnos and Samothrace are without question, according to Art. 12 of the 1923 → Lausanne Peace Treaty (LNTS, Vol. 28, p. 11), part of Greek territory. The Turkish Government holds that according to the 1923 Lausanne Convention on the Régime of the → Straits (LNTS, Vol. 28, p. 115), Greece is under an obligation not to militarize the islands and, consequently, not to integrate them into military exercises, whereas the Greek Government believes that any restriction was abolished by the Montreux Convention regarding the Régime of the Straits, July 20, 1936 (LNTS, Vol. 173, p. 213).

In effect, the 1923 Lausanne Convention on the Régime of the Straits, which is part of the overall Peace Treaty, provides in Art. 4, *inter alia*, that the islands Samothrace, Lemnos, Imbros, Tenedos and Rabbit will be demilitarized. This régime was superseded by the Montreux Convention, signed on July 20, 1936, as expressly stated in the preamble. The new régime does not refer to the military status of the said islands. The former restrictions must therefore be considered abolished. The protocol annexed to the Montreux Convention does not seem to sustain a different view. In the protocol, the parties agree that Turkey is entitled to militarize the straits immediately, i.e. from the time of signature rather than from the date of its entry into force on November 9, 1936. The protocol clearly has an interim character and contains no provision concerning the Greek or the Turkish islands.

Disagreement also exists as to whether Art. 12 of the Lausanne Peace Treaty, which covers the issue of → sovereignty over the eastern Aegean islands in general, contains an independent regulation of their military status. Art. 12 refers to the Decision of February 13, 1914 by the London Conference (B. Simsir, Aegean Question Documents, Vol. 2 (1913–1916) (1982) p. 392), which determined *inter alia* the existence of an obligation by the Greek Government not to fortify or use those islands, including Lemnos and Samothrace, for naval or military purposes. However, in view of the express dispositions concerning the military status of the same islands, with the exception of Lemnos and Samothrace, in the Peace Treaty and similar dispositions concerning the latter islands in the Lausanne Convention on Straits, it is rather doubtful whether this indirect reference still has any bearing on the islands' military status. Seen otherwise, the provisions in new instruments would make little sense. Nevertheless, the difference of opinion on this issue persists, creating problems especially for military cooperation in the area.

The appertainance of the eastern Aegean islands other than Lemnos and Samothrace (e.g. Lesbos, Chios, Samos, Icaria) to Greece was confirmed in Art. 12 of the Lausanne Peace Treaty. Under a

special régime established by Art. 13 of this Treaty, the Greek Government undertakes, for the maintenance of peace, not to establish a naval base or any other fortification on these islands. The Greek military forces on these islands will be limited to the normal recruited contingent which can be trained locally. The police force on these islands should be proportional to the normal police force in the rest Greece. Since the 1970s, more specifically since the invasion of Cyprus by Turkish troops, Greece has considered these restrictions as obsolete, or at least as ineffective. As justification, Greece has invoked a constant threat by its neighbour and an inherent right of → self-defence according to Art. 51 of the → United Nations Charter. Greece has further referred to the fact that Turkey itself does not respect vital rules of the Lausanne Peace Treaty régime.

The Dodecanese are a group of islands, the biggest of which is Rhodes, in the south-eastern Aegean. Although the name Dodecanese refers to 12, the group actually comprises 35 islands. As a consequence of the Italian-Turkish War of 1913, the Dodecanese islands were placed, without any restrictions, under Italian sovereignty (see Art. 15 of the Lausanne Peace Treaty). After the Second World War, in the Peace Treaty between the Allied Powers and Italy signed in Paris on February 10, 1947 (UNTS, Vol. 49, p. 31; → Peace Treaties of 1947), to which Turkey is not a party, the group passed under Greek sovereignty (see Art. 14). According to paragraph 2 of Art. 14, the islands will be demilitarized and remain under that status.

Greece does not abide by this stipulation, invoking a justification similar to that used in the case of the eastern Aegean islands. No State party to the Treaty has ever lodged a → protest against this practice.

3. *The Territorial Sea*

Greece claims a territorial sea of six nautical miles as measured from its shores. In the Aegean this leaves 65 per cent open seas and, even at its narrowest point, a small → high seas passage for international navigation between the Mediterranean and the Black Sea. Turkey has fixed its territorial waters at six nautical miles in the Aegean and at twelve nautical miles in the Black Sea. Unlike Greece, Turkey employs straight → baselines to measure the width of its territorial waters. On various instances, Greece has invoked a right to enlarge its territorial waters to 12 nautical miles. This would reduce the open sea space in the Aegean to 36 per cent and leave no high seas passage for international navigation. It would further have a bearing on the controversial delimitation of the continental shelf (see section 5 *supra*), the area of which depends on the outer boundary of the territorial sea.

Turkey is vigorously opposed to such a claim and has even called it a *causa belli*. Apart from being sensitive to potential consequences of the Greek policy on the issue of the continental shelf, Turkey is concerned about access to its → ports on the Aegean coast, among them Izmir, the second biggest port of Turkey. Under the present régime, ships calling at this port enjoy free access from the high seas to Turkish territorial waters. An extension of the Greek territorial sea to 12 nautical miles would render access to this port dependent on passage through Greek territorial waters.

Although the right of coastal States to extend their territorial sea up to 12 nautical miles is generally accepted, it may be subject to restrictions in special cases. The problem created for the régime of straits by extending territorial waters seems to be adequately solved by the new concept of free transit passage. But the issue of free access to ports remains open. The right of innocent passage through territorial waters is not equivalent to free access, because innocent passage implies certain obligations for passing ships and certain rights of control and inspection by the coastal State (→ Innocent Passage, Transit Passage). Thus, the extension of territorial waters may encroach upon vital interests and rights of → neighbouring States. State practice shows various examples of self-imposed restrictions on the extension of territorial waters so as to leave high seas channels open to neighbouring States and international navigation.

4. *Greek National Airspace and the Athens Flight Information Region (FIR)*

In 1931, Greece claimed by presidential order a territorial sea of ten nautical miles for the purpose of delimiting its airspace, while maintaining a territorial sea of three miles and, since 1936, of six nautical miles for all other purposes. The wording

of the order suggests that Greece claims two different kinds of territorial waters, but her claim in the zone between six and ten nautical miles refers in practice only to the adjacent airspace.

This rather unique claim apparently was not challenged – with the exception of a British protest in 1940 – until Turkey on September 1, 1974, in the wake of the Cyprus crisis, asked Greece to restrict its air space to six nautical miles, i.e. to its territorial waters. Since then Turkish military → aircraft frequently enter the zone between six and ten nautical miles to demonstrate that Turkey does not recognize the Greek claim, each time provoking Greek protests.

Under → customary international law, airspace shares the legal nature of the surface and the subsoil (→ Airspace over Maritime Areas). This rule is laid down in Art. 2 of the ICAO Convention to which both Greece and Turkey are parties (→ International Civil Aviation Organization). Greece argues that, since it is entitled to extend its territorial waters to twelve nautical miles, it also has the right to do less, that is, to extend its airspace to only ten nautical miles. Greece further holds that, in the absence of general protest, its claim has been met with → acquiescence and that Turkey is, after 40 years of acceptance, estopped from asserting a challenge (→ Estoppel). The Turkish side considers the Greek claim to be illegal because a State's airspace may not exceed its land territory and territorial sea, and because Turkey was not informed of the Greek claim until it was announced on June 2, 1974, upon Greek request, by the ICAO to all member States. The dispute has been brought before the ICAO and to the attention of the → United Nations Secretary-General by letters from both sides, without resulting, to date, in any solution.

Another dispute related to air traffic in the Aegean concerns the applicable Flight Information Region (FIR). A FIR does not refer to sovereign rights but designates, in the framework of ICAO, zones of air control. The → European Civil Aviation Conference – Regional Air Navigation Meeting of 1952, in which both Greece and Turkey participated, adopted the boundaries of the FIR in the eastern Mediterranean. This FIR, control over which was assigned to the Athens Civil Aviation Authority, follows the Greek land boundaries and, in the eastern Aegean, roughly the line of the outer boundary of the Turkish territorial waters. Thus, it covers all Greek islands and the international waters of the Aegean.

With the Notice to Airmen (NOTAM) 714 of August 6, 1974, Turkey drew a line (reporting line) through the middle of the Aegean and asked all aircraft flying east of this line to report to the Istanbul FIR, thereby challenging in practice the internationally agreed FIR boundaries (Text in: C. Sazanidis, p. 107). Greece protested and on September 13, 1974, in NOTAM 1157 (ibid., p. 111), declared the Aegean to be a "dangerous region", thus stopping international aviation in this area for six years. In February 1980, Turkey finally revoked its NOTAM, without abandoning the claim to revise the FIR boundaries. Greece, on the other hand, declared itself unwilling to consider a FIR which subjects Greek territory to the flight control of another State.

A related controversial issue is the relevance of the FIR to military aircraft. The Turkish view, as opposed to the Greek one, is that the FIR does not apply to military aircraft. Consequently, Turkey does not submit flight plans for military aircraft in the international airspace of the Aegean. Within the NATO alliance, a similar dispute persists concerning the delimitation of the Operational Air Control in the Aegean.

5. The Aegean Continental Shelf

In 1973, Turkey granted its State Petroleum Company exploration leases for the central Aegean and published in its Official Gazette a map delimiting the Aegean sea-bed by a sort of median line between the two mainland coasts (Archiv der Gegenwart (1976) p. 20551). This map depicted the numerous Greek islands as having individual territorial seas of six nautical miles but no continental shelf, provoking a Greek protest. In the subsequent exchange of notes both sides expressed their views as follows. According to Greece, islands have a continental shelf of their own and must be taken into account in the same way as mainland territory. Delimitation must be effected on the basis of equidistance which, in the case of opposing coasts, leads to establishment of a median line. Turkey emphasized that the continental shelf is the natural prolongation of the

land mass, and stated that the eastern Aegean islands do not have their own continental shelf but rather lie on the Anatolian continental shelf. The Aegean is, according to the Turkish view, a semi-enclosed sea, implying the need for special rules of delimitation, and presenting a typical example of "special circumstances" which preclude the application of the equidistance principle. Finally, Turkey holds that the delimitation must be subject to equitable criteria and that the principal method for delimiting the continental shelf is by negotiation.

Contacts were established on various levels and, on May 31, 1975, the prime ministers of both countries met in Brussels and agreed in a joint communiqué, *inter alia*, to start negotiations with a view to reaching agreement to submit the controversy to the → International Court of Justice (ICJ). These negotiations never really began and when, during the summer of 1976, Turkey sent the research vessel *Sismik I* to conduct resource exploration in the central Aegean, Greece referred the dispute both to the → United Nations Security Council and, without agreement, to the ICJ (Greek Application Instituting Proceedings, August 10, 1976, ICJ Pleadings, Aegean Sea Continental Shelf (1980) p. 3, para. 6.8; → Aegean Sea Continental Shelf Case). This move did not result in a decision on the merits. During the Court proceedings, negotiations continued.

On November 11, 1976, representatives of both sides, meeting in Berne, agreed on a protocol which fixed the procedural aspects of the negotiations (ILM, Vol. 16, p. 13). Included among these aspects was the obligation of both sides to refrain from initiatives or acts with regard to the continental shelf capable of disturbing the negotiations. From 1977 to 1981 various meetings were held on different levels without significant results. At the end of 1981, the newly elected Greek Government declined to carry on the negotiations, arguing that negotiations presupposed mutual claims and that Greece had no claims *vis-à-vis* Turkey regarding the continental shelf.

At the end of 1986, an international consortium, to which Greece had granted leases to explore and exploit hydrocarbon resources within and beyond the territorial waters in the vicinity of Thasos, considered drilling in an area between the islands of Thasos and Samothrace, outside Greek territorial waters. Turkey protested, claiming a violation of the Berne protocol. Greece retorted that this protocol had become ineffective because the negotiations it was intended to regulate had ceased. Subsequently modifying its stance, the Greek side declared itself open to negotiations leading to submission of the conflict to the ICJ.

In March 1987, the conflict reached its climax when the Turkish research vessel *Sismik I*, escorted by naval forces, headed for the central Aegean. The Greek prime minister declared publicly that Greece's naval forces would impede any prospecting on what Greece considered to be its continental shelf. Greek armed forces were set on alert. The crisis was defused by the declaration of the Turkish prime minister that, as long as Greece refrains from prospecting outside her territorial waters, Turkey will do the same. This declaration was tacitly accepted by the Greek side. Whether or not the Berne protocol is still in force, the tacit → moratorium suggests that the portion of the Aegean Sea located outside Greek and Turkish territorial waters remains a disputed zone.

Lausanne Peace Treaty, July 24, 1923, LNTS, Vol. 28 (1924) 11–113.

Lausanne Convention on the Régime of the Straits, July 24, 1923, LNTS, Vol. 28 (1924) 115–137.

Montreux Convention regarding the Régime of the Straits, July 20, 1936, LNTS, Vol. 173 (1936–1937) 213–241.

Peace Treaty between the Allied Powers and Italy, February 10, 1947, UNTS, Vols. 49–50 (1950).

C.L. ROZAKIS, The Greek-Turkish Dispute over the Aegean Continental Shelf (1975).

Y. SOULIOTIS, Le différend gréco-turc au sujet du plateau continental de la mer Egée (1976).

P. DRAKIDES, Le sort actuel des démilitarisations en Méditerranée, RevHellén, Vol. 30 (1977) 42–81.

C. ROZAKIS et al., La relation entre la Grèce et la Turquie pendant les années 1973–1978 (1979).

M. SAKELLARIOS et al., The Aegean Sea and the Greek Turkish Dispute (1979).

A. WILSON, The Aegean Dispute (1979).

C. SAZANIDIS, The Greco-Turkish Dispute over the Aegean Airspace, Hellenic Review of International Relations, Vol. 1 (1980) 87–122.

F. BASTIANELLI, Border Delimitation in the Mediterranean Sea, Spettatore Internazionale, Vol. 17 (1982) 283–306.

W. WENGLER, Der Internationale Gerichtshof und die

Abgrenzung des Meeresbodens im Mittelmeer, Neue Juristische Wochentschrift, Vol. 35 (1982) 1188–1189.
F. BASTIANELLI, Boundary Delimitation in the Mediterranean Sea, Marine Policy Reports, Vol. 5, No. 4 (1983).
P. DRAKIDES, La démilitarisation du Dodécanèse, Défense Nationale, Vol. 39 (1983) 123–136.
A. DE GUTTRY, The Delimitation of Territorial Waters in the Mediterranean Sea, Syracuse Journal of International Law and Commerce, Vol. 11 (1984) 377–415.
C.P. ECONOMIDÈS, Nouveaux éléments concernant l'île de Lemnos: Un problème totalement artificiel, Rev. Hellén, Vol. 37 (1984) 15–21.
C. ROUSSEAU, Grèce et Turquie: Controverse sur la condition juridique de l'île de Lemnos, RGDIP, Vol. 88 (1984) 481–483.
R. MEINARDUS, Der griechisch-türkische Konflikt über den militärischen Status der ostägäischen Inseln, Europa-Archiv, Vol. 40 (1985) 41–48.
H. PAZARCI, Has the Demilitarized Status of the Aegean Islands as Determined by the Lausanne and Paris Treaties Changed?, Turkish Review Quarterly Digest, Vol. 1 (1985/1986) 29–46.
N. RONZITTI, Demilitarization and Neutralization in the Mediterranean, ItalYIL, Vol. 6 (1985) 33–54.
B. OXMAN, Problèmes soulevés par l'application de la convention du droit de la mer aux espaces maritimes des juridictions nationales: le cas de la Méditerranée, Etudes Nationales (1987) 27–45.
P. SONNENHOL, Meeresrechtliche Problematik des Ägäiskonflikts, Schriftenreihe der Deutschen Gruppe der AAA, Association des Auditeurs et Ancien Auditeurs, Vol. 6 (1987) 87–96.
C. ROZAKIS, The International Legal Régime of the Aegean and the Greek-Turkish Crisis. The Bilateral and International Issues, in: The Greek-Turkish Relations 1923–1987 (1988) 269–492 [in Greek].
W. HEINTSCHEL VON HEINEGG, Der Ägäiskonflikt: Die Abgrenzung des Festlandsockels zwischen Griechenland und der Türkei und das Problem der Inseln im Seevölkerrecht (1989).

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ÅLAND ISLANDS *see* Aaland Islands

ANDORRA

Andorra (*les Vallées d'Andorre, Valls d'Andorra*) is a territory in the Pyrenees between France and Spain with an area of 465 square kilometres and some 42 000 inhabitants. The official language is Catalan.

At the beginning of the 13th century Andorra came under the control of the Bishop of Urgel in Spain. Later in that century disputes arose between the Bishop and the Counts of Foix to whom certain rights over the valleys had devolved. These disputes were settled by a kind of → arbitration, the *Paréage* of September 8, 1278 (Text in: Valls Taberner, Textes de dret catala, Vol. 3, Vall d'Andorra (1920) p. 414). This instrument was supplemented by a further *Paréage* of December 6, 1288 (ibid., p. 429).

By these acts, which are still valid today, Andorra came under joint control (suzerainty) of the Bishop of Urgel and the Count of Foix. By marriage and succession the rights of the Counts of Foix passed to the French crown in 1589, when the Count of Foix and Béarn became Henry IV of France, and, after the end of the monarchy, to the President of the French Republic. The two sovereigns, called co-princes, never met personally until 1973 when President Pompidou met the Bishop of Urgel on French territory. In 1978 President Giscard d'Estaing met the Bishop on Andorran territory on the occasion of the 700th anniversary of the *Paréage*.

Each co-prince is represented in Andorra by a *Viguier*, whose tasks include mainly the control of the administration of justice and the direction of the Andorran police. Each co-prince has set up a permanent delegation for Andorran affairs. The prefect of the French department of the Eastern Pyrenees in Perpignan and the vicar general of the diocese of Urgel function as permanent delegates. Legislative power is vested in the two co-princes, but in practice is exercised jointly by the two permanent delegations. A General Council of the Valleys, whose 28 members are elected by universal suffrage, adopts decrees which must be submitted to the permanent delegations for approval. In practice the Council enjoys considerable autonomy. The Council elects as its head a *Syndic* who until 1982 also acted as chief executive. In January 1982 the Council for the first time appointed an Executive Council of six members and thereby introduced the separation of powers between the legislative and the executive.

Judicial power in civil matters is exercised in the first instance by two judges (*Bayles*), one appointed by the French *Viguier*, the other by the episcopal *Viguier*. Parties to a dispute can choose freely between them. In the second instance there is a Judge of Appeal appointed alternately by the two co-princes. As the third instance there are

again two courts between whom the parties may choose: The Tribunal Supérieur d'Andorre in Perpignan composed of five members in accordance with a decree of the French co-prince, and the Episcopal Tribunal in Urgel consisting of one judge designated by the Bishop. Jurisdiction in criminal matters is exercised by the Tribunal des Cortes composed of the judge of appeal and the two *Viguiers*. The courts apply the Andorran decrees which are in force, the customary law of Andorra and, subsidiarily, Catalan law, Canon law and Roman law.

Unlike → micro-States such as → Liechtenstein, → Monaco and → San Marino, Andorra is generally not considered to be a → State or a → subject of international law. As a remnant of feudalism, Andorra cannot be classified in one of the contemporary categories of territorial entities, but is an entity *sui generis*. Classification as a → protectorate is hardly correct since the relations between the two co-princes and Andorra are not relations of international law as is usual for protectorates. It is more common to consider Andorra as a → condominium, but an objection to this qualification is that the relationship between the two sovereigns is not one of international law, as should normally be expected for a condominium. One author (Crawford) compares Andorra with a personal union.

Although Andorra, in default of → sovereignty, is not a State, it has many attributes of a State. Thus it is a separate territorial entity, not identical with France or Spain; it has its own → nationality, distinct from the nationality of France and Spain; and it has its own legal system. French and Spanish laws as well as treaties concluded by these States do not apply to Andorra. French and Spanish authorities cannot exercise any jurisdiction in Andorra. The two co-princes act not as organs of their States, but in their personal capacity derived from the *Paréage* of 1278 (see AFDI, Vol. 25 (1979) 915). Judgments rendered by Andorran courts have for a long time been considered by French courts as French judgments immediately executable in France (Cour de cassation and Cour de Montpellier, AFDI, Vol. 26 (1980) 853) but more recent decisions by other French courts as well as the French Government consider them as foreign judgments (Tribunal de Béziers, AFDI, Vol. 24 (1978) 1068; Cour de Versailles, AFDI, Vol. 30 (1984) 928; RGDIP, Vol. 88 (1984) 974; Minister of Justice, AFDI, Vol. 30 (1984) 950).

Andorra remained neutral in all wars fought by France and Spain, and also in World War II (Bélinguier, p. 170). German forces did not occupy Andorran territory when they occupied French territory.

France undertakes the diplomatic and consular protection of Andorrans abroad (→ Diplomatic Protection of Foreign Nationals). The French co-prince, but not France, claims to have the exclusive right to conclude treaties binding Andorra. As the episcopal co-prince has no international status he obviously cannot do the same. However, when ratifying the convention on the → World Meteorological Organization in 1951, Spain declared in a special note attached to its instrument of ratification that it would apply the convention also to Andorra. In 1954, Spain signed the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict also for Andorra (→ Cultural Property, Protection in Armed Conflict). In both cases France protested (→ Protest). Since then, Spain has not continued this practice. The French co-prince has adhered to only few international conventions for Andorra. Andorra evidently cannot be a member of any international organization. The postal services in Andorra are organized simultaneously by France and Spain according to an agreement concluded in 1930 between the two postal administrations. Both the French and the Spanish currency are used in Andorra.

The treaty establishing the → European Economic Community, March 25, 1957 (UNTS, Vol. 298, p. 11) is not applicable to Andorra. Art. 227(4) states that the treaty applies to the "European territories for whose external relations a Member State is responsible". As it is not France but the French co-prince who is responsible for the external relations of Andorra, treaties to which France is a party are not automatically applicable to Andorra. On the occasion of Spain's accession to the Community it was provided for in a Common Declaration attached to the Treaty of Accession of June 12, 1985 that a regulation concerning the commercial policy between the Community and Andorra should be elaborated within two years after the coming into force of the

Treaty (Official Journal 1985, L 302). Up to now the customs régime of Andorra has been very liberal. No customs duties have been collected either in relations between Andorra and its neighbouring countries or on the imports from third countries to Andorra.

R. TOURENG, Statut juridique des Vallées d'Andorre (1939).
J.M. VIDAL and GUITART, Instituciones políticas y sociales de Andorra (1949).
C. ROUSSEAU, Les Vallées d'Andorre. Une survivance féodale dans le monde contemporain, in: F.M. Van Asbeck et al. (eds.), Symbolae Verzijl (1958) 337–346.
B. BÉLINGUIER, La condition juridique des Vallées d'Andorre (1970).
J. CRAWFORD, The International Legal Status of the Valleys of Andorra, Revue de droit international, de sciences diplomatiques et politiques, Vol. 55 (1977) 258–272.
P. RATON, Le statut juridique de l'Andorre (1984).

DIETRICH SCHINDLER

ANTARCTICA

1. Introduction

Antarctica was the last continent to be discovered, with Great Britain, the Soviet Union and the United States each claiming that distinction. In 1773 Captain Cook first crossed the Southern polar circle, searching for Antarctica, the *terra australis*. Systematic scientific exploration of Antarctica only started at the turn of this century (Scott, Amundsen, de Gomery, von Drygalaski, Nordenskjold, Mawson, Shackleton, Byrd and others). Antarctica has a surface area of more than 14 million square kilometres including its large ice-shelves; thus it represents about 9 per cent of the Earth's landmass. Some 98 per cent of Antarctica is covered by ice, with an average thickness of 2300 metres, which may reach up to 4800 metres. Unlike the → Arctic, Antarctica has no native inhabitants. The crews of the permanent stations there depend entirely upon outside support.

2. Legal Situation Preceding the Antarctic Treaty

Before any claims were made there the Antarctic continent, its → islands and the Antarctic ocean were open for sealing, fishing and whaling. By letters patent of July 21, 1908 Great Britain made the first claim to → territorial sovereignty in Antarctica, comprising all areas and islands between 20 and 50 degrees West longitude and south of 50 degrees South latitude, as well as those south of 58 degrees South latitude and between 50 and 80 degrees West longitude. A principal objective of this claim, which was finally delimited in 1917, was to control whaling in the Southern Ocean (→ Whaling Régime).

In 1923, by Order-in-Council, Great Britain formally claimed the Ross Ice Shelf and its surrounding coasts, an area lying between 160 degrees of East longitude and 150 degrees West longitude, and placed it under the administration of the governor-general of New Zealand. This was followed by the claiming of the Australian Antarctic Territory in 1933 which was placed under the administration of the Commonwealth of Australia. The Australian Antarctic Territory was defined as all the islands and territories, other than Adélie Land, situated south of 60 degrees South latitude and lying between 160 degrees of East longitude and 45 degrees East longitude. In 1924 France formally annexed Adélie Land, which forms a wedge in the area claimed by Australia. Only in 1938 when agreement was reached with Australia on the precise boundaries between their territories was Adélie Land extended to the Pole. It comprises the sector south of 60 degrees South latitude lying between 136 and 142 degrees East longitude.

In 1927 Norway annexed the sub-Antarctic Bouvet Island, two years later the Antarctic Peter I Island, and in 1939 laid claim to the mainland coast between the Australian and the British sectors, i.e. 20 degrees West longitude and 45 degrees East longitude, with the southern boundary of its claim remaining undefined.

Chile and Argentina in 1940 and 1942 respectively claimed parts of Antarctica; those claims not only infringe upon each other but partially conflict with the British claim (→ Antarctica Cases (U.K. v. Argentina; U.K. v. Chile)). Chile's claim comprises the sector between 53 and 90 degrees of West longitude which joins in the Chilean territory in the north. Argentina claims the landmass and the islands between 25 and 74 degrees West longitude whose northern boundary is 60 degrees South latitude. Both take the position that the

claimed sector had been national territory all along.

The area between the claims of Chile and New Zealand (80 and 150 degrees West longitude) remains unclaimed.

The claimant States base their claims on different bases: occupation, contiguity, sector principle, → continuity (of the American land mass), discovery and exploration, and → historic rights in the cases of Argentina and Chile (→ Uti possidetis Doctrine; → Territory, Acquisition; → Territory, Discovery).

The claimant States recognize one another's sovereignty on the continent except where claims overlap in the Peninsula. Although they each maintain overlapping claims, Argentina and Chile have both acknowledged that between them they share rights to the Southern American Antarctic.

The non-claimant States do not recognize the legal validity of the claims made with respect to Antarctica because the traditional requirements for the acquisition of territory are not fulfilled. If Antarctica, prior to the Antarctic Treaty, is considered as a *terra nullius*, mere discovery would not confer title. Even if discovery were accepted as an inchoate title, it would not be easy for any claimant to prove effective possession (→ Effectiveness). In 1924 Secretary of State Hughes stated: " . . . the discovery of lands unknown to civilization, even when coupled with the formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by actual settlement of the discovered country." Accordingly the United States Government declined to confirm possession taken by its nationals Byrd and Ellsworth. Nevertheless, in 1958 it reserved all rights arising out of its activities in Antarctica. A similar point of view was expressed by the Government of the Soviet Union concerning rights deriving from discoveries and explorations of Russian navigators and scientists during the 19th century.

The question as to whether the claims to territorial sovereignty in Antarctica are valid has never been decided upon by international → arbitration or adjudication (→ Judicial Settlement of International Disputes). It is one of the characteristics of the Antarctic legal régime that it emerged and was elaborated in spite of disagreement amongst some of the claimant States on their competing claims and between non-claimant and claimant States on the legal validity of the claims to territorial sovereignty.

Apart from the claims themselves, no legal action was taken regarding Antarctica until the end of World War II. In 1948 Chile, Argentina and Great Britain agreed not to send warships south of 60 degrees South latitude to avoid military clashes.

With a view to ensuring freedom of scientific research in Antarctica and avoiding conflicts between Argentina and the United Kingdom, the United States Government in 1948 proposed the establishment of an international régime for Antarctica, either in the form of a → United Nations trusteeship or of a → condominium of the claimants and the United States. Both ideas were eventually rejected. The Chilean reply proposed a → *modus vivendi* based upon free scientific research and exchange of information with no new expedition or other activity south of 60 degrees South latitude prejudicing rights of sovereignty; these principles were later carried over into the Antarctic Treaty. The United States initiative also triggered a Soviet memorandum (1950) stating that no Antarctic régime should be established without participation of the Soviet Union and that the Soviet Government could not recognize as lawful any decision on the Antarctic régime taken without its participation.

The need for some form of international regulation was addressed during the International Geophysical Year (IGY; 1 July 1957 to 31 December 1958), an initiative of the International Council of Scientific Unions aimed at coordinating different national scientific programmes in order to achieve concurrent synoptic observations at many points. Twelve nations, including all claimant States, decided to take part in the IGY. During the 1955 pre-IGY conference, delegations accepted a declaration by Chile and Argentina that the IGY activities would not affect the → *status quo*. This → "gentlemen's agreement" contains the core of present Art. IV of the Antarctic Treaty.

During the IGY, in May 1958, the United States Government invited the countries having "a direct interest in Antarctica", meaning in practice all countries active during the IGY, to → negotiations with a view to convening a conference, which eventually resulted in the Antarctic Treaty. This move was motivated by the fact that the IGY was

of a temporary nature and the Soviet Union had made it clear that its activities in Antarctica would continue after the end of the IGY and the following year of International Geophysical Co-operation (1959).

After the successful close of the IGY the International Council of Scientific Unions founded a Special Committee on Antarctica Research which has since then coordinated scientific activities in Antarctica.

3. *The Antarctic Treaty Régime*

(a) Principles

The Antarctic Treaty is based upon three principles: the dedication of Antarctica for peaceful purposes only (Art. I), the continuance of freedom of scientific investigation and cooperation (Art. II) and the preservation of the Antarctic environment (Art. IX(1)(f)).

Art. I(1) formulates the general principle that Antarctica shall only be used for peaceful purposes and explicitly prohibits the establishment of military bases and fortifications, military manoeuvres, and the testing of any type of weapons. Furthermore, nuclear explosions are prohibited. This provision, quite extraordinary at the time of its conclusion, makes Antarctica the first region to become demilitarized (→ Demilitarization; → Nuclear-Free Zones). The use of military personnel or equipment for scientific research or for any other peaceful purpose is permitted (Art. I(2)). In practice, some Consultative Members largely rely on their military infrastructure for carrying out research programmes.

The observance of the obligations enshrined in Art. I is secured through an inspection system (Art. VII) and the obligation to publish the results of the research carried out (Art. III). According to Art. VII, each Consultative Party may designate → observers to carry out inspections. Such observers have freedom of access at any time to all areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft discharging or embarking cargoes or personnel in Antarctica.

The main activity in Antarctica at present is scientific research. Arts. II and III, providing for the freedom of scientific research, oblige the parties to exchange to the greatest extent feasible information regarding plans for scientific programmes, to exchange scientific personnel and to make scientific observations and results freely available, as practiced on a provisional basis during the IGY. The parties are under an obligation to inform all other parties in advance of all expeditions to and within Antarctica on the part of its ships or nationals, of all expeditions organized in or proceeding from its territory, of all stations in Antarctica occupied by its nationals and of any military personnel or equipment intended to be introduced into Antarctica (Art. VII(5)). Scientific research is under no limitation, although the Consultative Parties may issue restrictive recommendations, several of which have been enacted, for example, the Agreed Measures for the Conservation of Antarctic Fauna and Flora (Rec. III-VIII).

Although the protection of the Antarctic environment is mentioned in Art. IX only with respect to living resources and by prohibiting the disposal of nuclear waste, and not as a general principle, the Consultative Meetings have made this issue a major concern. Various recommendations have been enacted specifically to prevent harmful impact upon the most vulnerable coastal and ice-free areas. Most important in that respect are the Agreed Measures referred to above, the Code of Conduct for Antarctic expeditions and station activities (Rec. VIII-11) and the recommendations entitled "Man's impact on the Antarctic Environment" (Rec. VI-4, VII-1, IX-5, XII-3 and 4, XIII-4 and 5; → Environment, International Protection; → Waste Disposal).

In implementing the Agreed Measures the Consultative Parties have established so-called Specially Protected Areas which may be entered if at all only in accordance with a special permit and where even research activities are restricted.

(b) Categories of State parties

The Antarctic Treaty is the result of the Washington Conference (15 October – 1 December 1959) attended by the following States, named in the preamble as Contracting Parties: Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom (claimants) and Belgium, Japan, South Africa, Soviet Union, United States (non-claimants). The Treaty entered

into force, after ratification by all signatories, on 23 June 1961.

The Treaty is open to accession by any State which is a member of the United Nations or by any other State which may be invited to accede to the Treaty with the consent of all Consultative Parties (Art. XIII(1)). Consultative Parties are those named in the preamble and all acceding Parties during such time as that Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition (Art. IX(2); Revised Rules of Procedure, September 1983, para. 1). Only the Consultative Parties participate fully in the normally biennial Consultative Meetings. Since 1983 non-Consultative Parties may be invited to participate as observers. In addition to the original Contracting Parties, the Consultative Parties are Poland (1977), the Federal Republic of Germany (1981), Brazil (1983), India (1983), China (1985), Uruguay (1985), the German Democratic Republic (1987), Italy (1987), Spain (1988) and Sweden (1988); Peru has made an application. In practice, the decisive criterion for acquiring consultative status is the running of a permanent station in Antarctica. The underlying rationale is that no State should participate in decision-making on Antarctica without direct knowledge of the very particular circumstances in that region.

(c) Treaty area

The provisions of the Treaty apply to the area south of 60 degrees south latitude, including all ice shelves (Art. VI). Although this wording seems to include the sea areas, the exercise of the rights of any State under international law with regard to the high seas within that area are not in any way affected by the Treaty. The peculiar wording of Art. VI, which reflects an unresolved disagreement between the original Consultative Parties, has created continuing problems. According to the claimants' view there exists a territorial sea adjacent to the Antarctic coast, except for the unclaimed sector, and assertions can be made with respect to an exclusive economic zone.

The argument has been advanced that the establishment of an exclusive economic zone would not be an enlargement of an existing claim (Art. VI). This view is, however, not shared by the non-claimants. The practice of the Consultative Parties regarding offshore areas has undergone considerable change: whereas in the early years they refused to adopt restrictive recommendations referring to marine areas, this practice was later dropped. The divergent views upon Art. VI lead to the conclusion of the Antarctic Seals Convention, as the Consultative Parties held that the hunting of seals on the high seas could not be regulated under the Antarctic Treaty.

(d) Sovereignty and jurisdiction

The Antarctica Treaty does not attempt to solve the question of claims to territorial sovereignty in Antarctica. The relevant Art. IV is essentially an agreement to disagree. It safeguards the *status quo* of the legal positions taken by claimant and non-claimant parties as well as by those parties asserting a basis of claim to territorial sovereignty in Antarctica, as long as the Antarctic Treaty is in force. Consequently, Art. IV contains a → moratorium, which allows the parties having irreconcilable views on the subject of claims to shelve this issue and to agree upon certain areas of cooperation, thus minimizing the possibility that disputes over claims will erupt and interfere with scientific research in Antarctica.

Similarly, the parties to the Convention for the Conservation of Antarctic Seals (hereafter Seal Convention; see → Seal Fisheries) have affirmed the provisions of Art. IV of the Antarctic Treaty. The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Convention on the Regulation of Mineral Resource Activities not only provide that the contracting parties are bound by Art. IV but reiterate the provision and adapt it to marine areas and to certain areas north of the Antarctic Treaty area (→ Conservation of Living Resources of the High Seas). Art. IV(1)(a) of the Antarctic Treaty which stipulates that nothing shall be interpreted as affecting previously asserted rights or claims to territorial sovereignty is meant to protect the claimants. Similar safeguard is contained in Art. IV(1)(b) for any basis of claim to territorial sovereignty in Antarctica which a State may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise. This clause, although generally drafted, was meant to accom-

modate the interests of two non-claimants, the United States and the Soviet Union, who did not want to abandon what they regard as a basis of possible claims. Non-claimant States are protected under Art. IV(1)(c) which provides that a party does not prejudice its position with regard to recognition or non-recognition of other States' rights or claims. This provision also protects claimants which have already recognized the claims of other States.

Art. IV(2) deals with activities during the life of the Antarctic Treaty, which are not to constitute a basis for asserting, supporting or denying a claim or creating any rights of sovereignty. No new claim or enlargement of an existing claim may be made. This basic rule contains the working principle of the Antarctic Treaty and the whole Antarctic system: The sovereignty issue is set aside while the parties agree on a practical but limited régime of the Antarctic continent. Any clause of the Treaty, any regulation elaborated through the consultative mechanism must be seen under a "bifocal" approach, i.e. its interpretation must give room both for the claimant's and for the non-claimant's view.

The issue of → jurisdiction, closely related to sovereignty, could not be settled on a general basis either. The Treaty deals with jurisdiction over officially designated observers and scientific personnel exchanged under the Treaty (Art. VIII) only, and this under the express safeguard that it is without prejudice to the respective positions of the parties relating to jurisdiction over all other persons in Antarctica. Disputes with regard to the exercise of jurisdiction shall be resolved through consultation of the parties concerned. The Consultative Parties failed to supplement the imperfect rules on jurisdiction, although this was meant to be one of their tasks (Art. IX(1)(e)). The Consultative Parties, however, were able to reach agreement on jurisdictional rules for specific aspects, such as enforcement of the Seal Convention and of the Agreed Measures. The CCAMLR, being less clear in this respect, provides for "procedures for flag state prosecution" in a system of observation and inspection. In contrast, the Convention on the Regulation of Mineral Resources Activities leaves this question more or less open.

At the time being practical problems in respect of the exercise of jurisdiction are settled on an *ad hoc* basis. Jurisdictional issues within stations or on ships anchored are usually dealt with on a nationality basis. Sanctions, at least by non-claimants, are indirect, i.e. by disciplinary measures or through contractual obligations to abide by the rules of the Treaty and the recommendations of the Consultative Parties.

(e) Consultative Meetings

The Antarctic Treaty has no permanent organs with general administrative competence, not even a secretariat. This was consistent with the limited objective which the Contracting Parties envisaged for the Treaty and equally reflected the fears of claimant States that the establishment of an international organization might erode their claims. Under the present conditions it is unlikely that this reluctance to provide for some administrative body, such as a secretariat, will prevail. In spite of its administrative shortcomings the Consultative Meetings have produced a considerable body of rules and thus a successful although limited co-administration of Antarctica within the scope of the Treaty's objectives. To that extent, providing for an international organization with respect to the conservation of marine living resources and the regulation of mineral resources represents a major concession from the viewpoint of the claimant States.

The institution of Consultative Meetings provided for in Art. IX of the Antarctic Treaty is, due to its lack of binding decision-making powers, not an organ of an international organization but a State conference (→ Conferences and Congresses, International). The first was convened in Australia, and later meetings on a biennial basis were in principle hosted in turn by countries according to English alphabetical order. Since the second Consultative Meeting preparatory meetings are organized by the host country. In addition, Special Consultative Meetings have made their appearance since 1977 dealing with issues not dealt with by Consultative Meetings. Consultative, special consultative and preparatory meetings are financed by the host country, which also performs secretariat functions.

Only Consultative Parties are entitled to participate in the decision-making of the Consultative Meetings. Decisions of Consultative Meetings are mostly enacted by way of recommendations.

According to the Rules of Procedure recommendations require unanimous approval by those Consultative Parties attending the meeting, followed by unanimous approval by all Consultative Parties which were entitled to participate in the respective meeting before becoming effective (Art. IX(4)). Other decisions, mostly of a procedural nature, may be embodied in the final report, for which only a majority approval is needed. Recommendations which have become effective are, in the view of the Consultative Parties, measures in furtherance of the principles and objectives of the Antarctic Treaty and are an essential part of the overall structure of cooperation established by the Treaty. Accordingly approved recommendations are to be viewed as international agreements, supplementing the obligations which flow from the Antarctic Treaty. The Consultative Parties have urged other Contracting Parties to accept existing recommendations, and the Agreed Measures even provide an appropriate procedure.

Before becoming Consultative Parties, States are urged to accept existing recommendations as measures in furtherance of the principles and objectives of the Treaty but there exists no obligation to do so. The mandate of the Consultative Meetings to enact recommendations is specified in Art. IX in rather general terms. In practice, recommendations so far have mainly dealt with the protection of the Antarctic environment and the conservation of living resources, the facilitation of scientific research, the facilitation of international scientific cooperation, the exchange of information, and the operation of the Antarctic Treaty system.

(f) Termination and review

The Treaty is of unlimited duration. After the expiration of 30 years from the date of entry into force, i.e. after 1991, any Consultative Party may request the convening of a review conference which may adopt modifications or amendments to the Treaty by a majority of the Contracting Parties, including a majority of the Consultative Parties (Art. XII(2)). Those modifications or amendments do not enter into force unless all Consultative Parties have ratified them. If this is not the case within a period of two years any Contracting Party may give notice of its withdrawal from the Treaty.

The Consultative Parties may, at any time, themselves agree to modify or amend the Treaty. After entry into force of such modification or amendment by ratification of all Consultative Parties all other parties may either also ratify or are deemed to have withdrawn from the Treaty (→ Treaties, Revision; → Treaties, Termination).

4. Convention for the Conservation of Antarctic Seals

Sealing, in the 18th century one of the major economic activities taking place in Antarctica, had resulted in the near-extinction of the Antarctic fur seal population. Not until the adoption of the Agreed Measures in 1964 was an international conservation régime established. As the Agreed Measures and the other recommendations concerning sealing (Rec. III-11, IV-21), due to the then-prevailing interpretation of Art. VI of the Antarctic Treaty, did not apply to the → high seas, the Consultative Parties decided to elaborate a legal instrument separate from the Antarctic Treaty.

The Convention for the Conservation of Antarctic Seals, June 1, 1972, entered into force on March 11, 1978, after having been ratified or accepted by seven States parties. It covers all species of seal in the waters of the Antarctic Treaty area. Very conservative catch limits are set out for Crabeater, Leopard and Wedell seals; the taking of Ross, southern Elephant and southern fur seals is prohibited. Furthermore, closed seasons and designated closed areas have been established. The Convention does not regulate catch allocation. Although no attempt has been made, despite the increasing population of fur seals, to exploit Antarctic seals commercially, a special group within SCAR continues to monitor the taking of seals for scientific purposes. If commercial sealing does begin, any party may propose a meeting of Contracting Parties, to establish an effective system of control and a Commission. Until such action is taken the enforcement of the Convention rests with the relevant flag State (Arts. 2(2) and 5(5)). The drafting of the Convention was carried out by the Consultative Parties, like the Convention on the Regulation of Antarctic Mineral

Resource Activities. Express reference to the Antarctic Treaty and the fact that States may only accede to this Convention with the consent of the signatory Parties to the Seals Convention, ensure the link between the Antarctic Treaty and the Seals Convention. Up to now the Convention is of little relevance, although it set a precedent for further development of the Antarctic régime.

5. *Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)*

After the exploitation of fur seals and whales ceased, attention turned to Antarctic fish stocks and krill, a small shrimplike crustacean which is the staple food of most of Antarctic whales, seals and birds. Experimental krill fishing started in the mid-1960s, and fin fish began to be heavily exploited in 1969. Recommendation VIII-10 (1975) emphasized the need "to promote and achieve within the framework of the Antarctic Treaty, the objectives of protection, scientific study and rational use of Antarctic marine living resources". As the research programme on the Biological Investigation of Marine Antarctic Systems and Stocks, together with three reports prepared by the → Food and Agriculture Organization of the United Nations, indicated that irrational exploitation of krill could have severe repercussions on the Antarctic living resources, recommendation IX-2 called for a Special Consultative Meeting to elaborate a régime. The negotiations began in February 1978 and were concluded in May 1980. The Convention entered into force on April 7, 1982 after having been ratified, accepted or approved by eight States having participated in the Conference in which the Convention was adopted. This Conference consisted of Consultative Parties and the Federal Republic of Germany as well as the German Democratic Republic.

Although the Convention was negotiated and adopted under the aegis of the Antarctic Treaty, the area of application of the Convention is larger than in the Antarctic Treaty. It encompasses the areas beyond the Antarctic Treaty area up to the Antarctic Convergence, a major circum-Antarctic bio-geographic boundary where the cold northerly-moving waters dip beneath warmer southerly-moving subtropical waters, which is the northern boundary of the Antarctic ecosystem. For the purpose of the Convention this boundary is defined by geographic coordinates. The CCAMLR is based upon an ecosystem approach to conservation, which requires that determination of the rate of use of any target species must take into account the effects on species dependent on the target species for food. It is not enough to merely consider the effect utilization will have on the target species alone (Art. II).

Art. IV of the CCAMLR refers to Art. IV of the Antarctic Treaty and extends its application to those areas covered by the CCAMLR, and not covered by the Antarctic Treaty. Hence, the question of claims to territorial sovereignty is also kept in abeyance for those areas.

Unlike the Antarctic Treaty and the Seals Convention, the CCAMLR establishes an international organization with a Commission as its main organ, a Scientific Committee, and a Secretariat with headquarters in Hobart, Tasmania. Each State having participated in the Conference is entitled to be a member of the Commission. Acceding States parties are entitled to membership during such time as they are engaged in researching or harvesting the marine resources.

The functions of the Commission are very much like those of fishery organizations. To give effect to the stated conservation principles, *inter alia*, it shall facilitate research into the ecosystem, compile data on the population of harvested and dependent species, implement the observation and inspection system and adopt conservation measures. However, doubts exist whether this régime has truly fulfilled the expectations attached to it. Whereas the harvesting of krill has not yet entered a commercial stage, indications exist that the stocks of fin fish have been over-exploited, which might be partly due to the fact that it was difficult to agree upon an efficient inspection system, which has now been established.

6. *Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)*

The Antarctic Treaty does not contain any reference to mineral exploration and development, although the subject had been mentioned at the Antarctic Treaty Conference. In 1970 the Consultative Parties first considered the matter,

after receiving enquiries about the possibility of prospecting in Antarctic seas. After the issue had been addressed in several recommendations (Rec. VII-6, VIII-14, IX-1, X-1) the Consultative Parties recommended the convening of a Special Consultative Meeting to elaborate a régime governing Antarctic mineral resource development should it ever occur. The relevant recommendation (XI-1) described five principles upon which the new régime on mineral resources was to be based: continuance of the active and responsible role of the Consultative Parties, maintenance of the Antarctic Treaty in its entirety, protection of the Antarctic environment and of its dependent ecosystems, non-prejudice of the interests of all mankind in Antarctica, and the application of Art. IV of the Antarctic Treaty. The negotiations started in 1983 and were concluded on June 2, 1988.

The CRAMRA reflects many of the special features of the Antarctic Treaty more distinctively than the two other Antarctic Conventions. It proved to be especially difficult to agree upon the area of application and all issues having some bearing upon claims to sovereignty and jurisdiction. The CRAMRA (Art. 5) applies in principle to the Antarctic Treaty area, i.e. the area south of 60 degrees South latitude. However, mineral resource activities taking place in the continental shelf adjacent to the Antarctic continent stretching beyond that limit to the north are equally covered. The Convention does not attempt to regulate mineral resource activities in the deep sea-bed south of 60 degrees South latitude or mineral resource activities in offshore areas of sub-Antarctic islands. Art. 9 of the Convention refers to Art. IV of the Antarctic Treaty making this principle applicable to areas not covered by the Antarctic Treaty.

With respect to the exercise of jurisdiction it was impossible to agree upon a definite solution. Art. 7 of the Convention provides that "each Party shall take appropriate measures within its competence to ensure compliance with this Convention", the notion of "within its competence" being bifocal as it can be read to refer to personal as well as territorial jurisdiction. Nevertheless, the CRAMRA proceeds from the assumption that the exercising of jurisdiction will be primarily based upon personal jurisdiction as the sponsoring State will be held primarily responsible for activities of its operator.

The institutional framework the CRAMRA provides, as well as the substantive law, are unique in international law. The Convention envisages the establishment of various organs, a Commission, Regulatory Committees, an Advisory Committee and a Special Meeting of Parties. The Commission will be composed of the Consultative Parties which had this status when this Convention was opened for signature, acceding States during such time as they are actively engaged in substantial scientific, technical or environmental research, and acceding States which sponsor activities according to an approved management scheme. The Advisory Committee is to consist of scientists and will be open to all Parties. The other organ also consisting of all Parties will be the Special Meeting, and will have a political function. The composition of the Advisory Committee and of the Special Meeting is an attempt to accommodate the interests of the non-consultative parties, which objected to the vesting of most functions in the Commission and the Regulatory Committees where Consultative Parties are heavily represented and have a decisive vote.

The composition of the Regulatory Committees and the decision-making provided for them reflects the will to accommodate the claimants' interests and the special concern of → developing States. Each Regulatory Committee will, in general, and subject to further conditions, consist of ten members which shall include four claimant States (among them the geographically relevant claimant or claimants), the United States and the Soviet Union as States asserting a basis of claim, and four non-claimant States. Three members of each Regulatory Committee will be developing countries. Thus, the composition of the Regulatory Committees is designed, leaving aside the United States and the Soviet Union, to strike an equilibrium between claimants and non-claimants, although amongst the Consultative Parties the non-claimants outnumber the claimants. The privileged status of claimant States is further strengthened by the fact that they will be nominated by the relevant claimant or claimants, whereas the Commission and its Chairman have some discretion in selecting the non-claimants.

Mineral activities may be undertaken by opera-

tors. An operator can be a party, an agency thereof, a juridical person or a joint venture. The three latter must have a link of corporate control to a party, the so-called sponsoring State. Non-parties and their corporations are excluded from mineral resource activities under this régime. The expression mineral activities embraces prospecting, exploration and development. The Convention specifically provides that no mineral resource activity shall take place until it is judged, based upon assessment of its possible impact on the Antarctic environment and on dependent or associated ecosystems, that the activity in question would not adversely affect the Antarctic environment.

Prospecting is defined as activity aimed at identifying areas of mineral resource potential through techniques designed to have as little impact upon the Antarctic as possible. Prospecting is mainly controlled by the relevant sponsoring State which thus has to enforce the environmental standards laid down in the Convention; every member of the Commission, however, may initiate a Commission procedure if it is concerned that the planned prospecting or ongoing activities are inconsistent with the Convention.

Exploration, which means activities aimed at identifying and evaluating specific mineral resource occurrences, can only be undertaken after the relevant area has been opened for exploration by the Commission upon the advice of the Advisory Committee and the Special Meeting of parties, and after the operator has been granted permission to explore a specific site by the Regulatory Committee established for that area. Such permission will take the form of a Management Scheme, which represents the arrangements and rules under which the exploration activities, and eventually the development activities, will occur. It covers a wide range of issues, from depletion policy and duration of the exploration permit to applicable jurisdiction. In negotiating the Management Scheme, a task mainly undertaken by the relevant claimant State and the sponsoring State, the Regulatory Committee has rather far-reaching discretion, although the Commission as well as the Regulatory Committee itself will enact measures or attach conditions and general guidelines which are meant to guide and pre-structure the content of the Management Scheme. This quite unprecedented system reflects the interests of the claimant States in exercising as much influence as possible over the content of the Management Scheme.

In spite of the detailed provisions on institutions and their functions the new Convention constitutes only a framework agreement. As it was impossible to elaborate more than the basic obligations of operators and States to take action against threats or damage to the Antarctic environment or to provide for compensation (liability), a supplement of the Convention through a separate protocol is mandatory before applications for an exploration or development permit may be lodged (Art. 8 (9)). Until the Convention enters into force, the final Meeting of the Fourth Special Consultative Meeting agreed that all States represented at that meeting would urge their nationals and other States to refrain from all Antarctic mineral resource activities; thereafter, until a Protocol has been accepted, only prospecting activities are permitted.

Although the Convention constitutes only a framework agreement, the provisions concerning the protection of the Antarctic environment are far-reaching: an operator undertaking mineral resource activities must take necessary and timely action if the activity results or threatens to result in damage to the Antarctic environment or its dependent or associated ecosystems. If the operator is unable to restore the *status quo ante*, where loss or impairment of an established use, a damage to property or a loss of life or personal injury to a third party has taken place, the operator is held strictly liable. The supplementary responsibility of the sponsoring State varies according to whether the operator has undertaken prospecting or exploration or development activities.

The Convention also establishes a new system of inspection, according to which mineral resource activities in Antarctica are monitored by all members of the Commission, the Commission itself, or relevant Regulatory Committees. In contrast to the Antarctic Treaty and the two other Conventions it provides mandatory mechanisms to settle disputes between States parties and between a Regulatory Committee and an operator, which are similar to the procedures provided for by the United Nations Convention on the Law of the Sea (→ Law of the Sea).

The negotiation among the Consultative Parties of a régime for Antarctic mineral resources has

been objected to by the majority in the United Nations, especially the developing countries, on the ground that a limited group of States should not decide upon the distribution of natural resources beyond the limits of national jurisdiction. The Consultative Parties, in turn, have rejected any such assertion. They have emphasized that they have over a period of 25 years guaranteed unchallenged the demilitarization of Antarctica and the protection of the Antarctic environment, and thus the other members of the State community had acquiesced in the special status of Antarctica (→ Acquiescence). Further, they have pointed to the fact that the Antarctic Treaty is open for wider access, resulting in a balanced system. The position of the Consultative Parties has been endorsed by the fact that developing countries such as China, India, Brazil and Uruguay have gained the status of Consultative States.

7. Concluding Remarks

The limited scope of the Antarctic Treaty has gradually evolved into a system which now covers most of the potential activities in Antarctica. This development illustrates the consolidation of the Antarctic régime and its transformation from loose cooperation of States into a régime with a significant organizational structure. The Antarctic régime demonstrates that successful cooperation among States may be achieved and maintained despite existing legal controversies.

The Antarctic Treaty, Washington, 1 December 1959, UNTS, Vol. 402, pp. 71–102.

Convention for the Conservation of Antarctic Seals, June 1, 1972, ILM, Vol. 11 (1972) 251–261.

Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, ILM, Vol. 19 (1980) 841–859.

Convention on the Regulation of Antarctic Mineral Resources Activities, June 2, 1988, ILM, Vol. 27 (1988) 865–900.

W.M. BUSH (ed.), Antarctica and International Law: A Collection of Inter-State and National Documents, 3 vols. (1982–1988).

P.C. JESSUP and H.J. TAUBENFELD, Controls for Outer Space and the Antarctic Analogy (1959).

J.HANESSIAN, The Antarctic Treaty 1959, ICLQ Vol. 9 (1960) 436–480.

T. HANEVOLD, The Antarctic Treaty Consultative Meetings – Form and Procedure, Cooperation and Conflict, Vol. 6 (1971) 183 et seq.

C. BEEBY, The Antarctic Treaty (1972).

R.E. GUYER, The Antarctic System, RdC, Vol. 139 (1973 II) 149–170.

R. LAGONI, Antarctica's Mineral Resources in International Law, ZaöRV, Vol. 39 (1979) 1–37.

A. VAN DER ESSEN, Les réunions consultatives du Traité sur l'Antarctique, Rev. Belge, Vol. 15 (1980) 20–27.

F.M. AUBURN, Antarctic Law and Politics (1982).

C.C. JOYNER, Antarctica and the Law of the Sea: An Introductory Overview, Ocean Development and International Law Journal, Vol. 13 (1983/1984) 277–289.

F. ORREGO VICUNA (ed.), Antarctic Resources Policy (1983).

P.W. QUIGG, A Pole Apart: The Emerging Issue of Antarctica (1983).

L.M. ALEXANDER and L.C. HANSON (eds.), Antarctic Politics and Marine Resources: Critical Choices for the 1980's (1984).

R. WOLFRUM (ed.), Antarctic Challenge: Conflicting Interests, Cooperation, Environmental Protection, Economic Development (1984).

R. WOLFRUM, Die Internationalisierung staatsfreier Räume (1984).

U.J. NUßBAUM, Rohstoffgewinnung in der Antarktis, Völkerrechtliche Grundlagen nichtlebender Ressourcen (1985).

Antarctic Treaty System: An Assessment, Proceedings of a Workshop held at Beardmore South Field Camp, Antarctica, January 7–13, 1985 (1986).

J.D. MYHRE, The Antarctic Treaty System: Politics, Law and Diplomacy (1986).

G. TRIGGS, International Law and Australian Sovereignty in Antarctica (1986).

R. WOLFRUM (ed.), Antarctic Challenge II, Conflicting Interests, Cooperation, Environmental Protection, Economic Development (1986).

F. FRANCIONI and T. SCOVAZZI (eds.), International Law for Antarctica (1987).

Handbook of the Antarctic Treaty System (5th ed., 1987).

F. ORREGO VICUNA, Antarctic Mineral Exploitation: The Emerging Legal Framework (1988).

R. WOLFRUM (ed.), Antartic Challenge III, Conflicting Interests, Cooperation, Environmental Protection, Economic Development (1988).

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AQABA, GULF OF

1. Background

The legal status of the Gulf of Aqaba (Eilat) including its entrance, the Strait of Tiran, has constituted one of the central issues in the conflict between → Israel and the Arab States. Both the

1956 Suez War (→ Suez Canal) and the 1967 Six-Day War have largely been attributed to contention between the two sides over maritime jurisdiction, navigation rights, and claims based on a state of → war concerning the Gulf and the Strait. Nevertheless, it is doubtful that a legal dispute would have arisen absent the underlying political objection to Israel's existence.

Forming the north-eastern arm of the → Red Sea, the Gulf of Aqaba washes the shores of Egypt, Israel, Jordan and Saudi Arabia. The Gulf is separated from the Red Sea's north-western arm, the Gulf of Suez, by the land-bridge which connects Africa and Asia known as the Sinai Peninsula. Near the southern apex of the Sinai, between this land mass and the Arabian Peninsula, entry into the Gulf from the Red Sea occurs through the Strait of Tiran.

The Gulf measures approximately 98 miles in length; its width varies from 3 to 14½ miles. Tiran Island lies about three miles east of the Sinai coast at the entrance to the Gulf. One and a half miles farther east is Sanafir Island, which is separated from the coast of the Arabian Peninsula by a distance of less than one-half mile.

Reefs prevent the transit of all but very small boats through any of the waters connecting the Gulf with the Red Sea other than the → strait between Tiran Island and the Sinai Peninsula. The Strait of Tiran is almost evenly divided by drying coral reefs into two channels, Enterprise Passage in the west and Grafton Passage in the east, the respective minimum widths of which are 1300 yards and 950 yards. Navigation is generally confined to Enterprise Passage and thereby localized within the Egyptian → territorial sea and the régime established by the 1979 Treaty of Peace between Egypt and Israel (ILM, Vol. 18, p. 362).

Egypt and Saudi Arabia each possess shores stretching over 100 miles northwards from the Gulf's entrance to the Israeli and Jordanian borders respectively. The Egyptian coastline on the western side of the Gulf (Sinai Peninsula) converges with Israel's approximately 6-mile-long coastline just past → Taba. Somewhat south of this demarcation, the Saudi-Jordanian frontier may be found on the eastern side of the Gulf (Arabian Peninsula). The unusual feature in this geopolitical configuration involves the location of two of the four littoral States at a substantial distance from the entrance to the Gulf.

Special significance attaches to the Gulf for the two countries situated at its northern end, where each maintains a harbour. The → port of Aqaba is Jordan's sole outlet to the high seas. Despite the opening of the Suez Canal to Israeli shipping, increasing the importance of Israel's Mediterranean ports, Eilat represents the country's gate to East Africa and Asia.

While mentioned in the Old Testament, navigation in the Gulf was infrequent until very recent times. Unfavourable climatic conditions hampered the development of maritime communication through the waterway before the advent of steam-power. The first noteworthy traffic in the Gulf involved the supplying of British forces on Ottoman territory through Aqaba in 1917. Shipping came to a standstill after World War I and resumed during the mid-1930s, remaining inconsequential, however, until the early 1950s. Moslem pilgrims do not appear to have used the waterway before then.

Following the attack on the one-day-old State of Israel by neighbouring Arab States and members of the Arab League in 1948 (→ Arab States, League of), Egypt imposed a blockade against Israel in the Gulf. The → blockade ended during the 1956 Suez War when Israel occupied the Sinai Peninsula and forced Egyptian troops off the islands in the Strait of Tiran. After the deployment of → United Nations forces (UNEF) at Ras Nasrani and Sharm el-Sheikh was agreed upon in March 1957, assuring free navigation through the Strait and the Gulf (→ Navigation, Freedom of), Israel removed its forces from these positions commanding entry to the Strait.

Transit through the Gulf continued unhindered until May 1967, when Egypt requested the withdrawal of UNEF and reinstituted the blockade in the Strait of Tiran, provoking the subsequent outbreak of war. The ensuing Israeli occupation of the Sinai re-established free navigation in the Gulf.

This régime was again interrupted during the 1973 Yom Kippur War when Israeli shipping briefly encountered a blockade at the southern entrance to the Red Sea at Bab al-Mandeb. Unimpeded freedom of navigation through the waterways in the area resumed thereafter and became an essential component of the 1975

disengagement agreement between Egypt and Israel (ILM, Vol. 14, p. 1450), the 1978 Camp David Agreements (ILM, Vol. 17, p. 1466), the 1979 Peace Treaty, diplomatic assurances by the United States supporting Israel's interpretation of the applicable legal régime (ILM, Vol. 18, p. 537), and the protocol establishing a Multinational Force and Observers for the Sinai (ILM, Vol. 20, p. 1190).

2. *Legal Régime Prior to the 1979 Egyptian-Israeli Treaty of Peace*

In the 1949 → Corfu Channel Case, the → International Court of Justice (ICJ) decided that passage in straits used for international navigation and connecting two parts of the → high seas cannot be impeded by the coastal State, within the territorial sea of which the strait lies, if the passage is innocent, even when → warships are involved. This holding, generally accepted as expressing → customary international law, translated into a right of non-suspendable → innocent passage through the Strait of Tiran and, *a fortiori*, through the Gulf of Aqaba for those who saw the Gulf as containing pockets of high seas. Support for this view was found in the fact that both Egypt and Saudi Arabia claimed only 6-mile-wide territorial seas until 1958.

Egypt, otherwise recognizing the right to free and innocent passage through the Strait of Tiran, sought to justify its repeated blockade against Israel as a legitimate tactic by a belligerent (see e.g. UN Doc. S/PV.1343 (1967) para. 102). According to Egypt, its → armistice agreement with Israel did not terminate the state of war between the two countries (but see, UN SC Res. 95, UN Doc. S/2322 (1951)).

Saudi Arabia based its legal position regarding delimitation and navigation rights in the Gulf of Aqaba on → historic rights and special geographic circumstances (see UN Doc. A/PV.697 (1957) paras. 92 and 93). The Saudi claim that the Gulf fell into the exceptional category of an historic bay (cf. 1958 Convention on the Territorial Sea and the Contiguous Zone (UNTS, Vol. 516, p. 205), Art. 7(6); 1982 United Nations Convention on the Law of the Sea (UN Doc. A/CONF. 62/122 with Corr.), Art. 10(6)) was supported by analogy to the 1917 Gulf of → Fonseca Case. The analogy suggested that the Gulf, as a multinational bay the coasts of which previously fell under the territorial sovereignty of a single State (→ Bays and Gulfs), fell under the régime of passage for → internal waters. However, the analogy foundered on a failure to meet the burden of clearly proving historical continuity with respect to the littoral States' identity as successor States to the Ottoman Empire (→ State Succession), the effective exercise of sovereign rights by these States over the Gulf for an extended period of time, and the acquiescence of other States. The major weakness of the historic claim was an absence of express agreement on the status of the Gulf of Aqaba even among the Arab coastal States.

Saudi Arabia also asserted the theory that the rules for bays surrounded by the coast of a single State should apply if the coastal States agreed among themselves to treat the Gulf as "closed" (*mare clausum*). Consequently, the Gulf was held to comprise either internal waters unaffected by a right of innocent passage or territorial seas subject to a régime of suspendable innocent passage. This approach presumed that the Israeli presence on the Gulf was not equivalent to territorial sovereignty (→ Israel: Status, Territory and Occupied Territories) and that, therefore, the remaining littoral States could mutually agree to draw a closing line across the entrance to the Strait of Tiran, as permitted by Art. 7(4) of the 1958 Convention, without violating Art. 4(5) which forbids the use of straight baselines "to cut off from the high seas the territorial sea of another State".

Despite the challenge to the Israeli presence at Eilat as an ongoing violation of the February 24, 1949 Egyptian-Israeli Armistice Agreement and mere military occupation, the matter was already settled in Israel's favour by the → United Nations General Assembly's adoption on November 29, 1947 of the Partition Plan (Res. 181(II)) which envisaged the establishment of a Jewish State within the → Palestine → Mandate, as well as by → recognition of Israel by the majority of States. Moreover, the occupation of Eilat by Israeli forces in March 1949 occurred in an area in which there were no Egyptian troops and which was outside the scope of the February Agreement. Since the operation was completed before conclusion of the April 3, 1949 armistice régime between Israel and

Jordan (UNTS, Vol. 42, p. 303) and the Partition Plan foresaw the establishment of Israel's international → boundary at Eilat, the occupation clearly took place in accordance with international law and entailed the right to exercise territorial sovereignty.

During the drafting sessions of the → International Law Commission (ILC) held prior to the First → Conference on the Law of the Sea, Israel proposed providing for reinforced innocent passage through a strait connecting high seas with territorial seas constituting the only access to the port of a foreign State (YILC, Vol. 2 (1956) p. 52, at pp. 56 and 59). The ILC rejected this approach and refrained from stating any general rules regarding passage through or delimitation of multinational bays.

In practice, however, many States backed the Israeli view that, whether or not a territorial régime should otherwise apply to a strait connecting high seas with a multinational bay consisting entirely of territorial seas, free passage must prevail through the Strait of Tiran and the Gulf of Aqaba for the two States with harbours not located at the entrance to the Gulf. Evidence of this State practice abounds in references to the Gulf and the Strait as "international waterways" at UNCLOS I and before the 11th session of the UN General Assembly during the debates concerning the 1956 war. Major maritime powers repeatedly used this designation (see e.g. *Aide-mémoire* from the United States to Israel, DeptStateBull, Vol. 36 (March 1957) p. 392), and the deployment of UNEF for ten years in the area of tension guaranteed the Israeli position practical international support.

Art. 16(4) of the 1958 Convention on the Territorial Sea expressly provided for a régime of non-suspendable innocent passage for "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 seas of a foreign State*" (emphasis added). Since this provision directly applied to the Strait of Tiran, departed from the formula used by the ICJ in the Corfu Channel Case, and went beyond the ILC's draft, some commentators, as well as the Arab States, saw Art. 16(4) as a new rule without binding effect on these States as non-signatories. However, many other observers have concluded that Art. 16(4) is merely an alternative or progressive → codification of customary international law.

In formulating a right to unimpeded passage without reference to a quantum of international use or the indispensability of the passage way for international maritime communication, the drafters of Art. 16(4) successfully avoided the problem of legally defining "international waterways". Nevertheless, dispute has been fueled by the fact that opponents of the right, even where they recognize the obligatory nature of Art. 16(4), have interpreted the Article restrictively. It has been argued, for example, that Art. 14(4) of the 1958 Convention permits coastal States wide discretion to characterize a particular passage as "innocent" or not, and that Art. 16(4) is inapplicable to the Gulf of Aqaba as opposed to the Strait of Tiran, to warships and during wartime.

The → United Nations Security Council's unanimous adoption of Res. 242 (1967) settled the issue of belligerency decisively following the Six-Day War. Paragraph 1(ii) of the Resolution affirmed that → United Nations Charter principles required, *inter alia*, the "[t]ermination of all claims or states of belligerency" as well as recognition of the right of all States in the area to exist "within secure and recognized boundaries free from threats or acts of force". Paragraph 2(a) affirmed, moreover, the necessity "[f]or guaranteeing freedom of navigation through international waterways in the area". Subsequently, Res. 338 (1973) called on the parties to the 1973 Yom Kippur War to implement immediately Res. 242 in all of its parts.

Even if Art. 16(4) of the 1958 Convention did not initially bind non-signatories, Security Council Resolutions 242 and 338, which became the basis for cease-fire agreements between Egypt, Jordan and Syria on the one hand and Israel on the other, represent strong evidence that State practice later transformed reinforced access through the Gulf and the Strait into a rule of customary international law.

3. 1979 Peace Treaty and Related Developments

The 1979 Peace Treaty resulted in an unambiguous guarantee of freedom of navigation and → overflight closer to the régime traditionally associated with the high seas than that established

by Art. 16(4) of the 1958 Convention and retained in Art. 45(1)(b) and (2) of the 1982 Convention or somewhat expanded in the latter by provisions on transit passage (Arts. 37 to 44). Under Art. V, para. 2, sentence 1 of the Treaty, the Strait and the Gulf are considered "to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight". Sentence 2 provides that the parties will respect "each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba". In the Agreed Minutes to Art. V, the régime established for all nations by para. 2, sentence 1 is emphasized as equally applying to the parties themselves. Annex I, Art. VI, para. 2 (d) provides for UN operations explicitly aimed at "[e]nsuring the freedom of navigation through the Strait of Tiran in accordance with Article V of the Treaty of Peace" (see also para. 10(d) of the annex to the 1981 protocol on a Multilateral Force and Observers (MFO) proposed in lieu of the UN force (ILM, Vol. 20, p. 1190), and the 1981 United States-Israel statement on MFO participation (ILM, Vol. 21, p. 202)).

Egypt's ratification of and declaration concerning the 1982 Convention on the Law of the Sea necessitate consideration of possible conflict between the Convention and the Peace Treaty (→ Treaties, Conflicts between), although the Convention is neither in force, nor has it been signed by Israel or Jordan (→ Treaties, Conclusion and Entry into Force). In referring to passage through the Strait of Tiran and the Gulf of Aqaba under the Peace Treaty, the Egyptian declaration emphasizes the right of coastal States bordering straits to exercise sovereignty in these areas as provided by Part III of the 1982 Convention (cf. Art. 34(1)).

Determining the relationship of the 1982 Convention to the 1979 Peace Treaty requires reference to the interpretive clauses of the Convention itself. Art. 34(2) of the Convention stipulates that "[t]he sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to *other rules of international law*" (emphasis added). The 1979 Peace Treaty may not presently fall under Art. 35(c), which forecloses application of the Convention's provisions on straits used for international navigation *inter alia* to straits subject to long-standing international conventions. However, under Art. 311(2) and the Preamble of the 1982 Convention, the Peace Treaty should remain applicable as a compatible and supplementary agreement if or when the 1982 Convention enters into force or is generally recognized as reflecting customary international law, since the Convention lacks a provision covering the territorial sea in multinational bays (cf. Art. 10(1)).

The Peace Treaty also contains interpretive provisions which expressly resolve the issue of applicability for the parties. Under Art. VI, para. 4 the parties agree not to assume obligations in conflict with the Treaty. In the event of conflict, the obligations established under the Treaty are deemed binding and shall be implemented, subject to Art. 103 of the UN Charter (Art. VI, para. 5). These obligations, derived from and specifying those entailed in Resolutions 242 and 338 (see Peace Treaty, Preamble, para. 1), which implicitly fell within the Security Council's peacekeeping competence, arguably bind all UN members including Egypt and Israel. The régime of freedom of navigation and overflight under the Peace Treaty is thereby also assured priority where it differs from the provisions of the 1958 and 1982 Conventions.

Egypt's suspension from the Arab League and the severance of diplomatic and economic ties between Egypt and other Arab States following the conclusion of the Peace Treaty settled the issue of the Treaty's priority and validity concerning Egyptian mutual defence agreements, but this political situation shows signs of change. Consequently, the status of such agreements in relation to the Peace Treaty may again become relevant.

Art. VI, para. 2 of the Peace Treaty requires the parties to implement the Treaty irrespective of responses by third parties and independently of external instruments. Following conclusion of the Treaty, Art. VI, para. 5 expressly subordinated Egypt's other obligations to those established by the Treaty. According to the Agreed Minutes, Art. VI, para. 5 contains "no assertion that the Treaty prevails over other Treaties or agreements" or *vice versa*; nevertheless, the cited provision expressly avoids contravening Art. VI, para. 5.

It has been argued that by referring to Art. 103 of the UN Charter, which establishes for UN

members the priority of their obligations under the Charter, Art. VI, para. 5 of the Peace Treaty may allow Egypt to assert the priority, for example, of the Treaty of Joint Defence and Economic Co-operation between the Arab League States, June 17, 1950 (BFSP, Vol. 157, p. 669), with respect to the Peace Treaty. Nevertheless, in establishing the paramouncy of the UN Charter, Art. 103 refers only to the UN members' "obligations". Art. 103 does not prevent UN members from limiting their "right" under Art. 51 to → collective self-defence. Moreover, the Charter nowhere indicates that Art. 51 exhaustively regulates the right of collective self-defence and that this right may not be limited on the basis of other → sources of international law. Nor would an agreed limitation of the right seem to violate the doctrine of → *jus cogens*.

In practice, the question of the legal régime applicable to the Jordanian and Saudi territorial seas may be irrelevant, as access to Eilat from the Red Sea does not require passage through these waters. To the extent Art. 16(4) of the 1958 Convention and Arts. 37 to 44 and Art. 45(1)(b) and (2) of the 1982 Convention represent codifications of customary international law, these provisions require Jordan and Saudi Arabia to recognize the right of non-suspendable innocent passage or, possibly, transit passage in these waterways, although neither country has ratified either instrument (→ Treaties, Effect on Third States). The 1979 Peace Treaty may be evidence, moreover, that the trend to secure freedom of navigation as well as overflight through international waterways has become part of customary international law, binding on Jordan and Saudi Arabia without their express consent.

Treaty of Peace between Egypt and Israel, March 26, 1979, ILM, Vol. 18 (1979) 362-393.

Egyptian Declaration made upon Ratification of the 1982 Convention on the Law of the Sea, August 8, 1983, in: Office of the Special Representative of the Secretary-General for the Law of the Sea: Status of the United Nations Convention on the Law of the Sea (1985) 34–36.

Israeli Note with Respect to Declaration of Egypt, January 23, 1985, ibid., 46.

L.M. BLOOMFIELD, Egypt, Israel and the Gulf of Aqaba (1957).

A. MELAMID, The Legal Status of the Gulf of Aqaba, AJIL, Vol. 53 (1958) 412–413.

C.B. SELAK, Jr., A Consideration of the Legal Status of the Gulf of Aqaba, AJIL, Vol. 52 (1958) 660–698.

L. GROSS, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage through the Gulf of Aqaba, AJIL, Vol. 53 (1959) 564–594.

M.B.W. HAMMAD, The Right of Passage in the Gulf of Aqaba, RevEgypt, Vol. 15 (1959) 118–151.

L. GROSS, Passage through the Strait of Tiran and in the Gulf of Aqaba, Law and Contemporary Problems, Vol. 33 (1968) 125–146.

P.T. MERANI and J.L. STERLING, Legal Consideration of the Israeli-Egyptian Dispute Involving the Right of Innocent Passage through the Straits of Tiran, Indian JIL, Vol. 11 (1971) 411–434.

A.A. EL-HAKIM, The Middle Eastern States and the Law of the Sea (1979).

M. EL BARADEI, The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba. A New Legal Regime, AJIL, Vol. 76 (1982) 532–554.

Note, Legal Status of the Gulf of Aqaba and the Strait of Tiran: From Customary International Law to the 1979 Egyptian-Israeli Peace Treaty, Boston College International and Comparative Law Review, Vol. 5 (1982) 127–174.

R. LAPIDOTH, The Strait of Tiran, the Gulf of Aqaba and the 1979 Treaty of Peace between Egypt and Israel, AJIL, Vol. 77 (1983) 84–108.

STEVEN LESS

ARABIAN GULF *see* Persian Gulf

ARCTIC

1. Historical Background

The geographical term "Arctic" originally referred to the northern polar region situated beneath the constellation of Ursa major (*arktos* in Greek). The Arctic area is usually considered to be delimited by the northern tree line, which approximately coincides with the 10° isotherm of July as the warmest month of the year. The Arctic is also defined by the northern polar circle, and so covers the area within a circle drawn around the pole at 66.5° Northern latitude. This region measures nearly 20 million square kilometres, about half of which consists of ocean surface, approximately 90 per cent of which is permanently ice-covered; the remainder is constituted by Canadian, United States (Alaska), Soviet, Nor-

wegian, and Danish (→ Greenland) territories as well as numerous → islands. All of these islands are under the → territorial sovereignty of one of the above-mentioned States. A part of Iceland's → continental shelf is also situated within the northern polar or arctic circle.

Access to the Arctic Ocean is provided via the Bering Strait, the so-called North West Passage (Davis Strait, Baffin Bay), and the → Barents Sea.

Exploration of the Arctic area started around the year 1000 A.D. The search for a north-east or north-west passage began to intensify during the 16th century. The North Pole was first reached in 1909 and overflown by aircraft in 1926. The first passage under the North Pole was completed by a United States → submarine in 1958; similar operations have been undertaken by further United States, British and Soviet expeditions. Shipping in the Arctic is generally rare. Between 1975 and 1983, for example, the North-West Passage was crossed by 21 units, most of them under Canadian flag.

The Arctic is of enormous strategic importance to the United States and the Soviet Union alike, both of which installed marine bases, in Alaska and the Kola peninsula respectively. The area is appropriate for covert submarine operations and offers the shortest route between the territories of the two powers. The economic potential of the Arctic became evident in the second half of the 1960s. The Arctic shelf areas contain rich oil and gas resources, the exploitation of which began in the early 1980s especially in the Prudhoe Bay, Barents Sea and Kara Sea areas. Numerous → artificial islands and installations have been erected.

Due to extreme climatic conditions the exploitation of non-living resources requires special technological skills. The potentials of using icebergs as a fresh water resource are currently also under consideration. Nearly all military and commercial activities in the Arctic affect the ecological balance in the area (→ Environment, International Protection) and also involve the question of conservation of traditional varieties of aboriginal society (→ Indigenous Populations, Protection). A more recent problem is caused by the pall of smog which annually emerges above the Arctic between December and March, resulting from → air pollution in the industrial regions of North America, Europe and the Soviet Union. This phenomenon is expected to create a risk of melting the Arctic ice masses, which itself may affect the balance of world climate and ocean water levels.

2. Current International Legal Situation

Territorial sovereignty over all Arctic land territories is not fully clear in a formal sense, but currently gives rise to no cause for international conflicts. The Arctic Ocean is under the régime of the → law of the sea. Delimitation of marine zones is, however, an object of dispute (→ Maritime Boundaries, Delimitation).

All Arctic States claimed sovereignty for regions beyond their land territories, thereby proclaiming a sector theory, which has never been accepted as part of international law by the community of States. The development of the law of the sea has definitely removed the bases of such claims. The United States claim to a sector between 141° and 169° Western longitude also cannot be justified by the 1825 and 1867 treaties concerning Alaska, concluded between Russia on the one hand and the United Kingdom and the United States respectively (e.g. Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, February 16(28), 1825, CTS, Vol. 75 (1824–1825) p. 95).

United States territory in the Arctic is therefore confined to Alaska and some adjoining islands. The Soviet Union legitimately exercises → sovereignty over some islands to the north of her coast, presumably including the island Wrangel and the Franz Joseph Land archipelago, which for a long time had been claimed by the United Kingdom, Canada, the United States and Norway. The Soviet Union also by legislation declared a sector between 167° 49′ 30″ Western longitude and 32° 4′ 35″ Eastern longitude to be under her sovereignty. There is no justification for this claim. The → Spitzbergen/Svalbard archipelago was recognized as Norwegian territory in the Treaty Regulating the Status of Spitzbergen, and Conferring the Sovereignty on Norway, February 9, 1920

(LNTS, Vol. 2, p. 7); the status of Svalbard since then has not been under dispute. Canada's claims to some islands off her coast were rejected by the United Kingdom, Denmark and Norway for a period of time, but seem to have been accepted since the 1930s.

A more serious problem concerns competition for coastal States' rights to parts of the Arctic Ocean. Referring to the fact that the area is predominantly ice-covered, there have been tendencies to question the status of the Arctic Ocean as a sea area, in order to apply to it principles of land acquisition, or at least a legal régime *sui generis* (→ Territory, Acquisition). The → negotiations during the → Conferences on the Law of the Sea clearly showed, however, that these aspirations stand no chance of being accepted. The United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF.62/122 with Corr.) contains, in its Art. 234, only one clause reserved especially to ice-covered areas. This clause establishes particular powers with respect to environmental protection, thus leaving no doubt that a broad → consensus exists as to the question of the applicability of maritime law to all parts of the Arctic Ocean.

All Arctic States have claimed sovereign rights to segments of the Arctic Ocean. The reformulation of the international law of the sea, especially the competence to declare zones of special national jurisdiction have changed the legal status of the Arctic Ocean profoundly. Currently about half of it (exact cartographic material being not available) belongs to national zones. Norway in particular confirmed its status as an arctic State by establishing → exclusive economic zones and → fishery zones around Svalbard, Bear Island and → Jan Mayen.

Open questions of delimitation exist to date between Norway and Denmark (Jan Mayen and Greenland), Norway and the Soviet Union (concerning the continental shelf in the Barents Sea), the United States and the Soviet Union (Bering and Chukchi Seas), and the United States and Canada (Beaufort Sea; → American-Canadian Boundary Disputes and Cooperation). A bilateral understanding between Iceland and Norway about exclusive economic zones and shelf delimitation was reached in 1981 (Agreement on the Continental Shelf between Iceland and Jan Mayen, October 22, 1981, ILM, Vol. 21 (1982) p. 1222). Another agreement was reached between Canada and Denmark in 1973 (Agreement Relating to the Delimitation of the Continental Shelf between Greenland and Canada, December 17, 1973, UNTS, Vol. 950, p. 147).

The Norwegian-Soviet conflict seems to bear particular political implications, the Soviet Union still having recourse to the legally invalid sector theory; a provisional understanding has been reached, however, proclaiming a common jurisdiction and actual usage of a marine area north of the land frontier between the two States. In January 1985 the Soviet Union adopted a treaty establishing straight base lines around three → archipelagos according to Part IV of the 1982 Law of the Sea Convention. A similar Canadian Order-in-Council establishing straight base lines was adopted by Canada in September 1985. It remains doubtful, and subject to State practice, if these legislative acts of the two countries will be accepted as valid under international law.

The remainder of the Arctic Ocean has to be considered as → high seas, but not as a closed or semi-closed sea according to Art. 122 of the 1982 Convention, as is argued, for parts of it, by the Soviet Union. In spite of the permanent ice cover all States here enjoy the regular freedoms of the sea, including the freedom to conduct marine scientific research. The precarious ecological balance calls for global and regional measures according to Art. 197 of the 1982 Law of the Sea Convention.

3. Special Problems of International Law

In addition to the already-mentioned delimitation problems concerning marine zones as well as continental shelves, major legal problems in the Arctic area are currently caused by the indeterminate status of the North-West Passage, the future of indigenous populations and environmental matters (→ Marine Environment, Protection and Preservation).

The economic importance of the North-West Passage will grow according not only to technological progress in navigation through and under ice-covered water but also to increasing profitability of the exploitation of Arctic non-living

resources. Developments depend to a certain extent on crude oil prices. There is some controversy as to whether the North-West Passage is to be considered as a → strait used for international navigation, which would bring it under the régime of transit passage, being less favourable to Canada than the rules of innocent passage applying in coastal waters (→ Innocent Passage, Transit Passage). The relatively minor sea traffic in the strait, amounting to about a dozen complete passages by non-Canadian ships in a period of 80 years, is an argument against the application of transit passage rules. It is an open question, however, if and how Canada could prevent a change of the legal situation, in which oil producers especially are highly interested. Canada and the United States concluded an Agreement on Arctic Cooperation, dated January 11, 1988 (Communiqué No. 010 of the Canadian Foreign Office, January 11, 1988), which provides that navigation by United States ice breakers within waters claimed to be internal by Canada will only be undertaken with Canada's consent. It is also specified that by the agreement the respective positions of the two States "on the Law of the Sea in this or other maritime areas" are not affected.

The traditional way of life of Inuit nomads, mostly of Canadian → nationality, and of United States Eskimos, living partially on ice-covered parts of the Arctic Ocean by fishing and seal hunting, will be adversely affected by growing resource exploitation. The future of traditional arctic life depends mainly on its preservation by national law. In Canada, law reforms on the status of the Inuit are under way, expanding Canada's jurisdiction over persons living off the coast line. In the United States, an Alaska Native Claims Settlement Act was enacted in 1971 (United States Statutes at Large, Vol. 85 (1971) p. 688). All national regulations in the field have to take the international legal rules on collective protection of → minorities into account. The Inuit Circumpolar Conference, a → non-governmental organization recognized by the → United Nations, plays an important role in adapting relevant Canadian laws.

The development of international environmental law in the Arctic was advanced in 1970 by the Canadian Arctic Waters Pollution Prevention Act (ILM, Vol. 9 (1970) p. 543). This act, at first rejected as *ultra vires* by the United States Government, and to a certain extent by international legal doctrine, proclaims a 100 nautical miles zone of special jurisdiction and enforcement rights with regard to environmental protection. Today the Act seems to be widely accepted as lawful (cf. Art. 234 of the 1982 Law of the Sea Convention). As long as a regional régime of international environmental protection, comparable to the models found in the → Baltic Sea, Mediterranean Sea (→ Mediterranean Pollution Conventions), and the → Persian Gulf, has not been established in the Arctic, and so long as bilateral agreements (e.g. the 1983 Canadian-Danish Treaty on Monitoring in the Baffin Bay-Davis Strait Area, ILM, Vol. 23 (1984) p. 269) remain a rare exception, only unilateral measures on the basis of Art. 234 can be the foundation of environmental protection law in the Arctic.

4. Evaluation

Rich resources and strategic conditions have rapidly changed the political importance of the Arctic area in recent years. The ecological vulnerability of the area, including possible consequences for world climate, requires clear rules of international law concerning the different types of economic activity which are carried out in the Arctic ice as well as a monitoring scheme. General universal international law of the sea is not sufficient in this respect, whereas the development of national laws does not assure a well-balanced régime which takes other States' interests into account. It has been proposed, therefore, to elaborate an environment-oriented international régime under the responsibility of Arctic States. The model provided by the → Antarctica system is of limited use as a prototype, for three reasons: The strategic importance of the Arctic is far greater than that of Antarctica; the Arctic area is also more widely inhabited than Antarctica; and, finally, the involvement of non-regional States is currently negligible in the Arctic, but of high importance in Antarctica.

R.S. REID, The Canadian Claim to Sovereignty over the Waters of the Arctic, CanYIL, Vol. 12 (1974) 111–136.

R. WOLFRUM, Die Beschränkungen für die Freiheit der Schiffahrt durch das kanadische "Arctic Water Pollution Prevention Act" sowie die internationalen

Übereinkommen zum Schutze der Meeresumwelt, in: R. Bernhardt and W. Rudolf (eds.), Die Schifffahrtsfreiheit im gegenwärtigen Völkerrecht (1975) 143–162.

B.J. FEDER, A Legal Regime for the Arctic, Ecology Law Quarterly, Vol. 6 (1978) 785–829.

D. PHARAND, The Legal Status of the Arctic Regions, RdC, Vol. 163 (1979 II) 49–115.

C. ARCHER and D. SCRIVENER, Frozen Frontiers and Resource Wrangles: Conflict and Cooperation in Northern Waters, International Affairs, Vol. 59 (1982/1983) 59–76.

J. MOLDE, The Status of Ice in International Law, NordTIR, Vol. 51 (1982) 164–178.

B. JOHNSON THEUTENBERG, The Arctic Law of the Sea, NordTIR, Vol. 52 (1983) 3–39.

D. VANDERZWAAG and D. PHARAND, Inuit and the Ice: Implications for Canadian Arctic Waters, CanYIL, Vol. 21 (1983) 53–84.

U. JENISCH, Der Arktische Ozean und das Neue Seerecht, Außenpolitik, Vol. 35 (1984) 204–222.

J.W. KINDT and T.J. PARRIOTT, Ice-covered Areas: The Competing Interests of Conservation and Resource Exploitation, San Diego Law Review, Vol. 21 (1984) 941–983.

D. PHARAND, The Legal Regime of the Arctic: Some Outstanding Issues, International Journal, Vol. 39 (1984) 742–799.

D. PHARAND, Northwest Passage. Arctic Straits (1984).

K.M. SHUSTERICH, International Jurisdictional Issues in the Arctic Ocean, Ocean Development and International Law, Vol. 14 (1984) 235–272.

O.R. YOUNG, The Age of the Arctic, Foreign Policy, Vol. 61 (1985/1986) 160–179.

C. BERNIER, Les droits territoriaux des Inuit au large des côtes et le droit international, CanYIL, Vol. 24 (1986) 314–334.

B.A. BOCZEK, The Arctic Ocean and the New Law of the Sea, GYIL, Vol. 29 (1986) 154–189.

J.E. HARDERS, The Arctic Ocean: Environmental Protection and Circumpolar Co-Operation – An Assessment and a Proposal for a Legal Regime, in: Energy Law 1986, Proceedings of the International Bar Association Seminar Munich (1986) 493–532.

W. ØSTRENG, The Soviet Union in Arctic Waters (1986).

C. LAMSON and D. VANDERZWAAG, Arctic Waters: Needs and Options for Canadian-American Cooperation, Ocean Development and International Law, Vol. 18 (1987) 49–99.

F.-A. MATHYS, Accord de coopération dans l'Arctique entre le Canada et les États-Unis d'Amérique, CanYIL, Vol. 25 (1987) 345–353.

D. PHARAND, Canada's Sovereignty over the Newly Enclosed Arctic Waters, CanYIL, Vol. 25 (1987) 325–343.

J. WOEHRLING, Les revendications du Canada sur les eaux de l'archipel de l'Arctique et l'utilisation immémoriale des glaces par les Inuit, GYIL, Vol. 30 (1987) 120.

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AUSTRIA

1. The Formation of the Republic

The formation of the Republic of Austria was a direct consequence of the collapse of the Austro-Hungarian Monarchy. On October 30, 1918 the Provisional National Assembly for German-Austria adopted a provisional constitution (Staatsgesetzblatt (StGBl) 1918/1). On November 11, 1918, Emperor Karl I renounced his further participation in the government. On November 12, 1918, the Republic of Deutschösterreich (German-Austria) was proclaimed.

2. Territory

In accordance with the principle of → self-determination as expressed in → Wilson's Fourteen Points, the new Republic claimed all territories inhabited by the German speakers of the Austrian half of the Dual Monarchy (StGBl 1918/40). This would have left a population of over 10 million of the 12 million German speakers of the former Monarchy (census 1910) within the boundaries of the Republic. Art. 27 of the → Saint-Germain Peace Treaty of September 10, 1919 drastically reduced these claims leaving a territory inhabited by about 6.5 million. Art. 36 specifically provided for a cession of → South Tyrol in favour of Italy. In addition, the German speaking parts of Bohemia and Moravia (see also Boundary Treaty with Czechoslovakia of March 10, 1921, Austrian Bundesgesetzblatt (BGBl) 122/396), and portions of southern Styria and of southern Carinthia had to be given up.

The Klagenfurt area of Carinthia (Art. 49) was partitioned into two zones. A referendum in the southern zone held on October 10, 1920 yielded a majority in favour of Austria. Thereupon both zones were incorporated into Austria in accordance with the provisions of Art. 50. A western strip of Hungary was assigned to Austria by Art. 27. A bilateral agreement between Austria and Hungary of October 13, 1921 (BGBl 1922/138) settled the modalities of the handover in accordance with a referendum held on December 14 to 16, 1921.

After the re-establishment of Austria in 1945 the frontiers remained unaltered, a fact which was specifically confirmed by Art. 5 of the → Austrian State Treaty of May 15, 1955 (UNTS, Vol. 217, p. 223). Subsequently, boundary treaties were

concluded with Yugoslavia on April 8, 1965 and October 29, 1975 (BGBl 1966/229, 1976/585), Switzerland on July 20, 1970 (BGBl 1972/331), Czechoslovakia on December 21, 1973 (BGBl 1975/344) and the Federal Republic of Germany on February 29, 1972 (BGBl 1975/490).

3. *Independence*

(a) Austria and Germany

(i) The collapse of the Austro-Hungarian Empire led to a deep crisis of identity in the small Republic. The idea of a union with Germany (*Anschluß*) had widespread support and found its expression in early statutory enactments (StGBl 1918/5, StGBl 1919/174). By Art. 88 of the Saint-Germain Peace Treaty Austria assumed the obligation to remain independent except with the consent of the → League of Nations. Art. 80 of the → Versailles Peace Treaty (1919) imposed a corresponding obligation on Germany to respect Austria's independence. A subsequent statute changed the name of the State from "Deutsch-österreich" to "Republik Österreich" and repealed the statutory provisions concerning union with Germany (StGBl 1919/484).

(ii) The Geneva Protocols of October 4, 1922 (BGBl 1922/842, LNTS, Vol. 11, p. 387) providing a loan to Austria under the auspices of the League of Nations confirmed Austria's independence and added provisions concerning economic independence from other States. In 1931, plans for the creation of a customs régime between Germany and Austria led to the request for an advisory opinion from the → Permanent Court of International Justice (PCIJ) by the Council of the League of Nations. In its advisory opinion of September 5, 1931 (PCIJ, Series A/B Nr. 41) the Court held that the planned customs union, while not incompatible with Art. 88 of the Saint-Germain Peace Treaty, would violate the Geneva Protocols (→ Customs Régime between Germany and Austria (Advisory Opinion)). The customs union did not materialize.

(iii) A communiqué of July 11, 1936 setting out the text of an informal agreement between the two States contained an explicit recognition of Austria's sovereignty by Germany (Akten zur Deutschen Auswärtigen Politik, Series C: 1933–1936, Vol. V(2) p. 706).

(iv) In 1938, pressure by Nazi Germany on Austria prompted the Austrian Government to call a referendum at short notice for March 13, to confirm Austria's determination to remain independent. On March 11, Hitler issued an → ultimatum threatening an invasion and demanding the cancellation of the referendum and the resignation of the Austrian Government. A government subservient to Germany's wishes was installed on that day. On March 12, Germany started a full scale invasion of Austria on the pretext of a call for military help by the new puppet government. The relevant telegram was later identified as a forgery. There was no resistance on the part of the Austrian army.

On March 13, a statute for the unification with Germany (*Anschlußgesetz*), drafted by the German Government, was communicated to the Austrian Government and promulgated as an Austrian (BGBl 1938/75) and as a German statute. The circumstances of its passage in Austria suggest several grave irregularities. On April 10, a referendum arranged in order to confirm the established fact of the union with Germany yielded the official result of 99.73 per cent in favour.

There were formal → protests by Britain, France and Mexico. A number of other States condemned the *Anschluß* without submitting formal protests. Austria effectively ceased to exist as an independent State. Its foreign relations were completely taken over by Germany. There was no government in exile. Its nationals were treated as Germans abroad.

(v) In the Moscow Declaration on General Security of October 30, 1943 (DeptStateBull, Vol. 9, No. 228, p. 308) the governments of the United Kingdom, the Soviet Union and the United States declared the → annexation imposed upon Austria null and void, described Austria as the first free country to fall a victim to Hitlerite aggression and expressed the wish to see a free and independent Austria re-established. At the same time, Austria was reminded of its responsibility for participation in the war.

(vi) Austria proclaimed its independence on April 27, 1945 (StGBl 1945/1) a few days before the effective end of World War II. The Declaration of Independence emphasizes the illegality of Austria's annexation of 1938 and declares it null and void. Since 1945, Austria's independence has

been an accepted fact which has never been seriously challenged internally or on the international level. The experience of the period of 1938 to 1945 has dispelled the doubts of Austrians about their national identity. The idea of the *Anschluß* which was a recurrent theme after World War I is no longer a political issue.

(vii) The Austrian State Treaty (1955) confirms Austria's re-establishment as a free and independent State (Art. 1), its independence and territorial integrity (Art. 2) and contains an explicit prohibition of a political or economic union with Germany in any form whatsoever (Arts. 3 and 4).

(b) Occupation by the Allied Forces

(i) At the end of World War II, Austria was occupied by the troops of the four Allied Powers. Its international freedom of action was severely restricted in the initial period after the war. The First Control Agreement between the four Allied Powers of July 4, 1945 (British Command Paper, Cmd. 6958, Treaty Series No. 49 (1946) p. 3) vested supreme power in Austria in an Allied Council. All legislative and executive activities of Austrian authorities were subject to the orders and supervision of the Allied military government.

(ii) The Second Control Agreement of June 28, 1946 (UNTS, Vol. 138, p. 85) brought a considerable relaxation of Allied control. It was concluded after the first free elections on November 25, 1945 and the appointment of a democratic government. In particular, Austria was granted the power to pass legislation and to conclude treaties subject only to a unanimous → veto by the Allied Council within a period of 31 days. Only constitutional laws required express approval (Art. 6). The lack of agreement within the Allied Council meant that Austria gained a relatively free hand. In addition, Austria was authorized to establish diplomatic and consular relations with governments of the → United Nations (→ Diplomatic Relations, Establishment and Severance). Establishment of such relations with other powers required the approval of the Allied Council (Art. 7). During this period Austria re-established diplomatic relations with many countries, concluded numerous treaties and was admitted to a number of international organizations. Admission to the United Nations was also sought during this period but had to be postponed until after the entry into force of the Austrian State Treaty (1955), due to Soviet resistance.

(iii) With the entry into force of the Austrian State Treaty on July 27, 1955 (signed on May 15, 1955) Austria recovered its full → sovereignty and freedom of action in the international sphere. The Control Agreement and all other arrangements governing the occupation were terminated and all Allied Forces were withdrawn (Art. 20).

(c) Permanent neutrality

The status of → permanent neutrality for Austria was a political condition for the conclusion of the Austrian State Treaty (1955) but was not incorporated into it. Austria insisted on a procedure which would underline the voluntary character of the adoption of this status. In the Moscow Memorandum Concerning Results of Negotiations between the USSR and Austria of April 15, 1955 (DeptStateBull, Vol. 32 (1955) p. 1011) the members of the Austrian delegation undertook to bring about a declaration which would bind Austria to maintain a status of permanent neutrality as practised by Switzerland.

In accordance with this undertaking, a Constitutional Law on the Neutrality of Austria was adopted on October 26, 1955 (BGBl 1955/211) after the termination of the occupation by the Allied Forces. It was notified to all States which had diplomatic relations with Austria at the time and was recognized by a large number of States including the four Allied Powers.

4. Identity and Continuity

(a) From the Monarchy to the First Republic

The official Austrian view after the end of World War I was that the newly established Republic was not identical with the Monarchy but had the same status as the other successor States. At the Saint-Germain Conference this theory of discontinuity was consistently maintained by the Austrian delegation. The importance of this question lay primarily in the responsibility for the war. The Allied Powers did not accept the Austrian position. The Saint-Germain Peace Treaty, although not designated as such, bears all the elements of a peace treaty with a defeated enemy (→ Peace Treaties; → Peace Treaties after World War I). Art. 177 contains a war-guilt clause and

imposes the obligation to pay → reparations. The treaties which were to bind Austria were specified in Arts. 234 to 247 and 313. Nevertheless, Austrian legislation (e.g. StGBl 1919/484), court practice and treaty practice with respect to treaties not covered by the Saint-Germain Peace Treaty denied any continuity of the Republic with the Monarchy.

(b) Occupation or annexation by Germany

(i) The *Anschluß* of 1938, although clearly in violation of international law, effectively removed Austria as an independent State. The Moscow Declaration on General Security, October 30, 1943 and the Austrian Declaration of Independence April 27, 1945 (StGBl 1945/1) declared the union with Germany null and void.

Official Austrian doctrine as well as the majority of Austrian authors have maintained that Austria did not cease to exist in the period of 1938 to 1945 but merely fell victim to an illegal foreign occupation which deprived it of its capacity to act as a State (→ Continuity). Therefore, post-World-War-II Austria was identical in all respects with the First Republic and continued to carry its rights and obligations. Another view is that Austria was effectively annexed in 1938, ceased to exist and was re-established as a new State in 1945. This point was important not only for the question of Austria's participation in World War II and any responsibility arising from it, but also for questions of → nationality and for the continued validity of pre-World-War-II treaties.

(ii) After the war, Austria was not regarded by the Allied Powers as an enemy country but as a liberated area. On the other hand, an occupation of ten years is difficult to reconcile with the status of a non-belligerent. The Austrian State Treaty (1955) is not designated as a peace treaty. Its → preamble is ambivalent on the point of Austria's continuity. On the one hand, it reaffirms the Moscow Declaration on General Security, October 30, 1943 and points out that Austria was "liberated from the domination of Hitlerite Germany". On the other hand, it refers to "the annexation of Austria by Hitlerite Germany and participation of Austria in the war as an integral part of Germany". A clause referring to a certain responsibility by Austria for the war was dropped from the drafts and Art. 21 states that no reparation shall be exacted from Austria arising from World War II. The acceptance of Austria, not as a participant in the war but as a victim has facilitated a tendency in Austria to ignore the political and moral responsibility arising from crimes committed by Austrians serving as officials for Nazi Germany.

(iii) In 1945 and thereafter, questions of nationality were treated in Austria on the assumption of the uninterrupted validity of Austrian nationality law. Therefore, individuals who had Austrian nationality in 1938 or would have obtained it under Austrian law thereafter, were treated as Austrians in 1945 (StGBl 1945/59). By contrast, German practice regards German nationality as validly conferred upon all Austrians, at any rate until 1945.

(iv) In the area of treaty relations and membership in international organizations, Austria sought to resume its legal status in 1945 as it existed in 1938 (→ International Organizations, Membership). However, State practice is not entirely uniform. Austria's attempts to participate in the dissolution of the League of Nations as a full member were not successful. Austria's delegation was only admitted in the capacity of an → observer. The General Conference of the → International Labour Organisation (ILO) in a resolution of June 24, 1947 "readmitted" Austria and at the same time took note that ILO Conventions ratified by Austria before 1938 continued to be binding upon it (Conférence Internationale du Travail, Trentième Session, Genève 1947, Compte Rendu des Travaux, p. 568). With regard to the → Universal Postal Union, Austria simply reappeared on the list of members in 1945 with the date of accession given as 1875. Also, the → International Telecommunication Union amended its list of members to include Austria in 1945.

Austria's pre-1938 bilateral treaties were mostly reactivated by agreed declarations of reapplication through informal exchanges of → notes. In some cases treaties were also applied without such declarations by Austrian courts. The contentious question of the continued validity of the → Concordat of 1933 was eventually also settled in favour of continuity. With respect to multilateral treaties, Austria reactivated its participation in most cases. Foreign court practice on the con-

tinued applicability of pre-1938 Austrian treaties is contradictory.

5. *Present Situation*

In 1988 Austria had diplomatic relations with 150 States. It holds membership in most important global and European international organizations. The notable exceptions are military → alliances and the → European Communities. There are, however, Free Trade Agreements with the → European Economic Community and the → European Coal and Steel Community (→ Permanent Neutrality and Economic Integration). Within international organizations Austria pursues an active policy as part of the neutral and non-aligned group (→ Non-Aligned States). Statistical surveys of Austria's voting pattern show a clear preference for Western positions and a certain affinity with Scandinavian voting behaviour.

Austria's membership in the United Nations has not led to any difficulty arising from its status of permanent neutrality. At the time of Austria's admission there were no misgivings in the United Nations concerning the compatibility of membership and permanent neutrality. According to Austria's official position, Art. 43(1) of the → United Nations Charter providing for special agreements between the Security Council and members which make available armed forces, assistance and facilities, would preclude an automatic participation in enforcement measures involving the use of armed force (→ Use of Force). Moreover, it is pointed out that Art. 48(1) leaves it to the Security Council to determine which members are to carry out the action for the maintenance of international peace and security.

Recognition of Austria's permanent neutrality by the four Allied Powers who are permanent members of the Security Council is seen as an → estoppel against a decision calling upon Austria to act in a manner contrary to its status of permanent neutrality. The practice of the Security Council has not provided any instances testing this theory. Austria is participating or has participated in a number of → United Nations forces in the framework of its peacekeeping operations notably in the Congo (ONUC), the Middle East (UNEF II, UNDOF and UNTSO) and Cyprus (UNFICYP).

Austria has made strong efforts to establish Vienna as a third United Nations Headquarters. United Nations agencies in Vienna include the → International Atomic Energy Agency, the → United Nations Industrial Development Organization, the → United Nations Commission on International Trade Law, the Division of Narcotic Drugs, the United Nations Fund for Drug Abuse Control and the → United Nations Relief and Works Agency for Palestine Refugees in the Near East.

In the area of official development assistance Austria's contributions measured in per cent of gross national product are clearly below the average of States members of the → Organisation for Economic Co-operation and Development.

The vast majority of treaties in force for Austria have been concluded since 1945. It is estimated that there are about 1300 bilateral and 370 multilateral treaties in this category. Austria's treaty profile is comparable to that of other States of similar size and location. Roughly half of the bilateral treaties concluded in the first 30 years after World War II were with Western European States, about a quarter with Eastern Europe. In the field of multilateral treaties, Austria has been particularly active in the area of → human rights conventions.

S. VEROSTA, Die internationale Stellung Österreichs 1938 bis 1947 (1947).

A. MERKL, War Österreich von 1938 bis 1945 Bestandteil des Deutschen Reiches?, Archiv des öffentlichen Rechts, Vol. 82 (1957) 480–490.

R.E. CLUTE, The International Legal Status of Austria 1938–1955 (1962).

K. MAREK, Identity and Continuity of States in Public International Law (2nd ed. 1968) 199–236, 338–368.

W. JAKUSCH, Okkupationstheorie, Annexionstheorie und das ius postliminii, Österreichische Juristen-Zeitung, Vol. 25 (1970) 258–263.

H. NEUHOLD, Der österreichische Staatsvertrag als Grundlage der österreichischen Außenpolitik, Österreichische Monatshefte, Vol. 25 (1980) Nr. 5, 8–19.

I. SEIDL-HOHENVELDERN, Die Überleitung von Herrschaftsverhältnissen am Beispiel Österreichs, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Suppl. 5 (1982).

W. HUMMER, Der internationale Status Österreichs seit 1918, in H. Neuhold, W. Hummer and C. Schreuer, Österreichisches Handbuch des Völkerrechts Vol. 1 (1983) 407–441, Vol. 2 (1983) 442–474.

W. KARL, Die Verträge der Republik Österreich – Bedeutung, Vertragsbestand und Vertragsprofil, Jahr-

buch der Universität Salzburg 1983–1985 (1987) 105–121.

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BALTIC SEA

1. Geographical Situation

The Baltic Sea is a shallow sea connected with the Atlantic Ocean through the Skaw, a part of the North Sea between Norway and the Danish Peninsula of Jutland. It extends east of Jutland and the Scandinavian Peninsula from about 54° N almost to 66° N, close to the Arctic Circle. The Baltic Sea consists of the Kattegat between Jutland and the west coast of Sweden, the Sound and the Belts, the Baltic Sea proper including the western and middle Baltic, the Gulf of Bothnia north of the → Aaland Islands, the Gulf of Finland and the Gulf of Riga to the east. It has an area of approximately 370 000 square kilometres. Its average depth is only 55 metres with a maximum depth of 459 metres in the Landsort Deep, one of the four major deep basins in the middle Baltic. The coastal States of the Baltic Sea are Denmark, Sweden, Finland, the Soviet Union, Poland, the German Democratic Republic, and the Federal Republic of Germany.

2. Definition

Although the Skaw and the Kattegat form a hydrographical unit, the Skaw is a part of the North Sea, whereas the Kattegat is generally considered as a part of the Baltic Sea. The Helsinki Convention of 1974 includes the Kattegat in the "Baltic Sea Area" (Art. 1) and determines the parallel of the Skagerrak at 57° 44' 8'' N as the southern boundary of the Skaw. So does the MARPOL Convention of 1973/1978, under which the Baltic Sea is a "special area". The Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft of 1972 (Art. 2), which includes the Kattegat in its area of application, and the Gdansk Convention of 1973 (Art. II), which excludes the Kattegat, define the southern boundary of the Kattegat as a line across the northern approaches of the Sound and the Belts. The Agreement on the Protection of Salmon Population in the Baltic Sea of 1962 applies to the Baltic Sea without the Sound and the Belts (Art. 1).

3. Zones of National Jurisdiction

The coastal States of the Baltic Sea apply a system of straight → baselines where the configuration of the coastline makes this appropriate. Finland (Decree No. 464, August 18, 1956), Sweden (Decree No. 375, June 3, 1966), Denmark (Decree No. 437, December 21, 1966, revised by Decree No. 189, April 19, 1978), and the Soviet Union (Decrees of February 7, 1984) have employed straight baselines at most parts of their coasts in the area. The Federal Republic of Germany, the straight baselines of which are published in marine charts effective May 8, 1978, and the German Democratic Republic (Regulation of June 15, 1972) still have considerable stretches of normal baselines. Poland (Act No. 37, December 17, 1977) has closed only the Gdansk Bay with a straight baseline.

Denmark and the Federal Republic of Germany have a → territorial sea of only 3 nautical miles and Finland of 4 nautical miles, whereas the Soviet Union (Decree of June 15, 1927), Poland (Act No. 37, January 1, 1978) and Sweden (Act of July 1, 1979, amended January 1, 1980) have extended their territorial seas to 12 nautical miles. Denmark, the German Democratic Republic, Finland and the Soviet Union are parties to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 (→ Conferences on the Law of the Sea).

Beyond the territorial seas, the → sea-bed and subsoil of the whole Baltic Sea constitutes → continental shelf. All coastal States of the Baltic, except for Poland, made express continental shelf proclamations during the 1960s. With the exception of the Federal Republic of Germany, they are parties to the 1958 Geneva Convention on the Continental Shelf. There is no off-shore production of oil and gas on the continental shelf of the Baltic Sea as yet, but there is dredging of sand and gravel.

After Denmark (in the Kattegat), Poland and Sweden had established exclusive → fishery zones of 12 nautical miles, Sweden extended her exclusive fisheries jurisdiction beyond that in 1977

(Decree No. 642). The other coastal States of the Baltic followed this example, and by the end of 1978 the exclusive fishery zones enclosed the whole Baltic Sea. In 1984 the Soviet Union (Decree No. 137, March 1, 1984) replaced her exclusive fishery zone by an → exclusive economic zone.

Delimitation of the existing territorial seas and of zones of national jurisdiction has widely been effected by 12 bilateral agreements of coastal States in the Baltic (→ Maritime Boundaries, Delimitation). A large area of overlapping claims ("grey zone") in the middle Baltic has been dissolved by drawing the boundary line between the Soviet exclusive economic zone and the Swedish exclusive fishery zone (Agreement of April 18, 1988). But there still exists a "grey zone" of overlapping fisheries jurisdiction and continental shelf claims between Denmark (island of Bornholm) and Poland. Also, certain boundary lines in the southern Baltic between Sweden and Poland, Denmark and Sweden, and Denmark and the German Democratic Republic remain to be established by agreement.

4. The Baltic Straits

(a) The Sound and the Belts (Little Belt and Great Belt) are the natural approaches to the Baltic Sea (→ Straits). The only alternative approach for sea-going vessels from the North Sea is through the → Kiel Canal. Measured by tonnage flows, the Great Belt is the most important seaway to the Baltic, although greater numbers of vessels are passing through the Sound or the Kiel Canal.

The Great Belt between the Danish Islands of Fyn and Langeland in the west and Sjaelland and Lolland in the east is at its smallest point 9.2 kilometres wide and as a minimum 17 metres deep. Including the Samsoe Belt as its northern approach, it is part of a shipping route ("Route T", in the southern Belt "Route H") which leads through waters of different legal status from Skagen to the Kadet Channel between the Danish island of Falster and the coast of the German Democratic Republic. Ships with a draught of not more than 15 metres, which normally means not more than 150 000 tons deadweight, can navigate on a → sea lane through the Great Belt. Traffic separation schemes have been established upon recommendation of the → International Maritime Organization (IMO) at congested sections of Route T. In November 1975, the IMO (then IMCO) recommended certain standards of equipment for ships of 40 000 tons deadweight or more when passing through the entrances to the Baltic Sea. The Danish Government renders navigational services such as radio telecommunication, navigational aids, pilotage, and ice-breaking on Route T.

The Sound (Øresund) between Sjaelland and Sweden is 4 kilometres wide at its narrowest point. Its navigational channel, with traffic separation schemes at both approaches, allows the access of large ships to Copenhagen and Malmoe from the Kattegat, but it is only 8 metres deep in its southern part.

The Little Belt between Jutland and Als to the west and Fyn and Aeroe to the east is a narrow, winding waterway, only 700 metres wide at its narrowest point, with strong currents. Being bridged since 1935, it is mainly used for coastal navigation by small vessels with a clearance of less than 33 metres.

The Danish Belts and the Sound are straits used for international navigation between one part of the → high seas in the Kattegat and another part of the high seas in the Baltic Sea proper. The establishment of exclusive economic zones on either side would not affect the present legal status of the straits. The navigational channel of the Sound is partly in the Swedish, partly in the Danish territorial sea; that of the Great Belt extends widely in the Danish territorial sea; since 1966, the Little Belt and its approaches have been completely enclosed as → internal waters of Denmark.

Ships of all States, whether coastal or not, enjoy the right of → innocent passage through the Belts and the Sound as well as through the usual approaches to these straits. The obligation not to hamper the innocent passage of foreign ships through the straits would not prevent the riparian States exercising their sovereign right to bridge the Sound or the Great Belt, provided that the existing possibility of tall sea-going vessels to pass through the straits is preserved. The right of innocent passage applies to all foreign ships and sea-going vessels including → warships and government ships operated for non-commercial purposes (→ State Ships). There shall be no suspension of

innocent passage through the mentioned straits. The non-suspensible right of innocent passage through straits used for international navigation is provided for in Art. 16(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and it is contained in corresponding rules of → customary international law as well. The → International Court of Justice (ICJ) recognized this right for warships in the → Corfu Channel Case, in which it also invented the term "straits used for international navigation" (ICJ Rep. 1949, at p. 28).

Denmark declared in 1857 "entire freedom of navigation of the Sound and the Belts in favour of American vessels . . . forever" (Art. I of the Convention Concerning the Redemption of the Sound Dues, signed in Washington). In 1919, the → Versailles Peace Treaty (LNTS, Vol. 7, p. 35), "in order to ensure free passage into the Baltic to all nations" prohibited Germany from fortifying certain areas (Art. 195). As any interpretations of such phrases used in old treaties have to take into account the subsequent development of customary international law and the relevant 1958 Geneva Convention as well as the firmly established practice of the coastal States concerned, "freedom of navigation" or "free passage" through the straits means innocent passage in the existing international law of today.

Denmark and Sweden have taken account of the non-suspensible right of innocent passage through the Belts and the Sound in their laws and practice. In accordance with Art. 5(2) of the 1958 Geneva Convention on the Territorial Sea and the corresponding customary international law, Denmark provided in Art. 3 of its Ordinance No. 437 of 1966 that the establishment of straight baselines "shall involve no restrictions in the existing right of passage for foreign vessels through those parts of the internal waters in the Samsoe Belt, the Little Belt, the Great Belt, and the Sound, which are normally used for such passage". For the purpose of its Ordinance of February 27, 1976, Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, "the term 'passage' means innocent passage within the meaning of international law" (Section 1 subsection 3).

Simultaneous passage of more than three foreign warships of the same nationality through the Great Belt, Samsoe Belt or the Sound requires prior notification (Section 3 subsection 4). In accordance with international law, → submarines are required to navigate on the surface and to show their flag while navigating in the territorial waters (Section 6 subsection 2). As there is no corresponding right of → overflight in international law, military aircraft, except in distress, have to obtain prior permission through diplomatic channels for flights over or landing in Danish territory including the straits (Section 7).

According to the Royal Notice No. 366 of June 3, 1966, Concerning the Admission to Swedish Territory of Foreign Warships and Military Aircraft, Sweden does not require foreign warships to give notice for passage through the Sound (Art. 4). Foreign military aircraft shall be admitted to pass through the Swedish air space in the Sound (Art. 5).

In times of → war or → armed conflict, belligerent warships also have the right of innocent passage through the straits. The observation of the Court in the → *Wimbledon* Case concerning "great international waterways" – i.e. → canals – that passage of such ships does not compromise the neutrality of the riparian State (→ Permanent Court of International Justice, Series A, No. 1, p. 25 (1923)) applies *a fortiori* to straits used for international navigation. Yet, in the situation of → self-defence, the riparian State concerned may close the strait for enemy warships (ibid., p. 23).

Several legal scholars consider the régime of transit passage, which is provided for straits used for international navigation in Part III Section 2 of the UN Convention on the Law of the Sea of 1982, as applying to the Sound and the Belts as well. But pursuant to Art. 35(c), the Baltic Straits will not be affected by Part III of the Convention, because the régime of passage in these straits is partly regulated by the Treaty Concerning the Sound Dues signed by Denmark and the European shipping nations on March 14, 1857 in Copenhagen. This Treaty of Copenhagen – and for American ships the Washington Convention of the same year – abolished the Sound dues, a major source of fiscal revenues of the Danish Crown, for foreign → merchant ships. Warships never had to pay such dues.

However, the Treaty of Copenhagen did not only abolish charges burdening the sea trade. A

century before the rule was generally recognized in Art. 18 of the 1958 Geneva Convention on the Territorial Sea, it established a duty of the coastal State not to levy any dues or other charges whatsoever on ships passing through the Belts or the Sound (Art. 1(1)). In the same paragraph it regulated also the navigation in the straits stipulating that: "Aucun navire quelconque ne pourra désormais, sous quelque prétexte, que ce soit, être assujetti au passage du Sund ou des Belts à une détention ou entrave quelconque." ("No ship of any sort, however, for any reason whatsoever, may be subjected to detention or hindrance of any sort in passage of the Sound or the Belts.")

Accordingly, it was the understanding of Denmark at the Third UN Conference on the Law of the Sea that the exception from the transit passage régime in straits provided for in Art. 35(c) will apply to the Sound and the Belts. With regard to the Swedish part of the Sound, Sweden included a statement to this effect in her declaration made upon signature of the Convention (Law of the Sea Bulletin, No. 5, July 1985, p. 22).

(b) As an effect of an extension of the territorial sea to 12 nautical miles, parts of the Kattegat, the Fehmarn Belt, the Kadet Channel, and the strait between the Danish island of Bornholm and the Swedish coast; would be enclosed as territorial waters as well. In order to preserve high sea routes providing freedom of navigation and overflight through these straits used for international navigation, Denmark and the Federal Republic of Germany have not extended their territorial seas in the Baltic beyond 3 nautical miles as yet. Sweden extended her territorial sea in the Bornholmgat to less than 12 nautical miles, and she amended her Act on the Sea Territory of July 1, 1979 on January 1, 1980 returning portions of the Kattegat to the status of high seas. The German Democratic Republic extended her territorial sea south of the Kadet Channel in 1985 to less than 12 nautical miles in order to leave the shipping route as a high sea route. A high sea route exists also through the strait between the Swedish islands of Oeland and Gotland. Accordingly, the régime of transit passage will not apply to these straits used for international navigation (Art. 36 of the UN Convention on the Law of the Sea). The narrow Kalmar Sound between the Swedish island of Oeland and the Swedish mainland, bridged in 1972, is no longer of practical relevance for international navigation.

(c) The six-miles-wide approach to the Gulf of Bothnia through the Aaland Sea between the Finnish Aaland Islands and the Swedish coast, with a deep navigational channel in the Swedish territorial sea, is also a strait used for international navigation. The shallow waters east of the islands, which are less than 10 metres deep, are in the territorial sea of Finland. Under the Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands of 1921, which confirms the Treaty of Paris of March 30, 1856 and which is supplemented by a bilateral Treaty of 1940 between Finland and the Soviet Union, foreign warships enjoy innocent passage through the territorial waters in the neutralized zone of the Aaland Islands (Art. 5), whereas overflight of foreign military aircraft is prohibited (Art. 4). The provisions shall remain in force independent of any change in the → *status quo* of the Baltic Sea (Art. 8).

As passage is regulated in the part of the Aaland Strait which is in the territorial sea of Finland, Finland and Sweden, when signing the UN Convention on the Law of the Sea, declared their understanding that the exception from the transit passage régime in straits provided for in Art. 35(c) is applicable to the strait between Finland and Sweden (Law of the Sea Bulletin, No. 5, July 1985, pp. 10 and 22). Sweden (Royal Notice No. 366 of June 3, 1966) as well as Finland (Decree Amendment 656/80 of January 1, 1980) require foreign warships, government ships used for non-commercial purposes, and military aircraft to give → notification prior to passage through their territorial sea.

5. Regional Cooperation in the Semi-Enclosed Sea

Surrounded by seven States and connected to the North Sea and the Atlantic Ocean by a narrow outlet, the Baltic Sea is a "semi-enclosed sea". This concept has been newly introduced into international law by Art. 122 of the UN Convention on the Law of the Sea. According to Art. 123 of the Convention, the littoral States should

cooperate with each other concerning the living resources of the Baltic, the protection and preservation of its marine environment, and the conduct of marine scientific research in the area, and they shall invite, as appropriate, other interested States or international organizations to cooperate with them (→ Marine Environment, Protection and Preservation; → Marine Research).

Under this provision, no coastal State of the Baltic may refuse to enter into meaningful → negotiations requested by another State bordering this sea with regard to one of the mentioned fields. Likewise, no such State may be excluded from regional negotiations concerning cooperation in the Baltic with regard to one of the mentioned fields. But neither the régime of the semi-enclosed sea as such nor any regional agreement or other kind of regional cooperation could affect the international rights and obligations of ships flying the flag of third States in the Baltic Sea. The coastal States of the Baltic Sea already have established effective forms of cooperation concerning the living resources, the protection of the environment and navigation in the Baltic. As regards navigation, they have, *inter alia*, established together with IMO/IMCO 16 traffic separation systems in international waters of the Baltic Sea. Promotion and coordination of marine scientific research is within the powers of the International Baltic Sea Fisheries Commission and the Baltic Marine Environment Protection Commission as well as the International Council for the Exploration of the Sea (ICES). All littoral States of the Baltic Sea are parties to the 1964 Agreement concerning the ICES (UNTS, Vol. 652, p. 237) and its Protocol of 1970 (UNTS, Vol. 1003, p. 402).

6. Conservation and Management of the Living Resources

(a) Alarmed by an increasing depletion of fish stock, the coastal States of the Baltic Sea introduced conservation measures into their domestic legislation in the late 1950s. The first multilateral fisheries agreement for the Baltic after World War II followed the lines of similar agreements concluded before the war.

Under the Agreement on Protection of the Salmon Population in the Baltic Sea of 1962 with Protocol of 1972 Denmark, the Federal Republic of Germany, Poland (since 1971) and Sweden shall prevent the fishing of undersized salmon by fishing vessels of their flag and the landing or selling of such fish by anybody (→ Flags of Vessels). A Standing Committee established under the agreement shall coordinate technical contacts and recommend amendments. Even though its functions have been taken over by the comprehensive Gdansk Convention of 1973, the Agreement of 1962 is still in force.

(b) The Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts signed at Gdansk in 1973 entered into force for the littoral States of the Baltic on June 28, 1974. Denmark and the Federal Republic of Germany withdrew from it on March 18, 1984, when the → European Economic Community acceded to the Gdansk Convention in their place in accordance with the Protocol of 1982. The Protocol amended the Convention after the coastal States had established exclusive fishery zones enclosing the whole Baltic Sea in 1978.

Applying to all waters except the internal waters, the Convention shall help to achieve a "maximum and stable productivity of all living resources of the Baltic Sea and the Belts" (Preamble) by establishing the International Baltic Sea Fishery Commission in Warsaw. The Commission shall coordinate the management of the living resources by collecting statistical data, promote coordination of scientific research, make recommendations concerning protection measures and the amount of the total allowable catch, and examine the information submitted by the Contracting States (Art. IX). Recommendations of the Commission concerning protection measures (Art. X) become binding for Contracting States which have not objected within ninety days (Art. XI). However, the Commission has no power to enforce the binding measures, and the Convention does not provide for binding settlement of disputes. Nevertheless, the situation with respect to certain stocks in the Baltic can be said to have been considerably improved. Several bilateral fisheries agreements, some of which take account of traditional fishing rights after the delimitation of the territorial seas or the fishery zones, add to the regulations provided by the Gdansk Convention.

7. *Protection and Preservation of the Marine Environment*

The Baltic Sea forms the largest body of brackish water in the world with a total volume of about 20 000 cubic kilometres, which is exchanged only once within 20 to 30 years. About 200 rivers discharge their water into the Baltic. There is no noticeable tide in the Baltic proper, which consists of layers of water with different salinity. Its northern parts are frozen in normal winters. Enclosing 97 per cent of the Baltic Sea, its coastal zones are inhabited by approximately 70 million people. After pollution of the marine environment reached an alarming level, the coastal States have taken various steps since the early 1970s, which have improved the ecological situation in the Baltic.

(a) "Bearing in mind the exceptional hydrographic and ecological characteristics of the Baltic Sea Area" (Preamble), the seven coastal States of the Baltic Sea signed on March 22, 1974 in Helsinki the Convention on the Protection of the Marine Environment of the Baltic Sea Area. After all signatories had provided the legal and administrative requirements, which include measures concerning land-based pollution (Art. 6) and reception facilities for oil, harmful substances, sewage and garbage in ports (Art. 7), the Helsinki Convention entered into force on May 3, 1980. It applies to the Kattegat and the Baltic Sea including the territorial seas, but the signatory States undertake to ensure that the purpose of the Convention will be obtained in their internal waters as well. Excluded, as usual, is the application to warships, military aircraft, and government ships and aircraft used for non-commercial purposes (Art. 4).

In contrast to the sectoral approach of other agreements, the Helsinki Convention takes a comprehensive approach towards the protection of the marine environment dealing with land-based pollution (Art. 6), pollution from ships (Art. 7), dumping (except dredged spoils, Art. 9), and pollution caused by the exploration and exploitation of the sea-bed and its subsoil (Art. 10). Detailed measures of cooperation in combating marine pollution are provided in Annex VI to the Convention.

For the purpose of enabling cooperation the Convention established the Baltic Marine Environment Protection Commission in Helsinki. Preceded since 1974 by an Interim Commission with two expert committees, the Commission has comprehensive duties concerning, *inter alia*, the implementation of the Convention, the recommendation of measures and of amendments of the Convention and its Annexes, which can be amended in accordance with a simplified procedure, the definition of pollution control criteria and the promotion of scientific and technological research. But it has no enforcement or control powers, such powers being left to the signatory States. They jointly shall develop uniform rules concerning responsibility for damage resulting from acts or omissions in contravention of the Convention. The Helsinki Convention does not give the coastal State more powers with regard to foreign ships than it already has in international law. Binding third party settlement of disputes presupposes prior agreement of the parties concerned (Art. 18).

(b) The Helsinki Convention is without prejudice to other international agreements concerning the marine environment of the Baltic. The seven coastal States of the Baltic Sea ratified the 1972 Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter as well as the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) with Protocol of 1978. The MARPOL Convention, which replaces the so-called OILPOL Convention of 1954, defines the Baltic Sea as a "special area", where any release of oil or harmful substances by ships of more than 400 tons deadweight into the sea is prohibited (Annex I, rule 10). In addition, the Scandinavian States signed the progressive Convention for the Protection of the Environment of the Nordic Council in 1974. Moreover, in 1960 a bilateral agreement had been concluded between Denmark and Sweden establishing a Sound Water Committee.

8. *Military Navigation and Overflight in the Baltic Sea*

Under existing international law all States enjoy the freedoms of military navigation and overflight in those parts of the Baltic Sea which are high seas. Against this, the Soviet Union suggested at a

conference on maritime → disarmament in Rome in 1924 to close both the Baltic and the → Black Sea for military vessels and aircraft of States not bordering the respective sea. A similar proposal was made by Romania and Ukraine at the 1958 Geneva Conference on the Law of the Sea (Doc. A/CONF.13/C.2/L.26). Along the same lines, Soviet scholars tried to revitalize the concept of the "*mare clausum Balticum*" first recognized by the riparian States of the Baltic in the Peace Treaty of Nystad in 1721 and later, *inter alia*, in the Declaration of St. Petersburg of July 21, 1780. The purpose of this concept of a "closed sea" was to provide an armed neutrality of the riparian States in times of war by excluding belligerent warships of third States from the Baltic. While the concept was given up by the other States, the Russian Empire tried to uphold it during the 19th century. The uniform practice of naval powers since the → Crimean War (1853 to 1856) shows that the Baltic has not become a *mare clausum* in customary international law.

After World War II the Soviet Union, Poland, and the German Democratic Republic invented the political concept of the Baltic as a "sea of peace" in order to exclude warships and military aircraft of third States even in times of peace from the Baltic Sea. The concept has never been recognized by other States. Therefore the Baltic remains a sea open for navigation of naval vessels and for overflight of military aircraft of all States. This would be so under Art. 58(1) of the UN Convention on the Law of the Sea, even in the case of the establishment of exclusive economic zones by all coastal States of the Baltic.

Treaty for the Redemption of the Sound Dues between Austria, Belgium, France, Great Britain, Hanover, the Hanse Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark, March 14, 1857, CTS, Vol. 116 (1856–1857) 357–371.

Convention for the Discontinuance of the Sound Dues between Denmark and the United States, April 11, 1857, CTS, Vol. 116 (1856–1857) 465–468.

Convention relating to the Non-Fortification and Neutralization of the Aaland Islands, October 20, 1921, LNTS, Vol. 9 (1922) 211–221.

Agreement concerning Protection of the Salmon Stock in the Baltic Sea, December 20, 1962, UNTS, Vol. 955 (1974) 259–274.

Protocol amending the Agreement concerning Protection of the Salmon Stock in the Baltic Sea, January 21, 1972, UNTS, Vol. 1092 (1978) 385–395.

Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, September 13, 1973, ILM, Vol. 12 (1973) 1291–1297.

Protocol amending Convention of September 13, 1973 on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts to Provide for EEC Membership, November 11, 1982, ILM, Vol. 22 (1983) 705–707.

Convention on the Protection of the Marine Environment of the Baltic Sea Area, March 22, 1974, ILM, Vol. 13 (1974) 544–590.

E. BRÜEL, International Straits, 2 vols. (1947).

B. JOHNSON, The Baltic, in: R.R. Churchill, K.R. Simmonds and J. Welch (eds.), New Directions in the Law of the Sea, Vol. 3 (1973) 209–218.

I. VON MÜNCH, Die gegenwärtige Situation der Ostsee und die Zusammenarbeit zwischen den Anliegerstaaten, Archiv des öffentlichen Rechts, Vol. 103 (1978) 522–566.

L. GELBERG, Rechtsprobleme der Ostsee (1979).

B.A. BOCZEK, The Baltic Sea: A Study in Marine Regionalism, GYIL, Vol. 23 (1980) 196–230.

G. ALEXANDERSSON, The Baltic Straits (1982).

M. FITZMAURICE-LACHS, The Legal Regime of the Baltic Sea Fisheries, NedTIR, Vol. 29 (1982) 174–251.

G. JAENICKE, Cooperation in the Baltic Area, in: C. Park (ed.), The Law of the Sea in the 1980s (1983) 493–513.

W. GRAF VITZTHUM, The Baltic Straits, in: C. Park (ed.), The Law of the Sea in the 1980s (1983) 537–596.

E.J. MANNER, Some Observations on the Effects and Applications of the New Law of the Sea, with Special Reference to the Baltic, Publications of the Finnish Branch of the International Law Association, Vol. 5 (1987) 114–144.

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BALTIC STATES

1. Historical Development

The history of the Baltic States is one of great change, whereby the historical development of Estonia and Latvia differs considerably from that of Lithuania. During the process of Christianization, introduced in 1180 and associated with German colonization of the East, Estonian and Latvian tribes came under German domination. The realm concerned, known as Livonia, also included the northern area of Estonian settlement sold in 1346 by the Danes to the German crusading

knights in the Livonian branch of the Teutonic Knights, who in 1237 succeeded to the Order of the Brethren of the Sword, founded in 1203.

The cities of Riga and Reval (in Estonian: Tallinn) were founded in 1201 and 1219 respectively. As members of the Hanseatic Union, Riga applied the law of the State of Hamburg, Reval that of Lübeck. Because the old Livonia region was connected with the German Reich of the Middle Ages, it became an early constituent part of the western European tradition. It is worth noting that the political and social hegemony of the Baltic Germans did not entail a Germanification of the Estonian and Latvian population.

Lithuania's development differs from that of the other Baltic States because by the 13th century it had been possible to group together the Lithuanian tribes within their own State, comprising White Russia and, for some time, parts of the Ukraine. The capital city, Vilna (in Lithuanian: Vilnius), applied the law of the city of Magdeburg. Lithuania also became a component part of the western European tradition through the process of Christianization, which took place somewhat later then in the other parts of the Baltic region, and also because of the effects of Lithuania's links with Poland in 1386.

During the Reformation and the Counter-Reformation, additional differences arose in the development of the individual parts of the Baltic region. While the German Balts as well as the Estonians and the Latvians (with the exception of the Latgalians) assumed the Protestant (Lutheran) confession, the Lithuanians remained faithful to Roman Catholicism. These ties were further strengthened by the Union of Lublin with Poland in 1569.

The Reformation brought an end to the crusading Teutonic Order and the old confederative unity. Subsequently, the area was split up into Estonia (North Estonia), Livonia (South Estonia and North Latvia) and Courland.

The attempt by the Russians under Tsar Ivan the Terrible during the 16th century to take advantage of the power vacuum in the area and to establish a presence on the Baltic Sea failed against the opposition of Sweden and Poland. Sweden, seeking to become a great power in Europe after her success in the Thirty Years War, first secured Estonia for herself and then acquired Livonia from Poland. Courland retained her independence as an autonomous duchy.

It was only during the 18th century that the Baltic countries became part of the Russian Empire. Estonia and Livonia were surrendered by Sweden to the Russian Empire under the Peace of Nystadt which brought an end to the Nordic War. Polish Livonia (Latgalia), Courland and Lithuania first became parts of the Russian Empire during the first and third partitioning of Poland. Estonia, Livonia and Courland, as opposed to Lithuania, enjoyed very wide-ranging territorial autonomy under Tsarist rule. This development is attributable to the obligations undertaken by Tsar Peter the Great on his own and his successor's behalf in relation to the Baltic countries under the Capitulation of 1710, as far as national public law was concerned, and in the Peace of Nystadt of August 30, 1721 (Arts. IX and X; CTS, Vol. 31, p. 339), as far as international law was concerned. Autonomy was also extended to Courland.

It was through the process of Russification which took place towards the end of the 19th century that the autonomy of the "Baltic Sea Provinces" began to be limited. The Russification of Lithuania began much earlier and became more vigorous following the Polish Revolt of 1863.

During the 19th century, a national consciousness arising out of a movement towards national renewal emerged in the three Baltic peoples. The Revolution of 1905, which in the Baltic region gave rise to deep unrest in the countryside, provided impetus for those in favour of reform and greater autonomy. Of particular importance in this regard were the formation of political parties and the possibility of parliamentary participation in the State Duma. The latter body was established on the basis of the first Russian Constitution of 1906.

2. Foundation and Recognition of the Baltic States

World War I and the Russian Revolutions of 1917 provided the prerequisites for the foundation of the three independent Baltic States. After the February Revolution of 1917, which was aimed at a democratic reconstruction of Russia, the demands of the representatives of the Baltic peoples were directed mainly towards territorial autonomy within the framework of a federal constitutional

order. Also mentioned at the time was the possibility of cultural autonomy for → minorities.

The Provisional Government which arose out of the State Duma took a step in this direction by declaring itself willing to take account of demands for greater autonomy in the Baltic Provinces based on the principle of → nationality. It was along these lines that the Decree of March 30 (April 12), 1917 was issued, creating a new government of Estonia to preside over the whole Estonian area of settlement including the northern part of Livonia. In Latvia, the principle of extended self-administration was granted only to the southern part of Livonia, including Riga. Courland was occupied by German troops beginning in the summer of 1915. The Provisional Government was not prepared to separate Latgalia from the Witebsk Government. No concessions towards demands for autonomy were made to Lithuania, which had also been occupied since 1915.

The German advance, which in September 1917 resulted in the occupation of Riga and Ösel Island and later, in 1918, Livonia and Estonia, as well as the Bolshevist October Revolution, altered the political landscape. Separatist movements in Estonia and Latvia as well as in occupied Lithuania, aiming towards a dissolution of the bonds with the Russian Empire, received encouragement from these events and the emerging principle of → self-determination.

In the Declaration of the Rights of the Russian Peoples of November 2 (15), 1917, the peoples of Russia were conceded the right to self-determination up to and including outright separation and the formation of their own independent States according to Lenin's basic idea. By reference to the right of self-determination, the democratically elected Estonian diet (Maapaev), which contained only a tiny minority of Bolsheviks, declared itself the sole bearer of supreme political authority in Estonia on November 15 (28), 1917. This occurred shortly before the diet, like the Constituent Assembly of Russia, was removed through the use of armed force by the Bolsheviks.

A Committee for the Salvation of Estonia, which had been set up by the Council of Elders of the diet, proclaimed on February 24, 1918 the independent State of the Republic of Estonia. The Provisional Government formed by the Committee was unable to assume its duties by reason of the German occupation which followed shortly thereafter.

In September 1917 German troops occupied Riga and Ösel Island. The renewed German advance, which by February 1918 led to the occupation of all of Estonia and Livonia, placed the Soviet Government in a perilous position. This led the Soviet Government to concede to the demands of the Central Powers at the peace negotiations in Brest-Litovsk. Under the → Brest-Litovsk Peace Treaty of March 3, 1918, the Soviet Government agreed under Art. III to the separation from Russia of Lithuania, Courland, Riga, as well as Ösel and other islands. The future of these areas was to be determined in consultation with their populations and Russia agreed to refrain from any intervention in their internal affairs.

Under Art. VI, Russia agreed to the occupation of Estonia and Livonia by a "German police force". The German occupation was to last as long as it took to guarantee security by a local institution and to restore order in the State. In a German-Russian supplementary treaty of August 27, 1918 (CTS, Vol. 224, p. 66), the Soviet Government under Art. 7 waived its → sovereignty over Estonia and Livonia and also undertook to refrain from interfering in these States' domestic affairs. In German-occupied Lithuania, a State Council (Taryba) presided over by Antonas Smetona proclaimed on December 11, 1917 the restoration of an independent Lithuanian State with its capital at Vilna. After the signing of the peace of Brest-Litovsk, the independence of Lithuania was recognized by the German Reich on March 23, 1918.

Although the majority of Estonians and Latvians favoured the establishment of their own nation States set up on a democratic basis, a minority led by German Balts strove towards a unified Baltic State internally subdivided into estates and closely linked to the German Reich.

In addition to the "Democratic Bloc", the Latvian National Council, which was formed in Petrograd, stepped forward to proclaim the national independence of Latvia. The "Democratic Bloc" on November 17, 1918 formed a Latvian People's Council as a provisional representative body. On November 18, 1918, this body proclaimed Latvia as a free, independent, democratic,

republican → State within identifiable ethnographic boundaries (Courland, Livonia and Latgalia). Thereafter, a provisional government was also established.

After the revolution in Germany, the occupying military authority was transformed into a civil authority. August Winnig was appointed plenipotentiary for the Reich in the Baltic area. He, in turn, transferred the administration of Estonia on November 19, 1918 to the Estonian Provisional Government under Konstantin Päts. On November 26, 1918 Winnig established the same sort of relations with the Latvian Provisional Government under Karlis Ulmanis. Winnig also made an agreement with the latter on December 7, 1918 on the establishment of a national army consisting of troops of mixed nationalities under German command. With these agreements, the *de facto* recognition of both States by the German Reich was accomplished.

Soviet Russia, demanding the formation of Baltic Soviet Republics, began the re-conquest of the Baltic countries after the All Russian Central Executive Committee annulled the Brest-Litovsk Peace Treaty on November 13, 1918. In this conflict, the Soviet Government relied above all on the Latvian rifle regiments which formed the core of the Red Army. The governmental authorities in Estonia, Latvia and Lithuania were able, using their own military forces reinforced by volunteers from Finland and other Scandinavian countries, to emerge victoriously from the "war of liberation" which followed. A substantial role was also played by the troops of the German Reich which had remained behind and the support of the British Fleet.

As a consequence of setbacks in the civil war and in the fight with foreign interventionist forces and the failure of the Soviet régime in the eastern part of the Baltic region, the Soviet Government sought to reduce its burdens in the west by concluding peace treaties with the Baltic States, Finland and Poland. This process began with the conclusion of the Peace Treaty of Dorpat (in Estonian: Tartu), signed between Estonia and the Russian Socialist Federative Soviet Republic (RSFSR) on February 2, 1920 (LNTS, Vol. 11, p. 29). This Treaty was followed on July 12, 1920 by the Moscow Peace Treaty between Lithuania and the RSFSR (LNTS, Vol. 3, p. 105) and on August 11, 1920 by the Riga Peace Treaty between Latvia and the RSFSR (LNTS, Vol. 2, p. 195; see also → Peace Treaties after World War I).

Under Art. II of the Estonian-Soviet Peace Treaty, Russia recognized the independence of the State of Estonia without reservation and agreed to forgo freely and for all time all rights of sovereignty which she had over the Estonian people and territory. The same formula was used in Art. I of the Lithuanian-Soviet Peace Treaty. Art. II of the Latvian-Soviet Treaty speaks not only in terms of the recognition of the independence but also the sovereignty of the State. In all three cases, the Russian Socialist Federative Soviet Republic presumed the right of all peoples to free self-determination up to and including the complete separation from the State to which the peoples belong.

The conclusion of these peace treaties by the Soviet Union led the Western powers to abandon their reticence in the → recognition of the new States. The *de facto* recognition of the representative and governmental organs of the Baltic States by Great Britain and France beginning in 1918 occurred subject to the final arrangement which would follow from a peace conference. It was only with the conclusion of the → Versailles Peace Treaty on June 28, 1919, that Estonia and Latvia were recognized as *de jure* States on January 21, 1921 by the Supreme Allied Council (Great Britain, France, Italy, Japan, Belgium). Because of the particular problems surrounding the city of Vilna, the *de jure* recognition of Lithuania was delayed until December 26, 1922. The provisional capital city of the new State was Kovno (in Lithuanian: Kaunas).

Because of the loss of Vilna, which the Lithuanian Government continued to demand as the capital of Lithuania, a claim was made for territorial compensation in the form of the Memel region, previously separated from Germany under Arts. 292 and 293 of the Treaty of Versailles. The forced inclusion of the Memel territory within Lithuania at the beginning of 1932 darkened the relations between Germany and Lithuania, notwithstanding the Memel Convention of May 8, 1924 (LNTS, Vol. 29, p. 85; see also → Interpretation of Memel Territory Statute

Case) which provided for a degree of autonomy. Between 1919 and 1921, the Baltic States received *de jure* recognition from further States. This enabled membership by the Baltic States in the → League of Nations on September 22, 1921, in which Estonia and Latvia became particularly active.

Despite its identification with the right of self-determination, the United States was reticent in relation to the separatist movements within the Russian Empire and first recognized the Baltic States *de jure* in July 25, 1922.

3. *Protection of Minorities and Treaty Relations in the Period of Independence*

While the Baltic States were attaining their status as full → subjects of international law, the Baltic region was also undergoing a process of internal consolidation. The radical agrarian reforms in Estonia and Latvia in 1919, and later in Lithuania, underpinned the social basis of the three States by reinforcing the position of the land-owning farmers and increasing their numbers. The breaking up of the great land holdings undermined the economic basis of the earlier dominant social classes, in particular the German Baltic aristocracy.

Nevertheless, the German Balts and several other national minorities remained influential within urban and industrial circles. The protection which was afforded to the minorities on the basis of domestic law and international law served to reinforce their loyalty to their respective home States. The equality of all citizens, irrespective of their national or ethnic origins was guaranteed under the Estonian Constitution of June 15, 1920, the Latvian Constitution of February 15, 1922 and the Lithuanian Constitution of August 1, 1922 within the framework of a liberal parliamentary and democratic order. Moreover, special rules in respect of national minorities were contained in the constitutions of Estonia (Arts. 20 and 21) and Lithuania (Arts. 115 and 116).

On the basis of Art. 21 of the Estonian Constitution, the law on Cultural Self-Administration of February 2, 1925 was passed providing for wide cultural autonomy grounded on the principle of personal rights. This model legal régime, which was successfully resorted to by the German Balts and the Jewish minorities, above all secured the autonomy of their school systems. A guarantee of such autonomy was also extended to the national minorities in Latvia by a law dated December 8, 1919. With these laws Latvia and Estonia honored the obligations which they had assumed in relation to the League of Nations by their Declarations on the Protection of Minorities of July 7, 1923 (LoN, Journal Officiel, Vol. 4 (1923) p. 932) and September 17, 1923 (LoN, Journal Officiel, Vol. 4 (1923) p. 1311). In Lithuania, the wide cultural autonomy first guaranteed to the Jewish population was later extended to other nationalities on the basis of the 1922 Constitution.

The multiplicity of parties and the weak constitutional positions of the heads of State led to a crisis within the parliamentary systems of the Baltic States which was not without influence as far as the protection of minorities was concerned. In 1926 President Smetona formed an authoritarian régime in Lithuania; Latvia under President Ulmanis followed suit in 1934.

A similar movement in Estonia, restricted to the period between 1934 and 1937, was above all designed to frustrate an assumption of power by the "freedom fighters", a movement of the radical right. The ultra-liberal Constitution of 1920 was replaced by a more conservative document of September 3, 1937. It was on this basis that the return to democracy followed under President Päts. The cultural autonomy of the national minorities was not endangered during this development. However, in Lithuania the position of the minorities worsened under the authoritarian régime which promulgated a new constitution on May 15, 1928 to serve its own purpose. The same may be said of Latvia after 1934, where the autonomy of schools was substantially limited.

The development of authoritarian régimes with pronounced nationalistic characters in the Baltic region was promoted more strongly by external political problems and dangers than by domestic political concerns.

Within the framework of the Versailles system, the Baltic States served as a *cordon sanitaire* around the Bolshevik aim of world revolution on the one hand and, on the other, as a barrier between Germany and Soviet Russia. The Baltic

States were also at the same time obliged, as in the past, in the interest of their own security, to carry out their traditional function as the bridge between East and West. The putting into practice of these political aims, which also included a normalization of relations with the Soviet Union, was made more difficult by the disputes between Lithuania and Germany in connection with the Memel question and between Lithuania and Poland in relation to the area around Vilna.

The normalization of relations with the Soviet Union following the failure of the Communist *putsch* in Estonia on December 1, 1924 was marked by the conclusion of a bilateral → non-aggression pact between the Soviet Union and Lithuania on September 18, 1926 (LNTS, Vol. 60, p. 146). This formed the point of departure for a wide-going system of non-aggression pacts set up by the Soviet Union to reinforce her external security against a feared attack while at home she sought to build socialism. Subsequently, the Litvinov Protocol of February 9, 1929 (LNTS, Vol. 89, p. 369) was signed in Moscow. This instrument brought the → Kellogg-Briand Pact (1928) into effect between the Soviet Union, Poland, Estonia, Latvia and Romania before it entered into force for the original contracting parties. Lithuania signed the Litvinov Protocol on April 5, 1929. The non-aggression pact between the Soviet Union and Finland of January 24, 1932 (LNTS, Vol. 157, p. 393) was followed by non-aggression pacts with Latvia on February 8, 1932 (LNTS, Vol. 148, p. 126) and Estonia on May 4, 1932 (LNTS, Vol. 131, p. 297), which were supplemented by arbitration agreements dated June 18, 1932 (LNTS, Vol. 148, p. 129) and June 16, 1932 (LNTS, Vol. 131, p. 309) respectively. These, in turn, were followed by a non-aggression treaty with Poland dated July 25, 1932 (LNTS, Vol. 156, p. 41).

In London, on July 3, 1933 (LNTS, Vol. 147, p. 69), a convention on the definition of → aggression was signed on the initiative of the Soviet Union by the Soviet Union, Estonia, Latvia and also Poland, Turkey, Iran and Afghanistan. The terms of the convention were also extended to Lithuania under a special treaty between the Soviet Union and Lithuania (LNTS, Vol. 148, p. 79).

By 1933/1934 the general constellation of power in north-eastern Europe was changed to the danger and detriment of the Baltic States through the seizure of power by Hitler in Germany and the formation of the personal dictatorship of Stalin in the Soviet Union. The situation did not change even after the entry of the Soviet Union into the League of Nations in 1934, not least because the Soviet idea of a regional eastern pact with the Baltic States and Finland did not become a reality.

For their parts, the Baltic States made efforts to strengthen the ties between themselves. The defensive alliance between Estonia and Latvia based on the treaty dated November 1, 1923 (LNTS, Vol. 23, p. 81) was further developed by a treaty dated February 17, 1934 (LNTS, Vol. 150, p. 104). However, the Treaty on Friendship and Co-operation signed in Geneva on September 12, 1934 (LNTS, Vol. 154, p. 93) which involved Lithuania as well as Estonia and Latvia was less ambitious. All three Baltic States sought by means of a policy of neutrality to hold themselves apart from the conflict developing between National Socialist Germany and Poland (→ Neutrality, Concept and General Rules).

Estonia and Latvia both signed non-aggression treaties with the German Reich on June 7, 1939 (LNTS, Vol. 198, pp. 49, 105). Lithuania also sought to improve her relationship with Germany following the treaty on the return of the Memel territory of March 22, 1939 (German Reichsgesetzblatt (1939 II) p. 608), which had been concluded under pressure.

The moment of decisive change was brought about by the conclusion of the "Hitler-Stalin Pact" on the eve of the Second World War following the breakdown of the Soviet Union's secret talks with Great Britain and France in the summer of 1939. The "Hitler-Stalin Pact" refers to the secret additional Protocols to the Non-Aggression Treaty of August 23, 1939 (German Reichsgesetzblatt (1939 II) p. 968) between the Soviet Union and the German Reich and to the Border and Friendship Treaty dated September 28, 1939 (German Reichsgesetzblatt (1940 II) p. 4). Through these instruments, eastern central Europe was divided into two spheres of interest (→ Spheres of Influence). The Baltic States and Finland fell within the Soviet sphere of interest.

Thus, Soviet Russia was given a *carte blanche* by

National Socialist Germany for future "territorial political transformation" within the Soviet area of interest. At the outbreak of war between Germany and Poland, the three Baltic States were forced to conclude treaties of → alliance with the Soviet Union in the form of Mutual Assistance Treaties. The Mutual Assistance Pact with Estonia of September 29, 1939 (LNTS, Vol. 198, p. 223) was followed by similar agreements with Latvia on October 5, 1939 (LNTS, Vol. 198, p. 381) and Lithuania on October 10, 1939. The area of Vilna, which as a part of the eastern territories of Poland had been forcibly occupied by the Soviet Union, was transferred to Lithuania pursuant to Art. 1 of the Soviet-Lithuanian Treaty of Mutual Assistance.

The Mutual Assistance Treaties expressly emphasized that the granting of military bases and the carrying out of measures designed to implement the treaties were in no way to prejudice the sovereign rights of the contracting parties, in particular their economic systems and their State constitutions. Thus, the State sovereignty of the Baltic States was preserved in full. The preambles of the Mutual Assistance Treaties expressly referred to the Peace Treaties of 1920 and the Treaties on Non-Aggression and Friendly Resolution of Disputes which the Soviet Union had concluded with the Baltic States.

The duties assumed by the Baltic States under the Mutual Assistance Treaties were observed in full by them *vis-à-vis* the Soviet Union during the Soviet-Finnish Winter War of 1940/1941 which led to the expulsion of the Soviet Union from the League of Nations as an aggressor State.

Although this compliance was confirmed a number of times by the Soviet Government, the latter was not prepared to accept the → *status quo*. The German advance in the west was used as a mere pretext by the Soviet Government to demand on June 15 and 16, 1940 by way of an → ultimatum the total occupation of the Baltic States by the Red Army and the formation of governments friendly to the Soviet Union. A further pretext were the plans for closer cooperation between the Baltic States within the framework of the Baltic Entente, formed in 1934, which had no military character.

The Soviet Government declared itself willing in the event its ultimatum was accepted to preserve the national independence of the three Baltic States within the framework of the prevailing treaty provisions. The Soviet ultimatum was accepted by the Governments of Lithuania, Latvia and Estonia subject to this fundamental condition, not least because military resistance to the Soviet demands had no prospect of success.

The Soviet Government did not honour its undertakings. The occupation of the Baltic territories by the Red Army, which otherwise was indistinguishable from an act of aggression, brought the intermediate period of popular democracy to a speedy end. Elections held on July 14 and 15, 1940 in violation of prevailing constitutional and electoral laws were sham elections, as almost without exception only Communist parliamentary candidates were permitted to stand. Those elected introduced a totalitarian style, single-party, Communist dictatorship which expedited the sovietization of the society.

On July 22, 1940 the Communist People's Parliament following the directions of the Soviet occupying forces issued a declaration on the entry of Estonia into the Soviet Union. Resolutions in identical terms were also issued by the sham parliaments of Latvia, on July 21, 1940, and Lithuania, on July 22, 1940. On the basis of these "requests", the Baltic Republics were incorporated into the Soviet Union at the beginning of August. The incorporation of the Baltic States within the Soviet federation on the basis of Soviet laws dated August 3, 5 and 6, 1940, thus, did not represent the voluntary choice to enter a union on the basis of the right of self-determination but rather rested upon the unilateral appropriation of foreign State territory by the → use of force, i.e. an unlawful → annexation in terms of modern international law.

A secret Protocol of September 28, 1939 (A. Seidl, Die Beziehungen zwischen Deutschland und der Sowiet-Union 1939–1941 (1949) p. 126) on the resettlement of parts of populations from the respective spheres of influence was annexed to the "Hitler-Stalin Pact". This led to the resettlement of the overwhelming majority of German Balts within the German Reich on the basis of resettlement treaties which the German Reich

concluded with Estonia on October 15, 1939 (Documents on International Affairs 1939–1946, Vol. 2 (1954) p. 264) and with Latvia on October 30, 1939 (LNTS, Vol. 200, p 213). The German Balts, who one-by-one were released from Estonian and Latvian nationality, ndividually received German nationality on the basis of this "dictated option of nationality". Resettlement of the remaining German Balts from Estonia and Latvia as well as Lithuanian Germans was only able to go forward following the conclusion of the Treaty on the German-Soviet Border from the Igorka River to the Baltic Sea on January 10, 1941 (ZaöRV, Vol. 10 (1941) p. 877). This border Treaty amounted to a *de facto* recognition of the Soviet annexations by National Socialist Germany. The outbreak of war between Germany and the Soviet Union precluded *de jure* recognition because the instruments of ratification were not exchanged.

The resettlement of the remaining German Balts and Lithuanian Germans within the German Reich proceeded in connection with the Border Treaty, which also confirmed the German possession of the Memel territory. This resettlement was effected on the basis of a resettlement agreement with the Soviet Union dated January 10, 1941.

4. *The Legal Position of the Baltic States Following Their Annexation*

It follows from the prohibition of annexation that the forced incorporation of the Baltic States is a legal → nullity and the Baltic States should be seen as occupied territories. The extent to which international legal practice coincides with this proposition largely depends on the positions assumed by individual States as members of the → international legal community in relation to the Baltic States. Here the practice of States has been inconsistent. For States which have not given *de jure* recognition to the annexation, Estonia, Latvia and Lithuania continue as direct State subjects of international law. Although the Baltic States have lost their independence, they are still entitled to certain sovereign rights, in particular those relating to nationality and title to assets. In the eyes of States which have given *de jure* recognition to the annexation, the Baltic States have completely lost their national independence. Such States thus recognize that the Soviet Union has extended her State sovereignty over the Baltic countries.

States which took up diplomatic relations with the Soviet Union during World War II or afterwards, especially → developing States, may have taken as their point of departure the existing territorial extent of the Soviet Union without adopting any position on the question of the legitimacy thereof under international law.

It is of no little importance not only in power politics but in international legal terms that the group of States which do not recognize the annexation of the three Baltic States *de jure*, and thus assume that the Baltic States continue as subjects of international law, comprises most western States including the Vatican. These States include all the member States of the → North Atlantic Treaty Organization (NATO) with the exception of the Netherlands, the position of which remains an open question. Among the → Great Powers, the United States and Great Britain refrained from recognizing the annexation of the Baltic States by the Soviet Union from the moment it occurred. Even though National Socialist Germany's aggression against the Soviet Union on June 22, 1941 led to the formation of an alliance of the western powers with the Soviet Union, and notwithstanding Soviet pressure to recognize the annexation, the position of these countries on recognition remained unchanged.

Following the war the policy of non-recognition by the United States and Great Britain has been followed consistently. Each presidential administration in the United States has formally confirmed the decision of its predecessor. Certifications issued by the State Department have confirmed that the incorporation of the Baltic Republics in the Soviet Union, the régimes which exercise power by courtesy of the Soviets, and their nationalization laws and decrees, as well as other measures, are not recognized by the United States. At the same time, it has been confirmed that the head of the diplomatic representation of each Baltic State is duly recognized by the American Government. No change of policy has come about as a result of the → Helsinki Conference and Final Act on Security and Cooperation in Europe.

In cases of the death of a head of the diplomatic and consular representation of the Baltic States, a

successor has to date always been found according to autonomous rules and received recognition not only from the American but also from the British Government. This problem has arisen a number of times in the diplomatic representation of Latvia in Washington.

France takes the same legal position in relation to the Baltic States, and the Federal Republic of Germany also belongs to the group of western States which do not recognize *de jure* the annexation by the Soviet Union. Accordingly, the competent Federal German authorities have recognized Estonian, Latvian and Lithuanian nationality on the basis of → passports issued by the official representatives of the Baltic States in exile. The German position in respect of the Baltic question was not affected by the establishment of diplomatic relations between the Federal Republic of Germany and the Soviet Union in September 1955 or the agreement between Germany and the Soviet Union on repatriation of April 8, 1958 and the conclusion of the Moscow Treaty of August 12, 1970 (ILM, Vol. 9, p. 1026).

Both Canada and Australia belong to the group of States which do not recognize the Soviet annexation. The Labour Government under Whitlam was prepared to change its position in 1974. However, the recognition accorded by the Government was rescinded by the Conservative Government under Fraser towards the end of 1975.

Western States which have not recognized the annexation *de jure* include Switzerland. In the case of Sweden, the recognition which has been given is ambiguous.

The Parliament of the European Communities has devoted close attention to the situation in Estonia, Latvia and Lithuania. On January 13, 1983 this body adopted a resolution (Official Journal of the European Communities 1983, C 42/77) which approved the → non-recognition policy and called upon the Foreign Ministers of the → European Communities to ensure that the Baltic question would be dealt with in the United Nations Decolonization Committee and in the follow-up conferences to the Helsinki Accord. The European Parliament also adopted resolutions to the Baltic question on October 15, 1987, July 7, 1988 and January 19, 1989.

Under Soviet State law the Baltic States have acquired the status of Union republics following their integration by force into the Soviet Union. The number of Union republics has declined from 16 to 15 in the post-war period (→ Soviet Republics in International Law).

On February 1, 1944, an amendment to the 1936 Constitution of the Union of Soviet Socialist Republics granted the Union republics the power to maintain direct relations with foreign States within a legal order to be established by the federal Government. This reform granted the republics a means of participation, albeit extremely limited, in the exercise of foreign powers which remained in effect under the Soviet Constitution of 1977, although the latter increased the central powers of the federal Government.

At the → Yalta Conference (1945) Stalin sought on the basis of the constitutional reforms of 1944 to have not only the Ukrainian and Byelorussian Soviet Socialist Republics admitted within the group of founding members of the United Nations but also the Lithuanian Soviet Socialist Republic. This was declined by Roosevelt and Churchill on the basis of the policy of non-recognition of the Soviet annexations.

As far as the Soviet Union is concerned, all the Soviet Union republics, therefore also the Estonian, Latvian and Lithuanian Soviet Socialist Republics, are entitled to be regarded as having not only general qualities of States but also definite sovereign powers as States which are tightly bound to the sovereignty of the Soviet federal State. The view of Soviet international lawyers is that all the individual constituent republics also have "national sovereignty" which is bound up with the right of self-determination.

In view of the dominance of central power and the totalitarian form taken by Communist single party rule until now, it was only possible to recognize a degree of territorial autonomy as belonging to the Union republics and, thus, also to the Baltic Republics rather than outright State sovereignty. A greater degree of State independence vested in the individual republics would be conceivable only if the confederative elements of the federal order of the Soviet multinational State were greatly strengthened. The Constitution of the Union of Soviet Socialist Republics of 1977, which

restricted the formal sovereignty of the Union republics, preserves the right of → secession. However, there is no procedure laid down for the exercise of such a right and, indeed, the right stands in contradiction to provisions of the Constitution based on the idea of a unitary Soviet people.

A certain change in the constitutional situation has occurred as a result of Gorbachev's policy of reform in accordance with *perestroika* and *glasnost*. This can be seen in the willingness of the Soviet federal Government to grant the Union republics more autonomy in economic and cultural affairs, thus investing their purely formal national sovereignty with some real content. These changes have, however, failed to satisfy the growing aspirations of the reform movements within the Baltic Republics. These movements centre around the Popular Fronts in Estonia and Latvia and the Sajudis in Lithuania. Demands for true national sovereignty led to the Declaration on the Sovereignty of Estonia of November 16, 1988, which was followed by similar declarations in Lithuania and Latvia on May 18, 1989 and July 28, 1989 respectively.

These declarations, and the related amendments to the 1978 constitutions of the three Republics, contained provisions which stressed the political independence of the Baltic Republics. They were declared null and void by the Presidium of the Supreme Soviet of the Union of Soviet Socialist Republics on the grounds that they conflicted with the Constitution of the Union of Soviet Socialist Republics. The resulting constitutional conflict still continues. Its resolution will depend on the restructuring of the relationship presently existing between the Soviet federal Government and the Union republics.

Opinion polls have shown that most Balts favour restoration of their complete national independence. The second most popular option is a confederation with the Soviet Union. Retention of the present form of federation is favoured by only a minority.

The Soviet leadership is seeking a complete reorganization of the federal structures in the Soviet Union, possibly by means of a system of treaties. The present parliaments in all three Baltic States claim that the annexation of the Baltic States by the Soviet Union was in violation of international law and therefore null and void. In their view, in order to conform with international law, any solution to the Baltic question must take account of the wishes of the Baltic peoples, freely expressed in accordance with the right to self-determination.

K. AUN, Der völkerrechtliche Schutz der nationalen Minderheiten in Estland von 1917 bis 1940 (1951).
K. MAREK, Identity and Continuity of States in Public International Law (1954).
R. WITTRAM, Baltische Geschichte. Die Ostseelande Livland, Estland, Kurland 1180–1918 (1954).
B. MEISSNER, Die Sowjetunion, die baltischen Staaten und das Völkerrecht (1956).
S.W. PAGE, The Foundation of the Baltic States (1959).
A.N. TARULIS, Soviet Policy toward the Baltic States Estonia, Latvia and Lithuania 1918–1940 (1959).
V. SIPOLS, Die ausländische Intervention in Lettland 1918–1920 (1961).
H.-J. UIBOPUU, Die völkerrechtliche Stellung der baltischen Staaten (1965).
M. HELLMANN, Grundzüge der Geschichte Litauens (1966).
J. VON HEHN, H. VON RIMSCHA and H. WEISS (eds.), Von den baltischen Provinzen zu den baltischen Staaten, Vol. 1 (1971), Vol. 2 (1977).
D.A. LOEBER, Diktierte Option. Die Umsiedlung der Deutsch-Balten aus Estland und Lettland 1939–1941 (1972).
A. ZIEDONIS, W.L. WINTER and M. VALGEMÄE (eds.), Baltic History (1974).
H.-J. UIBOPUU, Die Völkerrechtssubjektivität der Unionsrepubliken der UdSSR (1975).
G. VON RAUCH, Geschichte der baltischen Staaten (2nd ed. 1977).
I.I. MINC (ed.), Socialisticeskaja revoljucija 1940 g. v Litve, Latvii i Estonii (1978) [in Russian].
V.S. VARDYS and R.J. MISIUNAS, The Baltic States in Peace and War (1978).
B. MEISSNER, Die Auswirkungen der neuen Bundesverfassung der UdSSR auf die verfassungsrechtliche Stellung der baltischen Unionsrepubliken, Acta Baltica, Vol. 19/20 (1979–1980) 65–80.
S. MYLLYNIEMI, Die baltische Krise 1938–1941 (1979).
G. RHODE, Litauen vom Kampf um seine Unabhängigkeit bis zur Gründung der Sowjetrepublik 1917–1944, in: T. Schieder (ed.), Handbuch der europäischen Geschichte, Vol. 7 II, Europa im Zeitalter der Weltmächte (1979) 1062–1079.
A. FREIHERR VON TAUBE, Estland und Lettland als selbständige Republiken und als Unionsrepubliken der UdSSR 1918–1970, in: T. Schieder (ed.), Handbuch der europäischen Geschichte, Vol. 7 II, Europa im Zeitalter der Weltmächte (1979) 1107–1133.
B. MEISSNER, The Right of Self-Determination after

Helsinki and its Significance for the Baltic Nations, Case Western Reserve Journal of International Law, Vol. 13 (1981) 375–384.

E. LEVITS, Die baltische Frage im Europäischen Parlament, in: Acta Baltica, Vol. 22 (1982/1983) 9–37.

R.J. MISIUNAS and R. TAAGEPERA, The Baltic States. Years of Dependence 1940–1980 (1983).

W.J.H. HOUGH, III, The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory, New York Law School Journal of International and Comparative Law, Vol. 6 (1985) 301–533.

T.U. RAUN, Estonia and the Estonians (1987).

J. HIDEN and A. LOIT (eds.), The Baltic in International Relations between the two World Wars (1988).

B. MEISSNER (ed.), Die baltischen Nationen – Estland, Lettland, Litauen (1990).

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BARENTS SEA

1. Geographic Data

The Barents Sea, named for the Dutch navigator Willem Barents (1550–1597) who searched for a north-east passage from Europe to China, is an outlying part of the Arctic Ocean. The Sea is bounded in the south by the Norwegian mainland (Finnmark) and the Soviet mainland (Kola peninsula), in the east and north-east by the Soviet → archipelagos Novaya Zemlya and Franz Josef Land, in the north-west by the Norwegian archipelago → Spitsbergen (Svalbard), and in the west by the customary boundary which runs from Spitsbergen to the North Cape, separating the Barents Sea from the Greenland Sea.

Covering about 1 405 000 square kilometres (542 000 square miles), the Barents Sea is relatively shallow. Its average depth of 229 metres (740 feet) plunges to a maximum of more than 500 metres (2000 feet) in the Bear Island Trench, which cuts the floor of the Barents Sea from east to west along with the smaller South Cape, Northern, and Northeastern trenches.

2. Economic and Strategic Significance

The Barents Sea has long been known for its rich fishing grounds. Although it covers only 3 per cent of the world's ocean surface, the Sea yields nearly 4 per cent of the annual global fish catch, which accounts for 50 per cent of the Norwegian catch and 12 per cent of the Soviet catch. These data (from 1986) demonstrate that Norway and the Soviet Union are clearly the most important fishery nations in the area. The Barents Sea fisheries are also very important regionally because the population along the coast of northern Norway is heavily dependent upon the fisheries and related industries for its livelihood. For Russian fishermen the area used to be the most important fishing ground. This is no longer the case, partly due to overfishing, partly due to the development of Soviet distant-waters fishing. The home harbour of the Soviet distant-waters fishing fleet is the city of Murmansk on the Kola peninsula where a substantial fish-processing industry is also situated.

The prospects for finding oil and gas in the Barents Sea appear quite promising. Soviet experts estimate that 35 per cent of the offshore oil reserves of the Soviet Union are located on its European shelf. Most of these reserves are likely to be found in the Barents Sea and the Kara Sea where about 20 sources of petroleum have already been identified. Manganese nodules and other mineral deposits have also been discovered on the Barents Sea shelf. Since production in the Norwegian oil fields now in operation in the Norwegian Sea and the North Sea is calculated to decrease towards the 21st century, Norway has also explored other potentialities in the Barents Sea.

The Barents Sea is also one of the strategically most important areas of Europe and a field of friction between two antagonistic military alliances. The military build-up in the Barents Sea area is considered a threat by the → North Atlantic Treaty Organization (NATO) member States as well as by the Soviet Union. Murmansk is the home port of the Soviet North Fleet, which is the most important of the four Soviet fleets. 70 per cent of the Soviet strategic submarines, and 75 per cent of the Soviet Delta-class vessels operate from bases on the Kola peninsula. NATO as well as the Soviet Union use the Barents Sea as a deployment and test area for nuclear missile submarines and installations for submarine detection systems on the sea-bed.

Due to radical improvements in the range of the missiles they carry, the Soviet Delta-class vessels

need no longer leave the Barents Sea to be capable of reaching targets in Western Europe and North America. It is therefore no longer necessary for the Soviet missile submarines to cross the closely guarded Svalbard passage, thereby risking detection and elimination. On the other hand, the powerful Soviet North Fleet is concentrated in a relatively small area just 100 kilometres from the border of the NATO member State Norway. This makes the Soviet bases vulnerable to surprise attack and explains the extreme sensitivity on the Soviet side about military activities of other States in the adjoining land and sea areas.

3. Origin of Legal Dispute

In the Barents Sea area, Norway and the Soviet Union are States with opposite as well as adjacent coasts. With the exception of a treaty concluded February 15, 1957 concerning the Varangerfjord area (UNTS, Vol. 312, p. 289), no agreement on delimitation of the maritime boundaries between Norway and the Soviet Union by agreement has as yet been reached (→ Maritime Boundaries, Delimitation). Both States adhere to different principles of delimitation. The Norwegian position is based on the median line or equidistance principle, the Soviet position on the so-called sector principle.

The sector principle historically has its forerunner in a 1916 note of Imperial Russia to the Allied and Associated Powers declaring explicitly listed islands north of Russia's northern coast as being under Russian → sovereignty (principle of → contiguity). On April 15, 1926 the Soviet Union issued a sector decree which asserted sovereignty over "land and islands" in the Arctic Ocean from its northern coast to the North Pole and between 32 degrees 4 minutes 35 seconds longitude east of Greenwich and 168 degrees 49 minutes 30 seconds west (Text in: Dokumenty vneshnej politiki SSSR, Vol. 9 (1964) p. 228). This decree was probably inspired by the Canadian Order in Council (P.C. No. 1146), July 19, 1926 (Canada Gazette, Vol. 59 (1926) p. 382).

Soviet writers on international law initially held that, according to the Soviet sector decree, all the waters and the air space between the sectors had come under Soviet sovereignty. In present Soviet legal literature this extensive interpretation is rejected. The sector decree, according to its wording, is said to refer only to "land and islands", and the Barents Sea is explicitly qualified as belonging to the → high seas, although it remains a zone of special security interest for the Soviet Union.

4. Delimitation of the Continental Shelf

As early as 1967 the Norwegian Government confronted the Soviet Union with the question of the delimitation of the → continental shelf in the Barents Sea. Since 1974 → negotiations aimed at finding a solution have taken place with interruptions. Both States are parties to the Geneva Convention on the Continental Shelf, April 29, 1958 (UNTS, Vol. 499, p. 311), the Soviet Union since 1960, Norway since 1971. In their national legislation on the continental shelf (Norway: Royal Decree of 1963, Norsk Lovtident (1963 II) p. 275; Soviet Union: Decree of the Supreme Soviet of February 6, 1968, Sbornik Zakonov SSR I Ukazov, Vol. 2 (1938–1975) p. 404), both States make references to the pertinent delimitation principles of Art. 6 of the 1958 Convention. The significant difference, however, is that the Norwegian Decree lacks any reference to the "special circumstances" criterion. It is precisely over this omission that the disagreement regarding the boundary line of the shelf in the Barents Sea has arisen.

Norway principally refers to the general delimitation rule in Art. 6 of the 1958 Convention, i.e. the median or equidistance line principle, whereas the Soviet Union refers to the special circumstances rule in order to depart from the median line. Though there is little detailed information publicly available with regard to the arguments put forward, the main elements of the positions taken by both sides seem to be as follows. The Soviet Union adheres to a broad understanding of "special circumstances" as comprising not only geographic criteria but also the sector principle claim, as well as economic, demographic and security aspects. Norway rejects this broad concept of "special circumstances" and especially argues that the sector principle has no basis in international law because only Canada supports it, whereas all the other arctic littoral powers have rejected it.

The United Nations Convention on the Law of the Sea of December 10, 1982 (UN Doc. A/

CONF.62/122 with Corr.) did not incorporate the sector principle. On the other hand, the Convention changed the delimitation criterion from the median line or special circumstances principle to the equitable solution (Art. 83). Whether the latter principle will lead to a compromise in the Norwegian and Soviet disagreement remains an open question. The ocean between the median line and the sector line covers an area of about 155 000 square kilometres.

5. *Delimitation of Fishery Zones and Exclusive Economic Zones*

On December 10, 1976 the Soviet Union promulgated a decree establishing a provisional 200-mile → fishing zone comprising the marine areas north of the Eurasian coast (Vedomosti Verchovnogo Soveta SSSR, Vol. 39 (1976) p. 843). This decree did not explicitly refer to the sector claim or to any other delimitation criterion. Thus, it left the question of delimitation open. One week later, on December 17, 1976, Norway established a 200-mile economic zone (Act No. 91; UN St/LEG/SER.B/19, p. 241; → Exclusive Economic Zone). The Norwegian law referred to the median line delimitation criterion. These acts of national legislation made the delimitation question more urgent, at least in matters of fishery.

Norway and the Soviet Union had previously, on October 15, 1976, signed an agreement on fisheries (Overenskomster med fremmede Stater (1977) p. 974), reciprocally allowing vessels of both States to fish in the fishing zones outside the territorial seas. This agreement does not contain any delimitation provisions.

On January 11, 1978 an additional fisheries agreement was concluded which specifically concerns fishing in the Barents Sea (Overenskomster med fremmede Stater (1978) p. 436). This "Grey Zone Agreement" covers an area of 67 420 square kilometres which does not exactly correspond to the area disputed in the delimitation talks. Parts of the disputed area are left out while adjacent areas to the east and to the west are included. The area west of the sector line is much larger than the area east of the median line. According to the agreement, vessels of both parties are allowed to fish in the "Grey Zone". Third-country vessels are under Norwegian jurisdiction if their right to fish has been authorized by Norway, or under Soviet jurisdiction if their right is dependent on Soviet permission. Norway interprets this system as not being a joint jurisdiction arrangement but rather a régime of clearly separate responsibilities. A special provision of the "Grey Zone Agreement" explicitly states that the agreement shall not prejudice the position of either party in the boundary line negotiations.

The Soviet provisional 200-mile fishing zone decree of December 10, 1976 has meanwhile been replaced by the decree of February 28, 1984, establishing a 200-mile economic zone (Vedomosti Verchovnogo Soveta SSSR, Vol. 47 (1984) p. 174). According to Art. 1 of this decree, the delimitation of economic zones between the Soviet Union and States with coasts which are opposite or adjacent to the coast of the Soviet Union "is effected with regard to the legislation of the USSR by agreement on the basis of international law in order to achieve an equitable solution". Thus, the Soviet national legislation partly incorporates Art. 74 of the 1982 UN Convention on the Law of the Sea.

6. *Special Delimitation Issues in the Spitsbergen Treaty Area*

The largest portion of the area covered by the Spitsbergen Treaty of February 9, 1920 (LNTS, Vol. 2 (1920) p. 7) forms part of the Barents Sea. The Treaty does not mention the continental shelf and the sea beyond the territorial waters. Therefore, the question has arisen, whether the Spitsbergen Treaty régime shall apply to the high seas areas as well as to the continental shelf areas around the islands.

The Norwegian view is that the restrictions of the Spitsbergen Treaty do not apply to the continental shelf and to the waters beyond the territorial sea. The continental shelf around Spitsbergen is, furthermore, regarded by Norway as belonging to the Norwegian shelf. In July 1977 Norway established a 200-mile fishery zone around Spitsbergen. Great Britain and the United States, parties to the Spitsbergen Treaty, opposed the Norwegian position.

The Soviet Union seems to hold the opinion that the Spitsbergen Treaty régime is also applicable to the continental shelf and the high seas within the Spitsbergen Treaty area. However, this attitude may be of a tactical nature only, because it is highly doubtful whether the application of the

Spitsbergen régime would really serve Soviet interests. Under the Spitsbergen Treaty the area would be subject to → demilitarization provisions and all 41 States parties to the Treaty would be entitled to exploit the Spitsbergen continental shelf. It appears, therefore, that the Soviet Union is interested in a package-deal solution containing the Soviet recognition of the Norwegian position of non-applicability of the Spitsbergen régime to the open waters and the continental shelf in return for Norway's willingness to accept a delimitation line for the continental shelf and exclusive economic zone which approximates the sector line.

7. *Further Developments*

The visit to Norway by the Chairman of the Council of Ministers of the Soviet Union in January 1988 did not bring about the solution of the delimitation problems in the Barents Sea expected by the Norwegian public. One of the treaties signed during the visit concerned the disputed area but did not touch on any delimitation questions (Soviet-Norwegian Agreement on Co-operation in the Search for Persons Missed and in Rescuing Persons Involved in Accidents in the Barents Sea, January 15, 1988 (Sobranie Postanovlenie Pravitel'stva SSSR 1988, No. 4, Pos. 7)). The Soviet Chairman indicated during his visit that the negotiations are caught in a blind alley, but stated that the Soviet Union is in favour of "exact and clear" frontiers in the Barents Sea; a similar statement was made by the Norwegian Prime Minister.

Clearly the Soviet Union, at least for the time being, does not really want a solution of the delimitation problems, mainly because of military security concerns. The Soviet Union prefers to treat the question of delimitation "more broadly in a spirit of realism" and suggested, first, that the Barents Sea area be included in a North-European "zone of confidence-building measures" aimed at arms control and disarmament commitments and, second, that a "special zone of Soviet-Norwegian partnership" be established in the Barents Sea to promote cooperation on an equal basis, with the participation of third States, in the form of joint ventures for the exploration, exploitation, processing and sale of the oil and gas reserves of the Barents Sea (→ Joint Undertakings). The configuration of that "zone of partnership" should not be detrimental to the principal positions of both sides to the delimitation issue (Pravda, January 16, 1988, p. 4).

N.V. MIRONOV, The Legal Regulation of Foreign Relations of the USSR, 1917–1970 (1971) 133–138 [in Russian].

P.S. ODNOPOZOV, The International Legal Régime of Arctic Ocean Areas, Pravovedenie (1973) 78–82 [in Russian].

G.I. TUNKIN, International Law (1974) 262–264 [in Russian].

E. RAUCH, Politische Konsequenzen und Möglichkeiten der Seerechtsentwicklung aus der Sicht der UdSSR. Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien, Vols. 36 and 47 (1977).

K. TRAAVIK and W. ØSTRENG, Security and Ocean Law: Norway and the Soviet Union in the Barents Sea, Ocean Development and International Law, Vol. 4 (1977) 343–367.

F. BOMSDORF, Norwegens Nordpolitik und die Sowjetunion, Außenpolitik (1979) 254–269.

C.A. FLEISCHER, The Northern Waters and the New Maritime Zones, GYIL, Vol. 22 (1979) 100–118.

W. ØSTRENG, The Continental Shelf – Issues in the "Eastern" Arctic Ocean. Implications of UNCLOS III, with Special Reference to the Informal Composite Negotiating Text (ICNT), in: Law of the Sea: Neglected Issues (ed. by J.K. Gamble, Jr.) (1979) 165–182.

W. ØSTRENG, Norwegen und die Sowjetunion in der Barentssee, Europa-Archiv, Vol. 35 (1980) 711–720.

L.P. BLOOMFIELD, The Arctic: Last Unmanaged Frontier, Foreign Affairs, Vol. 60 (1981/1982) 87–105.

S.V. MOLODCOV, International Legal Delimitation of the Areas of the World Ocean, in: C.N. Alekseev et al., International Security and the World Ocean (1982) Part 3, 46–63 [in Russian].

W. ØSTRENG, Strategic Developments in the Norwegian and Polar Seas: Problems of Denuclearization, Bulletin of Peace Proposals, Vol. 13 (1982) 101–112.

B.J. THEUTENBERG, The Arctic Law of the Sea, NordTIR, Vol. 52 (1983) 3–39.

U. JENISCH, Der Arktische Ozean und das neue Seerecht, Außenpolitik, Vol. 35 (1984) 204–222.

K.M. SHUSTERICH, International Jurisdictional Issues in the Arctic Ocean, Ocean Development and International Law, Vol. 14 (1984) 235–272.

A.N. VYLEGZHANIN, International Legal Principles for Delimiting the 200-Mile Economic Zones and Continental Shelves, Sovetskoe Gosudarstvo i Pravo, No. 3 (1984) 125–129 [in Russian].

C. ARCHER and D. SCRIVENER (eds.), Northern Waters (1986).

W. ØSTRENG, Delimitation Arrangements in Arctic Seas, Marine Policy, Vol. 10 (1986) 132–154.

W. ØSTRENG, The Soviet Union in Arctic Waters, Security Implications for the Northern Flank of NATO (1987).

F. BOMSDORF, Zur Nordinitiative der Sowjetunion, Außenpolitik (1989) 59–69.

J. KOMISSAROV, Security and Cooperation. The Experience of the European North (1989) 114–117 [in Russian].

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BAY OF LÜBECK *see* Lübeck, Bay of

BEAGLE CHANNEL

1. Geographical Position, Economic and Geostrategic Significance

The Beagle Channel is a narrow seaway situated near the southern extremity of South America, about 300 kilometres south of the Straits of Magellan and about 170 kilometres north of Cape Horn. It averages about 4.8 to 5.6 kilometres in breadth, and its total length varies from 192 to 240 kilometres, according to the selected starting and finishing points. This southernmost passage of the South American continent, named after the British sloop HMS Beagle, during the voyages of which from 1830 to 1834 the Channel's existence was first definitely established, links the South Atlantic with the South Pacific close to 55 degrees latitude South and between 66 degrees and 70 degrees longitude West.

The Beagle Channel has attracted particular attention among international lawyers because of the legal issues connected with the Argentina-Chile delimitation dispute and the related 1977 arbitral award (ILM, Vol. 17, p. 634; → Beagle Channel Arbitration). In late 1978, world public opinion was alarmed when the dispute seemed likely to escalate into military conflict between the two countries. The dispute concerned not only the delimitation of → boundaries within the Channel itself, but also title to the territory of certain islets and rocks, as well as to the three → islands, Picton, Lennox and Nueva, situated in the eastern end of the Beagle Channel where it meets the Atlantic.

The fact that the legal dispute over the → territorial sovereignty of an area which is only 457 square kilometres large and inhabited by only eight shepherd families brought the two countries close to → war might only be explained in the context of competing national interests with respect to the exploitation of → natural resources in the disputed area. Territorial sovereignty over the three islands raises, in terms of the new → law of the sea, undoubtedly profitable perspectives for the future exploitation of the land, subsoil, sea-bed and marine resources (→ Sea-Bed and Subsoil). Such → sovereignty also entails control over a strategically important region in the South Atlantic. Finally, a determination with respect to territorial sovereignty might prejudice national economic prerogatives in the → Antarctica after termination of the Antarctic Treaty (UNTS, Vol. 402, p. 71) in 1991.

From the geographical point of view, the Beagle Channel region belongs to the Tierra del Fuego → archipelago and, more generally, also to Patagonia, according to Argentina, or to the Magellanic area, according to Chile. This area, described at the end of the 19th century by the Argentine Foreign Minister Irgoyen as "a sombre and unknown region, frozen at certain times of the year, which has resisted all investigations and all hopes", according to recent reports by experts belongs to the most economically promising regions of South America. Rich oil and natural gas fields are said to exist both on the land and → continental shelf. Besides such land minerals as uranium, iron ore, kaolin, asbestos, magnesium and mica, rich mangan resources are expected to be discovered near the southernmost extremity of the continent (Drake Passage). Within the 200-mile → exclusive economic zone, the rich fish, whale, calamary, algae and antarctic krill resources are of importance for the national economies of the bordering States.

Moreover, because of its geographical position, the Beagle Channel area is of major geostrategic importance. In the face of the → demilitarization of the Magellan Straits, sovereignty over the Beagle Channel area gives an excellent opportunity for exclusive control, both civil and military, over the whole Cape Horn route. Such control cannot be without strategic significance for the whole South Atlantic region.

2. Historical Antecedents

The Beagle Channel delimitation dispute is only one of the border disputes in South America whose roots go back to the colonial epoch (→ Boundary Disputes in Latin America). When

Argentina and Chile as well as other administrative divisions of Spanish colonial rule proclaimed themselves independent, they adopted the principle of colonial → *uti possidetis* to preclude the legitimacy of a right of → conquest and reliance on acquisition of *territorium nullius*, irrespective of how remote or inhospitable a given territory might have been, or titles *jure belli* which non-American powers might acquire on the American continent (→ Boundaries in Latin America: uti possidetis Doctrine). While it held advantages as a principle of reciprocal respect of territorial status, the *uti possidetis* rule encountered serious difficulties in its application to those territories where jurisdictional boundaries had never been precisely fixed by the Spanish Crown. This was especially true for the southern extremity of the South American continent.

Following a number of controversies and boundary incidents between Argentina and Chile, the principle of *uti possidetis juris* of 1810 was for the first time bilaterally recognized in Art. 39 of the Treaty of Peace, Friendship, Commerce and Navigation between the Argentine Confederation and the Republic of Chile of August 30, 1855 (BFSP, Vol. 49, p. 1200; → Treaties of Friendship, Commerce and Navigation). A special territorial clause in this Treaty was designed to freeze respective claims and to defer the question of delimitation for further → negotiations. Those negotiations took place in 1865, 1872 to 1873, and 1876 to 1881, and led finally to conclusion of the Boundary Treaty of Buenos Aires of July 23, 1881 (BFSP, Vol. 72, p. 1103). This Treaty was intended to delimitate definitively the 4000 kilometre-long border and to settle any dispute arising out of the → *status quo* boundary formerly agreed to in principle but never precisely fixed.

The Boundary Treaty of 1881, at first sight exhaustive and detailed, proved to be vague in its delimitation of the southern region. According to Art. III, to Argentina shall belong the "Staten Islands, the small islands next to it, and the other islands there may be on the Atlantic to the east of Tierra del Fuego and of the eastern coast of Patagonia; and to Chile shall belong all the islands to the south of Beagle Channel up to Cape Horn". In the Chilean view, the Boundary Treaty recognized the Chilean title to Picton, Lennox and Nueva, as well as to the other small islands and rocks in the Channel. Argentina saw the provisions merely as a reflection and confirmation of a rule already deduced from the doctrine of *uti possidetis*, i.e. the "maritime" or "oceanic" (Atlantic) principle. According to this principle, Argentina was entitled to the Atlantic coast while Chile had sovereignty over the Pacific coast; thus the three disputed islands should belong to Argentina. Differences concerning the interpretation of the Boundary Treaty provisions became even more intense because of uncertainty as to which arm of the eastern part of the → strait should be regarded as the Beagle Channel and the proper meanings of the geographical terms "Patagonia" and "Tierra del Fuego".

The differences in interpretation of the Boundary Treaty led to a series of incidents when both Argentina and Chile ventured to implement their positions in practice. The situation became more serious after the first stage in the → codification of the law of the sea at Geneva in 1958. The tensions increased even more during the negotiations at UNCLOS III (→ Conferences on the Law of the Sea).

The Arbitral Award of April 22, 1977 (ILM, Vol. 17, p. 634), approved by Queen Elizabeth II of Great Britain, was based on a textual interpretation of the Boundary Treaty and took into consideration corroborating material. The ruling followed the Chilean "territorial" approach as to the delimitation of boundaries and recognized Chilean title to the three disputed islands. It did not admit the legal significance of the "oceanic" principle, which ultimately derived from the very *uti possidetis* doctrine the Treaty was intended to supersede, and in consequence implicitly recognized Chilean claims to territorial rights over the South Atlantic coasts. This ruling was rejected by the Argentine Government on January 25, 1978, and declared to be null and void. Against a background of growing tensions and military manoeuvres, however, negotiations were resumed.

On February 20, 1978, the presidents of Argentina and Chile signed an agreement at Puerto Montt (ILM, Vol. 24, p. 3), establishing a system of negotiations in three stages for the purpose of solving pending matters including the

definitive delimitation of jurisdictions in insular and maritime areas of the southern region, questions concerning the Straits of Magellan, interests in the Antarctic, as well as physical integration and economic cooperation between the two countries. With both countries again close to war, two agreements were signed on January 8, 1979 in Montevideo, one accepting the mediation of the → Holy See (ILM, Vol. 24, p. 5; → Conciliation and Mediation), and the other emphasizing the desire not to resort to the → use of force. On December 12, 1980, the Holy See submitted to Argentina and Chile a proposal concerning the Beagle Channel dispute (ILM, Vol. 24, p. 7). This proposal was accepted by Chile, but renounced by Argentina. Prolonged negotiations in the Vatican led finally to a compromise. On November 29, 1984, a non-binding referendum in Argentina approved the terms of the Treaty of Peace and Friendship (ILM, Vol. 24, p. 11). This Treaty was signed in the Vatican four days later and entered into force with the exchange of ratification documents on May 2, 1985.

3. The Treaty of Peace and Friendship

Concluded "in the Name of Almighty God" and placed under the spiritual protection of the Holy See (Art. 16), the Treaty of Peace and Friendship establishes "definitive and unmovable boundaries" (Art. 14) between Argentina and Chile. The Treaty provisions are the result of a compromise and reveal several elements of former efforts to resolve the conflict. The 1978 agreement of Puerto Montt had previously attempted to find definitive solutions to many interrelated questions. For this reason the 1985 Treaty not only refers to delimitation issues, but also contains provisions on the settlement of disputes and respective procedures (Arts. 1 to 6 and Annex 1), on economic cooperation and physical integration (Art. 12), and on mutual recognition of straight → baselines already drawn in the respective territories (Art. 11).

The mutually agreed maritime boundary line over the sea, land and subsoil departs from the delimitation which already existed in the Beagle Channel and reaches the points set by geographical coordinates defined in Art. 7 of the Treaty. The line is fixed in such a way that it attributes the three disputed islands to Chile. At the same time, however, it limits the Chilean claims to an exclusive economic zone far below the maximum breadth as provided by the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF. 62/122 with Corr.) and already recognized by → customary international law. From the point of intersection with the meridian of Cape Horn, the maritime boundary line follows the meridian to the south. The Cape Horn meridian separates the South Atlantic from the South Pacific. Argentina and Chile may claim their exclusive economic zones respectively to the east and to the west of the boundary line thus described. Within the area between Cape Horn and the easternmost portion of the Staten Islands, the legal régime of the territorial sea has been restricted in the mutual relations of Argentina and Chile to three marine miles, measured from their respective baselines (Art. 8). Within that area each Party may, however, invoke the maximum breadth of → territorial sea allowed by international law as regards third countries.

Though the three disputed islands situated in the South Atlantic fall under Chilean sovereignty, the determination of the boundary line between the maritime jurisdictions of Argentina and Chile implicitly recognizes the Argentine "oceanic" principle. Chilean rights to the exclusive economic zone next to Picton, Lennox and Nueva have been restricted. The Holy See proposal of December 12, 1980 (ILM, Vol. 24, p. 7) foresaw in that area the establishment of a "peace zone" with a special legal régime enabling both countries to undertake joint and concerted activities according to the principle of equal participation. At the present time most of what might be claimed in the region as an exclusive economic zone belongs to Argentina. Detailed provisions as to navigation facilities, rules of navigation, pilotage and piloting are specified in Annex 2.

The Treaty also determines in Art. 10 the boundary line between the jurisdictions of Argentina and Chile at the eastern extremity of the Straits of Magellan. At the same time the provisions reaffirm the perpetual → neutralization of the Straits and freedom of navigation accorded to ships of all flags sailing in and out of this waterway (→ Navigation, Freedom of).

4. Delimitation within the Beagle Channel Region and Territorial Claims to the Antarctic

Although jurisdiction over the Beagle Channel area is of no direct relevance to the territorial status of Antarctica, Art. 15 of the Treaty of Peace and Friendship provides that the Treaty's delimitation provisions "in no way affect, or may be interpreted in a sense that may affect, directly or indirectly, the sovereignty, right or legal positions of the Parties or delimitations in the Antarctic or in their adjacent maritime areas, including the soil and subsoil thereof". Both Argentina and Chile, as well as Australia, France, Norway, New Zealand and the United Kingdom, claim territorial sovereignty over certain areas in the Antarctic; on the other hand, the other parties to the Antarctic Treaty of December 1, 1959 (UNTS, Vol. 402, p. 71), do not recognize territorial claims to that continent.

The Argentine and Chilean claims are based on discovery and occupation of *terra nullius* and on geographic contiguity of the South American continent to the Antarctic Peninsula. The claims based on geographic contiguity point to the fact that the Antarctic Peninsula is a geographical continuation of the Andes, that there is still a bridge of continental shelf between the Antarctic Peninsula and the South American continent, and that the shortest distance to any other continent is the Drake Passage between Antarctica and South America.

Even if these claims of territorial sovereignty are based on the sectoral theory, which is controversial in international law, and on contiguity, they must be valid *erga omnes* if they are to exclude all other States' claims. In the case of Antarctica, neither the Argentine nor the Chilean claims are recognized by non-claimant States. Moreover, the overlapping of mutually exclusive claims in the region, as in the case of the Argentine, Chilean and British claims between 53 degrees West and 74 degrees West longitude, would seem to render these claims void. At the same time, the establishment of the Cape Horn meridian as the borderline between Argentine and Chilean jurisdictions might well prejudice the respective national prerogatives within the disputed Antarctic sector after the termination in 1991 of the Antarctic Treaty.

Treaty of Peace, Friendship, Commerce and Navigation, between the Argentine Confederation and the Republic of Chile, August 30, 1855, BFSP, Vol. 49 (1858–1859) 1200–1213.

Treaty between the Argentine Republic and Chile, defining the Boundaries between the two Countries, July 23, 1881, BFSP, Vol. 72 (1880–1881) 1103–1106.

Declaration of Puerto Montt Establishing Negotiating Stages, February 20, 1978, ILM, Vol. 24 (1985) 3–4.

Documents Signed at Montevideo. Agreement Accepting Mediation of the Holy See, January 8, 1979, ILM, Vol. 24 (1985) 5–6.

Papal Proposal in the Beagle Channel Dispute. Proposal of the Mediator, December 12, 1980, ILM, Vol. 24 (1985) 7–10.

Treaty of Peace and Friendship, November 29, 1984, ILM, Vol. 24 (1985) 11–26.

R.L. QUELLET, El canal de Beagle (1978).

R. SALGUERO, Todo sobre el Beagle (1978).

A. BROUILLET, La médiation du Saint-Siège dans le différend entre l'Argentine et le Chili sur la zone australe, AFDI, Vol. 25 (1979) 47–73.

J.E. GUGLIALMELLI, El conflicto del Beagle (1979).

A.L. MELO, La mediación de la Santa Sede en el conflicto argentino – chileno en la zona austral, Revista de derecho internacional y ciencias diplomáticas, Vol. 27–28 (1979–1980) 83–98.

A.A. ASTRADA, Argentina – Chile: controversia y mediación (1980).

J.S. CAMPOBASSI, Argentina en el Atlantico. Chile en el Pacífico (1981).

M. STRUBBIA, La mediación papel y el conflicto austral (1981).

G.J. FOGG, Soberania Argentina en el area austral (1983).

L.H. DESTEFANI, Lo que debe saberse del Beagle (1984).

S. FERLITO, La Santa Sede e il mantenimente della pace: il caso del Beagle, II diritto ecclesiastico, Vol. 96 (1985) 60–97.

See also bibliography for Beagle Channel Arbitration

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BERING SEA

Separating Asia from the American continent, the Bering Sea is a semi-enclosed sea, in the sense of Art. 122 of the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF. 62/122 with Corr.), located between 50 and 65 degrees latitude north. To the south, the Bering Sea is open to the Pacific Ocean; to the north it is linked to the Chukchi Sea; and further to the east, it is connected to the Siberian Sea

through the Bering Strait. The Bering Sea contains rich fishery grounds, and large petroleum and natural gas deposits are thought to be present in this area. The Bering Sea is bordered only by the Soviet Union and the United States.

In 1867, Russia ceded Alaska to the United States by a treaty (CTS, Vol. 134, p. 331). This treaty established a line of demarcation between the Russian and the United States possessions in the Bering Sea, the Bering Strait, and the Chukchi Sea. In 1976, the United States and the Soviet Union agreed in an exchange of notes to use this line as a boundary for fishery jurisdiction to the extent it did not reach beyond 200 nautical miles from either coast (→ Fishery Zones and Limits). When, in 1977, the United States extended her fishery conservation zone to 200 nautical miles, the contracting parties to the treaty of 1867 discovered that they had employed different methods of measurement to draw the line of demarcation in question. Whereas the United States defined the line as a great circle, the Soviet Union established a rhumb-line based on the Mercator projection of the earth commonly used to produce nautical → maps for short-distance navigation. The different methods lead to a discrepancy of 15 000 square miles. The disputed zone is presumed to contain an important quantity of petroleum and gas. Since 1977, the Soviet Union on several occasions intercepted fishing vessels in this area. The United States has given drilling concessions in this zone to private enterprises which, however, may only be exploited in the future.

Since 1981, the United States and the Soviet Union have tried to settle the dispute through → negotiations. Up to the present moment, a positive result has not been achieved.

The question of the demarcation line in the Bering Sea concerns treaty interpretation. The agreement of 1867 did not determine how the line was to be defined. A map was neither part of nor attached to the treaty. This lack of precision may be explained by an intention to distribute only the land lying between Siberia and Alaska. However, as early as the → Behring Sea Arbitration, the United States had referred to the demarcation line to justify an American right to protect seals in the waters east of it. In this context the line was regarded as a sea boundary.

To overcome the existing ambiguity, the contracting parties have been forced to refer to additional means of interpretation beyond the treaty text. Thus, the United States produced a map using a type of conic projection as a basis for negotiations and to which some speakers referred during the ratification debates in Congress. The Soviet Union presented a map based on a Mercator projection which shows the boundary as a rhumb-line. However, neither side could give conclusive evidence of the necessity to employ its preferred method of demarcation. Moreover, there was no proof that one or the other type of map was generally in use at the time the treaty was concluded.

Given this evidentiary situation the question at issue cannot be settled simply by interpreting the treaty. A solution to the boundary dispute may be found through negotiations, the judgment of an → international court or through → arbitration.

Until the settlement of the dispute the rights of the United States and the Soviet Union remain uncertain. Well-established and generally recognized rules for fixing the delimitation line of a fishery conservation zone or an → exclusive economic zone do not exist. Even the most recent → codification of this matter in the 1982 Convention on the Law of the Sea, which is not yet in force and was not signed by the United States, does not offer substantive criteria; Art. 74 provides only for two methods to determine the line, i.e. either by agreement or through international jurisdiction. Given this lack of clear norms in international law a State cannot unilaterally draw such a boundary (→ Unilateral Acts in International Law).

Since a demarcation line has not been determined, no measure should be taken which may prejudice a future settlement. The States involved must cooperate in exercising their rights in the disputed zone according to Art. 74(3) of the 1982 Convention. Each State may economically exploit the area only with the other's consent. Both States are entitled to prevent any activity by the other or a third State which may encroach upon their asserted rights. Thus, the disputing parties can provisionally defend their interests in the area as if these were secured by legal rights, but from an economic perspective they must conduct themselves as if no such rights exist.

L. GÜNDLING, Die 200 Seemeilen-Wirtschaftszone (1983) 305–310.

L. CAFLISCH, La délimitation des espaces marins entre Etats dont les côtes se font face ou sont adjacentes, in: R.-J. Dupuy and D. Vignes (eds.), Traité du Nouveau Droit de la Mer (1985) 375–440.

C.A. ANTINORI, The Bering Sea: A Maritime Delimitation Dispute between the United States and the Soviet Union, Ocean Development and International Law, Vol. 18 (1987) 1–47.

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BERLIN

1. The Four Power Occupation

The former German and Prussian capital Berlin was occupied by Soviet forces in May 1945 (→ Germany, Occupation after World War II). The protocol of September 12, 1944 on the zones of occupation in Germany and the administration of "Greater Berlin" had foreseen that the Berlin area would be jointly occupied by armed forces of the United Kingdom, the United States and the Soviet Union. This agreement had been extended to France by a special amendment. Berlin was to be divided in four sectors. The protocol makes it quite clear that the Berlin area is not part of one of the four zones of occupation by stating that Germany will, for the purposes of occupation, be divided into four zones and a special Berlin area, which will be under joint occupation by the Four Powers. This system was implemented in July 1945. According to Art. 7 of the Agreement on Control Machinery in Germany, an "Inter-Allied Governing Authority (Komendatura)" – today Kommandatura – consisting of four Commandants, one from each power, was established to direct jointly the administration of the "Greater Berlin" area. Each of the Commandants served in rotation, in the position of Chief Commandant, as head of the Inter-Allied Governing Authority. In fact, from the very beginning, each Commandant treated his sector as a special area of occupation under his jurisdiction and only matters concerning Berlin as a whole were regulated by the Allied Kommandatura. The Kommandatura worked as a Four Power institution until June 16, 1948 when the Soviet Commandant withdrew from it. On July 1, 1948 the Soviet Union announced that she would no longer participate in meetings of the Kommandatura. This situation reflected the beginning of the cold war which had brought about the breakdown of the Control Council for Germany on March 20, 1948 (for English texts of documents see Hendry and Wood (1987), for German texts Zivier (1987); see also → Germany, Legal Status after World War II).

2. Developments from 1948 to 1971

From 1948 onwards the administration of the city of Berlin was in fact divided. While the Western Sectors were still administered by the three Western Commandants who worked together in the Allied Kommandatura, the Soviet sector was administered separately. In 1949 the Federal Republic of Germany and the German Democratic Republic were founded. The Soviet Sector of Berlin was practically from the beginning treated as a part of the German Democratic Republic while the three Western Sectors of Berlin were to a great extent included in the constitutional, legal, economic and monetary system of the Federal Republic of Germany. However, the three Allied Powers formally stated when they gave their consent to the Federal Constitution (*Grundgesetz*) that Berlin "may not be governed by the Federation".

In 1958 to 1959 the Soviet Union claimed that the agreements concerning the joint occupation of Berlin were no longer in force (→ Clausula rebus sic stantibus). This was rejected by the three Western Powers and the Soviet Union has tacitly retreated from her position by confirming the former agreements and arrangements in the Quadripartite Agreement on Berlin of 1971. Even before that Agreement the Soviet Union had, in practice, fully respected the rights of the Western Powers flowing from the earlier agreements concerning access to Berlin, free movement of military personnel within Berlin and in the cooperation within the Air Safety Centre which controls the Berlin Control Zone, covering the airspace within a radius of 20 miles (32 kilometres) from the Allied Control Authority Building in which is established the Berlin Air Safety Centre. The Air Safety Centre is the only Four Power institution which has been in operation in Germany continuously since 1945.

In 1961 the Berlin Wall was constructed by the

German Democratic Republic authorities, interrupting the free movement of civilians between the two parts of Berlin. However, for Allied military personnel such movement was made more difficult but never interrupted. Only military police of one of the Four Powers controlled the movement of military personnel throughout the existence of the wall. On November 9, 1989, in the process of a peaceful revolutionary change in the German Democratic Republic, the wall was opened and the freedom of movement within the Greater Berlin area was re-established although border controls by the German Democratic Republic are formally upheld.

3. The Quadripartite Agreement of 1971

On September 3, 1971 the ambassadors of the three Western Powers in the Federal Republic of Germany and the Soviet ambassador in the German Democratic Republic concluded the Quadripartite Agreement on Berlin. An acceptable solution for the Berlin question had been made a political condition for the ratification of the German Eastern Treaties with the Soviet Union and Poland (→ Germany, Federal Republic of, Treaties with Socialist States (1970–1974)).

The Quadripartite Agreement on Berlin entered into force on June 3, 1972 with the signature of the final protocol. The Agreement is a complex system of international treaty stipulations. It consists of Part I, General Provisions, Part II, Provisions relating to the Western Sectors of Berlin, Part III, Final Provisions, and four Annexes, two agreed minutes, several letters and the Final Protocol. In the preamble the Governments show that they act "on the basis of their quadripartite rights and responsibilities, and of the corresponding wartime and post-war agreements and decisions of the Four Powers which are not affected". In the general provisions they agree that there shall be no use or threat of force in the area and that disputes shall be settled solely by peaceful means. The four Governments accordingly will respect their individual and joint rights and responsibilities, which remain unchanged.

Part II refers specifically to the Western Sectors of Berlin. The Soviet Union declares that transit traffic by road, rail and waterways through the territory of the German Democratic Republic of civilian persons and goods between the Western Sectors of Berlin and the Federal Republic of Germany will be unimpeded. Reference is made to an agreement to be concluded by the competent German authorities. The governments of the Western Powers declare that the "ties" between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these sectors continue not to be a "constituent part of the Federal Republic of Germany and not to be governed by it". The Soviet Union declares that communications between the Western Sectors and areas bordering on these sectors and other areas of the German Democratic Republic will be improved. It is further stated that representation abroad of the interests of the Western Sectors of Berlin and consular activities of the Union of Soviet Socialist Republics can be exercised in accordance with Annex IV. In the annexes, the transit traffic, the relationship between the Western Sectors of Berlin and the Federal Republic of Germany, and the other matters regulated in Part II are set out in further detail.

Some problems have arisen with the complex structure of the Four Power Agreement. The Soviet Union, the German Democratic Republic and some other Eastern countries have sometimes taken the position that the whole Agreement only concerns the Western Sectors of Berlin. It seems doubtful whether this position is still upheld today (1990). However, a careful reading of the document can hardly fail to reach the clear conclusion that the general provisions must refer to the whole Berlin area. Otherwise it would not make sense to stipulate general provisions after confirming the wartime and post-war agreements referring to the Greater Berlin area and then in the second part have a detailed system which relates only to the Western Sectors of Berlin. Therefore, the correct view, always taken by the three Western Powers, is that the Agreement covers the whole area of Berlin.

Another problem has been created by an interpretation according to which the different Annexes which include communications either from the three Western Powers to the Soviet Union or vice versa should not be seen as part of the Treaty but as unilateral declarations. This view seems untenable. As Art. 31 (2) of the → Vienna Convention on the Law of Treaties shows,

preamble and annexes form, if there is no indication to the contrary, part of the treaty itself. There is not the slightest indication that the concluding parties had anything else in mind when drafting the Quadripartite Agreement. There is a rather clear explanation why the parties chose the very complex structure of the Agreement. This was the need to refer to the two German States in that context. The Western Powers had not recognized the German Democratic Republic when the Quadripartite Agreement was concluded (→ Recognition). The Western Powers had a special interest in obtaining a formal stipulation by the Soviet Union, especially for access to Berlin. They could, however, accept that the Soviet Union in her communication referred also to her relations with the German Democratic Republic. It is of considerable importance that the Annexes form part of the treaty obligations of all parties because Number 4 of the Final Protocol states that in the event of a difficulty arising in respect of the obligations of the Quadripartite Agreement or any of the above-mentioned agreements or arrangements which any of the four Governments consider serious, a procedure of → consultations is applicable.

In practice, the interpretation of the notion "ties" for the relations between the Western Sectors and the Federal Republic of Germany has given rise to difficulties. The Soviet Union always argued for a restrictive interpretation while the Western Powers claimed that this referred also to the possibility of extending the presence of the Federal Republic of Germany in Berlin. When the Federal Office for the Environment (Umweltbundesamt) was established in Berlin in 1974 this led to a serious dispute. No other Federal Office has been established in Berlin since.

4. The System of Access to Berlin

The agreements concluded by the Four Powers in 1944 and 1945 concerning the occupation of Germany and Berlin did not contain provisions on access between the Western zones of occupation and the Berlin area. However, the Western Powers always claimed that the right to be in Berlin necessarily carried with it the right of access (→ Traffic and Transport, International Regulation). In fact, on November 30, 1945 it was agreed that three air corridors from Berlin to the Western zones of occupation would be established. On March 30, 1948, ten days after the Soviet member had left the Control Council, the Soviet military authorities in Germany informed the Western allies that new provisions regarding communications between the Soviet and Western zones would enter into force on April 1, 1948. From then on several restrictions were introduced and finally all surface communication to Berlin by road, rail and river traffic was interrupted by the Soviet Union. The so-called → blockade was maintained for more than one year while Berlin was fully provisioned with all necessary goods through the air corridors.

The famous *Luftbrücke* (airlift), an extraordinary achievement, mainly by the United States Air Force and the Royal Air Force, was the answer to that clearly illegal Soviet move. By the "Jessup/Malik Agreement" of May 4, 1949 the blockade was lifted and it was agreed that all restrictions on communications, transportation and trade between Berlin and the Western zones be removed. In the years following 1949 the right of access was a frequent source of controversy. In practice, however, military access was practically unimpeded while civilian access was sometimes made difficult by cumbersome border controls.

After the 1971 Agreement access also for civilians received a clear legal regulation. It became similar to a corridor system because three roads and railway lines were specifically regulated for traffic to and from Berlin. It was agreed that "through trains and buses" can be used and their inspection procedures will not include any formalities other than identification of persons. In general, that system worked smoothly, although at times, with high numbers of travellers, the border controls took a considerable time. Military personnel of the Western allied forces in Berlin remained outside the Agreement; such personnel is only controlled by Soviet military police and will in fact receive special priority treatment. The air corridors are not regulated in the Quadripartite Agreement but in the Agreement of November 1945. There are three corridors: Berlin – Hamburg, Berlin – Bückeburg and Berlin – Frankfurt. Each corridor is 20 English miles wide. According to the Western Powers there is no upper

limit to the corridors although the Soviet Union has sometimes claimed that there is an upper limit of 3000 metres (→ Air Law).

5. Berlin (West) and the Federal Republic of Germany

According to the formal declaration in the Quadripartite Agreement the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by the latter. By this formula the Four Powers agreed that the Western Sectors of Berlin do not form part of the Federal Republic of Germany. However, by the reference to the continuing practice they implied that the development of German law which was consented to by the Western Powers does not contradict that statement.

According to the Basic Law of the Federal Republic of Germany Berlin should have become a member of the Federal Republic (Art. 23). The Federal Constitutional Court has held that according to German law Art. 23 means that Berlin is part of the constitutional system of the Federal Republic but this cannot become fully applicable because of the Allied reservations. However, the legal system of the Federal Republic is practically without exception also applicable in the Western Sectors of Berlin. Legislation will be taken over to Berlin by a special law adopted by the Berlin parliament (Abgeordnetenhaus). According to the German view the result of such a *Mantelgesetz* (covering law) is that federal legislation in Berlin will have the same rank as in the Federal Republic of Germany and will have priority over any Berlin-Land legislation. Only legislation concerning the federal army, air navigation and some other matters have not been taken over to Berlin. The Western Allied Powers have prohibited the taking over of the legislation for the Federal Constitutional Court. Therefore, the Federal Constitutional Court has no direct jurisdiction over public acts of Berlin authorities. However, the highest administrative court of the Federal Republic of Germany, the Bundesverwaltungsgericht, has its seat in Berlin.

In the Quadripartite Agreement the Soviet Union recognized that German citizens in the Western Sectors of Berlin may receive passports from the Federal Republic of Germany. It has also been agreed that in accordance with established procedures, the extension to the Western Sectors of Berlin of international agreements and arrangements entered into by the Federal Republic of Germany will be continued. Also, the representation of the interests of the Western Sectors of Berlin in international organizations and in international conferences will normally be performed by the Federal Republic of Germany. The same is true for consular services for permanent residents of the Western Sectors of Berlin (→ Consuls).

The extension of treaties and agreements has been organized in such a way that specific clauses will be agreed upon. In bilateral treaties the Federal Republic will normally include a provision which states that the treaty shall also apply to Land Berlin provided that the Government of the Federal Republic of Germany does not make a contrary declaration within a specific time. In the case of multilateral treaties the Federal Republic makes a declaration when depositing its instrument of ratification or accession. The representative of the Federal Government will declare that the Agreement shall also apply to Land Berlin with effect from the day on which it entered into force for the Federal Republic of Germany. The Agreement of such clauses has sometimes caused problems with Eastern countries, especially the Soviet Union. The Western Powers have reserved their competence for treaties which concern security and status. In the United Nations the Soviet Union has sometimes protested against the representation of Berlin (West) by the Federal Republic of Germany.

6. Berlin (East) and the German Democratic Republic

East Berlin is the capital of the German Democratic Republic and the latter has tried to remove all remnants of the Four-Power Status. The Soviet Union has sometimes supported the German Democratic Republic position. However, in several respects the remaining Four-Power Status of the whole of Berlin remains visible and confirmed by practice also for East Berlin. This

was true for the free movement of Allied military personnel also throughout the existence of the Berlin Wall from 1961 to 1989 when civilian traffic within Berlin was practically interrupted. It is also true for the control of the Berlin air zone through the Four Power Berlin Air Safety Centre.

For a long time deputies to the parliament of the German Democratic Republic were not elected from East Berlin and legislation was made applicable by a special order as for the Western Sectors of Berlin. However, this was discontinued in the 1970s. The Western Powers have frequently protested against the presence of German Democratic Republic military forces in the Berlin area which is, according to the arrangements, an area where only military forces of the Four Powers are admitted. The German Democratic Republic has taken some measures to find a compromise. For instance, foreign ambassadors will be formally received with military honours displayed by a regiment which is not part of the German Democratic Republic army but a special police unit of the Ministry of State Security. Although this is much less obvious than for the Western Sectors of Berlin, the Eastern Sector remains part of the area which has a specific Four-Power Status since 1945. This status will probably come to an end through the procedure of German unification which seems to be underway while this entry is being written (March 1990).

7. Evaluation

Berlin with its complex legal status and the many problems which arose, especially during the period when the two parts of the city were separated by the Berlin Wall, became a symbol for the separation of Germany and the claim to its unification. While for most practical purposes the Western Sectors could be seen as being under the jurisdiction of the Federal Republic of Germany and the Eastern Sector under the jurisdiction of the German Democratic Republic it was clear that some reserved positions for the Allied Powers remained. Although the Soviet Union and the German Democratic Republic, for some time, claimed that the Western Sectors of Berlin form an international entity on its own, this has never been recognized by the Western Powers or the Federal Republic of Germany. In fact, the agreements in force show that this is not the case. Berlin is part of Germany, has a special status in relation to the two German States, and remains under a supreme Four Power jurisdiction.

M. DRATH, Die staatsrechtliche Stellung Berlins, Archiv des Öffentlichen Rechts, Vol. 82 (1957) 27–75.

K. DOEHRING and G. RESS, Staats- und völkerrechtliche Aspekte der Berlin-Regelung (1972).

K. CARSTENS, Zur Interpretation der Berlin-Regelung von 1971, in: H. Ehmke, J.H. Kaiser et al. (eds.), Festschrift für Ulrich Scheuner zum 70. Geburtstag (1973) 67–83.

G. DOEKER, K. MELSHEIMER and D. SCHRÖDER, Berlin and the Quadripartite Agreement of 1971, AJIL, Vol. 67 (1973) 44–62.

L. GUSSECK, Die Internationale Praxis der Transitgewährung und der Berlin-Verkehr (1973).

J.A. FROWEIN, Legal Problems of the German Ostpolitik, ICLQ, Vol. 23 (1974) 105–126.

G. RESS, Das privilegierte rechtliche Regime des Transitverkehrs von und nach West-Berlin, ZaöRV, Vol. 34 (1974) 133–147.

H. SCHIEDERMAIR, Der völkerrechtliche Status Berlins nach dem Viermächte-Abkommen vom 3. September 1971 (1975).

J.A. FROWEIN, Review of Schiedermair, Archiv des Öffentlichen Rechts, Vol. 101 (1976) 638–645.

O. HENNING, Die Bundespräsenz in West-Berlin (1976).

H.M. CATUDAL, The Diplomacy of the Quadripartite Agreement on Berlin (1978).

G. PFENNIG and M.J. NEUMANN, Verfassung von Berlin (1978).

G. RESS, Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972 (1978).

H. SCHIEDERMAIR, Das Verbot des Rechtsmißbrauchs und die Regelung des Transitverkehrs nach Berlin, ZaöRV, Vol. 38 (1978) 160–181.

W. WENGLER, Berlin-Ouest et les Communautés européennes, AFDI, Vol. 24 (1978) 217–236.

D. WILKE, Das Viermächte-Abkommen über Berlin 1971–1976, Bilanz der politischen Praxis, GYIL, Vol. 21 (1978) 252–271.

B. ZÜNDORF, Die Ostverträge (1979).

J.A. FROWEIN, Die Rechtslage Deutschlands und der Status Berlins, in: F. Benda et al. (eds.), Handbuch des Verfassungsrechts der Bundesrepublik Deutschland (1983) 29–58.

D. SCHRÖDER, Der Status Deutschlands in Berlin, in: G. Zieger (ed.), Recht, Wirtschaft, Politik im geteilten Deutschland, Festschrift für F. Mampel zum 70. Geburtstag am 13. September 1983 (1983) 71–91.

D. SCHRÖDER, Die ausländischen Vertretungen in Berlin (1983).

W.A. KEWENIG, Entwicklungslinien des völker- und staatsrechtlichen Status von Berlin, Schriftenreihe der Juristischen Gesellschaft zu Berlin, Vol. 88 (1984).

T. SCHWEISFURTH, Der Status der Deutschen Reichsbahn

in Berlin (West) im Lichte der Berliner S-Bahn-Vereinbarung vom 30. Dezember 1983, ZaöRV, Vol. 44 (1984) 482–494.

E. SCHRÖDER, Die gegenwärtigen Kontrolleinrichtungen der Vier Mächte in Deutschland, AVR, Vol. 23 (1985) 42–73.

D.A. GILLIES, West Berlin and the European Communities, Legal Issues of European Integration (1987) 33–53.

L.D. HENDRY and M.C. WOOD, The Legal Status of Berlin (1987).

R. SCHOLZ, Der Status Berlins, in: J. Isensee and P. Kirchhof, Handbuch des Staatsrechts der Bundesrepublik Deutschland, Vol. 1 (1987) 351–383.

E.R. ZIVIER, Der Rechtsstatus des Landes Berlin (4th ed. 1987).

D. WILKE and J. ZIEKOW, Die Entwicklung von Status und Verfassung des Landes Berlin seit 1945, Jahrbuch des öffentlichen Rechts der Gegenwart, Vol. 37 (1988) 167–334.

E.R. ZIVIER, Berlin und sein Status in der neueren Literatur und Rechtsprechung, Recht und Politik, Vol. 24 (1988) 13–22.

J. HACKER, Die Berlin-Politik der UdSSR unter Gorbatschow, Außenpolitik, Vol. 40 (1989) 243–260.

M. REXIN, Ost-Berlin als DDR-Hauptstadt, Deutschland Archiv, Vol. 22 (1989) 644–655.

JOCHEN ABR. FROWEIN

BHUTAN

1. General Description

Bhutan is a small kingdom with a unique situation. Remotely but strategically located between China and India in the eastern Himalaya mountains, Bhutan has special bilateral treaty relations with India and is firmly within the → sphere of influence of India. In contrast to the kingdom's close contemporary relationship with its southern neighbour in secular affairs, however, the origin of the religious and cultural traditions of the dominant people of Bhutan can be traced northwards in past centuries to → Tibet. The State religion is lamaistic Buddhism, still practised or surviving throughout much of Bhutan in ancient forms which nowhere else have remained intact to the same degree. The king, Jigme Singye Wangchuck, who came to the throne in 1972 as the fourth ruling member of the Bhutanese royal dynasty, holds supreme authority in the government.

The territory of Bhutan extends over 18 000 square miles (47 000 square kilometres), slightly more than the area of Switzerland. The land is rugged and the altitude increases steadily from the foothills in the south to the high peaks in the north, where the environment is forbidding to human settlement. There are no railways and no cities. The capital is Thimphu, a predominantly administrative centre. Estimates suggest Bhutan has up to 1.4 million inhabitants, mostly dispersed in small settlements along the many river valleys.

Among Bhutan's major ethnic and linguistic divisions, the Bhutia, who originate from Tibet, are the largest and most influential group. The other main groups originate from Nepal, and from Assam or Burma. There are also tribal peoples, some of which may represent the region's indigenous inhabitants, and there is a small sector of Indian origin. The ethnic Nepalese, who mostly practise Hinduism, are not integrated with the highland Bhutanese but are largely contained in the south of the country where they form a sizeable minority community. There is a history of rivalry between the ruling Bhutia and the growing Nepalese sectors of the population, as a consequence of which the permanent → immigration of further Nepalese into Bhutan is prohibited.

The principal languages of Bhutan are mutually incomprehensible. The official language is Tibetan, known locally as Dzongkha, in which the country is referred to as Druk Yul. English is employed as a language of instruction in some schools, and as a medium for many administrative purposes. Nepali is also a lingua franca and there are other less important languages, especially in the east of Bhutan.

Reinforcing the country's natural seclusion from the rest of the world, all the rulers of Bhutan in the 20th century have succeeded in pursuing to a greater or lesser extent an effective policy of → isolationism. Nevertheless, strong influences from north and south have combined to shape Bhutan's history, for the country was often a focus for the rivalries of the → great powers of the region. However, Bhutan still retains its own unique characteristics and a very distinctive independent identity.

Bhutan's international frontiers are with the People's Republic of China and the Republic of

India. Directly to the north of Bhutan lie the provinces of southern and eastern Tibet. To the south of Bhutan are the Indian states of West Bengal and Assam. To the south-west, Bhutan is also bounded for a short distance by the Indian state of → Sikkim, and in the west and north-west by the strategic and previously well-traversed Chumbi valley in Tibet. In the east, no less strategically, Bhutan's frontier adjoins the important Mon-yul corridor which extends across the disputed Sino-Indian border between south-eastern Tibet and the Indian state of Arunachal Pradesh, formerly the North-East Frontier Agency. Bhutan's southern frontier region is likewise of considerable strategic importance because it dominates the narrow corridor of Indian territory that provides access to and from the north-eastern states and frontier areas of India which also border upon China (see → Boundary Disputes in the Indian Subcontinent).

Bhutan's southern border with India, which emerged during the 19th century following British → annexations along the foothills, is stable and mostly demarcated. Bhutan's northern border with China is an undemarcated traditional → boundary which runs for some 300 miles, mostly following the crests and the watershed of the main Himalaya range. Several high passes cross this border, providing access routes to and from Lhasa and the other towns of Tibet. The trade in wool, spice, grain and yak which once flourished along these routes has ceased and the passes lost their economic significance as a result of the interruption of contacts with Tibet following the events there in 1959. However, Lhasa is only about 200 miles by road from the north of Bhutan and the passes thus retain their vital strategic importance not only for Bhutan but also for India. India has often repeated that it regards Bhutan's northern border as lying within its own defence perimeter.

With the nearest → port at Calcutta, over 400 miles away, Bhutan belongs to the group of → land-locked and geographically disadvantaged States, and in addition is counted as one of the least developed among the → developing States. Bhutan is not usually listed among the → micro-States of the world, although practices in this regard varied when the country's population was smaller. Several authors, however, have placed Bhutan in the category of weak States, buffer States or semi-dependent States.

A member of the → United Nations, since 1971, and of the group of → non-aligned States since 1973, Bhutan's special situation is characterized primarily by the country's close links to India in both legal and geopolitical terms. Bhutan's legal relationship with India is governed by a bilateral treaty concluded in 1949 (BFSP, Vol. 157, p. 214), under which Bhutan agreed *inter alia* to be guided in regard to its external relations by the advice of the Government of India. In this matter the treaty exactly reiterated the provisions of an earlier agreement signed with Great Britain in 1910 (CTS, Vol. 210, p. 204; → Foreign Relations Power).

Contrary to the statements of some writers, Bhutan has never been a full → protectorate of India in a legal sense, for the 1949 treaty and its predecessor did not go quite that far. In reality, however, Bhutan is under the effective protection of India, while remaining legally autonomous with regard to internal administration.

Bhutan's physical isolation, combined until very recently with virtual inaccessibility, impeded not only communications to and within the country but also the unification and material development of the nation. An onerous system of personal servitude of certain landless cultivators was practised until relatively recently, but those involved received manumission during the reign of the previous king and some land reforms have since been introduced. While the fertile valleys of middle Bhutan are well populated and cultivated, the lack of basic facilities throughout most of the country imposes simple conditions on the majority of the population. The compilation of national statistical data is only in its early stages, but reports indicate that the average life expectancy in Bhutan is among the lowest in the world, and adult illiteracy is as high as 90 per cent in several regions.

The economy of Bhutan today is still based on subsistence agriculture. However, there are also forestry resources, mineral deposits and hydro-electric potential, all of which are largely unexploited. Monetization of the economy remains limited to a relatively small modern sector. The Indian rupee is dominant in Bhutan, circulating at parity with the national currency, the ngultrum, which was introduced in 1974. The Bank of Bhutan, established in 1968, is backed by the State

Bank of India. Most of Bhutan's imported requirements are supplied by India.

Bhutan has no written constitution and there are no political parties. The king presides over a national assembly, the Tshogdu, created in 1953. A separate judiciary and a high court were established in 1968. The lamaseries, which are now largely accommodated to the monarchy, receive direct State subsidies, but they also retain certain traditional privileges and the religious establishment still exercises considerable influence in the life of the nation.

2. Historical Background

Early Bhutanese history is clouded with uncertainty. The emergence of political stability in Bhutan, maintained by the royal family since 1907, is usually said to have had its origins in the early 17th century. From then onwards, Bhutan was governed under a diarchy in which spiritual and temporal powers were exercised by separate rulers. Few source materials from before this period have survived, but for many centuries the region's natural affiliations and important lines of communication were to the north with Tibet. Two Portuguese jesuits visited Bhutan as early as 1627, but little is known of their journey.

Bhutan's relationship with Great Britain began in the second half of the 18th century when the Honorable East India Company intervened in a dispute between Bhutan and neighbouring Cooch Bihar, in what has been described as the first Anglo-Bhutanese → war. The Company obtained payment of an annual tribute under a treaty concluded with the Deb Rajah of Bhutan on April 25, 1774 (CTS, Vol. 45, p. 319).

During the 19th century, Bhutan experienced many years of → civil war conditions. Following a number of British political missions to Bhutan, relations with Britain deteriorated seriously. The British Government annexed several tracts of Bhutanese territory including, in 1841, the seven so-called Assam Duars, from the revenues of which the Government of Bhutan was paid a subsidy by the British in return for good behaviour. By 1861, Britain had also effectively annexed neighbouring Sikkim with military force. The treatment accorded in Bhutan in 1864 to a British mission, headed by Ashley Eden, attests to the poor relations which then prevailed between Bhutan and Britain. The envoy was obliged to agree to the return of the lost Bhutanese territories by signing an unusual document, subsequently repudiated by the British, to which he appended the words "under compulsion" beneath his signature (text in Singh, Appendix IV, p. 232).

Bhutanese defeat in the ensuing second Anglo-Bhutanese war was followed by → negotiations which resulted in a → peace treaty concluded at Sinchula on November 29, 1865 (CTS, Vol. 130, p. 76; cf. → Unequal Treaties). In accordance with the treaty, Bhutan ceded to the British even more extensive territories than before, including all the Duars, which controlled access to the southern regions of Bhutan. The parties agreed to free trade and commerce, and an annual allowance was payable by Britain to the Government of Bhutan. Under Art. 8 of the treaty, the British Government obtained the right of → arbitration with binding effect in any disputes between Bhutan and Cooch Bihar or Sikkim. Through the treaty of Sinchula, the British thus took the first step in controlling Bhutan's foreign policy, although the important question of Bhutan's relations with Tibet remained undefined.

At the close of the 19th century, against the background of a gathering dispute between Great Britain and Tibet, Bhutan came increasingly under British influence. In 1907, Bhutan's former system of government was replaced by an absolute and hereditary monarchy when a maharaja was installed with the support of the British. In 1908, China asserted a form of suzerainty over Bhutan, claiming that Bhutan was "the southern gate of the Chinese empire". The maharaja rejected any Chinese claims or encroachments, and shortly afterwards he effectively surrendered the foreign relations of his country into British control by a treaty signed in Bhutan at Punaka on January 8, 1910 (CTS, Vol. 210, p. 204). Under the treaty, concluded with the British political officer in Sikkim acting in the name of the viceroy and governor-general of India, who subsequently ratified it, Art. 8 of the Sinchula treaty of 1865 was modified to this effect. According to the new provision, the Bhutanese Government agreed to be guided by the advice of the British Government in regard to its external relations. The annual allowance payable to Bhutan was doubled.

Under a further agreement signed on November

21, 1910 (CTS, Vol. 212, p. 319), earlier → extradition arrangements resulting from the treaty of Sinchula were harmonized with those prevailing between British India and the Indian States. The result of the new arrangements was that British India retained virtual → jurisdiction over Bhutanese subjects who had committed criminal offences on British territory and subsequently taken refuge in Bhutan.

Although the Punaka treaty of 1910 represented a significant change in the legal relations between Bhutan and British India, Bhutan did not thereby become a part of the British Indian empire. On the contrary, Bhutan retained a special position of its own, and the British largely respected Bhutanese susceptibilities in internal matters. However, the treaty of Punaka successfully precluded China from gaining influence in Bhutan. Only a few weeks after its conclusion, in February 1910 the Chinese invasion of Tibet took place and the Dalai Lama fled to India.

Bhutan had in practice become a buffer State under the protection of the British, one link in the chain of such States which was stretched along the northern borders of the Indian empire. Thereafter, Bhutan was not permitted to enter into any agreements with foreign States and an increased level of assistance from India was foreseen. The British in turn obtained security and peace on the Bhutanese frontier and continued to control Bhutan's external relations until they withdrew from India.

While Bhutan had been caught in a process that might have terminated with complete absorption into India, no such result in constitutional terms had come about by the time of the transfer of power. In fact, it was difficult to be categorical about the exact status of Bhutan during the closing years of British rule in India. Unlike Sikkim, Bhutan had not been mentioned in the Government of India Act, 1935. On the other hand, in reality, Bhutan was gradually being assimilated and had already been included in the editions of a government memorandum on the Indian States.

Bhutan did not participate in the Constituent Assembly of India, and without new arrangements an independent India would have lost the advantages which had accrued to the British in their dealings with the Bhutanese. From the perspective of the independent India, it was considered advisable to ensure at least the continuation of the pre-existing legal relationship and therefore to negotiate a new treaty with Bhutan as soon as possible after the transfer of power on August 15, 1947.

3. The 1949 Treaty with India

Following consultations between Bhutan and India, which had started in June 1946, a new bilateral treaty was concluded in India at Darjeeling on August 8, 1949 (BFSP, Vol. 157, p. 214). The 1949 treaty is still in force and has not been modified since its adoption. During the interim period of almost two years between the emergence of India as an independent State and the conclusion of the new treaty, Indo-Bhutanese relations were continued on the same basis as before and the Indian political officer in Sikkim continued to be accredited to Bhutan as well.

The 1949 treaty was concluded in the English language in the name of the Government of India and of the royal Government of Bhutan. In contrast to earlier practice, the ruler of Bhutan was styled Druk Gyalpo, instead of maharaja, and the treaty was signed not by the ruler in person but by his representatives charged with → full powers. Although the treaty contained no provision on ratification, or on entry into force, instruments of ratification were signed at Tongsa on September 15 and at New Delhi on September 22, 1949 by the heads of State of Bhutan and India respectively (→ Treaties, Conclusion and Entry into Force). The treaty's final article provides that the instrument shall continue in force in perpetuity unless terminated or modified by mutual consent (Art. 10).

The 1949 treaty was not registered with the United Nations, but the text was published in authoritative Indian sources (→ Treaties, Registration and Publication). Bhutan then had no official publications. The available versions differ slightly with respect to the instrument's title, but it is generally referred to as the Indo-Bhutan treaty, or treaty of perpetual peace and friendship, following the terminology employed in Art. 1.

In the matter of Bhutan's external relations, the new treaty preserved the legal → *status quo*. Art. 2 of the 1949 treaty provides:

"The Government of India undertakes to exercise no interference in the internal adminis-

tration of Bhutan. On its part the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations."

With this dual formula, Bhutan's situation in relation to India was continued unaltered. In the second sentence of Art. 2, the expression "to be guided" indicates at least a degree of leadership to be exercised by India. The controversial question whether Bhutan is always obliged to seek and to accept the advice of India with regard to external affairs has often been debated with vigour inside Bhutan. While Bhutan has sought as flexible an interpretation of the external relations clause as possible, India has usually interpreted Art. 2 broadly to mean that Bhutan's external relations must be conducted with the consent of India, and it would appear that Bhutan has complied with this interpretation.

Two changes to the benefit of Bhutan in the 1949 treaty were the restoration by India to Bhutan of a small piece of border territory, then known as Dewangiri, and a considerable increase in the payment made by India to the Government of Bhutan, enhanced to half a million rupees per annum. Under Art. 3, this payment is conditional upon the treaty remaining in force and upon its terms being duly observed. Since the early 1960s much larger sums have been paid to Bhutan by India for defence and development purposes.

Art. 5 of the treaty provided for free trade and commerce between India and Bhutan, as before, but it did not provide for a general right of → transit of goods or persons to or from Bhutan. Certain aspects of trade with and transit to third countries were later provided for in a separate treaty with India, and were subsequently regulated by a bilateral agreement on trade and commerce signed at ministerial level in Thimphu on December 27, 1983 for a period of five years, subject to renewal. An agreement in the same field was also signed with Bangladesh, albeit without immediate implementation. The third trade and transit agreement between Bhutan and India was signed in Thimphu on March 2, 1990.

Art. 6 of the 1949 treaty regulates the importation of arms from or through India into Bhutan, making such importation subject to the assistance and approval of the Government of India and to other conditions. In practice, this article allows India to control Bhutan's requirements in weapons and → war materials. The 1949 treaty also reincorporated the earlier extradition provisions, which are not based upon → reciprocity, including a provision for the extradition from Bhutan to India of subjects of third States in pursuance of any arrangements between India and such States.

The settlement of differences or disputes arising in the application or interpretation of the treaty was provided for by negotiation and by reference to binding arbitration by three arbitrators. Under an unusual provision, the third arbitrator and chairman shall be an Indian judge chosen by the Government of Bhutan. This arbitration clause has never been invoked.

4. Developments since 1949

Relations between Bhutan and India have usually been friendly in the period since 1949. India gave early advice to Bhutan against establishing diplomatic relations with foreign countries, and this advice was adhered to (→ Diplomatic Relations, Establishment and Severance). For about two decades, Bhutan continued to remain effectively isolated from the rest of the world. During the same period, Bhutan's treaty association with India was accompanied by almost total dependence on Indian assistance for material resources and technical expertise. The first five-year development plan was announced in 1961, to be financed by India (→ Economic and Technical Aid).

Bhutan had received increasing numbers of → refugees from Tibet during the 1950s, and several thousand entered the country upon the flight of the Dalai Lama to India, in 1959, before the border with Tibet was sealed in the following year. In certain frontier areas between Bhutan and Tibet there had been a long-standing customary practice of free movement of graziers and traders, which then ceased. Moreover, prior to the Chinese occupation of Tibet, a number of localities within Tibet had been subject to a form of Bhutanese administrative jurisdiction, and these → enclaves were terminated. The traditional privilege of Bhutanese → couriers passing through Tibetan territory was also discontinued. On behalf of Bhutan, on August 19 and 20, 1959, India delivered → notes of → protest to China concerning these matters.

Bhutan was not directly involved in the brief Sino-Indian border war of 1962, which was fought most fiercely in the territory immediately adjoining eastern Bhutan. However, defence considerations imposed on India at that time were prominent in motivating the urgent construction and improvement of highway communications to and within Bhutan. For reasons of military security, the eastern areas of Bhutan were made inaccessible to foreigners, as were the neighbouring frontier areas of India. India also invested heavily in facilities designed to serve the needs of the Indian army along the northern border of Bhutan. Civil and military engineering projects planned and financed by India were undertaken simultaneously. Today, India continues to maintain a military presence in Bhutan, and the small Bhutanese army is trained and equipped by India.

The new road from India to Bhutan which was completed in the aftermath of the border war has since provided the main avenue for Indian development assistance. However, the narrow relationship between Bhutan and India has obvious limitations in the economic sphere. Assistance programmes with a multilateral component were very gradually integrated into Bhutan's development planning, but only in the last two decades, roughly from the 1970s onwards, could Bhutan establish useful contacts of a multilateral nature. Some aspects of Bhutan's international situation in more recent times are summarized below. With considerable restraint, and with continuing reliance on India, especially in the military and economic spheres, Bhutan is slowly emerging into a more modern era.

(a) Membership of international organizations

Bhutan joined the → Colombo Plan in 1962 and applied to become a member of the → Universal Postal Union in 1969, in both cases upon sponsorship by India. Bhutan applied for membership of the United Nations in December 1970, and admission was granted by General Assembly Resolution 2751 (XXVI) of September 21, 1971, with effect from that date (see also UNTS, Vol. 796 (1971) p. 295). Also in 1971, the Government of the People's Republic of China was recognized as the legal representative of China at the United Nations. In the following years, Bhutan joined the non-aligned movement and the Economic and Social Commission for Asia and the Pacific (→ Regional Commissions of the United Nations). An office of the → United Nations Development Programme was opened in Thimphu in 1979. In 1981 Bhutan joined the → International Monetary Fund and the World Bank institutions, and in 1982 joined the → World Health Organization and began to participate in the Asian Development Bank (→ Regional Development Banks). By limiting expenditure to available resources, Bhutan has avoided any significant external indebtedness but some loans from multilateral sources have recently been negotiated. Bhutan has also joined a few other organizations within the UN system and is a member of the South Asian Association for Regional Cooperation. The number of development projects in Bhutan of → United Nations Specialized Agencies and subsidiary organs has increased considerably, based usually on standard agreements which have been signed with various organizations (see e.g. UNTS, Vol. 857 (1973) p. 174, p. 188, and p. 203; Vol. 950 (1974) p. 259; and Vol. 995 (1976) p. 95).

(b) Treaty relations

Bhutan did not become a party to the conventions on privileges and immunities of the United Nations, or of the United Nations Specialized Agencies (→ International Organizations, Privileges and Immunities). In 1972, Bhutan acceded to the → Vienna Convention on Diplomatic Relations and, in 1981, to the → Vienna Convention on Consular Relations. Also in 1981, Bhutan ratified the Convention on the Elimination of all Forms of Discrimination against Women. In 1984 Bhutan ratified the Agreement establishing the Common Fund for Commodities (→ Commodities, Common Fund). In 1988 and 1989 Bhutan deposited instruments of accession to the conventions on aviation security of Tokyo (1963), The Hague (1970) and Montreal (1971), which entered into effect for Bhutan in 1989 (→ Civil Aviation, Unlawful Interference with). Also in 1989 Bhutan deposited an instrument of adherence to the → Chicago Convention on International Civil Aviation, and from the date of its entry into effect on June 16, 1989 Bhutan became a contracting State of the → International Civil Aviation Organization. Apart from the

standard agreements with UN agencies and the conventions just mentioned above, Bhutan's treaty relations in force include several bilateral agreements with India, not all of which have been published. Bhutan is not a party to most of the other well known multilateral treaties, such as the → Vienna Convention on the Law of Treaties or the → Geneva Red Cross Conventions.

(c) Diplomatic relations

In 1972 Bhutan's diplomatic relations with India were upgraded in effect to ambassadorial level (→ Diplomatic Agents and Missions). In 1979 full diplomatic representation was exchanged with Bangladesh, the first country after India to have a relationship with Bhutan at ambassadorial level. Bhutan also opened one further embassy, in Kuwait, and there are honorary → consuls for purposes of trade in → Hong Kong, Singapore and → Macau. Bhutan has recently fostered diplomatic ties with selected Western European countries, but the relations which were opened in the mid-1980s with countries such as Denmark, the Netherlands, Norway, Sweden and Switzerland, and Austria and Finland in 1989, did not involve an exchange of full diplomatic missions. Apart from the Bhutanese permanent missions to the United Nations at New York and Geneva, and relations opened recently with the → European Economic Community, Bhutan's interactions with foreign States, with the exception of India, remain at a low level.

(d) Tourism

A regular air link to Bhutan, from Calcutta to Paro, was opened in 1983. Although some very limited → tourism to Bhutan has been permitted, starting in 1974, foreign visitors to Bhutan are restricted in number, subject to close supervision and they usually have no freedom of movement. The Indian Government also continues to restrict the entry and movement of foreigners in the states which border on Bhutan. Air services operated by the kingdom's national carrier, Druk Air, have now been extended to link Paro with New Delhi, Kathmandu, Dhaka and Bangkok. Official statistics indicate that 1524 tourists visited Bhutan in 1989.

(e) The border with China

While there seems to be agreement on both sides that the boundary between Bhutan and China lies for the most part along the great watershed of the Himalayas, several local variations, discrepancies or other disagreements appear to have contributed to prevent an exact delimitation of the border so far. A few relatively minor border incidents have taken place. It was reported that in July 1970 the Indian Government protested against the intrusion of Chinese troops into Bhutanese territory (AFDI, Vol. 16 (1970) p. 1018). Some Chinese → maps have apparently shown parts of Bhutan within China, but it is not known for certain whether these depictions amount to formal territorial claims, or how often or to what extent they have been repeated. Some Indian maps, on the other hand, have failed to show the frontier between Bhutan and India as a fully international frontier, but this would now seem to have been rectified.

For many years India insisted on a right to raise the northern border question on Bhutan's behalf in discussions with China. Moreover, during official consultations between China and India on their own mutual boundary, India has included descriptions of the boundary between Bhutan and China in its statements, whereas China has regarded the question as beyond the scope of official discussions with India.

China's policy has been based on a desire for direct negotiation with Bhutan and on full recognition of Bhutan's own competence in the border question. Until very recently, India's policy was to prevent such contacts. In this respect, India's interpretation of the second sentence of Art. 2 of the 1949 treaty was that Bhutan's external relations are not only subject to India's consent, but also must be determined by and negotiated through India. Several official Indian statements in this connection have affirmed that India, alone, is responsible for the conduct of Bhutan's foreign relations.

Nevertheless, starting in 1984, Bhutan entered into limited but direct contact with China on the border question, presumably with India's consent and apparently with only slow results. The sixth round of border talks between Bhutan and China was held at ministerial level in Beijing from October 30 to November 5, 1989, but no results on

the delimitation of the boundary were reported. Detailed information on this question has never been made available by the parties. However, any outstanding differences between Bhutan and China would appear to be of a comparatively minor nature, with the possible exception of a short section of the border in the extreme east of Bhutan, where India and China are also in dispute.

C.U. AITCHISON, A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, 14 vols. (1862; revised ed. 1929–1933, reprint 1973), Vol. 14 (1929) 71–95.
India-Bhutan Treaty of Friendship, Darjeeling, 8 August 1949, BFSP, Vol. 157 (1950) 214–217; A.J. Peaslee (ed.), Constitutions of Nations, (2nd ed.), Vol. 1 (1956) 172–174; Lok Sabha, Foreign Policy of India, Texts of Documents 1947–1964 (1966) 4–8.
Kuensel (in English; new series, weekly), Vol. 1 (1986) to present.
F. BLEIBER, Zum völkerrechtlichen Status der Himalaya-Staaten, Österreichische Zeitschrift für öffentliches Recht, Vol. 7 (1956) 320–334.
B.N. RAU, India's Constitution in the Making (1960) 367–373.
P.P. KARAN and W.M. JENKINS, The Himalayan Kingdoms: Bhutan, Sikkim and Nepal (1963).
United States Army, Area Handbook for Nepal, Sikkim and Bhutan, No. DA Pam 550–35 (1964; 2nd ed. 1973) xlix-lxiii, 349–379.
H. HECKER, Sikkim und Bhutan, Die verfassungsgeschichtliche und politische Entwicklung der indischen Himalaya-Protektorate (1970).
T.T. POULOSE, Bhutan's External Relations and India, ICLQ, Vol. 20 (1971) 195–212.
N. SINGH, Bhutan, A Kingdom in the Himalayas (1972; 3rd ed. 1985).
H. HECKER, Die Verfassung von Bhutan, Verfassung und Recht in Übersee, Vol. 6 (1973) 335–344.
K. LABH, The International Status of Bhutan before 1947, International Studies, Vol. 13 (1974) 75–93.
L.E. ROSE, Bhutan's External Relations, Pacific Affairs, Vol. 47 (1974) 192–208.
A. DEB, Bhutan and India, A Study in Frontier Political Relations 1772–1865 (1976).
L.E. ROSE, The Politics of Bhutan (1977).
N. RUSTOMJI, Bhutan, The Dragon Kingdom in Crisis (1978).
M. ARIS, Bhutan, The Early History of a Himalayan Kingdom (1979).
R. RAHUL, Making of Modern Bhutan, International Studies, Vol. 19 (1980) 515–528.
S. DUTT, Bhutan's International Position, International Studies, Vol. 20 (1981) 601–623.
M. KOHLI, Dragon Kingdom's Urge for an International Role, India Quarterly, Vol. 37 (1981) 227–240.
T.K. ROY CHOUDHURY, The India-Bhutan Relationship: Some New Trends, The World Today, Vol. 37 (1981) 476–481.
M. ARIS, Views of Medieval Bhutan (1982).
The World Bank, Bhutan: Development in a Himalayan Kingdom (1984).
P. COLLISTER, Bhutan and the British (1987).
The World Bank, Bhutan: Development Planning in a Unique Environment (1989).

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BLACK SEA

1. General Background

The Black Sea (Turkish: Karadeniz; Russian and Bulgarian: Noye More; Romanian: Marea Neagra) may be defined either as a large inland sea or as a sea peripheral to the Mediterranean Sea. The Black Sea is connected to the latter through the → Dardanelles, the Sea of Marmara (Marmora) and the Bosphorus (→ Straits). The Black Sea is bordered by the Soviet Union in the north and east, Romania and Bulgaria in the west and Turkey in the south. In the north, the Crimean Peninsula extends into the Black Sea, separating the latter from the Sea of Azov, which is accessible from the Black Sea through the Kerch Strait in the east. The surface of the Black Sea covers 162 280 square miles (420 300 square kilometres). The Sea has a maximum depth of 7 250 feet (2 210 metres); the total volume of the water amounts to 131 000 cubic miles (547 000 cubic kilometres).

As a residual basin of the ancient Tethys Sea, the Black Sea has acquired its present form due to structural and geological movements through which Asia Minor separated the Mediterranean basin from the Caspian basin. Over the past 40 million years, the Black Sea has gradually been isolated from the seas to which it is connected through the straits mentioned above. Thus, the Black Sea is now much less saline than the oceans; salinity ranges from 1.75 to 1.85 per cent in the center to 0.3 per cent at the coasts. The Black Sea is known for its rich sea life, although because of the special consistency of the water at greater depths (i.e. high percentage of hydrogen sulphide), only the surface waters are inhabitable by sea fauna and flora, of which there are a considerable number (e.g. about 1 500 species of fish).

2. *Economic and Political Importance*

The economic significance of the Black Sea arises not only from its importance to fishery. The Sea also secures access to the → high seas and, thus, international trade for Romania and Bulgaria and, in conjunction with the → Danube River, even for Hungary. For the Soviet Union, which partially borders on the high seas, the Black Sea figures as the most important means of entry to the Mediterranean Sea (Middle East, Africa and southern Europe) and the South Atlantic (Africa, Latin America and Central America). The Black Sea also plays a role as a starting point for strategic movements of the Soviet navy in the Mediterranean Sea, although this function is contingent on passage through the Dardanelles and the Bosphorus straits not being prohibited by Turkey under the Treaty of Montreux of July 20, 1936 (LNTS, Vol. 173, p. 213).

3. *Legal Issues*

With the extension of the Ottoman Empire, the Black Sea for a short while turned into an internal sea (→ Internal Waters). Ottoman dominance over the Black Sea ended finally with the Peace Treaty of Paris, March 30, 1856 (→ Paris Peace Treaty (1856)), which lead to the → neutralization of the Black Sea (BFSP, Vol. 46, p. 8; Treaty of London, March 13, 1871, BFSP, Vol. 61, p. 7). On the same occasion, Russia and the Ottoman Empire agreed on a numerical limitation to their respective naval forces (Convention between Russia and Turkey limiting their Naval Forces in the Black Sea, March 30, 1856, BFSP, Vol. 46, p. 22; derogated by an annex to the Treaty of London, March 13, 1871, BFSP, Vol. 61, p. 11).

At present, the Black Sea is of minor political and legal importance. There are no international conventions having the Black Sea, itself, as an object. In general, the international → law of the sea applies to the Black Sea (see United Nations Convention on the Law of the Sea, December 10, 1982, UN Doc. A/CONF.62/122 with Corr., not yet in force and which until now has not been ratified by Turkey). Several multilateral agreements concerning the Black Sea regulate the following limited issues: Assistance to distressed vessels in the Black Sea, between Bulgaria, Romania and the Soviet Union (September 11, 1956, UNTS, Vol. 266, p. 221); load line for ships in the Black Sea, between the same parties (July 29, 1960, UNTS, Vol. 392, p. 69). An agreement between Turkey and the Soviet Union establishes the → maritime boundary on the basis of a 12-mile → territorial sea (April 17, 1973, UNTS, Vol. 990, p. 201); a 1978 agreement fixes the delimitation of the Turkish and Soviet → continental shelves (Turkish Official Journal, No. 17226, January 21, 1981).

As the continental shelf is of minimal extension in the Black Sea, most of the current legal issues concerning the Sea arise from economic problems such as fishery. A treaty on fishery exists between Great Britain, France, the Soviet Union, Romania and Bulgaria (June 7, 1959, UNTS, Vol. 377, p. 203). In addition, an → exclusive economic zone of 200 miles has been established through an exchange of letters between Turkey and the Soviet Union (Turkish Official Journal, No. 19386, February 28, 1987).

P.-H. MISCHEF, La Mer Noire et les détroits de Constantinople, Essai d'histoire diplomatique (1899).
K. RHEINDORF, Die Schwarze-Meer Frage vom Pariser Frieden von 1856 bis zum Abschluß der Londoner Konferenz von 1871 (1925).
S. STÉFANOVA, On the Legal Régime of the Black Sea, Prawna Micl, Vol. 8 (1964) 65–78 [in Bulgarian].
A.F. VYSOCKIJ, The Black Sea (1979) [in Russian].
J.J. DERBY, The Soviet Doctrine of the Closed Sea, San Diego Law Review, Vol. 23 (1986) 685–699.

CHRISTIAN RUMPF

BOSPORUS *see* Dardanelles, Sea of Marmara, Bosporus

BURKINA FASO/MALI, FRONTIER DISPUTE *see* Frontier Dispute Case (Burkina Faso/Mali)

CHANNEL ISLANDS AND ISLE OF MAN

The Channel Islands and the Isle of Man are → islands, under the → sovereignty of the British Crown, which enjoy a unique constitutional position. As a matter of constitutional law, they are dependencies of the Crown; but they are neither part of the United Kingdom nor colonies. The United Kingdom, Channel Islands and Isle of

Man are known collectively as the British Islands. The Home Office is the department of the United Kingdom Government mainly responsible for matters connected with the Islands, whereas the Foreign and Commonwealth Office is responsible in the case of other British dependent territories (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories). While their historical development is very different, the present constitutional position of the Channel Islands and Isle of Man is quite similar.

1. The Channel Islands

The Channel Islands (in French, Iles Anglo-Normandes) are a group of islands lying in the English Channel off the French coast. At their nearest point they lie only 6.6 miles off the French coast. They have a total land area of 195 square kilometres.

The Channel Islands are divided into two quite separate Bailiwicks, with no formal connections: (i) the Bailiwick of Jersey (including the Minquiers and Ecrehos); and (ii) the Bailiwick of Guernsey, which includes the islands of Guernsey (with Herm, Jethou and Lithou), Alderney and Sark. The population of the Bailiwick of Jersey is about 76 000, and that of the Bailiwick of Guernsey is about 53 000.

In A.D. 933 the Channel Islands were annexed by the Duke of Normandy (→ Annexation). In 1066 William Duke of Normandy became King of England following the Battle of Hastings, and they remained in allegiance to the King of England when continental Normandy was lost to the English Crown in 1204.

Although the Islands on occasion have been occupied by enemies of the Crown since 1204, most recently by German armed forces from 1940 to 1945, they have remained under the sovereignty of the Crown ever since. They have, however, always retained institutions separate from those in London.

There is a Lieutenant-Governor in each Bailiwick, who is the Crown's personal representative and the official channel of communication between the Crown and the United Kingdom Government and the Island authorities. There are also a number of officers, including the Bailiff and the Law Officers, who are directly appointed by the Crown. Each Bailiwick has a legislative assembly (the States). In each case, administration is delegated by the States to committees of its members. The legal system is quite separate from those of the United Kingdom; the final court of appeal is the Judicial Committee of the Privy Council. Alderney and Sark have their own institutions and a large measure of independence within the Bailiwick of Guernsey.

As the sovereign legislature of Her Majesty's dominions, the United Kingdom Parliament has the power to legislate for the Islands. However, Acts of Parliament do not extend to the Islands in the absence of an indication to this effect. For example, the Act itself may expressly provide that it so extends, or power may be given for this to be done by subordinate legislation (Order in Council); it is customary for such extension to be effected in consultation with the Island authorities. In matters of purely local application the Island legislatures pass laws which are submitted for Royal Assent by Her Majesty in Council.

2. The Isle of Man

The Isle of Man lies in the Irish Sea, and has an area of about 221 square miles. Its population is about 66 000.

The Isle of Man first came under the English Crown in the 14th century following periods under the suzerainty of the Kings of Norway and Scotland. From 1405 to 1765 the Island was granted to the Earls of Derby, or Atholl, as Lords of Man; but thereafter the rights of the Lords of Man were revested in the Crown and the Island was very largely governed from London. Beginning in 1866 more and more control has been transferred into local hands.

The Lieutenant-Governor of the Isle of Man is the head of the executive, as well as being the Crown's personal representative and the channel of communication between the Crown and the Island authorities. The Crown also appoints the Island's High Court Judges and Attorney General. The Government Secretary is the channel of communication between the United Kingdom Government and the Island authorities. The Tynwald (or Court of Tynwald) is the legislature. As with the Channel Islands, the final court of appeal is the Judicial Committee of the Privy

Council. The United Kingdom Parliament retains the power to legislate.

3. *International Legal Aspects*

The Islands do not have separate international legal personality; like United Kingdom dependent territories, for the purposes of international law they are under the sovereignty of the United Kingdom of Great Britain and Northern Ireland. The United Kingdom as such is responsible for the international relations of the Islands. Thus, for example, applications under the → European Convention on Human Rights complaining of the acts of an Island authority are properly brought against the United Kingdom as High Contracting Party; however, such an application may only be made by individual petition where the United Kingdom Government has made a declaration (currently in force) accepting that right in respect of and on behalf of that Island. Cases brought in respect of the Islands include the Gillow Case (E.C.H.R., judgment of November 24, 1986, Series A No. 109), which concerned the Guernsey Housing Laws; and the Tyrer Case (E.C.H.R., judgment of April 25, 1978, Series A No. 26), which concerned corporal punishment in the Isle of Man.

Treaties entered into by the United Kingdom may be applied to the Islands as they may apply to any other territories for whose international relations the United Kingdom is responsible; as with the application of United Kingdom legislation, this is customarily achieved in consultation with the Island authorities.

The Treaties establishing the → European Communities apply to the Islands only to the extent necessary to ensure the implementation of the arrangements for the Islands set out in the Treaty of Accession of January 22, 1972 (Cmnd. 7463, Treaty Series No. 18 (1979): see → European Coal and Steel Community Treaty, Art. 79(c); → European Economic Community Treaty, Art. 227(5)(c); → European Atomic Energy Community Treaty, Art. 198(d); and Protocol No. 3 to the Act of Accession). Under Protocol No. 3, the Community rules on customs matters and quantitative restrictions apply to the Islands under the same conditions as they apply to the United Kingdom, as do certain other Community rules.

Under the British Nationality Act 1981 (c. 61), citizens of the Islands are British citizens, as are British nationals connected with the United Kingdom itself (→ British Commonwealth, Subjects and Nationality Rules).

Because of their geographical location close to the French coast, the Channel Islands have played an important role in two international cases: the → Minquiers and Ecrehos Case and the → Continental Shelf Arbitration (France/United Kingdom). In the former case the → International Court of Justice found that sovereignty over the Minquiers and Ecrehos lay with the United Kingdom essentially on the basis of acts of administration on the part of the Jersey authorities. In the latter case the Court of Arbitration found that the boundary of the continental shelf appertaining to the Channel Islands to the north and west was a line twelve miles from established baselines.

Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom (1969).
The Royal Commission on the Constitution 1969–1973, Vol. 1 (1973) 407–425.
Halsbury's Laws of England, Vol. 6 (1974) 371–379.

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COLUMBIA RIVER

The Columbia River is 1225 miles long, 745 miles being in the United States and the rest in Canada. The river drains an area of some 259 000 square miles, 15 per cent being in Canada. Two of its tributaries, the Kootenay and the Flathead-Clark Fork-Pend-Oreille, themselves cross the Canada-United States border twice, contributing 21 per cent to the average run off of the river basin of 180 million acre-feet per year.

The special feature that places this river in the first rank of → international rivers is not its length but its potential for hydro-electric power, for it rises 2650 feet above sea level in Canada, is 1299 feet at the international boundary, and flows down valleys ideally suited for water storage behind dams. One-fifth of the energy of the rivers of the

world is said to be in North America, and of that one-third is in the Columbia River. Such a rich resource easily becomes the object of contention between the States that share it, involving economic, political and legal issues.

The Columbia River appeared on the international legal scene in the Treaty of Oregon of June 15, 1846 (BFSP, Vol. 34, p. 14), which fixed the boundary along the 49th parallel. This Treaty guaranteed the right of navigation of the river for the Hudson's Bay Company and all British subjects trading with the Company. This right of navigation, along with the salmon fishery on the Canadian section of the river, was destroyed without → protest by Canada when Grand Coulee Dam, 151 miles downstream from the international boundary, was completed in 1942.

The next step of legal significance was the Boundary Waters Treaty of January 11, 1909 (BFSP, Vol. 100, p. 137). Thereafter, dams or other obstructions affecting the natural level of waters on the other side of the boundary required the approval of the International Joint Commission (IJC). Thus, the IJC became involved in the development of the Columbia River, as in the case of the United States' decision to build Libby Dam on the Kootenay River to raise the level of the water 150 feet at the boundary and create a lake of 42 miles in Canada.

The IJC, however, became involved most significantly with Columbia River development in another way. Under the Boundary Waters Treaty, Art. IX, the parties can refer questions affecting their interests along their common frontier to the IJC for examination and report. In 1944, they did make such a reference. The Americans had undertaken considerable development of the river in their territory, most notably the installation of Grand Coulee Dam, and foresaw great benefits in flood and hydro-electric power generation from upstream storage in Canada. Consequently, Canada and the United States asked the IJC to investigate and make recommendations for further uses and developments of the river.

The work of the IJC under this reference contributed greatly to the decisions ultimately taken about the development of the river; it provided the facts about the various schemes of development that were feasible. Before its work was completed in 1959, however, the development of the Columbia River had become a matter of intense political and legal controversy, even in the IJC itself.

At the time of this controversy, there had been no major development of the river in Canada. In all the proposals being considered, however, dams for major storage of water there were the essential feature. These dams would not only make possible the generation of electric power in Canada but, by regulating the flow of the river, would add substantially to the capacity of existing installations in the United States at little additional cost and also provide flood control. Canada argued that it was entitled under international law to be compensated for these downstream benefits. When the United States disputed this claim, Canada asserted the right to divert some 15 million acre-feet of "Canadian" water from the Columbia River basin to the Thompson and Fraser Rivers which flow entirely in Canada.

These issues were settled by the Columbia River Treaty of January 17, 1961 (UNTS, Vol. 542, p. 244) and its Protocol of January 22, 1964 (UNTS, Vol. 542, p. 302). First, the United States recognized the claim to downstream benefits; in return for providing 15.5 million acre-feet of storage, Canada would receive 50 per cent of the resulting power benefits in the United States and $64 million for flood control benefits. By an exchange of notes, Canada sold the downstream power benefits for 30 years for $254.4 million.

Second, the Treaty sanctioned inter-basin, but not extra-basin, diversions of water by Canada. Apart from diversion for consumptive use, the latter was prohibited during the 60 year life of the treaty; the former, a diversion to the Columbia from its tributary, the Kootenay, was prohibited for 20 years after ratification of the Treaty but thereafter could be undertaken in increasing amounts. Although the 20 year period has expired, Canada has so far not exercised its option to divert. The legality of diversions on the termination of the Treaty is left open.

The history of Columbia River development accords with the international legal principle of equitable utilization; it illustrates the benefits that may accrue to States from the reasonable and equitable sharing of the uses of the waters of an international drainage basin. (See also

→ American-Canadian Boundary Disputes and Cooperation.)

Treaty between Great-Britain and the United States, for the Settlement of the Oregon Boundary, June 15, 1846, BFSP, Vol. 34 (1845–1846) 14–15.

Treaty between Great-Britain and the United States of America relating to Boundary Waters and Questions arising along the Boundary between Canada and the United States and the Establishment of an International Joint Commission, January 11, 1909, BFSP, Vol. 102 (1908–1909) 137–144.

Treaty Relating to the Cooperative Development of the Water Resources of the Columbia River Basin, January 17, 1961, UNTS, Vol. 542 (1965) 244–291.

Exchange of Notes Regarding Sale of Canada's Entitlement to Downstream Benefits under the Treaty of January 17, 1961 (with attached Protocol), January 22, 1964, UNTS, Vol. 542 (1965) 302–311.

Exchange of Notes, Constituting an Agreement authorizing the Canadian Entitlement Purchase Agreement provided for, under the Treaty of January 17, 1961, September 16, 1964, UNTS, Vol. 542 (1965) 312–343.

R.W. JOHNSON, The Columbia Basin, in: A.H. Garretson, R.D. Hayton and C.J. Olmstead (eds.), The Law of International Drainage Basins (1967) 167–255.

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CURZON LINE

When the Polish State was re-established at the end of World War I, the victorious Allied and Associated Powers assumed the responsibility for drawing its → boundaries in Art. 87 of the → Versailles Peace Treaty (1919). Whereas Poland's western and northern frontiers with Germany were either specifically provided for in the Treaty, or settled subsequently by way of → plebiscite, Poland's eastern frontier with the Soviet Union was more difficult to determine, because Poland insisted on its historic frontier prior to the 1772 partition (see Treaties between Austria and Russia, Austria and Prussia, Prussia and Russia, July 25, 1772, CTS, Vol. 45 (1772–1775) pp. 57–79). Recognition of the Polish claim would have brought considerable numbers of ethnic Ukrainians and Byelorussians under Polish → sovereignty, in violation of Point 13 of → Wilson's Fourteen Points: "An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations . . . ."

At the Paris Peace Conference the Allied Supreme Council set up a special commission on February 12, 1919 to study the matter. A provisional demarcation line based on ethnographic considerations was proposed on December 8, 1919 (BFSP, Vol. 112, p. 971), but was rejected by Poland, which was then at war with the Soviet Union. When the Polish offensive, which had succeeded in taking Kiev, collapsed in July 1920, the Polish Prime Minister sent an urgent appeal to the Inter-Allied Conference at Spa.

On July 11, 1920 British Foreign Secretary Lord Curzon addressed a → note to the Soviet Government proposing an → armistice line based on the Allied proposal of December 8, 1919 (Documents on British Foreign Policy 1919–1939, First Series, Vol. 11, p. 375). What became known as the Curzon line extended southward from the Lithuanian border to Czechoslovakia, passing east of Bialystok, immediately west of Grodno and Brest-Litovsk, following the Bug River to its junction with the pre-World War I frontier between the Austrian Empire and Russia at Sokoly and then turning west and southwest to the Carpatian Mountains, keeping Przemysl for Poland, but ceding eastern Galicia with the city of Lemberg (Lvov) and the oil fields to the Ukraine. This latter area had not been part of the Russian Empire, but belonged to Austro-Hungary before its → dismemberment in the → Saint-Germain Peace Treaty (1919) and → Trianon Peace Treaty (1920). Although the British Government, in a second note of July 20, 1920 (Documents on British Foreign Policy 1919–1939, First Series, Vol. 8, p. 649, at p. 650), committed itself to assist Poland if Soviet troops were to cross west of the proposed armistice line, the Soviet Government rejected the Allied proposal. On July 22, 1920 Soviet troops crossed the line and Britain started to send war materials to Poland.

The new Polish offensive and victory at the Battle of Warsaw led to peace talks at Riga and the adoption of a Soviet-Polish frontier based not on ethnography or historical claims but simply on the position of the respective armies on October 18, 1920. The Treaty of Riga of March 18, 1921 (LNTS, Vol. 4, p. 141) ended the conflict, recognizing a frontier roughly 100 miles (160

kilometres) east of the Curzon line and adding about 52,000 square miles (135,000 square kilometres) of territory to the new Polish State.

The Curzon line lost significance until the signing in Moscow on August 23, 1939 of the German-Soviet Non-Aggression Treaty (Documents on International Affairs 1939–1946, Vol. 1, p. 408), which provided in a Secret Additional Protocol for a division of → spheres of influence along the so-called Ribbentrop-Molotov line, a slightly modified Curzon line. This treaty facilitated Hitler's invasion of western Poland on September 1, 1939, which was followed by Stalin's occupation of eastern Poland on September 17, 1939. The modified Curzon line, thus, became the effective German-Soviet frontier until Germany's invasion of the Soviet Union on June 22, 1941.

With the turning of the winds of war in 1943, the Soviet Union started to press its demand for a Soviet-Polish frontier at the Curzon line, notably at the → Tehran Conference (1943). This demand, however, was vehemently opposed by the President of the Polish Government-in-Exile in London (→ Government-in-Exile), but supported by the Moscow Committee of National Liberation, which Stalin allowed to develop into a provisional Polish Government at Lublin in July 1944. The existence of this *de facto* government in Poland significantly diminished the influence of the *de jure* Government-in-Exile in London, which was not allowed to participate in the → negotiations on the Polish-Soviet frontier at the → Yalta Conference in February 1945. There, Churchill and Roosevelt formally approved Stalin's territorial demands:

> "The three Heads of Government consider that the eastern frontier of Poland should follow the Curzon Line with digressions from it in some regions of five to eight kilometers in favor of Poland. They recognize that Poland must receive substantial accessions of territory in the north and west" (DeptStateBull, Vol. 12, February 18, 1945, p. 215).

The Polish western frontier was thus moved some 100 miles westward to the → Oder-Neisse line, which received provisional approval in Art. IX of the Potsdam Protocol (→ Potsdam Agreements on Germany (1945)). This further entailed the expulsion of some 10 million Germans from the German provinces east of the Oder-Neisse boundary, as authorized in Art. XIII of the Potsdam Protocol (→ Population, Expulsion and Transfer).

Poland's eastern frontier on the Curzon line was formally agreed in the Treaty concerning the Polish-Soviet State Frontier of August 16, 1945 (UNTS, Vol. 10, p. 193) and slightly modified in the Polish-Soviet treaties of July 8, 1948 (UNTS, Vol. 37, p. 25) and February 15, 1951 (UNTS, Vol. 432, p. 199). Of the four million Poles who had lived east of the Curzon line, some two million were transferred to Poland from 1945 to 1949.

S. GRABSKI, The Polish-Soviet Frontier (1943).
L. WOOLSEY, The Polish Boundary Question, AJIL Vol. 38 (1944) 441–448.
H. WRIGHT, Poland and the Crimea Conference, AJIL, Vol. 39 (1945) 300–308.
L. KIERKEN, Russia, Poland and The Curzon-Line (1949).
J. SCHECHTMAN, The Polish-Soviet Exchange of Population, Journal of Central European Affairs (1949) 289–314.
W. CHURCHILL, The Second World War, Vol. 6, Triumph and Tragedy (1953).
G. RHODE, Die Entstehung der Curzon Linie, Osteuropa, Vol. 5 (1955) 81–92.
F. ARCISZEWSKI, Strategical Significance of the New and Old Soviet-Polish Border, Polish Review (1956) 89 et seq.
E. KUSIELEWICZ, New Light on the Curzon Line, Polish Review (1956) 82 et seq.
M. VOLASIC, The Curzon-Line and Territorial Changes in Eastern Europe, Belorussian Review, Vol. 2 (1956) 37–72.
R. YAKEMTCHOUK, La Ligne Curzon et la IIe guerre mondiale (1957).
A. DE ZAYAS, Nemesis at Potsdam (1977).

ALFRED-MAURICE DE ZAYAS

CYPRUS

1. Early History

The → island of Cyprus, which is mentioned even in Homer's Iliad, was in early times under Syrian, then Egyptian and Persian rule. It was part of the Empire of Alexander the Great from 332 to 323 BC, before reverting to Egyptian rule. The island formed part of the Roman Empire from 58 BC to 395 AD and subsequently part of the Byzantine Empire until 1184. The island was occupied seven times by the Arabs between 632 and 964. The Byzantine period was followed by a

period of independence and then came, in succession, Richard the Lionheart (Conquest of Cyprus 1191), the Lusignians, the Genoans and the Venetians. From 1571 onwards Cyprus was part of the Ottoman Empire. The island has a total land area of 9251 square kilometres.

2. *British Rule*

During the Balkan crisis of 1878, Britain and Turkey concluded a pact of mutual assistance (text in Dischler, p. 61). As far as Britain was concerned, the foreign policy aim of this was a strengthening of the Ottoman Empire against a further Russian advance in Asia Minor. The Sultan agreed to the occupation and administration of Cyprus by Britain without renouncing, in principle, Turkish → jurisdiction. From a political point of view, the granting of these guaranteed rights for an unlimited period amounted to the cession of Cyprus to Britain (→ Territory, Acquisition). Given its strategic importance, Cyprus was largely treated as a Crown Colony notwithstanding the continuing Turkish → sovereignty as far as international law was concerned. However, the inhabitants retained their Turkish → nationality and the treaties concluded by Turkey, with the exception of the suspended surrender treaty, continued to allude to Cyprus. During the Turkish wars of 1911 to 1913 Cyprus enjoyed the status of a neutral State.

The complete annexation of Cyprus by Britain dates from the Order in Council of November 5, 1914 (see Dischler, p. 73); formal acknowledgement of this dates from the → Lausanne Peace Treaty of 1923 (Art. 20). The status of a British Crown Colony was officially conferred by Letters Patent of March 10, 1925 (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories).

3. *Development of the Independence Movement*

There had been attempts at union between Cyprus and the newly independent Greece prior to British rule. This Enosis movement gathered strength after 1878 and led to unrest. The offer made by Britain to Greece on October 18, 1915, to cede Cyprus in exchange for the participation by Greece in the war – on the allied side – gave rise to particular hope. After Greece maintained neutrality and only entered the war in 1917 Britain felt no longer bound by this offer. Following the Order in Council of September 14, 1878 which had granted Cyprus a constitution appropriate for a Crown Colony, with Legislative and Executive Councils, further changes arose as a conseqence of the Order in Council of February 6, 1925. Arising out of the elevation to the status of Crown Colony, the office of High Commissioner was changed to that of Governor. Meanwhile the demands of the Enosis movement intensified and, coupled with the serious unrest of 1931, led to the constitution being changed by Royal Letters Patent of November 12, 1931 and the Cyprus Defence Order of October 22, 1931. The Legislative Council was suspended and all powers were concentrated in the hands of the Governor.

Despite some minor concessions in the period thereafter, tension between the Greek section of the community and the British colonial administration did not ease. The British proposals of May 7, 1948 for constitutional reform which essentially were directed at the restoration of the pre-1931 situation, met with sharp rejection. The election of Makarios as Archbishop and Ethnarch in 1950, both of which positions had political importance, gave support to the Enosis movement. Collaboration with the underground terrorist organization EOKA gave increased emphasis to the demands of the Enosis movement, and spread an atmosphere of fear and insecurity throughout the island.

After the British-Greek-Turkish talks of 1951 had foundered on the British intention of merely granting internal autonomy to the island, there had been a British readiness to recognize the right of the Cypriots to → self-determination. The constitutional proposals made by Lord Radcliffe in 1956 which contained the retention of British sovereignty as well as a large measure of self-government for the inhabitants, were rejected both by Greece and by the Ethnarchic Council. Only Turkey, and Britain as the protecting power of the Turkish → minority on Cyprus, saw any merit in the proposals as a basis for discussion. On June 19, 1958 the British Government made new proposals for the solution of the Cyprus question, with the so-called partnership plan. This set out that Britain, Greece and Turkey together with the Cypriots, should work closer together to direct the future destiny of the island. Since it was envisaged to have a period of seven years during which the

→ *status quo* would continue pending the introduction of the plan, this in turn was also rejected, although during the → negotiations, Makarios did make clear his readiness to entertain a solution along the lines of an independent Cyprus. This was the turning point as regards bringing the different varying attitudes together.

A basic agreement regarding a solution to the Cyprus question was reached at the Zürich talks between the Greek and Turkish Foreign Ministers held from February 6 to 11, 1959. The future position of Cyprus as regards public law and international law was settled at the London Conference held from February 17 to 19, 1959, by means of the British-Greek-Turkish Agreement (British Command Paper Cmnd. 679). The existence and independence of the new State was to be guaranteed by the three powers parties to the treaty. The Treaty of Guarantee (→ Guarantee Treaties) prohibited the partition of Cyprus, or her union with another State. Provision was made, in the event of a violation of the Treaty of Guarantee, for the protecting powers to intervene jointly or individually, but only for the purpose of maintaining or restoring the situation in line with the Treaty. Britain maintained jurisdiction over two districts and a number of special military rights for the purpose of maintaining her military presence (→ Military Bases on Foreign Territory).

4. *Independent Republic*

Cyprus was declared a republic on August 16, 1960, and one month later joined the → United Nations; she became a member of the → British Commonwealth of Nations and of the → Council of Europe in 1961. Archbishop Makarios was elected President in 1959 on his return from three years exile imposed by the British; the leader of the Turkish Cypriots, Fazil Kutchuk, was elected Vice-President. The following years were hallmarked by fruitless endeavours to resolve the complex constitutional problems (see British Command Paper Cmnd. 1093, p. 91 et seq.). Both President and Vice-President had a veto in relation to certain important laws (Art. 50). The 10 members of the Cabinet, the 50 members of the legislature and the senior posts in the civil service were to be drawn according to a ratio of 7:3 from the Greek and Turkish communities respectively, in line with the Constitution. The armed services were to have a ratio of 6:4, in favour of the Greek members of the population.

The Greek Cypriot side, however, was not always prepared to respect the constitutional rights of the Turkish Cypriots, particularly as regards the distribution of civil service posts and the rights concerning political participation and co-responsibility. In addition, some Greek Cypriots maintained their objective of union with Greece. The Turkish Cypriots, for their part, also created difficulties – for example, they prevented the successful passage of important tax legislation. Mutual distrust was the order of the day with the result that agreement on the administration of the five largest towns could not be reached.

The extent of the differences became quite obvious when on November 30, 1963, Makarios proposed thirteen amendments to the Constitution (Kyriakides, p. 105 et seq.) which had as their aim the simplification of the organization of the country, and would have led to a restriction of the Turkish Cypriot minority rights. The amendments were rejected by the Turkish Cypriot side. Strife, almost of → civil war proportions, broke out in December 1963, leading to several hundred deaths on both sides and to the flight of thousands of Turkish Cypriots from their villages. Following the → United Nations Security Council Resolution 186 of March 4, 1964, UN peace-keeping troops were stationed on the island in March 1964 where they have remained ever since, without being able to prevent further conflict (→ United Nations Forces). The Turkish Cypriot members of the government and office holders resigned when the conflict began.

The following years saw the emergence of a Turkish Cypriot administrative apparatus in those pockets where Turkish Cypriots were concentrated. The cooperation as foreseen in the constitution was totally frustrated. An American peace plan (Acheson Plan) which provided for the union of Cyprus with Greece, the creation of two Turkish Cypriot districts and a Turkish military base was turned down by Makarios in July 1964, in favour of preserving the independence of Cyprus.

The conflict flared up again in November 1967 when a Turkish invasion could only be prevented by Greek readiness to withdraw troops which had been stationed on the island in the course of the

preceding years. The success of these negotiations and the lifting of the restrictions on Turkish Cypriots led to a temporary relaxation in tension, and facilitated constitutional talks between representatives of the two communities which started in June 1968 and continued up to June 1974.

5. Partition of the Island

A coup was staged on July 15, 1974, led by radical Greek officers who were obeyed by the Cypriot National Guard, and Makarios had to flee. The *coup* was the result of tensions over the years between Makarios and radical Enosis supporters who had founded a new terror organization (EOKA-B) with which the Greek officers were connected and which was supported by the then Greek military government. The anti-Turkish newspaper publisher, Nikos Sampson, a former EOKA leader, became President in place of Makarios, but he was replaced on July 22, 1974 by the President of the Parliament, Glafkos Klerides, on the initiative of the Greek Government.

Despite international attempts at mediation, Turkey invaded Cyprus on July 20, 1974, justifying the action by the right of intervention under the Guarantee Treaty of 1959. Following a further offensive in August, Turkish troops occupied some 3500 square kilometres in the north of the island and put between 160 000 and 180 000 Greek Cypriots to flight from there. Some 25 000 Turkish soldiers still remain in northern Cyprus. Currently some 120 000 Turkish Cypriots and 65 000 mainland Turks live in the northern part of the island, the latter having settled there in the intervening period. Approximately 500 000 Greek Cypriots live in the southern part of the island. A Turkish Federated State of Cyprus was declared in northern Cyprus on February 13, 1975.

In the years from 1975 to 1983, discussions and negotiations took place between the two groups on a new common constitution for Cyprus modelled on a → federal State approach. These were held within the framework of two outline agreements of February 12, 1977 and May 19, 1979 (Ertekün, pp. 278 and 360) between Makarios, who had returned to Cyprus, and the Turkish Cypriot leader Denktash – but without success.

A separate State, the Turkish Republic of Northern Cyprus, was declared by a "Turkish Cypriot legislative assembly" on November 15, 1983 (Ertekün, p. 127 et seq.). Turkey remains the only country which has acknowledged the existence of this State; the separation was declared invalid in UN Security Council Resolutions 541 (1983) and 550 (1984). In addition, the British Commonwealth, the Council of Europe and the → European Economic Community (EEC) only recognize the Republic of Cyprus; the EEC and Cyprus have an Association Treaty dating from December 19, 1972. Following a → plebiscite held on May 5, 1985, Northern Cyprus acquired a constitution. Denktash was elected to President of the "Turkish Republic of Northern Cyprus" in the same year, followed by parliamentary elections. At present, the island is divided by an inner demarcation line which is hermetically sealed and guarded on both sides. Conflict still breaks out from time to time.

6. Recent Attempts to Find Solutions

Negotiations between both groups have continued since 1985 in an attempt to find a solution to reunifying Cyprus – on the lines of a federal structure. The → United Nations Secretary-General has frequently been involved as mediator, within the meaning of Art. 33 of the → United Nations Charter, and from time to time he puts forward his own suggestions. Georgios Vassiliou, Kyprianou's successor as President, has led the negotiations from the Greek Cypriot side since 1988. Denktash remains the Turkish Cypriot President.

Even at the beginning of the 1990s there are still enormous differences in the various standpoints. The question remains to be answered as to what type of political equality there should be in a future Cyprus composed of Greek and Turkish parts. The Greek side tends to favour a strong central State and the island's Turks lean towards a more confederal arrangement. A further problem area is that of the "three freedoms" (movement, establishment and property). The Turkish side has reservations about these freedoms. Further points of disagreement include the compensation of victims of the war on the island in 1974, the continuing stationing of Turkish troops on Cyprus, and future international guarantee obligations to replace the 1959 Treaty. The Greek side would prefer the 65 000 Turkish settlers in northern Cyprus to return to Anatolia. For the foreseeable

future it is hard to envisage an alternative to what the UN Secretary-General Pérez de Cuéllar had to say about the situation: "Patience is required when dealing with Cyprus." One possible way out could be via Turkey's desire to join the European Community; according to Greek statements, Greece would only be prepared to consent to this on the basis of an agreed solution to the Cyprus problem.

L. DISCHLER, Die Zypernfrage, Dokumente, Vol. 33 (1960) 7–174.

G. HILL, A History of Cyprus, 4 vols. (1948–1952).
P. TZERMIAS, Die Entstehung der Republik Cypern, Jahrbuch des öffentlichen Rechts, Vol. 9 (1960) 245–295.
P. TZERMIAS, Die Verfassung der Republik Cypern, Jahrbuch des öffentlichen Rechts, Vol. 10 (1961) 485–525.
S. XYDIS, Cyprus, Conflict and Conciliation 1954–1958 (1967).
S. KYRIAKIDES, Cyprus Constitutionalism and Crisis Government (1968).
L. IERODIAKONOU, The Cyprus Question (1971).
F. CROUZET, Le conflit de Chypre 1946–1959, 2 vols. (1973).
S. XYDIS, Cyprus – Reluctant Republic (1973).
K. MARKIDES, The Rise and Fall of the Cyprus Republic (1977).
D.S. CONSTANTOPOULOS, Die Türkische Invasion in Zypern und ihre völkerrechtlichen Aspekte, GYIL, Vol. 21 (1978) 272–310.
N. CRAWSHAW, The Cyprus Revolt (1978).
P. POLYVIOU, Cyprus. Conflict and Negotiation 1960–1980 (1980).
N. ERTEKÜN, The Cyprus Dispute (2nd ed. 1984).
M. FLORY, La partition de Chypre, AFDI, Vol. 30 (1984) 177–186.
R. MEINARDUS, Eine neue Phase im Zypern-Konflikt, Europa-Archiv, Vol. 39 (1984) 297–306.
S. PANTELI, A New History of Cyprus (1984).
A. HOTTINGER, Das ungelöste Zypern-Problem, Europa-Archiv, Vol. 41 (1986) 51–58.
R. MEINARDUS, Entwicklungen der Zypernfrage 1984–1987, Orient (1987) 519–532.
R. MEINARDUS, Wenig Bewegung in der Zypern-Frage, Europea-Archiv, Vol. 45 (1990) 29–36.

THOMAS OPPERMANN

DANUBE RIVER

Centuries of strife preceding the reduction of Turkish dominance in the Balkans rendered the Danube, up to the 19th century, economically less important than the other major European rivers. Thus, when the → Vienna Congress in 1815 established principles for a régime of → international rivers, providing for freedom of navigation (→ Navigation, Freedom of; → Navigation on Rivers and Canals), this régime was not applied to the Danube.

The → Paris Peace Treaty of 1856 extended the régime of international rivers to the Danube, providing free navigation for riparians and non-riparians as well as freedom from any tolls. Russia lost parts of the Danube delta which it had acquired in 1812 and 1829. The entire delta became part of the Principality of Moldavia, a → State under Turkish suzerainty (→ Sovereignty). The Treaty established the European Danube Commission for the region of the Danube delta, downstream from Isaktcha. This Commission was composed of representatives of France, Austria, Great Britain, Prussia, Russia, Sardinia and Turkey. Its task, originally, was limited to dredging and improving the Sulina navigation channel. The Treaty, furthermore, established a Permanent Commission of the Riparian States, composed of representatives of Austria, Bavaria, Turkey, Württemberg and the three Danubian principalities (Bulgaria, Moldavia and Serbia). The Treaty envisaged that after the completion of the dredging operation, the tasks of the European Danube Commission should be taken over by the Permanent Commission of the Riparian States. However, the latter Commission soon ceased its functions, after having, in 1857, drawn up navigation rules excluding → cabotage by non-riparians.

The Paris Conference of 1865 rendered the European Danube Commission permanent and increased its privileges (Acte public relatif à la navigation des embouchures du Danube, November 2, 1865, Martens NRG, Vol. 18, p. 143). In the delta area, where sovereign rights were divided between Turkey and Moldavia, the European Danube Commission gained a status rendering it nearly independent from any local authorities. The Commission appointed its officials, enjoyed far-reaching immunities, established and enforced navigation rules, collected fees, granted pilotage patents and exercised navigation police powers with the right to impose fines on individuals. The legislative and judicial powers of this Commission were so far-reaching that they may well be

compared to those enjoyed by → supranational organizations, especially by the → European Communities.

At the → Berlin Congress (1878), Romania became a member of the Commission, whose powers were extended upstream to the head of the delta at Galatz (Traité de Berlin, July 13, 1878, Martens NRG2, Vol. 3, p. 449). In 1880 Serbia and Bulgaria joined the Commission. The London Conference of 1883 authorized Russia to render navigable the northern-most Kilia arm of the delta, whose north bank had become part of Russia (Traité de Londres, March 10, 1883, Martens NRG2, Vol. 9, p. 392). The powers of the Commission were extended further upstream to Braila, the last Danube port accessible to maritime traffic.

The Berlin Congress re-confirmed freedom of navigation for riparians and non-riparians on the Danube in its entirety. All fortifications between the mouth of the Danube and the Iron Gates Rapids between Serbia and Austria-Hungary had to be dismantled. Various efforts to establish an international régime for the navigation on the Danube between Braila and the Iron Gate failed.

The → Peace Treaties after World War I re-instated the European Danube Commission, which was now composed of representatives of France, Great Britain, Italy and Romania and established an International Danube Commission for the Danube upstream from Braila to Ulm in Württemberg, its last navigable port. This International Danube Commission was composed of representatives of the riparian States Württemberg, Bavaria, Austria, Czechoslovakia, Hungary, Yugoslavia, Romania and Bulgaria as well as France, Great Britain and Italy. Detailed rules on the powers of the two Commissions figure in the Danube Convention signed in Paris on July 23, 1921 by Belgium, Czechoslovakia, France, Great Britain, Greece, Italy, Romania and Yugoslavia (Convention établissant le statut définitif du Danube, LNTS, Vol. 26, p. 173).

From 1919 to 1940 the entire Danube delta was under Romanian sovereignty. Romania resented the wide powers of the European Danube Commission. Romania tried in vain to reduce the area of the Commission's activities, invoking Romania's non-adherence to the London Conference of 1883 extending the Commission's jurisdiction to Braila (→ Jurisdiction of the European Commission of the Danube (Advisory Opinion)). At the Conference of Sinaia in 1938 Great Britain, France and Romania agreed to divest the Commission of its supranational powers (Arrangement relative to the Exercise of the Powers of the European Commission of the Danube and Final Protocol, August 18, 1938, LNTS, Vol. 196, p. 113). In the Treaty of Bucarest of March 1, 1939 Germany and Italy acceded to the Sinaia Agreement and Germany became a member of the Commission (LNTS, Vol. 196, p. 126). In 1940 the Soviet Union became again a riparian of the northern arm of the Danube delta. In October 1940 Germany, with Italy's consent, agreed with the Soviet Union to dissolve the two existing Danube Commissions and replace them with a single Commission composed of the riparian States and Italy. This Commission's jurisdiction was to extend from Bratislava to the sea. However, a treaty to this effect was not concluded, owing to the Soviet Union's insistence on special privileges in the delta.

When the International Danube Commission was established in 1921, its powers were limited to safeguarding freedom and equality concerning navigation and harbour use for riparian and non-riparian States on the Danube between Braila and Ulm and on some of its tributaries, and to planning and improving the navigation channels. Special provisions were made concerning maintenance of a passage through the Iron Gate Rapids. In 1936 Germany denounced the provisions of the → Versailles Peace Treaty of 1919 internationalizing her main waterways, including those under the jurisdiction of the International Danube Commission. Germany withdrew its two representatives (i.e. the former representatives of the German Länder Bavaria and Württemberg) from this Commission. In 1938 Germany's occupation of Austria limited even further the area of jurisdiction of the Commission, now extending only from Bratislava to Braila. The Commission was forced to transfer its seat from Vienna to Belgrade. In the Vienna Agreement of September 12, 1940 Germany, Bulgaria, Italy, Yugoslavia, Romania, Slovakia and Hungary agreed to dissolve the Commission and to establish a provisional wartime navigation régime for the Danube (United States Department of State, Documents and State Papers, Vol. 1 (1948) p. 273). On February 20, 1941 the Soviet Union acceded to this agreement

(see DeptStateBull, Vol. 18 (1948 I) p. 787, at p. 791). However, the project to establish a single Danube Commission did not materialize.

After World War II, the Danube up to Linz in the zone of Austria occupied by the United States came under Soviet control until 1955. Only in the → Peace Treaties of 1947 did the Soviet Union accept freedom of navigation, except cabotage, on the Danube for all States on a footing of equality. In 1948 the Soviet Union, the Ukraine, Bulgaria, Hungary, Romania, Czechoslovakia, France, Great Britain and the United States held a Danube conference in Belgrade. Against the objections of the Western participants, the conference assumed that for various reasons the earlier Danube conventions were no longer in force and replaced them with the Belgrade Convention of August 18, 1948 (UNTS, Vol. 33, p. 181). The Western participants refused even to sign this Convention and insisted on the continued validity of the 1921 Convention and on the acquired rights of non-riparian States. Thus the 1948 Convention was ratified only by the riparian States, except Austria and the Federal Republic of Germany. Austria acceded to the Convention in 1960 (Statute of December 19, 1959, Austrian Bundesgesetzblatt 1960, No. 40, p. 427); the Federal Republic of Germany has had observer status since 1957.

Austria did not adhere to the Additional Protocol to the 1948 Danube Convention (UNTS, Vol. 33, p. 181), transferring all assets of both of the former Commissions to the new Danube Commission while freeing it from their liabilities. As far as assets outside the Danubian States were concerned, this Protocol remained ineffective. The European Danube Commission went into exile in Rome. Greece became a member in 1955. This Commission still owned a considerable amount of gold. France, Great Britain and Italy, "acting jointly as members of the European Danube Commission having its seat in Rome", by an agreement of April 23, 1977 (British Command Papers, Cmnd. 8384, Treaty Series, No. 74 (1981)) ceded to Romania 50 kilograms of this gold in return for Romania's waiver of all claims to the rest of the Commission's gold and British Treasury Bonds.

The Belgrade Convention grants freedom of navigation in regard to port and navigation charges and conditions for merchant shipping, except cabotage, to all States on a footing of equality on the Danube, but not on its tributaries. The Convention establishes a single "Danube Commission" whose jurisdiction extends from the border of the Federal Republic of Germany to the → Black Sea, although Art. 2 of the Convention claims jurisdiction from Ulm to the Black Sea. Special Administrations were established for the criticial areas from Braila to the Black Sea and through the Iron Gates by agreements between the riparian States concerned (Soviet Union – Romania; Romania – Yugoslavia).

The powers of the 1948 Danube Commission are similar to those of the 1921 International Danube Commission. The Commission establishes plans for common work towards improving navigation. Where the riparian States concerned are unable to undertake such work themselves, the work is carried out by the Commission. The Commission also determines tolls for the financing of such work to be levied by the riparian States, by the Commission or by the Special Administrations. The seat of the Commission is in Budapest. At the peak of its tension with the Comintern, Yugoslavia threatened in 1952 to withdraw from the Commission, which was used by the Soviet Union as a tool to bring pressure on Yugoslavia. After 1955 Soviet dominance of the Commission was somewhat reduced.

The long-term plans of the Commission consist in the establishment of a waterway system linking the North Sea to the Black Sea via the → Rhine-Main-Danube Canal for ships of 1500 tons capacity. By establishing a continuous sequence of barrages and sluices along the entire Danube, this waterway will be open to navigation also during low-water periods in autumn and winter. These barrages, moreover, will produce hydro-electric power and improve the irrigation and underground water system in the vicinity of the river. However, realization of this project involves sacrificing the marsh-forest regions bordering most of the Danube south of Vienna. The threatened destruction of these wildlife reservations has come under bitter attack from environmentalists. As far as Austria, Hungary and Bulgaria are concerned, these plans are alleged to conflict with their commitments under the Ramsar Convention of February 2, 1971 on Wetlands of International Importance especially as Waterfowl Habitat

(UNTS, Vol. 996, p. 245), sponsored by the → United Nations Economic and Social Council (UNESCO).

The riparian States of the → Rhine River fear economic consequences from the establishment of this waterway. The heavily subsidized State-owned navigation companies of the Danubian States monopolize the traffic on the river. Private German or Austrian shipowners can hardly compete against these entities. On the Rhine, moreover, a large part of the traffic involves small and medium-sized private companies who fear that they would be unable to withstand the competition of the Danubian State shipping companies should the latter be able to compete with them on the Rhine as well. This apprehension is the background for Additional Protocol No. 2 to the Mannheim Convention (British Command Papers, Cmnd. 8309, Misc. 16 (1981)), granting non-EEC → State ships a mere right of transit on the Rhine while submitting all charges on cargo to special agreements, as well as for the conclusion of the Inland Navigation Treaty of November 20, 1985 between the Federal Republic of Germany and Austria (German Bundesgesetzblatt 1987 II, p. 79). The latter treaty regulates passage through the Rhine-Main-Danube Canal for Austrian ships and cargo-exchange traffic by boats of both States. The Federal Republic of Germany hopes that this treaty supplemented by quota regulations may serve as a model for similar treaties with the other Danube States.

Convention concerning the Regime of Navigation on the Danube, August 18, 1948, UNTS, Vol. 33 (1949) 181–225.

Convention on Wetlands of International Importance especially as Waterfowl Habitat, February 2, 1971, UNTS, Vol. 996 (1976) 245–268.

J. BLOCISZEWSKI, Le régime international du Danube, RdC, Vol. 11 (1926 I) 255–268.

H. HAJNAL, Le Droit du Danube International (1929).

L.G. MARCANTONATOS, Les pouvoirs juridictionnels de la Commission Européenne du Danube, Revue de droit international, Vol. 17 (1936) 469–533.

A. AUBURTIN, Die neue Rechtsstellung der Europäischen Donaukommission, ZaöRV, Vol. 9 (1939/40) 338–354.

L.G. MARCANTONATOS, L'évolution du statut international du Danube maritime de 1938 à 1948, Rev-Hellén, Vol. 1 (1948) 49–69, 140–156.

J.L. KUNZ, The Danube Régime and the Belgrade Conference, AJIL, Vol. 43 (1949) 104–113.

H.A. SMITH, The Danube, Yearbook of World Affairs, Vol. 4 (1950) 191–212.

L. IMBERT, Le régime juridique actuel du Danube, RGDIP, Vol. 55 (1951) 73–94.

W. WEGENER, Die internationale Donau (1951).

I. SEIDL-HOHENVELDERN, Die Belgrader Donau-Konvention von 1948, AVR, Vol. 7 (1958) 253–261.

H. BOKOR-SZEGÖ, La Convention de Belgrade et le régime du Danube, AFDI, Vol. 8 (1962) 192–214.

S. GOROVE, Law and Politics on the Danube (1964).

F. PICHLER, Die Donaukommission und die Donaustaaten: Kooperation und Integration (1973).

B. VITÁNYI, The International Régime of River Navigation (1979).

J.P. JACQUÉ, A propos de l'accord de Rome du 23 avril 1977. Etude de la survie de la Commission Européenne du Danube, AFDI, Vol. 27 (1981) 747–767.

A. KISS, Problèmes de droit international posés par la voie d'eau Rhin-Danube, AFDI, Vol. 27 (1981) 768–780.

B. VITÁNYI, Legal Problems in Connection with the Deep-Draught Rhine-Main-Danube Navigable Waterway after the Additional Protocol to the Act of Mannheim, ZaöRV, Vol. 41 (1981) 731–807.

H.-J. SCHLOCHAUER, Rechtsfragen grenzüberschreitender Wasserstraßen am Beispiel des Rhein-Main-Donau-Schiffahrtsweges, in: Festschrift für H. Mosler (1983) 839–847.

W. HAUER, Hainburg, rechtliche und rechtspolitische Aspekte oder Recht zwischen Parteitaktik und Umweltschützern (Ansätze einer kritischen Analyse) (1985).

IGNAZ SEIDL-HOHENVELDERN

DANZIG

1. Historical Background prior to 1918

The town of Danzig (Polish: Gdansk) is situated approximately 18.6 degrees longitude east of Greenwich and 54.4 degrees latitude north on the Vistula River five kilometres before the Vistula flows into the Bay of Danzig in the → Baltic Sea.

Danzig received its first documentary mention in A.D. 997. Until 1309 the town of Danzig belonged to the dukedom of Pomerelia (Pommerellen). After the extinction of the Pomerelia dynasty the town came under the reign of the Knights of the Teutonic Order. From 1309 until 1454, Danzig was a constituent part of the State ruled by the Teutonic Order. In 1454 Danzig, together with several other towns and rural estates of knights and bishops in the area, severed its adherence to that State and accepted the protectorship of the

King of Poland. Danzig was not incorporated into the territory of the Kingdom of Poland. The Danzig/Polish relationship in this period can, perhaps, best be defined as a → confederation with certain federal features. The protectorship lasted until 1793.

Throughout its history, Danzig has always endeavoured to maintain its independence as far as possible from the regional great powers. Danzig's special status and privileges were layed down in basic documents, the most famous of which were the Danziger Handfeste, dating from the middle of the 14th century, and, in the period of the Polish protectorship, the *privilegium Casimiranum* of May 15, 1457. During Danzig's first Polish period, the town set a high value on the confirmation of this *privilegium* as a condition for rendering an oath of allegiance to a new Polish king. Upon coming under the protectorship of the King of Poland, Danzig loosened its ties with the Holy Roman Empire of the German Nation. As early as 1456 the town refused to attend the Reichstag in Nuremberg. Nevertheless, the German emperors continued to invite Danzig to the Reichstag until 1615, although Danzig's representatives never appeared.

Due to its privileges, Danzig was a self-governing community with its own legislative, administrative, judicial and foreign relations powers. A significant aspect of this special legal position was Danzig's neutrality during the Polish-Swedish war of 1601 to 1611. Danzig was a member of the Hanseatic League and reached its peak as a major flourishing commercial power and as a cultural centre between 1550 and 1650.

Under the protectorship of the Catholic Polish Kingdom, Danzig was a Protestant German-speaking community. In this pre-nationalistic era the German city and its Polish environs lived peacefully together and mutual advantageous relations were maintained over several centuries.

In 1793, as a result of the second partition of Poland, Danzig was annexed by and incorporated into the territory of the Kingdom of Prussia (→ Annexation). After the defeat of Prussia in the Napoleonic wars, Danzig was severed from Prussia. Art. 19 of the Treaty of Peace signed at Tilsit on July 9, 1807 provided that the city of Danzig would be re-established in its independence under the protection of the King of Prussia and the King of Saxonia and be governed by the laws which were in force at the time when it ceased to govern itself ("la ville de Dantzick sera rétablie dans son indépendance, sous la protection de S.M. le Roi de Prusse et de S.M. le Roi de Saxe, et gouvernée par les lois qui la régissaient à l'époque où elle cessa de se gouverner elle-même"). This stipulation was annulled upon Napoleon's defeat. Art. XXIII of the Act of the → Vienna Congress of June 9, 1815 provided that the King of Prussia and all his heirs would again possess the city of Danzig and its territory as fixed by the Treaty of Tilsit ("posséderont de nouveau . . . la Ville de Danzig et son territoire tel qu'il a été fixé par le traité de Tilsit").

The territory of Prussia, including Danzig, became a constituent part of the territory of the German Reich upon the foundation of the latter in 1871 (1867). This situation remained unchanged until the → Versailles Peace Treaty of June 28, 1919.

2. Danzig after World War I

(a) Political background

At the end of World War I the State of Poland, which had been extinguished in 1795 (→ States, Extinction), was resurrected and the territory of Poland had to be determined. On historical and economic grounds, e.g. access to the Baltic Sea, Poland claimed that Danzig was included in her territory. Germany on the other hand, wanted Danzig to remain a constituent part of her territory and pointed for support to the newly proclaimed principle of → self-determination (→ Wilson's Fourteen Points). In 1918 almost 96 per cent of the population of Danzig was German.

Having accepted Point XIII of Wilson's Fourteen Points regarding the creation of an independent Polish State with "free and secure access to the sea", Germany suggested the establishment of → free ports in Danzig, Königsberg and Memel in order to guarantee this access. The principal Allied and Associated Powers, however, deemed that Danzig had to be cut off from Germany because there was no other possible means to afford that "free and secure access to the sea" which Germany had promised to cede ("retranchée de l'Allemagne parce qu'il n'y avait pas d'autre moyen possible de fournir ce 'libre et sûr accès à la mer' que

l'Allemagne avait promis de céder"; note of Clemenceau of June 16, 1919 to the German ambassador, Count Brockdorff-Rantzau). The fact that the population of Danzig was and had been for a long time German in its majority was an aspect only for the consideration not to propose its incorporation into Poland ("la population de Dantzig est et a été depuis longtemps en grande majorité allemande" . . . "qu'on ne propose pas de l'incorporer à la Pologne") and the reminiscence of Danzig's legal position prior to the incorporation of the city into Prussia in 1793 gave rise to the decision that Danzig would find itself in the future again placed in a position similar to that which it occupied for so many centuries ("va se trouver désormais placée de nouveau dans une position semblable à celle qu'elle a occupée pendant tant de siècles"; Sec. XI of the Réponse des puissances alliées et associées aux remarques de la délégation Allemande sur les conditions de paix). This position of the Allied and Associated Powers led to inclusion of Arts. 100 to 108 in Part II, Sec. XI of the Versailles Peace Treaty dealing with the "Free City of Danzig" (→ Free Cities) and represented an imposed territorial compromise which satisfied neither Poland nor Germany, or the inhabitants of Danzig themselves.

(b) The Free City of Danzig

The special international legal position of Danzig was layed down principally in Arts. 100 to 108 of the Versailles Peace Treaty and in the Paris Treaty of November 11, 1920 which, according to Art. 104 of the Versailles Peace Treaty, had to be concluded between the Polish Government and the Free City of Danzig. Germany was required under Art. 100 to renounce, "in favour of the Principal Allied and Associated Powers", all rights and title over the town of Danzig and the surrounding territory, altogether comprising 1951 square kilometres. When the Versailles Peace Treaty came into force on January 10, 1920, → sovereignty over Danzig and the surrounding territory passed to the Allied and Associated Powers; German nationals resident in Danzig and the surrounding territory lost *ipso facto* their German → nationality and became nationals of the Free City of Danzig (Art. 105). In fulfilment of Art. 102 of the Versailles Peace Treaty, the above-mentioned Powers established the town of Danzig and the surrounding territory "as a Free City" by a decision of October 27, 1920, which came into force on November 15, 1920, together with the Paris Treaty.

According to its constitution, the Free City of Danzig was a democratic "Freistaat" with its own flag and heraldic insignia, nationals, public power (i.e. legislature, administration, police and judiciary) and currency. Although it was a → State, Danzig was not a normal, fully independent → subject of international law because of its special legal relationship with the → League of Nations as well as with the Republic of Poland.

The Free City of Danzig was placed under the protection of the League of Nations by Art. 102 of the Versailles Peace Treaty. The League appointed a High Commissioner with residence in Danzig. The Commissioner was to decide in the first instance all disputes arising between Danzig and Poland in regard to the relevant provisions of the Versailles Peace Treaty, the Treaty of Paris and any other agreements or matters affecting relations between Poland and the Free City. The Commissioner could refer the matter, and Poland and Danzig had the right of appeal against the decisions of the Commissioner, to the Council of the League of Nations (Art. 103 of the Versailles Peace Treaty; Art. 39 of the Treaty of Paris). Decisions of the Council were binding upon Danzig and Poland.

The constitution of the Free City of Danzig was placed under the guarantee of the League of Nations. This meant that the constitution was indeed drawn up by representatives of Danzig but "in agreement with" the High Commissioner only, and revisions of the constitution came into force only when the League of Nations declared no objections (Art. 103 of the Versailles Peace Treaty; Art. 49 of the Danzig Constitution). The High Commissioner also had the right to veto any international treaty concluded by Poland and applying to Danzig where he regarded it as inconsistent with the status of the Free City (Art. 6 of the Treaty of Paris).

The principal legal relationship between Poland and Danzig was laid down in Art. 104 of the Versailles Peace Treaty on the basis of which the Treaty of Paris formulated further details as follows: First, Poland was authorized to the conduct of the foreign relations of the Free City of

Danzig. This provision recognized: the authority of Poland to conclude international agreements affecting the Free City but not without previous consultation with the Free City; the right of the Free City to contract foreign loans but only after previous consultation with the Polish Government; the right of the Polish Government with the agreement of the Danzig authorities to issue exequaturs for foreign consular officers residing at Danzig; the diplomatic and consular representation of Danzig by Poland whereby nationals of Danzig could be included in the staff of the Polish consulates; and the protection by Poland of Danzig's nationals abroad. The control of foreigners in the territory of the Free City was exercised by the City's authorities.

Second, Danzig was included within the Polish → customs frontier. Polish customs legislation and tariffs entered into force in the Free City. The customs administration in the Free City was placed under the competence of Danzig officials but remained under the general direction of the Polish central customs administration, which attached Polish inspectors to the Danzig personnel. Danzig received a fixed percentage of the customs revenues.

Third, a Polish post office, telegraph and telephone service was established in the port of Danzig for communications directly with Poland. All other postal, telegraphic and telephonic communications within the territory of the Free City and between the Free City and foreign countries were the concern of the Free City.

Fourth, "The Danzig Port and Waterways Board" was established. This body consisted of five Polish and five Danzig commissioners and a President to be chosen by agreement between the Polish and Danzig Governments; in the absence of such an agreement the Council of the League of Nations was to appoint a President of Swiss nationality. The Board exercised within the limits of the Free City the control, administration and exploitation of the port and waterways and of the railway system specially serving the port. Ownership of all property which belonged to the German Reich or to any German State and which formed part of the port was transferred to the Board. The Board also had the right to expropriate private property.

Fifth, the Danzig railway system outside the port was placed under the control and administration of Poland; and sixth, the Free City was obliged to prevent legislative or administrative discrimination against nationals of Poland, Polish-speaking persons and persons of Polish origin.

Supplementing the Treaty of Paris, the Warsaw Agreement was concluded between Danzig and Poland on October 24, 1921. Subsequently, numerous agreements regulating special questions were concluded between the Free City and Poland.

(c) The Statehood of the Free City: legal disputes

In Polish legal literature before and after World War II it was said that the Free City of Danzig was not a State under international law (cf. Skubiszewski, p. 292). This thesis is incompatible with the fact that the Free City possessed all the attributes of Statehood (territory, nationals, public power), that the League of Nations had agreed upon the Danzig constitution in which the City defined itself as a "Freistaat", and that the Treaty of Paris of November 11, 1920 designated both Poland and the Free City as "the two States" (Art. 17(b)). It was asserted, moreover, that the Free City was only an autonomous territory in the form of an administrative → protectorate of Poland, mainly because Poland had the right to conduct the foreign relations of the Free City (see Makowski). However, the legal relationship between Poland and Danzig was international in character; it did not rest on Polish constitutional norms. Poland's right to conduct Danzig's foreign relations was not absolute but limited by the interests of Danzig. As an intermediary between the Polish Government and the Government of the Free City, a "diplomatic representative" of Poland was stationed at Danzig (Art. 1 of the Treaty of Paris).

The "protection" of the City by the League of Nations, furthermore, did not amount to a protectorate in the international legal sense; the League only provided for the compliance by Danzig with its rights and duties emanating from the Versailles Peace Treaty and the Treaty of Paris. The sovereignty of the Free City of Danzig was, however, very restricted. Danzig's international capacity to act was limited to the conclusion of

international treaties with Poland and to relations with the League of Nations.

Different legal conceptions of the Danzig authorities and the Polish Government concerning mutual treaty-based rights and duties led to numerous legal disputes (see Entscheidungen des Hohen Kommissars des Völkerbundes in der Freien Stadt Danzig. Zusammengestellt und herausgegeben beim Senat der Freien Stadt Danzig, 6 vols. (1922–1933)). Some of these disputes were dealt with in → advisory opinions of the → Permanent Court of International Justice (see → Danzig and ILO (Advisory Opinion); → Danzig Legislative Decrees (Advisory Opinion); → Jurisdiction of the Courts of Danzig (Advisory Opinion); → Polish Nationals in Danzig (Advisory Opinion); → Polish Postal Service in Danzig (Advisory Opinion); → Polish War Vessels in the Port of Danzig (Advisory Opinion)).

3. *Danzig at the Outbreak of World War II and thereafter*

When the National Socialist Party (NSDAP) gained a bare majority of 50.03 per cent in the elections to the Popular Assembly (Volkstag) of Danzig on May 28, 1933, the political system of the Free City was changed to resemble that of the German Reich. After the dissolution of the last democratic opposition party in October 1937, the NSDAP had exclusive political power in the Free City and persued the incorporation of the City into the German Reich.

On September 1, 1939, when World War II started with an attack by the German navy on the Polish base Westerplatte in Danzig, a Danzig "Basic State Law" (Staatsgrundgesetz) was enacted contrary to the Danzig constitution which abolished that instrument and proclaimed the territory of Danzig to be a constituent part of the German Reich. A German law issued on the same day declared the Danzig Basic State Law to be a German law (Reichsgesetz), Danzig nationals to be German nationals, and German and Prussian law to be put into force for the territory of Danzig on January 1, 1940 (German Reichsgesetzblatt 1939 I, p. 1547). The High Commissioner of the League of Nations was forced to leave Danzig on the same day. With these acts the Free City of Danzig *de facto* ceased to exist.

Towards the end of World War II, in March 1945, the territory of Danzig was occupied by the Soviet army which, however, soon afterwards left the city to Polish administration. A Polish decree of March 30, 1945 established the *województwo gdanskie*, an administrative unit within the Polish State which incorporated "the whole territory of the former Free City of Danzig". An exchange of the population took place (→ Population, Expulsion and Transfer): The German inhabitants of Danzig partly fled and partly were expelled; the new Polish inhabitants came mostly from the eastern parts of Poland which had become Soviet territories.

At the Potsdam Conference (→ Potsdam Agreements on Germany (1945)), it was agreed that, "pending the final determination of Poland's western frontier, the former German territories" east of the → Oder-Neisse Line "including the area of the former free city of Danzig, shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet Zone of occupation in Germany".

4. *Evaluation and Present Status*

The incorporation of the Free City of Danzig into the German Reich was legally invalid. If the German law concerning "the reunification of the Free City of Danzig with the German Reich" of September 1, 1939 is regarded as an act of annexation, and if at that time annexation itself could still be regarded as legally permitted, the incorporation nevertheless lacked legal validity because of continuing hostilities. If the German law and the Danzig Basic State Law of September 1, 1939 are construed as forming a treaty of accession by Danzig to the Reich, this treaty was also legally invalid; Danzig had no treaty-making power in this respect. Therefore, although the Free City of Danzig ceased to exist *de facto* on September 1, 1939, its existence *de jure* continued.

The Polish decree of March 30, 1945 expressed the will of the Polish Government to incorporate the territory of Danzig into the Polish State. The decree was an act of annexation which was invalid during the state of → war still existing. In Polish legal writings, qualification of the incorporation of

the territory of Danzig into the Polish State as annexation is denied on the grounds that an object of annexation can be only the territory of a foreign State and the Free City of Danzig never constituted a State. Because Germany and the authorities of the Free City had violated the Treaty of Versailles in 1939, Poland in 1945 was no longer bound by the provisions of that treaty. In 1945 the Free City of Danzig had ceased to exist. Since no State possessed territorial sovereignty over the Free City of Danzig, Poland could extend her territorial sovereignty over the City. Neither the League of Nations nor the Four Powers protested against the extension of Polish territorial sovereignty. Thus, Poland gained territorial title not by an authorization of the Four Powers but *suo jure* (Skubiszewski, pp. 306–320).

Although both the Polish Decree of March 30, 1945 and the Potsdam Agreements on Germany spoke of "the former" Free City of Danzig, it is doubtful whether the Free City of Danzig already in 1945 also ceased to exist *de jure*. In the 1950s, former German inhabitants of Danzig living in western Germany established the Rat der Danziger, deemed to be a representative organ of the Free City of Danzig. These activities have meanwhile faded away. No → government-in-exile for Danzig exists, nor has any other organization proposed the reorganization of Danzig as a Free City. Danzig as a State or a special subject of international law has, therefore, also ceased to exist *de jure*. The present Polish title to the territory of the former Free City of Danzig has been established by → prescription. Since the occupation of Danzig in 1945, Poland has, with the requisite *animus domini*, exercised uninterrupted and effective possession of the territory. For a considerably long period of time, i.e. approximately three decades, this possession has been uncontested. Thus, → acquiescence and the passage of time have legitimated the doubtful Polish *suo jure* title of 1945 to the territory of the former Free City of Danzig.

Gesetz betreffend die Verfassung der Freien Stadt Danzig, Zbiór dokumentów urzedowych (ZdU), Vol. 1 (1919/1920) 133–134.

Réponse des puissances alliées et associées aux remarques de la délégation allemande sur les conditions de paix, ZdU, Vol. 1 (1919/1920) 6–7.

Verfassung für die Freie und Hansestadt Danzig, ZdU, Vol. 1 (1919/1920) 64–77.

Convention between Poland and the Free City of Danzig, November 9, 1920, LNTS, Vol. 6 (1919/1920) 189–207.

Amtliche Urkunden zur Konvention zwischen Danzig und Polen vom 15. November 1920. Zusammengestellt und mit Begleitbericht versehen von der nach Paris entsandten Delegation der Freien Stadt Danzig (1920).

Gesetz betreffend das Abkommen zwischen der Freien Stadt Danzig und der Republik Polen zur Ausführung und Ergänzung der polnischen Konvention, ZdU, Vol. 2 (1921–1923) 70–71.

P. SIMSON, Geschichte der Stadt Danzig, Vols. 1, 4 (1913), Vol. 2 (1918).

O. LOENIG, Danzig, Sein Verhältnis zu Polen und seine Verfassung (1921).

J. MAKOWSKI, La situation juridique du territoire de la Ville libre de Danzig (1925).

W. FÖRG, Die militärischen Rechte Polens in der Freien Stadt Danzig, Thesis, University of Würzburg (1926).

H. LEWINSKY and R. WAGNER, Danziger Staats- und Völkerrecht (1927).

H.A. HARDER, Danzig, Polen und der Völkerbund (1928).

W. FRIEDRICH, Der Hohe Kommissar des Völkerbundes in Danzig, Thesis, University of Leipzig (1932).

H. HOFFMANN, Die Kriegsneutralität der Freien Stadt Danzig, Thesis, University of Göttingen (1932).

H. STRASBURGER et al., Dantzig et quelques aspects du problème germano-polonais (1932).

I. ZUNDELEWICZ, Les rapports entre la Pologne et la Ville libre de Dantzig, Thesis, University of Paris (1935).

H.U. BÖTTCHER, Die völkerrechtliche Lage der Freien Stadt Danzig seit 1945 (1958).

L. DENNE, Das Danzig-Problem in der deutschen Außenpolitik 1934–1939 (1959).

H. JABLONOWSKI, Die Danziger Frage, in: Senatskommission für das Studium des Deutschtums im Osten an der Rheinischen Friedrich-Wilhelm-Universität Bonn (ed.), Studien zum Deutschtum im Osten, Die deutschen Ostgebiete zur Zeit der Weimarer Republik (1966) 65–87.

Die Vertretung der Freien Stadt Danzig (ed.), Gerechtigkeit für Danzig. Das Problem der Stadt Danzig (1967).

S. MIKOS, Dzialalnosc Komisariatu Generalnego Rzeczypospolitej Polskiej w Wolnym Miescie Gdanskie 1920–1939 [The Activity of the General Commissariat of the Polish Republic in the Free City of Danzig] (1971).

K. SKUBISZEWSKI, Zachodnia Grancia Polski w Swietle Traktatów [The Western Border of Poland in the Light of Treaties] (1975).

J. KALISCH, Die Freie Stadt Danzig (Gdansk) 1919/1920–1939 im Spiegel wissenschaftlicher Literatur und politischer Publizistik, Zeitschrift für Geschichtswissenschaft, Vol. 25 (1977) 57–74.

S. MIKOS, Wolne Miasto Gdansk a Liga Narodów 1920–1939 [The Free City of Danzig and the League of Nations] (1979).

W. RAMONAT, Der Völkerbund und die Freie Stadt Danzig 1919–1934 (1979).

M. STANISLAW, Die Rechte Polens in der Freien Stadt Danzig, Deutsch-Polnisches Jahrbuch der Deutsch-Polnischen Gesellschaft Bremen/Bremerhaven e.V. (1979/1980) 73–88.

C.J. BURCKHARDT, Meine Danziger Mission 1937–1939 (1980).

B. HAJDUK, Wolne Miasto Gdansk w polityce celnej Polski 1922–1934 [The Free City of Danzig in the Customs Policy of Poland] (1981).

M. ANDREZEJEWSKI, La propagande révisioniste allemande par rapport au problème de la Ville libre de Gdansk durant la période entre les deux guerres, Polish Western Affairs, Vol. 25 (1984) 103–120.

H. HECKER, Diplomatischer Schutz der Staatsangehörigen des geteilten Polens und Danzigs durch Besatzungsmacht oder Exilregierung von 1939 bis 1945, insbesondere in Ostpolen, Shanghai und Mauritius, AVR, Vol. 22 (1984) 172–194.

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DARDANELLES, SEA OF MARMARA, BOSPORUS

1. General Background

The Dardanelles (formerly, Hellespontus; Turkish: Çanakkale Bogazì), the Sea of Marmara (or Marmora; formerly, Propontis; Turkish: Marmara Denizi) and the Bosporus (or Bosphorus; Turkish: Bogaziçi, or Istanbul Bogazì) have played a central role in the development of the → Law of the Sea as far as the régime of → straits is concerned. These waterways, referred to in this article as the Turkish Straits or Straits, are situated in north-western Turkey and geographically separate Asia from Europe. They link the → Black Sea to the → Aegean Sea, thereby allowing for trade and water traffic as well as a natural exchange of waters between these seas.

A rapid current from north to south on the surface of the Bosporus and the Dardanelles (less rapid in the Sea of Marmara) finds its counterpart in a strong current from south to north on the bed of the Turkish Straits. The Dardanelles, as the southern part of the Turkish Straits, links the Aegean Sea in the south-west to the Sea of Marmara in the north-east. This portion of the Straits is 38 miles (61 kilometres) long, 180 to 300 feet (55 to 92 metres) deep and 3/4 to 4 miles (1.2 to 6.5 kilometres) wide. The Sea of Marmara connects the Dardanelles in the south-west with the Bosporus in the north-east and extends for a distance of 175 miles (281 kilometres). The greatest width amounts to 50 miles (80 kilometres); the average depth is 1620 feet (494 metres) and the maximum depth is 4440 feet (1355 metres). The Sea of Marmara came into existence some 2 500 000 years ago as a result of movements in the earth's crust. It is still an area visited by frequent earthquakes. The Bosporus unites the Sea of Marmara and the Black Sea along a straight line running south to north for a distance of 19 miles (31 kilometres). Its width varies between 2000 feet (660 metres) and 2.3 miles (3.9 kilometres); its depth ranges between 120 and 302 feet (37 and 92 metres) in mid-stream. The shores of the Bosporus are connected by the only two bridges, constructed in 1973 and 1987, spanning the Turkish Straits.

2. Economic and Political Significance

The Turkish Straits form the gateway for the Soviet Union, Bulgaria and Romania, as coastal States on the Black Sea, and Hungary, as a riparian on the → Danube River, to the Mediterranean, the Atlantic Ocean and the African coasts, in connection with the → Suez Canal and → Gibraltar. The Straits' economic and strategic importance is thereby evident and reaches far back into history. The Straits made accessible the vineyards of the Crimean peninsula to the Greeks and Romans. In 480 B.C. the Dardanelles was crossed by the troops of the Persian king Xerxes I in a campaign against the cities of Hellas by means of a boat-bridge. Using the same technique, Alexander the Great took the opposite direction 145 years later. The economic strength of the Byzantine Empire and, later, the Turkish Sultans was partly due to strategic control over the Turkish Straits. Despite the efforts of the Venetian Empire, entry through the Straits by force was achieved during the Ottoman period only once by a British fleet in 1807. An attempt by the Allies during World War I failed (1915).

Evidence of the continued political importance of the Turkish Straits is provided by discussions as

to the questions under what terms Soviet → warships should be allowed passage and whether or not Lemnos, a small Greek island near the Aegean entrance of the Dardanelles, should be demilitarized (→ Demilitarization). Seasonal fish migration through the Straits is important for fishery. The mild climate of the Sea of Marmara provides excellent conditions for wine-growing on the Marmara islands in the south. Beside several smaller → ports on the shores of the Dardanelles and the Sea of Marmara, the most important port in the Straits is Istanbul.

3. Legal Issues

(a) History

Under modern international law, the first important treaty concerning the Turkish Straits was that of Küçük Kaynarca in July 10 (21), 1774 (CTS, Vol. 45, p. 349), by which Russia obtained free passage from the Ottoman Empire (→ Navigation, Freedom of). The next treaty came closer to reflecting general European power politics, when Great Britain and the Ottoman Empire in 1809 agreed to the closing of the Turkish Straits to the passage of warships from the Black Sea to the Mediterranean Sea (çanak, First Treaty of Dardanelles, CTS, Vol. 60, p. 323). In 1829, the Ottoman Empire and Russia agreed on free passage for → merchant ships under the Treaty of Adrianople, September 14, 1829 (BFSP, Vol. 16, p. 647).

The principle of non-passage for warships was partially reversed by an agreement between the same powers in 1833 (Constantinople agreement of Hünkâr Iskelesi, July 8, 1833. BFSP, Vol. 20, p. 1176), which allowed Russian and Turkish warships to pass through the Turkish Straits. This privilege, however, was again abolished by the first Treaty of London, July 13, 1841 (BFSP, Vol. 29, p. 703). This Treaty, involving France, Prussia, Great Britain, Russia, Austria-Hungary and the Ottoman Empire, was the first multilateral regulation of straits, and an attempt at a final settlement of the so-called Turkish Straits question. The rules contained by the 1841 Treaty with regard to → innocent passage, prohibiting the passage of warships, whether in wartime or in peacetime, were slightly modified by the → Paris Peace Treaty of March 30, 1856 (BFSP, Vol. 46, pp. 8 and 18). The modification allowed the Sultan to authorize the passage of light warships to service the Ottoman embassies or to ensure the fulfilment of mutual duties to secure freedom of navigation on the river Danube.

Another modification came into force through an agreement reached at the Conference of London, January to March 1871 (BFSP, Vol. 61, p. 7, at p. 9). The new provision seemed to reinforce the → sovereignty of the Sultan by empowering him to open the Turkish Straits for the benefit of the fleets of States not situated on the coasts of the Black Sea, in case of necessity and for the security of the Ottoman Empire within a transitional period. This provision did not amount to a right of innocent passage. However, in terms of → power politics, the provision represented a latent threat to Russia if the Ottoman Empire were allied to one of the other → Great Powers in the event of another Turkish-Russian war. Thus, the → neutralization of the Black Sea, which had been agreed to the same occasion (BFSP, Vol. 61, p. 7, at p. 9), was endangered.

The Turkish Straits question arose again when the German warships *Goeben* and *Breslau* passed through the Straits and, after the outbreak of World War I, the Ottoman Empire closed the Straits to all vessels of the Allied Powers. Russia's withdrawal from the war in 1917 prevented fulfilment of the plans of the Allied Powers to confer control over the Turkish Straits to Russia in the case of victory.

(b) Recent developments

(i) The Lausanne Convention

Initially, the defeat of the Ottoman Empire in World War I seemed to re-open the question of the Turkish Straits. The Peace Treaty of Sèvres provided for totally free passage for all merchant vessels and warships (→ Peace Treaties after World War I). As a result of the Kemalist movement, however, this approach was abandoned. Instead, the Turkish Straits became an important issue in an annex to the → Lausanne Peace Treaty in 1923, i.e. the Convention relating to the Régime of the Straits, July 24, 1923 (LNTS, Vol. 28, p. 115), signed by Great Britain, France, Italy, Japan, Bulgaria, Romania, Russia, the

Serb-Croat-Slovene State, Japan, Greece, and Turkey.

The 1923 Convention attributed different roles to the contracting parties. France, Great Britain, Italy and Japan were guaranteed freedom of passage by sea and air as well as the freedom of navigation (→ Guarantee; → Guarantee Treaties). As far as the shores of the Straits were concerned, the → territorial sovereignty of Turkey, now a republic with territory confined to Asia Minor and eastern Thrace, was recognized under the condition that a demilitarized zone would be established along the coasts of the Turkish Straits. The security of this zone was to be guaranteed by all of the signatories. This zone also included several islands, i.e. nearly all the islands in the Sea of Marmara, the Aegean islands of Samothrace (Turkish: Semadirek adasì), Lemnos (Limni), Imbros (Imroz, Gökçeada), Tenedos (Bozcaada) and the Rabbit Islands (Esek adalarì).

The freedom of passage of merchant vessels was to be limited by visit and search in the case that Turkey would become a belligerent (→ Ships, Visit and Search). In the same case, free passage was to be accorded to neutral warships. The passage of warships was generally limited in tonnage and number; the size of each country's force in the Black Sea after passing through the Turkish Straits was not to exceed "the most powerful fleet of the littoral Powers of the Black Sea". In wartime, if Turkey was neutral (→ Neutrality in Sea Warfare), no limitation was to apply. Submarines were to pass on the surface (→ Submarines).

The Convention also applied to → aircraft and represented an early attempt to extend certain rules of the law of the sea to → air law. Finally, a Straits Commission was established for the purpose of observing whether the provisions of the Convention were being carried out. Essentially, the Lausanne Convention brought an entirely new régime to the Turkish Straits. This régime, however, did not last very long and was replaced by the extension of Turkey's sovereign discretion over the Turkish Straits.

(ii) The Montreux Convention

Changes in political relations between Turkey and Greece and the rising prestige of Turkey and her diplomacy led to → negotiations on a new régime for the Turkish Straits. These negotiations culminated in the Montreux Convention of July 20, 1936, which consists of 29 articles, four annexes and one protocol (LNTS, Vol. 173, p. 213; in force since November 9, 1936). The Convention has been ratified by Australia, Bulgaria, France, Greece, Romania, Turkey, Soviet Union, Yugoslavia, Japan. The Montreux Convention is still in force since none of the signatories has submitted a note of renunciation (Art.28). No amendments have been introduced since its coming into force, although several fruitless attempts were made by the Soviet Union to put the Convention on the agenda for political discussion following World War II (see e.g. the exchange of → notes between Soviet Union and Turkey, May 20 and July 18, 1953, BFSP, Vol. 160, p. 749). The Convention on the Territorial Sea and the Contiguous Zone, April 20, 1958 (UNTS, Vol. 516, p. 205), does not affect the legal force of the Montreux Convention, the latter being *lex specialis*. The same will apply to the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc.A/CONF. 62/122 with Corr.), if it should come into force and be ratified by Turkey.

The Montreux Convention is an attempt to secure the sensitive balance between the interests of international sea traffic and the sovereign rights of Turkey as a coastal State. At the same time, the Convention tries to uphold important principles of international law by declaring that freedom of transit and navigation should enjoy enduring → recognition. The first section of the Convention deals with merchant vessels in territorial waters and includes provisions on communications, sanitary control, navigation and safety, as well as the right to levy charges on the users of the waters in question. The only restriction on navigation is in time of war when Turkey is a belligerent. In this case, the Turkish Government may prohibit the passage of merchant vessels belonging to an enemy country.

The second section of the Convention has brought about some substantial modifications of the principles which had been laid down in the Lausanne Convention in regard to the passage of warships. According to the Montreux Convention, passage or transit does not include courtesy visits to a port in the Turkish Straits on the invitation of the Turkish Government. On the condition of at

least eight days' prior → notification to the Turkish Government through diplomatic channels, free transit in peacetime is allowed for light surface vessels, minor war vessels and auxiliary vessels of any Power, up to an aggregate of 15 000 tons or nine vessels in transit at a time. The transit must be effected in daylight and without delay. Certain privileges, however, are accorded to Black Sea Powers: The limitation of 15 000 tons may be exceeded by capital ships, which may be escorted by not more than two destroyers; submarines may pass on the surface and for purposes of repair outside the Black Sea or, after construction outside the Black Sea, to join their units in the Black Sea. Furthermore, the presence of warships of non-Black Sea Powers in the Black Sea is limited by time and by tonnage. Additional restrictions are subject to the discretion of Turkey in time of war, differences being made according to the neutral or belligerent status of either Turkey or the warships desiring transit.

In the third section of the Montreux Convention, Turkey is empowered to designate the routes which civil aircraft may use for a passage between the Mediterranean Sea and the Black Sea. It seems that according to this section, Turkey has no right to prohibit the passage of civil aircraft headed from one Sea to the other. Restrictions may only be made according to international air law and general air regulations in Turkey. In light of contemporary developments in air traffic and international air law, this section seems to have lost its practical importance.

According to the fourth section, the duties and functions of the international commission set up under the Lausanne Convention were transferred to the Turkish Government. This constitutes a total reversal of the policy of → internationalization concerning the Turkish Straits, and a return to recognition of Turkish sovereignty.

The four annexes of the Montreux Convention consist more or less of definitions clarifying different technical items. The protocol, however, again shows the increased importance of Turkish sovereignty; it provides for immediate remilitarization of the Turkish territories which had been demilitarized under the Lausanne Convention. Nevertheless, the Convention does not mean to recognize an unlimited sovereignty of Turkey in respect of the Turkish Straits. Turkey remains obligated to use her powers of control of transit in accordance with the stipulations of the Montreux Convention.

4. Special Problems

(a) The "Kiev" and other cases

Especially during the Cold War, it was questioned whether the Montreux Convention responded to contemporary necessities. Two incidents provoked heated debate in this respect. In December 1968, the United States destroyers *Turner* and *Dyess* passed through the Turkish Straits for a short visit to the Black Sea. The ensuing discussion between the Soviet Union and the United States revolved around two questions. One concerned "belligerence", since at that time the United States was at war in Vietnam and might have been considered a belligerent non-Black Sea Power. The other question involved the obvious insufficiency of annex II of the Montreux Convention which was, and still is, not up to date due to the fact that the technical development of armaments for warships, e.g. anti-submarine missiles furnishable with nuclear warheads, has gone beyond what was imagined by the signatory powers in 1936.

On July 18, 1976, the 40 000 ton Soviet aircraft-carrier *Kiev* headed for the Mediterranean. It was certain that this constituted a breach of the Montreux Convention, since annex II expressly excludes aircraft-carriers from the right of passage. A debate arose because the Soviet Union gave notification through diplomatic channels of the transit of the *Kiev*, but defined the vessel as a "capital ship" within the framework of annex II. Though the Turkish Government had exact knowledge of the characteristics of the *Kiev*, it accepted the definition provided by the Soviet Union and did not prohibit the ship's transit.

The same question arose in 1986 in respect to the Soviet nuclear aircraft-carrier *Kremlin*. Such an accepted breach, however, does not amount to a modification of the Montreux Convention through the tacit will of the signatories but should remain considered as a singular case. Questions were also provoked when in 1968, during a visit by the United States Sixth Fleet to Istanbul, the

admiral in command left the aircraft-carrier *Enterprise* for a short courtesy visit to the governor of the city by helicopter, though the launching of aircraft from warships is prohibited by the Montreux Convention.

(b) The Lemnos question

The Lemnos question is one of the problems central to Turkish-Greek relations. Lemnos is a small Greek island near the Aegean entrance to the Dardanelles. Its importance arises from the island's geographical and strategical position. According to the Lausanne Convention, Lemnos was supposed to be demilitarized in order to secure Turkey's control over the Turkish Straits. Greece claims that with the remilitarization of the shores of the Turkish Straits by Turkey according to the protocol attached to the Montreux Convention, the demilitarization of the Greek islands near the Turkish coasts would be void. Turkey, on the other hand, alleges that the status of the Greek islands is not affected by the modifications of the régime of the Turkish Straits effected by the Montreux Convention.

Both arguments are based on the Montreux Convention, which is not very clear in this regard. On the one hand, the signatories "resolved to replace" the Lausanne Convention by that of Montreux. This might allow the conclusion that the Lausanne Convention is no longer in force and that Greece would have the sovereign right to remilitarize her islands. On the other hand, the protocol, which allows Turkey to remilitarize the shores around the Turkish Straits, and the → preamble, which refers to "Turkish security and . . . the security, in the Black Sea, of the riparian States", might lead to a restrictive interpretation of the formula "resolved to replace".

Seen in the narrow sense, the new Convention intended a modification of the status of the Turkish Straits only as far as Turkish sovereign rights relating to the Straits are concerned. This would mean that rights and duties of other Powers, such as Greece, which have not been expressly subjected to stipulations of the Convention, remain regulated by the Lausanne Convention. In this case, the latter Convention would have to be considered void to the extent it conflicts with regulations of the Montreux Convention on the status of the Turkish Straits, as interpreted in a narrow sense. Both approaches do not lead to very satisfactory results. Ultimately, this problem can and should be resolved only by → conciliation following serious negotiation, by → arbitration, or with the procedural assistance of the → International Court of Justice.

(c) The Montreux Convention

Reference has already been made to the Montreux Convention in connection with the passage of American and Soviet warships through the Turkish Straits under unclear conditions or even in obvious contradiction to the Convention. One feature of the Convention which is especially open to interpretation concerns the meaning of the term "belligerent". Under present conditions, where war is usually not formally declared, this problem might be solved through a factual approach, dispensing with the need for a formal declaration. Furthermore, belligerence might be interpreted under the Convention as involving some strategic or logistic link to transit through the Turkish Straits.

Some of the definitions in annex II do not take account of modern technical developments in warfare and thus remain insufficient in this respect. It might be also questioned to what extent the Turkish right and duty to control passage and transit through the Straits includes a margin of appreciation with regard to conditions set by the Montreux Convention. Another important problem is the obscurity of the Convention with regard to the problem of demilitarization of Lemnos and other Greek islands.

Other defects of the Montreux Convention are related to the security of navigation. According to the Convention, Turkey may not require pilotage for ships sailing under the flag of a party to the Convention. Consequently, some of these vessels refuse pilotage, although passage through the Bosporus is considered very complicated and dangerous. Furthermore, the Montreux Convention contains no provisions regarding dangerous loads, accidents and pollution and, thus, does not adequately regulate the immense risks arising from the passage of supertankers and other vessels with dangerous loads. In several cases, some difficulties

concerning damages and costs with respect to accidents in the Straits, e.g. the accident of the Romanian oil-tanker *Independenta*, could be resolved through the instrument of Turkish national legislation. However, there are a great many substantive and jurisdictional questions pertaining to these issues that still need clarification.

S. GORIAINOV, Le Bosphore et les Dardanelles (1910).
J. SHOTWELL and F. DEAK, Turkey at the Straits (1940).
C. BILSEL, The Turkish Straits in the Light of Recent Turkish-Soviet Russian Correspondence, AJIL, Vol. 41 (1947) 727–747.
E. BRÜEL, International Straits: A Treatise on International Law, Vol. II (1947) 252–272.
Y. ALTUG, Turkey and Some Problems of International Law (1958).
F.A. VALI, Bridge across the Bosporus (1971).
M. KHADDURI (ed.), Major Middle Eastern Problems in International Law (1972).
H.N. HOWARD, The Turkish Straits (1974).
F.D. FROMAN, "Kiev" and the Montreux Convention: The Aircraft Carrier that Became a Cruiser to Squeeze through the Turkish Straits, San Diego Law Review, Vol. 14 (1976–1977) 681–717.
H.G. KNIGHT, The Kiev and the Turkish Straits, AJIL, Vol. 71 (1977) 125–129.
A.R. DE LUCA, Soviet-American Politics and the Turkish Straits, Political Science Quarterly, Vol. 92 (1977) 503–524.
A.L. MACFIE, The Straits Question: The Conference of Lausanne (November 1922-July 1923), Middle Eastern Studies, Vol. 15 (1979) 211–238.
C. ECONOMIDES, La prétendue obligation de démilitarisation de l'île de Lemnos, RevHellén, Vol. 34 (1981) 7–14.
S. TOLUNER, The Regulation of the Passage through the Turkish Straits and the Montreux Convention, Annales de la Faculté de Droit d'Istanbul, Vol. 28 (1981) 80–95.
A.L. MACFIE, The Straits Question in the First World War, 1914–1918, Middle Eastern Studies, Vol. 19 (1983) 43–74.

CHRISTIAN RUMPF

EAST TIMOR

The → island of Timor lies at the south-eastern extremity of the vast Indonesian → archipelago. From the early 18th century, East Timor was a Portuguese colony administered by Portugal (→ Colonies and Colonial Régime). East Timor comprised the eastern half of the island, together with the → enclave of Oecusse in the western half and the islands of Atauro and Jacó (see → Timor Island Arbitration). West Timor, a former Dutch colony, became a part of the newly independent Indonesian Republic in 1949 (→ Decolonization: Dutch Territories). From the 1950s to 1975, East Timor had the status of a → non-self-governing territory under Chapter XI of the → United Nations Charter (see → Decolonization: Portuguese Territories).

Statements made by Indonesian representatives before the organs of the → United Nations in the late 1950s and 1960s expressly disavowed any territorial claims to East Timor (e.g. GAOR, Twelfth Session, First Committee, 912th meeting, p. 247). Assurances of → non-intervention were also repeated by Indonesia to the Fretilin movement (Frente Revolucionária de Timor Leste Independente). By 1975 Fretilin had succeeded in taking control of a substantial part of the territory of East Timor and declared independence on November 28 of that year; 15 States extended → recognition. However, UN organs refused recognition as it would imply a challenge to Portuguese sovereignty over the territory, and such → sovereignty was viewed as an indispensable precondition to an ultimate exercise of the right to → self-determination. Thus, for example, → United Nations General Assembly Resolution 37/30 of November 23, 1982 still referred to Portugal as the "administering Power".

In December 1975, against the → protest of Portugal, Indonesia invaded East Timor. Since that time, the legal status of East Timor is in dispute and the issue has remained on the agenda of the UN General Assembly. On December 12, 1975 the General Assembly adopted Resolution 3485 (XXX) which strongly deplored "the military intervention of the armed forces of Indonesia in Portuguese Timor" (para. 4) and called for an immediate withdrawal of these forces and for States to respect the right of the people of Portuguese Timor to self-determination. On December 22, 1975 the → United Nations Security Council passed a resolution in similar terms (Res. 384 (1975)).

Similar resolutions were passed by the UN General Assembly until 1982, with an ever

decreasing majority. From 1977, these resolutions failed to demand an Indonesian withdrawal; the resolution of November 23, 1982 recognized the right of all peoples to self-determination but failed to reaffirm that the East Timorese were bearers of this right. After 1983 there was no voting on East Timor in the General Assembly.

Military clashes between Fretilin and Indonesian troops continued on a significant scale until 1978 to 1979, with a further loss of life resulting from famine conditions (which by 1984 had significantly improved, see UN Doc. A/AC. 109/783). The Indonesian action brought with it massive violations of → human rights and the laws of war (→ War, Laws of). In February 1985 the UN Commission on Human Rights invoked its secret complaints procedure to attempt to curb these practices. On March 5, 1985, it was announced that the situation in Timor was no longer under consideration by the Commission (see UN Doc. E/CN.4/1985/SR.41/Add.1).

Indonesia has sought to justify its incorporation of East Timor by arguing that it formed part of a pre-colonial Indonesian empire with close ethnic and cultural ties to the Indonesian archipelago (UN Doc. S/12097, Annex V (1976)). Indonesia has also sought to rebut the claim that the Indonesian invasion and → annexation of East Timor directly violate the international legal right to self-determination by arguing that the East Timorese, by a number of acts, indicated their preference for integration with Indonesia. However, this argument does not stand up to scrutiny. General Assembly Resolution 1541(XV) of December 15, 1960 lays down procedures for the exercise of the right of self-determination, and requires that integration should be the result of a democratic process "based on universal adult suffrage" (Principle IX(b)). Only 5 of the 28 representatives to the East Timor Regional Popular Assembly were elected by popular vote.

Moreover, the East Timorese did constitute a separate "people" entitled to exercise a right to self-determination, a conclusion endorsed by the relevant Security Council and General Assembly resolutions (at least from 1977 to 1982). The East Timorese have closer cultural and language ties to the Melanesians of Papua-New Guinea and the Malays than to the peoples of West Timor or Java.

Indonesia's argument of an abandonment of East Timor by Portugal (UN Doc. A/37/PV.34, pp. 123–125) is similarly flawed (→ Territory, Abandonment). Despite dwindling support for the UN General Assembly Resolutions condemning the Indonesian invasion, continuing Portuguese diplomatic protests preclude a consolidation of Indonesian title over the territory by → prescription (→ Territory, Acquisition).

So long as the East Timor dispute remains on the UN General Assembly's agenda, and Portugal maintains its diplomatic protests, Indonesian sovereignty in East Timor remains under challenge. Nevertheless, as Indonesian cultural integration advances, East Timorese hopes of determining their own future become increasingly remote.

Relatórios da Descolonizaçao de Timor (Reports on the Decolonization of Timor), Presidência do Conselho de Ministros (Presidency of the Government), 2 vols. (1981).

Republic of Indonesia, Department of Foreign Affairs and Department of Information, The Province of East Timor: Development in Progress (1981).

T.M. FRANCK and P. HOFFMAN, The Right of Self-Determination in Very Small Places, New York University Journal of International Law and Politics, Vol. 8 (1976) 331–386.

C. ROUSSEAU, Chronique des faits internationaux, RGDIP, Vol. 80 (1976) 958–959.

United Nations Department of Political Affairs, Trusteeship and Decolonization, Issue on East Timor (1976).

P.D. ELLIOT, The East Timor Dispute, ICLQ, Vol. 27 (1978) 238–249.

J. JOLLIFFE, East Timor, Nationalism and Colonialism (1978).

K.D. SUTER, International Law and East Timor, Dyason House Papers, Vol. 5 (1978) 1–10.

R.S. CLARK, The "Decolonization" of East Timor and the United Nations Norms on Self- Determination and Aggression, The Yale Journal of World Public Order, Vol. 7 (1980) 2–44.

R.S. CLARK, Does the Genocide Convention go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor, Ohio Northern University Law Review, Vol. 8 (1981) 321–328.

C. BUDIARDJO and L. SOEI LIONG, The War Against East Timor (1984).

Amnesty International, East Timor: Violations of Human Rights, Extrajudicial Executions, "Disap-

pearances", Torture and Political Imprisonment (1985).
F. HIORTH, Timor: Past and Present (1985).

PETER LAWRENCE

ELBE RIVER

1. *Historical Status*

The Elbe River begins in Czechoslovakia and flows through Germany to the North Sea. The river is 1165 kilometres long; the German part measures 793 kilometres. The Elbe is navigable for a distance of 940 kilometres.

The Elbe is one of the navigable rivers mentioned in Art. 108 of the Act of the Congress of Vienna of June 9, 1815 (Martens NR, Vol. 6, p. 379; CTS, Vol. 64, p. 454; → Vienna Congress (1815)). Under this treaty, States separated or traversed by the same navigable river engaged to regulate the navigation of that river in common instruments. It was agreed that the navigation of such rivers should be free and not discriminatory (→ Navigation on Rivers and Canals). On this basis, Anhalt, Austria, Denmark (for Holstein and Lauenburg), Hamburg, Hanover, Mecklenburg-Schwerin, Prussia and Saxony signed on June 23, 1821 the convention relating to the free navigation of the Elbe (Martens NR, Vol. 9 A, p. 714; CTS, Vol. 72, p. 19). The commercial navigation of the Elbe was declared to be entirely free. All existing tolls and duties were replaced by single Elbe tolls to be levied on cargoes and a duty of reconnaissance to be levied on vessels. All storehouse and obligatory harbor duties were suppressed. A commission of revision was established to supervise the due observance of the convention.

The → Versailles Peace Treaty of June 28, 1919 (Martens NRG3, Vol. 11, p. 323; CTS, Vol. 225, p. 189) established in Art. 314 an international commission for the Elbe with four members from Germany, two members from Czechoslovakia and one member each from Great Britain, France, Italy and Belgium. The participating States signed the Act for the Navigation of the Elbe on July 22, 1922 (German Reichsgesetzblatt 1923 II, p. 183). The Act regulates the organization of the international commission and the principles for the free navigation of the Elbe, the customs régime for transit, the régime for → ports and the prerequisites for permits of navigation. National regulations for navigation had to be agreed to by the commission. The parties to the convention had to designate courts with jurisdiction for matters concerning navigation. Judgments issued by these courts could be submitted for appeal to the international commission.

In a diplomatic → note of November 14, 1936 (German Reichsgesetzblatt 1936 II, p. 361) the German Government renounced the international régime for the → Rhine, the → Danube, the Elbe and the Oder rivers. The note refers to the unequal and discriminatory treatment of Germany under this régime. In the note the German Government assured the other parties to this régime that navigation on German waterways remained free for all vessels flying the flag of States which live in peace with Germany, and that there would be no discrimination between German and foreign vessels. Only France and Czechoslovakia answered the note with a → protest, but did not insist on the re-establishment of the international régime. Consequently, the international régime for the Elbe ceased in 1936. It was not revived after the defeat of Germany in 1945.

2. *The Elbe as Frontier between the Federal Republic of Germany and the German Democratic Republic*

The internal German frontier between the Federal Republic of Germany and the German Democratic Republic extends for 93.7 kilometres along the Elbe River. As the German State in form of the Federal Republic of Germany could only be reorganized within the western zone of occupation and as the German Democratic Republic could only be established in the Soviet zone of occupation, the frontier between the German States is identical with the → demarcation line between the zones of occupation (→ Germany, Occupation after World War II).

In the last days of April and the first days of May 1945, troops of the western Allies occupied parts of Mecklenburg; thus, the Elbe and both its banks were under the occupation of British and American forces. North-western Germany was assigned to the British forces, which administered the occupational authority in this region in June 1945.

The demarcation line between the British and the Soviet zones of occupation was agreed upon within the European Advisory Commission (EAC) in the Protocol on the Zones of Occupation in Germany and Administration of "Greater Berlin", signed in London on September 12, 1944 (UNTS, Vol. 227, p. 280). Under section 2 of the Protocol, the Eastern Zone, as shown on the annexed map "A", is circumscribed as follows:

> "[T]he territory of Germany (including the province of East Prussia) situated to the east of a line drawn from the point of Lübeck Bay where the frontiers of Schleswig-Holstein and Mecklenburg meet, along the western frontier of Mecklenburg to the frontier of the province of Hanover, thence along the eastern frontier of Hanover to the frontier of Brunswick . . . ."

The → map, which is reproduced in facsimile in UNTS, Vol. 227, clearly displays in red color the demarcation line on the right bank of the Elbe; the line follows the black markings indicating the boundary between Mecklenburg and the Prussian province of Hanover. The map bears the initials of the plenipotentiaries of the three powers.

In the first days of July the western Allies withdrew their troops to the line agreed to in the EAC Protocol and occupied the western sectors of Berlin, as designated in the same instrument. For a distance of 43.4 kilometres beginning 11.3 kilometres upstream from Lauenburg, the right bank of the Elbe was bordered by Amt Neuhaus, a part of the province of Hanover. Because all bridges in the vicinity had been destroyed and it was felt that the Elbe forms a natural boundary, the commanders-in-chief, Montgomery for Great Britain and Zhukow for the Soviet Union, agreed *inter alia* at Berlin on June 29, 1945 that this area should be taken over by the Russians (Foreign Relations of the United States, Diplomatic Papers 1945, Vol. 3, p. 820, at p. 822). This took place on July 4, 1945. The Control Council in Berlin agreed to this revision on July 30, 1945 on the basis of a British memorandum dated July 25, 1945. The operative part of this document reads: "The transfer to the Russian zone of that part of the Regierungsbezirk Luneburg lying in the province of Hanover lying east of the river Elbe (vide Appendix B)" (Documents on British Policy Overseas, Series 1, Vol. 1, p. 1192).

In practice the left bank of the Elbe in the section in question was under the occupational authority of the British forces, while the right bank was under the occupational authority of the Soviet forces. The historical frontier between Hanover and Mecklenburg traverses the Elbe several times, giving a bridgehead and some meadows on the left bank to Mecklenburg and, apart from the Neuhaus strip, some meadows on the right bank to Hanover; but the practice of the occupation forces did not take note of these circumstances. For 40.5 kilometres, the historical boundary between Mecklenburg and Hanover runs along the middle of the river.

For the 43.4 kilometres at Amt Neuhaus, the relevant documents show that legally the entire width of the river falls within the British zone. Here, the Elbe River belongs to the province of Hanover, attributed to the British zone in the EAC Protocol; the document on cession of that part of the Regierungsbezirk Luneburg lying east of the Elbe did not refer to a part of the river. Thus, within this section of the Elbe the demarcation line runs along the right bank. Map A, which is part of the EAC Protocol, also shows the Elbe River in its entire width for a distance of 11.3 kilometres downstream from the Neuhaus strip and for the section upstream therefrom as part of the British zone. Both banks of the river between Lauenburg and Schnackenburg were occupied by British forces during the end of May 1945 and the following month. After the withdrawal of these forces to the lines agreed upon in the EAC Protocol of 1944, the surface of the Elbe did not become an unoccupied part of Germany. There is no indication of constituent acts by the Soviet occupational forces to occupy the waters of the Elbe between Lauenburg and Schnackenburg.

For these reasons the Federal Republic of Germany maintains that the Elbe in its entire width between Lauenburg and Schnackenburg formed part of the British zone and, therefore, presently falls under the territorial jurisdiction of the Federal Republic (German Bundestag, Drucksache 10/3615, July 4, 1985). The Federal Supreme Court (Bundesgerichtshof) stated in a criminal case decided on February 2, 1977 that the Elbe at a location 540.5 kilometres from its source, within the Neuhaus strip, belongs in its entire

width to the Federal Republic (ZaöRV, Vol. 39, p.124). On the other hand, the German Democratic Republic claims that the frontier runs along the middle of the thalweg (mid-channel) of the Elbe (Grenzgesetz, March 25, 1982, sec. 2(3)b, Gesetzblatt der Deutschen Demokratischen Republik 1982 I, p. 197).

According to an additional protocol to the Treaty concerning the Basis of Relations between the Federal Republic and the Democratic Republic of December 21, 1972 (German Bundesgesetzblatt 1973 II, p. 426; United States Department of State (ed.), Documents on Germany, 1944–1985 (1985) p. 1215) both German States agreed to set up a boundary commission. The commission's task was to mark and document the existing boundary. Due to the different positions maintained with regard to the borderline, the commission was not able to reach agreement.

Navigation on the Elbe is currently regulated by the Treaty on Traffic Questions between the German States of May 26, 1972 (German Bundesgesetzblatt 1972 II, p. 1450; United States Department of State (ed.), Documents on Germany, 1944–1985 (1985) p. 1191). Ships of both German States and other States use the Elbe for navigation. Border controls take place at a point upstream from the disputed section. The entire width of this section of the river is patrolled by police boats of both German States.

D. RAUSCHNING, Die Grenzlinie im Verlauf der Elbe, in: J. Delbrück, K. Ipsen and D. Rauschning (eds.), Recht im Dienst des Friedens, Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976 (1975) 429–449.

S. G. SASSENROTH, Der Verlauf der Elbgrenze zwischen der Bundesrepublik Deutschland und der DDR, AVR, Vol.24 (1986) 314–343.

D. SCHRÖDER, Die Elbe-Grenze (1986).

DIETRICH RAUSCHNING

EMS-DOLLARD

1. Introduction

Before entering the North Sea, the German river Ems flows through a shallow estuary separating the mainlands of the Federal Republic of Germany and of the Netherlands. The Dollard is a bay within the estuary. Two harbours are located on the banks of the estuary, Emden on the German side and Delfzijl on the Dutch side. Both harbours are connected to the open seas by two channels which require a regular dredging to be kept navigable.

The two riparian States disagree about the location of the international boundary in the estuary (→ Boundaries; → Boundary Waters). The Federal Republic maintains that its territory extends over the whole of the estuary up to the low tide line of the Dutch coast. The Netherlands, on the other hand, claims that the thalweg of the principal navigable channel which runs close to the German coast marks the boundary.

2. Historical Development

The Federal Republic bases its claim on "historic title" (→ Historic Rights) according to Art. 12 of the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (UNTS, Vol. 516, p. 206), and Art. 15 of the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF. 62/122 with Corr.). Before the → recognition of the Netherlands as a sovereign State the Ems was an inner-German navigable waterway and, as such, subject to German royal prerogative. It is disputed whether an enfeoffment of the Count of East Frisia with regard to this waterway can be proved by an instrument dating from the year 1464 which has been attacked as a forgery. The Peace Treaties of Munster and Osnabruck (→ Westphalia, Peace of (1648)) provided that waterways subject to royal prerogative would be retained by those rulers who were enfeoffed with them. German documents indicate that German authorities (Count of East Frisia, Prussia, Hanover, again Prussia, and finally the German Reich) successively exercised control over the entire estuary and it seems that German sovereignty was recognized by Dutch authorities on various occasions. It is undisputed that the various German authorities have always assumed responsibility for the navigability of the channels running through the estuary by providing for their maintenance and the instalment of beacons. Shortly before and after the First World War, negotiations were held to conclude a boundary treaty but they led to no result.

3. *Applicable Treaties*

Shortly after the Second World War the Dutch claims were freshly voiced. The issue was then treated in the wider framework of the negotiations for the conclusion of a general post-war settlement agreement (→ Boundary Settlements between Germany and Her Western Neighbour States after World War II). As part of this settlement, the Ems-Dollard Treaty was signed on April 8, 1960 (UNTS, Vol. 509, p. 4).

Pursuant to Art. 1 of the Treaty, the two parties reserve their claims with respect to the question of the international boundary and undertake to cooperate in the spirit of good neighbourliness in order to safeguard the communication between their harbours and the sea. In the following articles, a number of questions such as maintenance and improvement of shipping lanes, construction of hydraulic works, instalment of beacons, and reclaiming of land are resolved in a pragmatic fashion. Jurisdiction over vessels is to be exercised according to their → nationality (→ Ships, Nationality and Status) or, in the case of third-country vessels, according to the law of the harbour of their destination or departure. The greater part of the estuary is declared a common fishing area. The Treaty also provides for the establishment of the Ems Commission, an organ with advisory competences in which both governments are represented. In case the two governments are unable to reach an agreement on a particular matter, either of them can issue a formal declaration of non-agreement and refer the controversy to an arbitral tribunal. Furthermore, it is provided that no party is entitled to unilaterally bring about changes in the state of the estuary.

After the discovery of natural gas and oil resources in the subsoil of the estuary a supplementary agreement was signed on May 14, 1962 (UNTS, Vol. 509, p. 140). This agreement provides for the sharing of all revenues derived from the exploitation of these natural resources in the disputed area. Both the Treaty and the supplementary agreement entered into force on August 1, 1963.

A German project to enlarge the harbour of Emden led to the conclusion of a treaty of cooperation on September 10, 1984 (not yet in force). The project requires the relocation of the river-bed within the estuary in the direction of the Dutch coast. The proposed installations would therefore partly extend over territory which is claimed by the Netherlands. The project foresees a division between the German harbour and the new river-bed consisting of an island which will be artificially constructed on a sandbank, known as Geiserücken, running parallel to the projected river-bed. In a complicated compromise, it was agreed that the island's northern mole, i.e. the one embracing the harbour, will become German territory. Thus, the entire area of the harbour will be part of the Federal Republic. The larger part of the island to be is assigned to the Netherlands. A remaining smaller part opposite the Dutch coast will become German territory. By an additional express provision, it was made clear that the partition of the island will not prejudice the parties' differing positions with respect to the territorial dispute over the remaining area.

As the harbour project will entail serious environmental repercussions, the occasion was taken to establish a régime of close cooperation in environmental matters for the whole area (→ Environment, International Protection). This régime does not go so far, however, as to lay down strict standards for the amount of pollution permitted. Nevertheless, the 1984 treaty of cooperation declares the Dollard a common nature reserve. The treaty also foresees establishment of an Ems-Dollard Advisory Commission, similar to the Ems Commission, which has the task of submitting recommendations in the fields of economic cooperation and environmental protection.

4. *Evaluation*

The evolution of parties' positions concerning the Ems-Dollard issue from confrontation to cooperation is a leading example of how the importance of a boundary dispute diminishes when negotiations marked by good-neighbourliness are held to find pragmatic solutions to practical questions. The treaties resulting from these negotiations reveal various legal techniques for solving such difficult problems as the attribution of jurisdiction and the exploitation of natural resources without making reference to sovereignty over a given piece of territory.

Treaty concerning Arrangements for Co-operation in the Ems Estuary (Ems-Dollard Treaty), April 8, 1960, UNTS, Vol. 509 (1964) 4–63.

Supplementary Agreement to the Treaty concerning Arrangements for Co-operation in the Ems Estuary (Ems-Dollard Treaty), May 14, 1962, UNTS, Vol. 509 (1964) 140–157.

Hoge Raad, Decision of December 14, 1979, Nederlandse Jurisprudentie (1982) No. 96, 351–360.

Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande über die Zusammenarbeit im Bereich von Ems und Dollart sowie in den angrenzenden Gebieten, September 10, 1984, German Bundesgesetzblatt 1986 II, 511–527.

Abkommen zwischen der Bundesrepublik Deutschland und dem Königreich der Niederlande über die Schiffahrtsordnung in der Emsmündung, December 22, 1986, German Bundesgesetzblatt 1987 II, 142–170.

H. AUBIN and E. MENZEL, Die niederländischen Ansprüche auf die Emsmündung (1951).

H.D. TREVIRANUS, Der Deutsch-Niederländische Ems-Dollart-Vertrag, ZaöRV, Vol. 23 (1963) 536–553.

L.J. BOULEZ, The Netherlands and the Law of International Rivers, International Law in the Netherlands, Vol. 1 (1978) 215–288.

M. BOTHE, Zusammenarbeit statt Grenzziehung. Neue Wege zur "Lösung" von Grenzstreitigkeiten, in: R. Bernhardt and U. Beyerlin (eds.), Deutsche Landesreferate zum Öffentlichen Recht und Völkerrecht (1982) 247–255.

R. WOLFRUM, Die Küstenmeergrenzen der Bundesrepublik Deutschland in Nord- und Ostsee, AVR, Vol. 24 (1986) 247–277.

G. HOOG, Flüsse und Kanäle der Bundesrepublik Deutschland, AVR, Vol. 25 (1987) 202–231.

H.-H. WINTE, Die Grenzproblematik des Dollarthafenprojekts, Deutsches Verwaltungsblatt, Vol. 103 (1988) 175–181.

GEORG NOLTE

EPARSES ISLANDS

Four Indian Ocean → islands located in the Mozambique Channel (Glorieuses, Juan de Nova, Europa and Bassas da India) have been the subject of territorial dispute since their exclusion from the transfer of → sovereignty from France to Madagascar in 1960. Tromelin Island, east of Madagascar and north of Reunion in the Indian Ocean is claimed not only by Madagascar but also by Mauritius and the Seychelles. By decree of April 1, 1960, France reiterated its claim to sovereignty, placing the islands under the administration of its Minister for Overseas Departments and Territories (Decree 60–555, Journal Officiel (1960) p. 5343; see → France: Overseas Territorial Entities; see also → Decolonization: French Territories).

The islands are of strategic importance because of their position on one of the world's main hydrocarbon shipping routes and because of political and military interests in the region. All but Bassas da India host meteorological stations and airfields and function as wildlife sanctuaries. France dates its claim *terrae nullius* to the Glorieuses, north of Madagascar and east of the Comoros, from 1892, and to Juan de Nova, Europa and Bassas da India, west of Madagascar and south of the Comoros, from 1897. Madagascar contends that all of these islands are natural dependencies, an integral part of its territory, and that France arbitrarily and unilaterally separated them by decree immediately prior to its gaining independence. The decree was not contested officially by the President of the first Malagasy Republic. The President of the second Republic sent a telegram shortly after his election to the → United Nations Secretary-General reaffirming Madagascar's → "historic rights" to the islands.

In Resolution 34/91 of December 12, 1979, and in Resolution 35/123 of December 11, 1980, the → United Nations General Assembly called upon France to initiate → negotiations. Morocco voted against the latter resolution because it considered that the problem concerns other States in the region; the Comoros abstained, stating that it did not consider itself bound by any resolution concerning the Glorieuses and that it reserved the right to raise the issue again in the future. It is unlikely that the Comoros would assert such a claim before resolution of its territorial dispute with France concerning the island of Mayotte (see Yearbook of the United Nations, Vol. 37 (1983) pp. 188–189). The General Assembly relies upon its Resolution 1514(XV) of December 14, 1960, on the Granting of Independence to Colonial Countries and Peoples, particularly the provisions concerning territorial integrity of a country at the time of its attainment of independence, its Resolution 2625 (XXV) of October 24, 1970, containing the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States (→ Friendly Relations Resolution), and relevant provisions of the

→ United Nations Charter concerning the → peaceful settlement of disputes. It has referred the question to its Special Political Committee which continues to monitor any developments. The Committee has on several occasions recommended that the General Assembly defer debate of the issue in view of the ongoing talks between France and Madagascar.

The → Organization of African Unity, which also monitors progress towards settlement of the dispute, has affirmed its support of Madagascar's claim to the islands in various decisions, including Resolution 784 (XXXV), adopted by its Council of Ministers meeting in Sierra Leone, June 18 to 28, 1980. The Group of 77 (→ Non-Aligned States) issued a Political Declaration concerning the Malagasy Islands at its Sixth Conference in Havana, September 3 to 9, 1979, also supporting Madagascar (see The Third World Without Superpowers, The Collected Documents of the Non-Aligned States, Vol. 5 (1979) p. 152).

The French position is that while there may be differences of opinion with Madagascar concerning the islands, there is no genuine dispute as to its territorial claim under international law. The uninhabited islands became French territory by their effective occupation in the last century. According to France, historically they were never considered natural dependencies of Madagascar as they were virtually unknown to its inhabitants.

In debate before the 37th session of the UN General Assembly's Special Political Committee, November 27 to 30, 1979, France cited the → North Sea Continental Shelf Case in support of its contention that mere proximity of the islands to Madagascar is not sufficient under international law to warrant title to them. Madagascar argued that geographical proximity gives the neighbouring State a natural right of sovereignty over adjacent islands. France also denied Madagascar's claim that its presence on the islands contributed to tension in the region, explaining that its policies are based upon friendship and cooperation and that the very size and configuration of the islands prevents the installation of strategic harbours or other large-scale constructions for military purposes. Madagascar has contended that France is gradually militarizing the islands, thus threatening the creation of a zone of peace in the Indian Ocean. France did not respond to Madagascar's denunciation of its delimitation of a 200-mile → exclusive economic zone around the islands. It regards consideration of the legal status of the islands as interference in its internal affairs.

Madagascar rejects the *terrae nullius* claim, asserting the existence of a recognized sovereign Malagasy State at the time France took possession and France's recognition of "Madagascar and its island dependencies" on October 15, 1958, when they ceased to be French colonies. It charges that by its April 1960 decree, France failed to respect the principle of → *uti possidetis juris* as regards the islands, thus violating the rules governing → State succession in cases of → decolonization (cf. British Order in Council, 8 November 1965, concerning Diego Garcia). Just as the UN General Assembly, it relies upon the Friendly Relations Resolution which affirms the inviolability of sovereign and territorial integrity of States, including the need of countries acceding to independence to preserve their national unity and → territorial integrity, and upon the duty to seek early and just settlement of international disputes by peaceful means. While agreeing that a sovereign State cannot be forced to negotiate, Madagascar has argued that France has a duty in → good faith to fulfil obligations assumed in accordance with the UN Charter and generally recognized principles and rules of international law and that it cannot indefinitely postpone negotiations.

It is generally agreed that as there is no indigenous population on the islands, the right of → self-determination is thus inapplicable. This circumstance distinguishes France's territorial claim to Mayotte, disputed by Comoros, from its claim to the Eparses Islands. It does not, however, address Madagascar's claim that separation of the islands without consultation of the Malagasy Government or its people violates general principles on State succession.

Decree 60–555, 1 April 1960, Journal Officiel de la République Française (June 1960) 5343.
UNGA Res. 34/91 of 12 December 1979.
UNGA Res. 35/123 of 11 December 1980.
UN Docs. A/35/480 of 27 October 1980, and A/36/718 of 25 November 1981, Reports of the Secretary-General on the Question of the Malagasy Islands of Glorieuses, Juan de Nova, Europa and Bassas da India.
Yearbook of the United Nations, Vol. 33 (1979) 268–271;

Vol. 34 (1980) 261–263; Vol. 35 (1981) 225–226; Vol. 36 (1982) 321; and Vol. 37 (1983) 189.

A. ORAISON, A propos du différend franco-malgache sur les îles Éparses du Canal de Mozambique, RGDIP, Vol. 85 (1981) 465–513.

MARY F. DOMINICK

ERITREA

1. Background

Pursuant to the Peace Treaty of February 10, 1947 with the victorious Allies following World War II, the fate of Italy's colonies in Africa, including Eritrea, was left to the → United Nations General Assembly to decide (→ Peace Settlements after World War II; → Decolonization). On December 2, 1950, the Assembly adopted a compromise resolution containing the blueprint, in the form of a Federal Act, of a federation between Eritrea and Ethiopia (GA Res. 390(V)). A United Nations Commissioner for Eritrea oversaw the establishment of the Federation as required by the resolution, including the drafting by him of an Eritrean Constitution in consultation with Ethiopia. The Federation came to an end on November 14, 1962, when, by Imperial Order, Eritrea was annexed by Ethiopia following votes of the Eritrean Assembly and the Ethiopian Parliament in favour of such an outcome (→ Annexation). A struggle for → secession has since been waged in Eritrea.

2. Legal Issues

(a) Historical title

Ethiopia wished to annex Eritrea, claiming historical title to the territory (→ Historic Rights). It argued that most Eritreans favoured the union, and that it was against principle for the General Assembly to sanction separatism and to foster the creation of artificial, non-viable States. At issue was the propriety of claims of historical title being the subject of a resolution by a political body, and the relative standing of such claims compared to the right of → self-determination. In the end. the Assembly heeded the argument that annexation involved a radical and final change of legal status which could not be effectuated without the people's consent.

(b) Self-determination

Opposing claims were made that Eritrea was capable of self-sufficiency and that most of its people desired independence. However, a majority of the members of the fact-finding UN Commission on Eritrea held that it was virtually impossible to accurately assess the aspirations of the populace, due to its diversity, disharmony, and low level of literacy and political awareness (→ Fact-Finding and Inquiry). Thus no → plebiscite was held, and the Commission's rudimentary efforts to gauge the political climate were assailed by many States as unscientific, impressionistic, probabilistic, inconclusive, and not in conformity with the → United Nations Charter. It was also said that if Eritrea in fact lacked capacity for statehood, the Charter (Arts. 1, 76 and 77) admitted of no other alternative than trusteeship, it being incumbent on the Organization to expeditiously assist and guide → non-self-governing territories on the road to full → sovereignty (→ United Nations Trusteeship System).

Some States surmised that if the Eritrean Assembly were to reject the territory's new Constitution the Federation could have been blocked and that therein lay a safety valve that satisfied the principle of self-determination. The UN Commissioner on Eritrea in his final report, however, opined that the Eritreans could not have challenged the federation plan (UN Doc. A/2188 (1952)). At any rate, the UN General Assembly Resolution 390(V) of December 2, 1950 did not give them a subsequent choice of independence. Nor did the federation plan include a revision clause, but it contained a proscription rendering inadmissible even constitutional amendments violative of the Federal Act.

The Commissioner also concluded that the Assembly would have continuing competence over questions of interpretation, amendment and observance of the Federal Act. However, by its total inaction since the collapse of the Federation, the United Nations would appear to have forfeited on principles of → estoppel, neglect and adverse possession whatever right it had by virtue of its

original mandate to deal anew with the Eritrean question.

(c) A flawed autonomy model

Under the UN General Assembly Resolution, Eritrea was given jurisdiction over its domestic affairs, while the Federal Government had competence over foreign affairs, defence, currency, finance, commerce, and federal taxation (→ Jurisdiction of States). The resolution mandated that Eritrea's Constitution be based on democratic principles, thus barring any derogation on that score even by constitutional amendment. The weak and controversial features of the federation scheme were the following: A supposedly democratic Eritrea was to be "an autonomous unit" (not an autonomous State) "under the sovereignty of the Ethiopian crown", and thus subordinate and under the dominion of an absolute monarch; there was no provision for either a separate federal government apart from the Government of Ethiopia, nor for an impartial federal court (one independent of the governments of both parties) to pass on jurisdictional issues; proportional (thus numerically small) representation of Eritreans in the Central Government's legislature was not balanced with provision for a second chamber where Eritreans and Ethiopians would share equal voting power; and Ethiopia was given authority to preserve the integrity of the Federation and thus suppress secession.

(d) Secession

The principle of respect for the → territorial integrity of States is generally incompatible with any attempt at → dismemberment of an independent nation. Any unwelcome intervention in a secession effort would be tantamount to interference in the realm of → domestic jurisdiction. The United Nations itself would be barred by its Charter (Art. 2(7)) from taking cognizance of the matter. The Organization, however, has assumed the right to intervene in separatist strife that comes within the ambit of self-determination, namely struggles for independence from exogenous rule. However, in view of the general proclivity of the international community to avow respect for boundaries fixed as a result of decolonization and to view self-determination as a "one-chance-only" proposition and of not much import in a post-colonial context, it cannot readily be said that the Eritrean struggle fits the self-determination mould.

T. MERON and A.M. PAPPAS, The Eritrean Autonomy: Case Study of a Failure, in: Y. Dinstein (ed.), Models of Autonomy (1982) 183–212.

ANNA MAMALAKIS PAPPAS

FALKLAND ISLANDS (MALVINAS)

Hardly any other territory has been the subject of such long-standing dispute as the Falkland Islands (Malvinas). The former Spanish historical claims to the islands, now asserted by Argentina, reach back to the year 1493, and Britain has at times supported her claim by reference to discovery apparently made in 1592 and 1594 (→ Territory, Discovery). Thus, ever since the existence of the islands became known, their international legal status has been controversial, and it remains so today.

Among the more than 200 → islands of which the Falklands (Malvinas) consist, East and West Falkland are by far the largest; together, all islands cover some 4700 square miles. For purposes of international law, the islands have been treated in the past as a unit, with occasional exceptions. Together with the relevant geographic, historical and economic factors, this almost consistent State practice has indeed justified considering the islands as one territory from the vantage point of international law.

The islands were first settled by France in 1764. Spain later claimed that she had already acquired territorial rights by virtue of the Papal Bull Inter Caetera (1493), and the Treaty of Utrecht (July 13, 1713, BFSP, Vol. 1, p. 420) (→ Territory, Acquisition). Britain subsequently claimed rights on the basis of discovery by her nationals in 1592 and 1594. However, the substance of discussions which took place between Britain and Spain in 1748 and 1749, after British plans to acquire the islands had become known at the Court in Madrid, casts serious doubts on the validity of any territorial claim relating to that period, since no legal argument of → sovereignty was raised by either side at that time.

France decided to acquire the islands in 1764 in order to accommodate settlers previously located in areas lost to Britain after the Seven Years' War (1756 to 1763). As early as 1766, however, the French ceded their rights to Spain, admitting, without apparent reason, that their settlements were illegal but at the same time receiving significant compensation. In 1765, Britain had sent an expedition to acquire the islands, unaware of the French colony; the chronology leaves no doubt, however, that the French had come before the British and that therefore the territorial rights had already passed to France. Thus, France was in a legal position to transfer her rights to Spain in April 1767. British settlers remained on one island. The ensuing tensions between Spain and Britain resulted in a short-lived → armed conflict on the islands in 1770 at the end of which the British left the islands. Prolonged diplomatic → negotiations led to an agreement between the two States. In a very complex and carefully drafted treaty, Spain reserved her legal position, declared her willingness to maintain the → *status quo* as it was before the armed conflict, and expressed her regret about the armed incident. It appears that the territorial status of the islands was not changed by this arrangement; an alleged additional and secret agreement by Britain to leave the islands has so far not been proven.

However, in 1774 the English did leave the islands, citing reasons of economy as their motive. They left a plaque, upholding the claim of the British Crown, which was removed in 1775 by the Spanish. From 1776, the Spanish formally incorporated the islands into the jurisdiction of their viceroy in Buenos Aires. A small Spanish settlement was maintained, and the Spanish protested against the fishing by British nationals on the shores of the islands in 1775; Britain replied, but did not herself assert a territorial claim. The Spanish rights were consolidated by the Nootka Sound Convention of October 28, 1790 (CTS, Vol. 51, p. 67) in which, *inter alia*, Britain agreed not to establish a settlement in the region of the islands. This period of Spanish domination came to an end in 1811 when the Spanish left the islands as a result of the revolutionary situation in Madrid; thereafter, Spain never again asserted a claim to the islands.

After Argentina declared her independence from Spain in 1816, it took four years before the new government sent a small crew to the islands in order to formally claim title. From then until 1828, this claim was reconfirmed and consolidated by a number of acts on the part of the Argentine government which could only be understood as manifestations of governmental control over the islands. In 1825 Britain formally recognized Argentina and concluded a friendship treaty (Treaty of Amity, Commerce and Navigation, February 2, 1825, BFSP, Vol. 12, p. 29), without protesting against the Argentinian claim or the situation on the islands. Considering the requirements for objective acts manifesting the claim to sovereignty in a remote and uncontested area of the world (see → Palmas Island Arbitration; → Clipperton Island Arbitration; → Eastern Greenland Case; → Minquiers and Ecrehos Case), it appears that the Argentinian efforts to assert their claim were sufficient for the acquisition of title, even though the government in Buenos Aires remained a weak one. In 1829, Britain first questioned the Argentinian rights in a formal → protest, and asserted a title of her own on the basis of discovery and subsequent → occupation. Even though the British had set up their plaque in 1774, it would appear unjustified under the circumstances to assume that this protest could have revived their title after 55 years of silence in the face of repeated Spanish and Argentinian open assertions and manifestations of sovereign rights.

In 1832, Britain repeated her protest and decided to take the islands again into her possession. The captain charged with this mission was instructed "to compel them [i.e. foreign military persons] to depart". As to the reasons for this reconsideration of the situation in London, it appears that strategic considerations, the fear of the acquisition of the islands by the United States, and new signs of weakness of the government in Buenos Aires formed the basis for the British decision. Moreover, an analysis of the relevant documents reveals that the authorities in London were led to believe, wrongly, that the islands had become *terra nullius* because the Argentinians had allegedly left them (→ Territory, Abandonment); the British chargé d'affaires had sent his superiors a report along these lines before the final decision to occupy the islands was made in London. On December 20, 1832 the British crew reached the

islands. The first confrontation with the small Argentinian contingent occurred on January 2, 1833. According to an Argentinian report, the British captain informed the Argentinian commander on January 3, "that he could see what Force he had, and that he was in momentary expectation of more, and that he ... could therefore act as he might think fit". This report is consistent with the instructions which the British officers had received and with reports which they submitted subsequently. Ever since that day, the islands have remained in British hands.

The question has been raised whether the British actions in 1832 and 1833 were lawful. This issue must, however, be distinguished from a determination of the consequences of these actions, together with the subsequent occupation, upon the territorial status of the islands. Even though the laws of → war at that time permitted States a very broad discretion in their choice of means by which to pursue their policies, the law clearly distinguished the → use of force in peacetime and placed certain limitations upon actions undertaken in peace. Britain has argued that her measures did not amount to a use of force. However, this appears to be contrary to the facts; the unfortunate incorrect assumption by the British authorities in London that the islands had the status of *terra nullius*, on the basis of the report of the British representative in Buenos Aires, did not objectively allow these actions to be categorized as peaceful occupation instead of forceful → conquest.

As to the effects of the British measures upon the international status of the islands, the rules of intertemporal law will have to be ascertained and applied (→ International Law, Intertemporal Problems). In this respect, the States in principle recognized, during that period, the right to use force as a means to acquire territory. However, this principle was subject to certain limitations, a fact which has occasionally been overlooked by individual authors on the Falklands (Malvinas) issue (see Greig, Reisman). The law during the relevant period distinguished, in certain situations, between the exercise of power on a territory and the right of sovereignty over this territory. The principle of State sovereignty as then understood did not only emphasize the right to use force, but also, in a sense paradoxically, the formal right of each State to respect its sovereign rights over its territory. This particular understanding of the operation of the principle of sovereignty found special expression in the case of a partial → annexation of foreign territory inasmuch as the consent of the State concerned to the cession of the territory was required. This state of the law was described in the 19th century by such prominent authors as Saalfeld, Schmalz, Klüber, Pölitz, de Martens, Rayneval, Heffter, Bluntschli and Pradier-Fodéré (for details, see Dolzer, pp. 98–102). The examination of State practice in the 19th century indeed does not reveal any instance in which a State succeeded in imposing its will to annex part of a foreign territory in the absence of a treaty (for details, see Dolzer, pp. 102–109). It may well be that Britain never concluded such a treaty with Argentina because the authorities in London had assumed that the islands had the status of *terra nullius* when they were occupied in 1832/1833; the position taken by the British Foreign Office in 1982 also assumes that no force was used, and thus the problem of consent in the context of partial annexation does not arise from the British perspective.

If it is conceded that the islands were under Argentinian sovereignty in 1832 and 1833, that the British used force to expel Argentina, and that therefore title to the islands did not pass to Britain in 1833, the further issue arises as to the legal consequences of the fact that the islands have now been held in possession by Britain for more than 150 years.

The British position seems to be that this fact in itself must suffice to acquire title. Thus, Britain has more recently no longer based her claim on → historic rights acquired before 1832, but upon her subsequent presence on the islands. Indeed, the principle of → effectiveness which underlies and shapes the law governing the acquisition and loss of sovereign territorial rights to a large extent seems to support this British position. However, it has been recognized that the notion of effectiveness also has its limitations stemming from the very normativity of the law. In this context, it is significant that Argentina has never acquiesced in the British claim to sovereignty (→ Acquiescence). Protests were filed in 1833, 1834, 1841, 1842, 1849, 1885, 1908, 1919, 1925, 1933, and Argentina also regularly expressed her

position after 1945. In 1884 and 1888, Argentina proposed to submit the dispute to → arbitration. Britain did not agree. Britain suggested in 1948 to bring the dispute over the Falkland Islands (Malvinas) Dependencies before the → International Court of Justice, without including the issue of the Falkland Islands (Malvinas) themselves. It has to be added that the response of the international community since 1833 was not such as to clearly express approval of the transfer of title to Britain.

The doctrinal issue, to identify the significance of the rules of acquiescence and → prescription under these specific factual circumstances, cannot be said to give a clear-cut answer either in favour or against a passing of the title to Britain. It is not without significance that modern tribunals charged with the determination of territorial issues have continuously emphasized the importance of the expressed will of the States concerned and the corresponding effect of protests or the lack of protests; in general, the term prescription has been avoided in these decisions. Also, in the one case in which a State has argued that possession of a territory for a longer period in itself will suffice to change title, this plea was not successful: in the dispute between Mexico and the United States concerning the status of the Chamizal border region, the Tribunal held that possession of the territory for more than 60 years could not overcome the effect of regular protests by the party originally entitled to the land (RIAA, Vol. 11 (1962) p. 309). In the light of the factual and legal considerations outlined above, this author has concluded that the Argentinian claim to the islands may well be stronger than the competing British claim.

Beyond the problem of a territorial title to the islands, Britain has argued after 1945 that the current population on the islands has a right to → self-determination. If this argument is considered so as to postulate a rank of the right of self-determination higher than the right to territorial sovereignty in a factual setting in which the potential holder of the right to self-determination first settled in the territory on the basis of an unlawful act, there may be good reasons to take the opposite view. This view would not be inconsistent with the practice of the → United Nations as expressed in the discussions and resolutions on Gibraltar, Ifni and Belize. In its direct treatment of the issue of the Falkland Islands (Malvinas), in Resolution 2065 (XX) of December 16, 1965 and Resolution 3/60 (XXVIII) of December 14, 1973 the → United Nations General Assembly has recognized the existence of a territorial dispute, has not addressed the current inhabitants as a "people", but as a "population", and has urged the two States "to proceed without delay with the negotiations . . . ".

After 1965, several efforts were made by Argentina and Britain to reach a mutually satisfactory solution to the dispute (for details see Gustafson, pp. 81–118). Starting in 1977, formal negotiations took place in which the sovereignty issue was discussed alongside the prospects for economic cooperation including offshore oil exploration. In the search to find a viable solution, the ideas either to freeze the territorial dispute following the pattern of the Antarctic Treaty (→ Antarctica) or to reach a lease-back agreement similar to the one governing → Hong Kong were discussed, *inter alia*. These diplomatic efforts come to nothing, however. In early 1982 Britain made it clear, as on earlier occasions, that no solution could be agreed that was not acceptable to the inhabitants of the islands.

In March 1982, an incident occurred, south-east of the islands in the British territory of South Georgia, which developed into a dispute between Argentina and Britain. On April 2, 1982, Argentina invaded and occupied the Falklands (Malvinas); irrespective of the territorial issue, this action was taken in violation of the prohibition of the → use of force. The following military battle led to the expulsion of the Argentine forces from the Falklands (Malvinas) by British troops in June, and a *de facto* cease-fire was reached in July. The → United Nations Security Council had passed Resolution 502 on April 3, 1982, in which a breach of the peace was determined, and in which an immediate cessation of hostilities, the immediate withdrawal of Argentine forces and the search for a diplomatic solution were called for; on May 26, Res. 505 reaffirmed Res. 502. During the military conflict, the Secretary-General had offered his → good offices, and various efforts to settle the dispute by third States, including the United States of America and Peru, were made. On June 25, the British Governor returned to the islands.

As of 1989, diplomatic relations between the two States remained severed. Argentina has not formally declared the hostilities terminated, and Britain retains an exclusion zone of 150 miles around the islands.

I. ARECO, Titulos de la República Argentina a la Soberania y Possessión de la Islas Malvinas (1885).

P. GROUSSAC, Les îles Malouines (1910).

V. BOYSEN, The Falkland Islands (1924).

W. DOWN, The Occupation of the Falkland Islands and the Question of Sovereignty (1927).

J. GOEBEL, The Struggle for the Falkland Islands (1927).

GOMEZ LANGENHEIM, Elementos para la historia de nuestras islas Malvinas, Vol. 2 (1939).

M. HIDALGO NIETO, La cuestión de las Malvinas, Contribución al estudio de las relaciones hispano ingiesas en el siglo XVIII (1947).

R. CAILLET-BOIS, Las Islas Malvinas, Una Tierra Argentina (2nd ed. 1948).

C.H.M. WALDOCK, Disputed Sovereignty in the Falkland Islands Dependencies, BYIL, Vol. 25 (1949) 311–353.

I. ARCE, Las Islas Malvinas (1950).

C. POP, L'affaire des îles Falkland (1952).

G. MONCAYO, Aspects juridiques de la controverse sur les Iles Malouines (1959).

L. MUÑOZ AZPIRI, Historia Completa de las Malvinas, 3 vols. (1966).

G. COHEN JONATHAN, Les Iles Falkland (Malouines), AFDI, Vol. 18 (1972) 235–283.

H. WEBER, "Falkland Islands" oder "Malvinas"? (1977).

B. HILLEKAMPS, Der Streit um die Falklandinseln (1978).

D. BLUMENWITZ, Falkland oder Malvinas? Der britisch-argentinische Streit über die Inselgruppe im Südatlantik aus der Sicht des Völkerrechts, Zeitschrift für Politik, Vol. 29 (1982) 318–330.

O. BRING, The Falkland Crisis and International Law, NordTIR, Vol. 51 (1982) 129–163.

J.E.S. FAWCETT, Legal Aspects, in: The Falkland Islands Dispute, Chatham House Special (April 1982) 5–8.

F. HASSAN, The Sovereignty Dispute over the Falkland Islands, Virginia Journal of International Law, Vol. 23 (1982) 53–71.

F.S. NORTHEDGE, The Falkland Islands: Origins of the British Involvement, International Relations, Vol. 7 (1982) 2167–2189.

J. PEARCE, The Falkland Islands Dispute, The World Today, Vol. 38 (1982) 161–165.

R.P. BARSTON and P.W. BIRNIE, The Falkland Islands/Islands Malvinas Conflict: A Question of Zones, Marine Policy, Vol. 7 (1983) 14–24.

A.B. BOLOGNA, Los derechos de Inglaterra sobre las islas Malvinas, Revista de Estudios Internacionales, Vol. 4 (1983) 775–783.

D.C. DICKE, Der Streit um die Falklandinseln oder Malvinen, in: Recht und Staat im sozialen Wandel, Festschrift für Hans Ulrich Scupin zum 80. Geburtstag (1983) 429–440.

D. DUNNETT, Self-Determination and the Falklands, International Affairs, Vol. 59 (1983) 415–428.

Falkland Islands Review, Report of a Committee of Privy Counsellors (Cmnd. 8787) January 1983.

H. FOX, Legal Issues in the Falkland Islands Confrontation 1982, International Relations, Vol. 7 (1983) 2454–2475.

T.M. FRANCK, Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War, AJIL, Vol. 77 (1983) 109–124.

D. GREIG, Sovereignty and the Falkland Islands Crisis, Australian YIL, Vol. 8 (1983) 20–70.

A. HOPE, Sovereignty and Decolonization of the Malvinas (Falkland) Islands, Boston College International and Comparative Law Review, Vol. 6 (1983) 391–446.

J.M. LINDSEY, Conquest: A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands, Texas ILJ, Vol. 18 (1983) 11–35.

Malvinas, Georgias y Sandwich del Sur, Consejo Argentino para las Relaciones Internacionales (ed.) (1983).

B.M. MUELLER, The Falkland Islands: Will the Real Owner Please Stand Up, Notre Dame Law Review, Vol. 58 (1983) 616–634.

A. PARSONS, The Falklands Crisis in the United Nations, 31 March – 14 June 1982, International Affairs, Vol. 59 (1983) 169–178.

R. PERL, The Falkland Islands Dispute in International Law and Politics (1983).

M. PINTO, Argentina's Rights to the Falkland/Malvinas Islands, Texas ILJ, Vol. 18 (1983) 1–10.

I. PUIG, Malvinas y Regimen Internacional (1983).

A. RANDELZHOFER, Der Falkland-Konflikt und seine Bewertung nach geltendem Völkerrecht, Europa Archiv, Vol. 38 (1983) 685–694.

W. REISMAN, The Struggle for the Falklands, Yale Law Journal, Vol. 93 (1983) 287–317.

M.A. SANCHEZ, Self-Determination and the Falkland Islands Dispute, ColJTransL, Vol. 21 (1983) 557–584.

A. SCHWED, Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute, Fordham Journal of International Law, Vol. 6 (1983) 443–471.

N.J. WATKINS, Disputed Sovereignty in the Falkland Islands: The Argentina – Great Britain Conflict of 1982, Florida State University Law Review, Vol. 11 (1983) 649–676.

ZORAQUIN BECU, Inglaterra Prometto Abandonar Las Malvinas (1983).

E. FERRER VIEYRA, Las Islas Malvinas y el Derecho Internacional (1984).

L.C. GREEN, The Falklands, the Law and the War, Yearbook of World Affairs (1984) 89–119.

H. GROS ESPIELL, El Caso de las Malvinas y el derecho a la libre determinación de los pueblos, Anuario Hispano-Luso-Americano de Derecho Internacional, Vol. 7 (1984) 27–41.

H. KÖCHLER (ed.), Le conflit des Malouines (1984).

N. RONZITTI, La questione della Falkland - Malvinas nel diritto internazionale (1984).

M. SCHRÖDER, Der Kampf um die Falklandinseln – Völkerrechtliche und europarechtliche Aspekte, GYIL, Vol. 27 (1984) 334–366.

J.L. VALLARTA, El conflicto de las Malvinas frente al derecho internacional, Anuario Jurídico Interamericano (1984) 193–221.

Crisi Falkland-Malvinas e organizzazione internazionale, L. Forlati and F. Leita (eds.) (1985).

E. FERRER VIEYRA, An Annotated Legal Chronology of the Malvinas (Falkland) Islands Controversy (1985).

J.F. GRAVELLE, The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute between Argentina and Great Britain, Military Law Review, Vol. 107 (1985) 5–69.

R. DOLZER, Der völkerrechtliche Status der Falkland-Inseln (Malvinas) im Wandel der Zeit (1986).

H. WEBER, Der Streit um die Falkland-Inseln: Welche Lehren? Der argentinisch-britische Konflikt im Spiegel zweier Neuerscheinungen, Verfassung und Recht in Übersee, Vol. 20 (1987) 255–268.

P. BECK, The Falkland Islands as an International Problem (1988).

L.S. GUSTAFSON, The Sovereignty Dispute over the Falkland (Malvinas) Islands (1988).

A.H. RIZZO ROMANO, El estoppel y la problemática jurídico-política de las Islas Malvinas, Liber amicorum: Colección de estudios jurídicos en homenaje al José Pérez Montero, Vol. 3 (1988) 1197–1210.

RUDOLF DOLZER

FAROE ISLANDS

1. History

The Faroe Islands, a small group of islands covering some 1400 square kilometres in the North Atlantic between Scotland and Iceland, were originally independent, but became a Norwegian tributary possession around the year 1000, as did → Greenland and Iceland. In 1380, when Denmark formed a monarchic union with Norway, all three territories came under Danish → sovereignty and were administered by the Danish King. This Union was dissolved when Denmark ceded Norway to Sweden in the Kiel Peace Treaty of January 14, 1814 (BFSP, Vol. 1, p. 194), but the Faroe Islands, Greenland and Iceland all remained Danish. Iceland achieved sovereignty in 1918 and became an independent State in 1944, whereas the Faroe Islands and Greenland are now → autonomous territories within the Danish Realm.

The Faroe Islands have some 46 000 inhabitants who live mainly from fishing. The language is Faroese, but Danish is spoken as the second language. The Faroes have their own flag.

The Faroe Islands have never had formal colonial status. They were, unlike Greenland, encompassed by the first Danish Constitution of June 5, 1849, and the Faroese have ever since elected two members to the Danish Parliament. Limited self-government was conferred on the Faroese Lagting (legislature) as early as 1852. During World War II, communications between Denmark and the Faroe Islands were interrupted, and the Islands were temporarily occupied by British troops for security reasons. In this period, the Faroese Lagting adopted on its own an extensive provisional self-government régime. After the war, the Faroese raised the question of the constitutional status of the Islands, and a first draft for Faroese self-government or home rule resulted in 1946 from joint Faroese-Danish negotiations. This draft was, however, rejected by a referendum on the Islands, and the majority in the Lagting shortly thereafter proclaimed the Islands' national independence from Denmark. Faced with this fact, the Danish King dissolved the Lagting on his own authority and called a new election on the Islands.

After renewed negotiations, a second draft for home rule emerged in 1947 which was upheld by the new Lagting and subsequently adopted by the Danish Parliament in 1948. This Home Rule Act entered into force on April 1, 1948, and has remained unchanged ever since (Act No. 137 of March 23, 1948 (Lovtidende Danmark (1948 A 1) p. 255). The Act transfers substantial legislative and executive powers within specified fields of jurisdiction from Denmark to the Faroese Home Rule Authorities.

2. Faroese Home Rule

(a) Institutions

The Lagting, the Faroese legislature, consists of 32 directly elected local residents holding Faroese citizenship. The members are elected for a four-year period, but the Lagmand (the Faroese

premier) may call a new election prior to expiration of the ordinary period. There are at present six political parties represented in the Lagting.

The Landsstyre (the government) is appointed by, but not necessarily recruited from, the Lagting. The present Landsstyre is a coalition of six ministers including the Lagmand. Outside the Home Rule structure is the Danish High Commissioner, representing the Danish Government on the Islands and in charge of the administration of those fields that have remained under Danish jurisdiction. Danish sovereignty is maintained by the Danish Navy.

(*b*) *Status and powers*

Section 1 of the Home Rule Act stipulates that the Faroes constitute a self-governing part of the Danish Realm. According to this provision, Faroese Home Rule is believed to imply the enjoyment of full international legal rights to irreversible → self-determination to the effect that the Danish authorities are permanently precluded from interfering with Faroese → domestic jurisdiction. This assumption is, however, disputed by many among the Danish authorities.

Jurisdiction between Denmark and the Faroe Islands is divided into three categories: (i) Faroese home rule affairs, (ii) Danish affairs, and (iii) Danish affairs administered under home rule.

(i) According to Section 4 of the Home Rule Act, the Home Rule Authorities hold legislative and administrative powers on the Islands within the fields of jurisdiction specified in List A annexed to the Act. List A includes, *inter alia*, the following: Faroese government and administration; direct and indirect taxation and powers of disposal over Home Rule revenues; employment, wages and salaries; fishery licensing and control; trade, industry and distribution; social security; vocational education; and infrastructure. These fields have all been assumed by Home Rule with the consequence that the appurtenant financial responsibility for each field has been taken over as well (cf. Section 2) and to the effect that the Danish authorities are no longer competent within these fields.

Also annexed to the Act is List B indicating a few additional fields which may pass over to Faroese control at a later stage subject to agreement between the two parties. List B includes, *inter alia*, the following: the Church; police and prison; natural and mineral resources; aviation; radio broadcasting; and control over import and export. Radio broadcasting and import-export controls were assumed in the 1970s, whereas the transfer of jurisdiction over natural resources has been rejected by the Danish Government ever since the Faroese request in 1980.

(ii) Residual fields of jurisdiction have remained Danish, subject to Danish legislation and regulation. The main Danish fields are foreign affairs, defence, currency, the judiciary, health services, primary schooling and the remaining fields on List B.

(iii) Section 9 of the Act stipulates that, if so agreed upon between the two parties, the Faroese authorities may assume the administration of a Danish field of jurisdiction notwithstanding the fact that the legislative control over the field is retained by Denmark. This provision has been applied, for example, to hospital administration.

(*c*) *International relations*

As indicated, foreign affairs are reserved as a Danish matter. After the establishment of a 200 nautical miles → fishery zone around the Islands in 1977, the Faroese Government has, however, negotiated and concluded fisheries agreements on its own with several neighbouring countries.

Denmark joined the → European Economic Community (EEC) in 1973 (Cmnd. 7463, Treaty Series No. 18 (1979)). However, the Faroe Islands decided to remain outside. Instead of membership, a mutual trade agreement with the EEC was concluded in 1974 allowing for substantial customs reductions and import concessions. A joint fisheries agreement was concluded with the EEC in 1977 (Agreement on Fisheries, March 15, 1977, Cmnd. 7759 (1980)). Trade agreements have also been concluded with various countries of the → European Free Trade Association. The Faroe Islands are not a full member of the → Nordic Council, but they are represented by their own delegation and have their own vote in this forum. The Faroes are an independent member of the

North East Atlantic Fisheries Convention (→ Fishery Commissions).

A. OLAFSSON, International Status of the Faroe Islands, Nordic Journal of International Law, Vol. 51 (1982) 29–38.

E. PATURSSON, Some Critical Observations on the Political Development of the Faroe Islands and their Present Political Situation, Nordic Journal of International Law, Vol. 54 (1985) 52–53.

E. PATURSSON, Some Critical Observations on the Faroese-Danish Financial Relations, Nordic Journal of International Law, Vol. 5[illegible] (1986) 41–45.

FREDERIK HARHOFF

FONSECA, GULF OF

1. Geographic Location

The Gulf of Fonseca is located in the Pacific Ocean between 12 degrees 54 minutes and 13 degrees 30 minutes latitude north and 87 degrees 36 minutes and 87 degrees 54 minutes longitude west, Greenwich. The area of the Gulf measures approximately 2000 square kilometres. The coastline bordering this body of water, including that of the → islands situated within it, stretches some 375 kilometres. Among the islands in the Gulf are Meanguera, Meanguerita, Conchaguita, Zacatillo, Zacate Grande, Tigre, Martin Pérez, Garrozo, Exposición, etc.

The three riparian States located on the Gulf are Honduras, Nicaragua and El Salvador. The territorial → boundary between El Salvador and Honduras reaches the Gulf at the mouth of the Goascarán River, at the northern margin of the "finger" where the port La Unión is located. The territorial boundary between Honduras and Nicaragua touches the sea near the mouths of the Negro and Estero Blanco rivers.

2. Significance

The Gulf is of economic and strategic importance to all the riparian States: The Salvadoran → port La Unión is located in the Gulf; the Gulf is the only outlet to the Pacific for Honduras; and the Gulf constitutes a direct maritime route for Nicaragua's trade with the other riparian States. Economic interests in the Gulf also concern future exploitation of marine resources, mainly fishing, and possible oil and mineral extraction from the marine subsoil.

The Gulf's outstanding feature is that it is the only case of a → bay or gulf having three bordering nations which have agreed to classify the body of water which they enclose as an "historic bay" "with characteristics of a closed sea" (→ Historic Rights).

3. Historical Background

Discovered by Spain in 1522, the Gulf was subject to the Captaincy General of Guatemala during the colonial period. After independence was proclaimed in 1821, the Gulf belonged to the provinces of El Salvador, Honduras and Nicaragua of the Federal Republic of Central America until 1838. Following the latter's dissolution, the three riparian States exercised joint ownership over the Gulf.

The Bryan-Chamorro Treaty, which was signed by the United States and Nicaragua on August 5, 1914 and entered into force on June 22, 1916 (Martens NRG3, Vol. 9, p. 350), empowered the United States to construct an inter-oceanic → canal on the San Juan River between Nicaragua and Costa Rica, as well as to establish a naval base on the Nicaraguan coast in the Gulf.

The impugnment of this Treaty by El Salvador before the → Central American Court of Justice (Martens NRG3, Vol. 3, p. 94), led to a decision which explains the legal nature of the Gulf (Anales de la Corte de Justicia Centroamericana, Vol. 6 (1917) p. 140). Nevertheless, the legal claims of the three riparian States as regards territorial waters, marine subsoil, and some of the Gulf's islands, still lack a solution acceptable to all three countries involved.

4. Legal Status

The Gulf of Fonseca is a historic bay comprised of internal waters. With respect to these waters there exists a divisionary line between Honduras and Nicaragua, as set out in the minutes of the Boundary Commission of 1900 to 1901. Notwithstanding various attempts to reach an agreement on the issue, the boundary between El Salvador and Honduras remains contested.

In 1916 a complaint was filed before the Central American Court of Justice against Nicaragua by El Salvador due to the fact that the Government of

Nicaragua had concluded the Bryan-Chamorro Treaty with the United States, which related, among other matters, to the leasing of a naval base in the Gulf of Fonseca. In its decision of March 9, 1917, the Court stated that the Treaty violated the "rights of co-ownership (of El Salvador) in the waters of said Gulf in the manner, and within the limitations, specified in the foregoing act recording the votes of the Court".

The record shows unanimous agreement by the judges to the effect that the Gulf of Fonseca is "an historic bay possessed of the characteristics of a closed sea". Beyond this, four judges found that "the legal status of the Gulf of Fonseca is that of property belonging to the three countries that surround it". One judge indicated that "ownership of the Gulf of Fonseca belongs respectively to the three riparian countries in proportion". Four judges maintained, moreover, that there existed an ownership "without prejudice, however, to the rights that belong to Honduras in those non-littoral waters". One judge rejected this assessment. In response to an additional question, three judges stated that "the league of maritime littoral that belongs to each of the states that surround the Gulf of Fonseca" should be "excepted from the community of interest or co-ownership". One judge concurred with this opinion and replied affirmatively but in a different manner, while another judge answered negatively, considering that "in the interior of closed gulfs or bays there is no littoral zone".

The Court's decision was based on the concepts regarding maritime affairs prevailing at that time in international law and was also influenced by private law criteria. The concept of historic bays was inspired by the judgment of the → Permanent Court of Arbitration at The Hague of September 7, 1910 in the matter of the → North Atlantic Coast Fisheries and, in particular, by the dissenting opinion of Drago to that judgment (Proceedings in the North Atlantic Coast Fisheries Arbitration before the Permanent Court of Arbitration at The Hague: 61st Congress, 3rd Session, Senate Document No. 870 (1912)).

It has been pointed out that the decision of the Central American Court of Justice does not ascribe to Gulf waters the status of internal waters, which would constitute an anomaly in light of the classification of the Gulf as an historic bay.

The decision acknowledged the right of innocent passage for merchant vessels through Gulf waters (→ Innocent Passage, Transit Passage).

Although the decision had a great impact – not only as regards the specific case at issue, but also on the development of the historic bay concept and its application in cases such as that of the Gulf of Aqaba (→ Aqaba, Gulf of) – it did not manage to resolve the Gulf problem among the three riparian States. Honduras had not been a party in the case and was, therefore, considered a third-party with respect to the judgment. Once the decision had been delivered, Nicaragua sent a note of protest to the Court, denying its obligatory force. El Salvador, which had invoked the existence of joint ownership over the entire body of water, accepted the Court's ruling, despite the declaration by the Court of the existence of a littoral zone where the coastal States exercise an exclusive jurisdiction.

The Bryan-Chamorro Treaty was subsequently annulled by the Treaty of July 14, 1970 (UNTS, Vol. 791, p. 305). The question of sovereignty over the islands and islets in the Gulf was not resolved by the decision. Although there is still a controversy in this regard, unrestricted freedom of navigation exists between the Gulf ports belonging to the different littoral countries and the Pacific Ocean.

5. The 1958 and 1982 Law of the Sea Conventions

The 1958 Convention on the Territorial Sea and the Contiguous Zone (UNTS, Vol. 516, p. 205) and the 1982 United Nations Convention on the Law of the Sea (UN Doc. A/CONF. 62/122 with Corr.; not yet in force) do not include regulatory provisions on historic bays or on bays with coastlines belonging to two or more riparian States (cf. Arts. 7(1)(6) and 10(1)(6) of the 1958 and 1982 Conventions respectively). In the case of historic bays such as the Gulf of Fonseca, the maximum entrance width allowed by international law in order for the waters which these bays enclose to be considered → internal waters may exceed the maximum width contemplated for bays which do not fall under the category of historic bays (Arts. 7(4) and 10(4) of the 1958 and 1982 Conventions respectively) or those bays to which the aforementioned Conventions do not apply.

6. *Current Situation*

Honduras, Nicaragua and El Salvador are in agreement on the Gulf's classification as a historic bay, as well as on conditions with respect to navigation through its waters. There is no agreement, however, concerning the jurisdiction to be exercised in the Gulf, over the existence of co-ownership, or with respect to the so-called littoral strip.

The question of the limits of jurisdiction that the riparian States exercise over the waters, subsoil and the islands of the Gulf remains unresolved. The October 30, 1980 peace treaty between El Salvador and Honduras failed to define the maritime boundaries of these two nations in the Gulf. In view of the fact that an agreement has not been reached between these two States on several issues concerning boundaries not defined in the treaty and the five years foreseen for reaching an agreement passed as of December 11, 1985, the treaty requires that "a commitment should be negotiated and signed by which the existing controversy or controversies are jointly submitted to the decision of the International Court of Justice". Among the possible controversies contemplated in Art. 31 of the 1980 treaty is "the juridical situation of insular and maritime areas".

The issues of jurisdiction in the Gulf and sovereignty over certain Gulf islands, such as Meanguera and Meanguerita, is included among the matters recently submitted to the → International Court of Justice (ICJ) by a → *compromis* between Honduras and El Salvador allowing for determination of the existing dispute by a chamber of the Court. Such a chamber was established by the Court's order of May 8, 1957 (ICJ Reports 1987, p. 10). In this case Nicaragua is not a party, unlike the case settled by the Central American Court of Justice in 1917.

The Republic of El Salvador v. The Republic of Nicaragua, Anales de la Corte de Justicia Centroamericana, Vol. 6 (1917) 140 et seq.; reprinted in: AJIL, Vol. 11 (1917) 674–730.

Relaciones Exteriores (Ministerio de El Salvador), El Golfo de Fonseca y el Tratado Bryan-Chamorro, Doctrina Meléndez (1917).

Demanda Promovida por el Gobierno de la República de El Salvador con motivo del Tratado Bryan-Chamorro, Escrito presentado por el Gobierno de Nicaragua (1917).

UN Secretariat, Historic Bays, Memorandum, UN Doc. A/CONF. 13/1, September 30, 1957.

UN Secretariat, Juridical Régime of Historic Waters Including Historic Bays, UN Doc. A/CN.4/143, March 9, 1962; YILC (1962 II) 1–26.

M. CASTRO RAMIREZ, Cinco años en la Corte de Justicia Centroamericana (1918).

E. ALVARADO GARCIA, La Base Naval en el Golfo de Fonseca ante el Derecho Internacional (1932).

C. MALEK, La théorie dite des bais historiques, Revue de Droit International pour le Moyen Orient, Vol. 6 (1957) 100–173.

M. STROHL, The International Law of Bays (1963).

L. BOUCHEZ, The Régime of Bays in International Law (1964).

F.RODRIGUEZ SERRANO, El Canal de Nicaragua (1968).

H.R. HERRERA CACERES, Estatuto Jurídico de la Bahia de Fonseca y Régimen de Las Zonas Adyacentes (1974).

C.J. GUTIÉRREZ, La Corte de Justicia Centroamericana (1978).

H. GROS-ESPIELL, El tratado de Paz entre El Salvador y Honduras, Revista Internacional y Diplomática, Vol. 30, No. 361 (1980).

L. PASOS ARGÜELLO, Los Conflictos Internacionales de Nicaragua (1982).

HECTOR GROS-ESPIELL

FRANCE: OVERSEAS TERRITORIAL ENTITIES

1. *Background*

The Constitution of October 27, 1946 replaced the colonial system which had been directed by the French authorities with a quasi-federal system (→ Colonies and Colonial Régime). Art. 60 provided that the French Union (l'Union française) is composed, on the one hand, of the French Republic (la République française) comprising metropolitan France and the overseas départements and territories, and, on the other hand, of the associated territories and States. Only → Vietnam, Laos and Cambodia became associated States, in 1949, remaining so until they attained full independence in 1955.

From 1955 onwards, the French Union had in fact ceased to exist. Only the French Republic remained, comprising in addition to metropolitan France both the overseas territories and the overseas départements (→ Decolonization: French Territories).

The Constitution of October 4, 1958 created a new quasi-federal structure, the Community (la Communauté), with the objective of associating

the overseas territories which desired to benefit from far-reaching autonomy while conserving close links with the French Republic. Thus, Art. 76 provided firstly that the overseas territories could retain their status within the Republic; and secondly that if, through deliberations of their respective territorial assemblies (within four months of the date of promulgation of the Constitution), they indicated their wishes accordingly, they could become either overseas départements of the Republic, or, whether in a group or otherwise, States members of the Community. All the overseas territories in Africa south of the Sahara, with the exception of Guinea which preferred independence, chose to have the status of State member of the Community. From 1960 onwards they requested and obtained full independence, and the "constitutional" Community was replaced by simple agreements of cooperation.

It is therefore evident that, since 1960, the few territories which remain dependent all form an integral part of the French Republic. They possess a territorial status the extent of autonomy of which is mostly in inverse relation to their degree of assimilation into metropolitan France. The only exception to this rule is the → Eparses Islands in the Indian Ocean (Tromelin, Les Glorieuses, Juan de Nova and Bassas de India) which are an integral part of the Republic, but which, having no permanent population, do not constitute overseas territories and are administered directly by the central administration and by the Commissioner of the Republic of Réunion (Decree 60–354 of April 1, 1960, Journal officiel (hereafter JO), April 13, 1960, p. 3429, and Order of March 16, 1972, JO, March 17, 1972, p. 2787). Likewise, the case of Clipperton Island should be mentioned, this island being directly administered by the High Commissioner of the Republic in French Polynesia.

2. *The Various Overseas Territorial Entities of the French Republic: A Diversity of Status*

(a) General remarks

The French overseas territorial entities may be divided into three categories at present (January 1989). These categories are: (i) the overseas départements (départements d'Outre-Mer): Martinique, Guadeloupe, Guayana, and Réunion; (ii) the overseas territories (territoires d'Outre-Mer): New Caledonia, Polynesia, Wallis and Futuna, and the Austral and Antarctic lands; and (iii) other territorial entities (autres collectivités territoriales): Saint-Pierre and Miquelon, and Mayotte.

All these territorial entities are an integral part of the French Republic. Since 1946, all their inhabitants enjoy the status of French citizenship; for example, in the last presidential elections (second round, May 1988), there were 967 177 overseas French among the 38 168 869 French persons registered on the electoral rolls.

The distinction between the overseas départements and the overseas territories originated in the Constitution of October 27, 1946. Art. 73 determined the principle according to which the legal régime of the overseas départements is the same as that of the metropolitan territories, unless otherwise provided for by law. However, Art. 74 established a contrary rule with regard to the overseas territories, stating that the overseas territories are provided with a special status taking account of their own particular interests within the overall interests of the Republic. The Constitution of October 4, 1958 retained the same distinction, based on Art. 72 according to which every territorial entity (other than the communes, the départements and the overseas territories) is created by law, the legislature having also established certain overseas territories as territorial entities without having them fall into the category either of overseas départements or of overseas territories.

(b) The overseas départements

According to Art. 72 of the Constitution of October 4, 1958, the overseas département is, like the metropolitan département, a territorial unit of the Republic (para. 1), which enjoys free self-administration through elected councils in accordance with the stipulations of the law (para. 2), and in which the delegate of the government is responsible for the national interests, administrative controls, and maintaining respect for the law (para. 3).

In fact since 1946, the overseas départements have enjoyed a degree of local autonomy approximately identical to that of the metropolitan départements. In particular, Laws 82–213 of March 2, 1982 (JO, March 3, 1982, pp. 730, 779), 82–623 of July 22, 1982 (JO, July 23, 1982, p. 2347), 83–8 of January 7, 1983 (JO, January 9,

1983, p. 215) and 83–695 of July 28, 1983 (JO, July 29, 1983, p. 2475) are applicable to the overseas départements as well as to the metropolitan départements.

Nevertheless, Art. 73 of the Constitution provides that the legal régime and administrative organization of these départements may be the subject of adaptive measures necessitated by their particular situation.

The authorities which are competent to adapt the legislative texts and national regulations to the particular situation of the overseas départements are the national authorities. In principle, these authorities are the parliament, with respect to the adaptation of laws, and the government, with respect to the adaptation of regulations (on the division of competences between the legislature and the executive, see in particular the following Decisions of the Constitutional Council (Conseil constitutionnel): No. 82–147 DC of December 2, 1982, Rec. 1982, p. 70 and especially No. 82–152 DC of January 14, 1983, Rec. 1983, p. 31). In the case of simple measures of application of a legal provision, even if a certain adaptation is required to the situation of the overseas départements, the executive authority responsible for making regulations will normally be competent to take such measures (Constitutional Council Decision No. 82–152 DC of January 14, 1983, Rec. 1983, p. 31).

Art. 73 accords to the national authorities the power, but not an obligation, to take measures of adaptation. Moreover, this power is limited. The process of adaptation does not include reversing a provision, and no challenge may be made to the general spirit or to the essential provisions of texts which are applicable to the entirety of the national territory. Thus, according to the Constitutional Council, the effect of Arts. 72 and 73 of the Constitution is that the status of the overseas départements must be the same as that of the metropolitan départements; the single exception is that the former may be the subject of measures of adaptation necessitated by the situation of the overseas départements (Decision No. 82–147 DC of December 2, 1982, Rec. 1982, p. 48).

In the decision cited above, the Constitutional Council declared unconstitutional a law which gave to the overseas départements a form of organization considered too different from that of the metropolitan départements. This very restrictive holding of the Constitutional Council should induce the legislature no longer to adopt in the future legal provisions for the overseas départements which derogate excessively from the law generally applicable. However, in view of the preliminary character of the control exercised by the Constitutional Council, old laws in derogation continue to remain in force.

In accordance with these constitutional principles, the national legislature has granted to the overseas départements a form of administrative organization which is very close to that of the metropolitan départements. In particular, the overseas départements have the same decentralized administrative units as the metropolitan départements: communes (communes), départements and regions (régions). The status of the communes and the départements is largely regulated by the same laws as in metropolitan France. Thus, Law No. 82–213 of March 2, 1982 (JO, March 3, 1983, pp. 730, 779), relating to the rights and freedoms of communes, départements and regions, provides in Art. 1, para. 3, that with regard to the overseas départements the present law shall apply until the promulgation of laws adapting its provisions to the requirements of each of the communities concerned. However, no law specifically relating to the overseas départements has been adopted.

Certain laws are applicable to the division of competences between the communes, the départements and the regions (Law No. 83–8 of January 7, 1983, JO, January 9, 1983, p. 215, and No. 83–663 of July 22, 1983, JO, July 23, 1983, p. 2286). At the same time the provisions of the Decree 60–406 of April 26, 1960 (JO, April 1960, p. 3944) remain applicable, imposing on the government the obligation to consult the General Council of the département on any draft decree seeking to adapt the legislation or the administrative organization of the overseas départements to their particular situation.

The status of the regions is clearly defined by the laws specifically relating to the overseas départements (Law No. 82–1171 of December 31, 1982, JO, January 1, 1983, p. 13, concerning the regions of Guadeloupe, Guyana, Martinique and Réunion). This status is very largely based on that of the metropolitan régime, the principal differences being due to two factors. On the one hand, each of

these regions includes only one département. On the other hand, the intention of the legislature was to accord to the regional Councils slightly broader competences than in the metropolitan area, in particular concerning the following: international relations (consultative powers with regard to agreements between France and neighbour States of the overseas region relating to certain matters), tax questions (dock dues and taxes on fuels), and the field of economic development, town and country planning, the environment and culture.

The overseas départements are regulated by national laws and regulations except where otherwise expressly provided for (Art. 73 of the Constitution). The legislation applicable to the overseas départements retains a special character in certain fields, notably the following: taxation (in particular, for the purposes of business taxation, the metropolitan area and each overseas département are considered to be exporting territories under Art. 294–2 of the general law of taxation (Code général des impôts)), social security, and family matters (although a certain reconciliation between the systems is taking place because of the decreasing population increase: 770 000 persons in 1954, 1 200 000 in 1972 and 1 250 000 in 1982). In the sphere of private law, such special features have practically disappeared.

According to Art. 227 of the Treaty establishing the → European Economic Community (EEC), the provisions of the Treaty are applicable to the French overseas départements at the latest two years after its entry into force.

(c) The overseas territories

Like the overseas départements, the overseas territories are territorial entities of the Republic the inhabitants of which are French citizens. For that reason, the overseas territories are represented in the National Assembly (Assemblée Nationale) and in the Senate (Sénat) by members elected under the same conditions as in the metropolitan area, and the electors, of course, participate in the election of the president of the Republic.

The overseas territories are also self-administered in conformity with the principles laid down by Art. 72 of the Constitution. The Constitutional Council has determined the meaning of the expression "self-administration". In accordance with the conditions which the law shall lay down, an overseas territory must possess an elected council endowed with effective powers. The principle of self-administration does not prevent a representative of the French government from being entrusted with the preparation and implementation of the decisions of such a council; this was, indeed, the régime applicable to the metropolitan départements before Law 82–213 of March 2, 1982 (Decision No. 85–196 of August 8, 1985, Rec. 1985, p. 43).

However, in accordance with Art. 74 of the Constitution, the overseas territories of the Republic have a special form of organization which takes account of their own particular interests within the overall interests of the Republic. That organization may be defined by law after consultation with the assembly of the territory concerned.

The power to endow a particular organization on the overseas territories belongs to the national legislature, but the latter may only exercise its power after consultation with the assembly of the territory concerned. The Constitutional Council has determined the extent of this obligation of preliminary consultation with respect to two matters. On the one hand, a government presenting a draft law concerning an overseas territory must consult the territorial assembly sufficiently early to enable its opinion to be transmitted to the French national parliament before the adoption of the text on first reading. In two instances, the Constitutional Council has declared unconstitutional laws which had been voted upon without prior consultation (Decision No. 82–141 DC of July 27, 1982, Rec. 1982, p. 48, and Decision No. 84–169 DC of February 28, 1984, JO of March 2, 1984, p. 764). On the other hand, the obligation of previous consultation does not prevent a government and the members of parliament from exercising their right of amendment in the course of debate, for otherwise every amendment would involve an interruption in the debate. Only the initial text must be the subject of prior consultation (Decision No. 79–104 DC of May 23, 1979, Rec. 1979, p. 27). However, when a text submitted to the national parliament does not initially envisage application in an overseas territory and, therefore, does not require consultation, any amendment seeking to render the text applicable to an overseas

territory is prohibited (Decision No. 81–129 DC of October 30 and 31, 1981, Rec. 1981, p. 39).

The extent of the obligation of prior consultation also depends on the contents of the concept of special or particular form of organization. In this regard, the Constitutional Council has adopted a very broad interpretation. Thus, matters falling within the particular competence of an overseas territory include not only administrative and judicial matters, including criminal procedure, but also the regulation of radio broadcasting and television, higher education and the law of insolvency. As a consequence the Constitutional Council has declared unconstitutional all laws which concern such matters and which have been adopted by parliament without prior consultation with the assembly of the territory concerned.

The power to endow the overseas territories with a particular form of organization is not facultative, as it is for the overseas département, but is obligatory: The legislature must take account of the particular needs of the population concerned. On the other hand, this power is very wide. The legislature being competent to determine the particular organization of each of the overseas territories may provide in a particular case for the forms of organization required by the specific situation, distinct from those applicable to other départements or territories (Constitutional Council Decisions No. 82–151 of January 12, 1983; No. 85–196 of August 8, 1985 (Rec. 1985, p. 63); and No. 87–241 DC of January 19, 1988 (JO of January 21, 1988)). In particular, the legislature may accord considerable autonomy to the overseas territories with regard to the enactment of laws, conferring on the assemblies of the territories regulatory powers which may even exceed those of the national government and which may relate to matters reserved to the national legislature in the rest of the Republic (Constitutional Council Decision No. 65–34 L of July 2, 1965 (Rec. 1965, p. 75)).

In accordance with these constitutional principles, the French legislature has provided very different types of status for the overseas territories. While some may appear to enjoy almost the status of a federated state, others, usually with fewer inhabitants, or uninhabited, are placed under a régime which more nearly approximates to direct administration by the central authorities than to territorial autonomy.

The most decentralized régime is undoubtedly that accorded to French Polynesia (167 000 inhabitants in 1984). At present the territory is regulated by Law No. 84–820 of September 6, 1984 (JO of September 7, 1984, p. 2831) which was held by the Constitutional Council to be in conformity with the Constitution in Decision No. 84–177 DC of August 30, 1984 (JO of September 4, 1984, p. 2803). There are two representative organs within the territory: the territorial assembly elected by universal suffrage, and a governing council composed of persons elected by the assembly. The division of competences is based on a listing of the competences reserved to the State and on the principle according to which the territory is competent in all other matters. The relative homogeneity of the population accounts for the fact that the territory of French Polynesia has no regional organization. It should be mentioned that Clipperton Island does not belong to this territory but is administered directly by the representative of the national government within the territory, the High Commissioner of the Republic (→ Clipperton Island Arbitration).

The status of New Caledonia (150 000 inhabitants in 1983) is based on Law No. 88–1028 of November 9, 1988 which made statutory provision for preparations towards the self-determination of New Caledonia in 1998 (JO, November 10, 1988); this law was adopted after the French people had voted in favour of it in a referendum held on November 6, 1988 (80 per cent in favour in the French Republic as a whole; 57 per cent in favour in New Caledonia). By this law, the overseas territory was divided into three provinces (North, South, and the islands of Loyauté), each province to enjoy greater autonomy than the territory itself; this paradoxical situation is due to the legislature's wish to promote the development of autonomy within a relatively homogenous framework, that of the province, leaving to the representative of the State in New Caledonia a role as umpire in matters involving the different ethnic groups at the level of the territory, which appears as a sort of simple federation of provinces.

Each of the three provinces possesses general competences, albeit limited by the list of matters reserved to the State and to the territory,

respectively. Each province is administered by a provincial assembly, elected on the basis of universal suffrage by proportional representation, and by the provincial president, elected by the assembly and entrusted with the implementation of its decisions; the High Commissioner of the Republic, representing the French Government in the territory, only has power to refer to the administrative tribunal any decisions which appear to be illegal.

The overseas territory only possesses competences limited to the matters prescribed by the above-mentioned law (mainly taxation, postal services, highways, town planning, health, employment, and civil procedure). The following matters are reserved to the State: foreign affairs, defence, maintenance of public order, administration of justice, and secondary and higher education. The only elected organ is the Congress; at present it takes the form of a session of the members of the assemblies of the three provinces. The preparation and implementation of decisions of the Congress are entrusted to the High Commissioner of the Republic. Nevertheless, every year the Congress elects by proportional representation a permanent commission to which it may delegate a part of its functions.

Between March 1 and December 31, 1998, the population of New Caledonia will be able, by a vote of self-determination, in conformity with the provisions of Art. 53 of the Constitution, to pronounce on the retention of the territory in the Republic or on its attainment to independence. The main notable feature of this vote is that only persons domiciled in New Caledonia from November 6, 1988 shall be able to participate therein.

The territory of Wallis and Futuna (with 14 500 inhabitants in 1983), was transformed from a → protectorate into an overseas territory following the referendum of December 27, 1959. The territory has a very considerably restricted autonomy, partly because of the low number of inhabitants. The status of the territory is determined by Law No. 61–814 of July 29, 1961 (JO of July 30, 1961, p. 7019) as modified by Law No. 78–1018 of October 18, 1978 (JO of October 20, 1978, p. 3626) which enumerates not only the competences reserved to the State but also those attributed to the territory; the list of the latter is not very long. Moreover, although there does exist a territorial assembly elected by universal suffrage, executive power is largely accorded to the representative of the national government, the head of the territory, who is assisted only by one consultative organ, the territorial council. The council is composed of the head of the territory himself together with the three traditional chiefs of the islands and three members proposed by the territorial assembly but selected outside the assembly. In addition, the head of the territory exercises control over the assembly in so far as the results of its deliberations, in order to be effective, must be confirmed by him. Each of the islands is a rather weak decentralized entity.

Finally, the status of the French Austral and Antarctic lands is somewhat unusual, no doubt partly because this territory has no permanent population but only several scientific missions during the summer. The territory comprises the islands of Saint-Paul and Amsterdam outside the Antarctic, the islands of Kerguelen and Crouzet in the South Indian Ocean and the Adélie Coast in the eastern Antarctic. Law No. 55–1052 of August 6, 1955 (JO of August 9, 1955, p. 7979) established these lands as overseas territories without precisely determining their status. The Treaty of Washington of December 1, 1959 (UNTS, Vol. 402, p. 71) on → Antarctica limited the → sovereignty of France over the Adélie Coast. Several decrees have provided for the administrative and legal aspects of the organization of the territory (especially Decrees No. 56–935 of September 18, 1956 (JO of September 26, 1956, p. 9086) conferring administrative and financial autonomy on the territories; No. 56–32 of January 13, 1956 (JO of January 14, 1956, p. 562) determining the financial régime of the territory; and No. 71–1021 of December 17, 1971 (JO of December 24, 1971, p. 12629) determining the areas of jurisdiction within the legal régime of the territory). The territory is administered by a high administrator nominated by the French Government who sits in Paris and is assisted by two consultative organs: the territorial consultative council composed of representatives of the relevant ministries, and the scientific council composed of members of the scientific community.

Under the terms of Art. 227 (3) of the EEC Treaty (UNTS, Vol. 295, p. 17), the French

overseas territories are the subject of a special régime of association defined in the fourth part of the Treaty. The council of the European Communities has laid down the modalities of this association. In particular, the council has established the principle of free access to the Common Market of products originating in the overseas territories of the member States, with a few exceptions, and has established a policy of granting development aid.

(d) The other territorial entities

Having listed the different forms of territorial entities within the Republic, namely the communes, the départements (metropolitan and overseas), and the overseas territories, Art. 72 of the Constitution provides that all other territorial entities shall be established by law.

The French legislature has employed this provision in order to create regions within the metropolitan area and in the overseas départements. The provision has also been employed in order to bring into being overseas territorial entities which are neither overseas départements nor overseas territories.

At present (January 1989), two overseas territorial entities have been established by law: on the one hand, Saint-Pierre and Miquelon, which had been an overseas territory from 1946 to 1976 and then an overseas département from 1976 to 1985; and, on the other hand, the island of Mayotte, which had belonged from 1946 to 1975 to the overseas territory of the Comores.

Saint-Pierre and Miquelon lost their status of overseas département in order to avoid certain restrictions resulting from the integration of the overseas départements into the EEC.

After the attainment of independence by the other islands of the Comores, the inhabitants of Mayotte sought to obtain the status of overseas département for their island. However, in order to leave open future possibilities for evolution towards a greater degree of autonomy, and no doubt also in view of the vigorous international protests, the French legislature instead preferred to endow the island in 1976 with an intermediate status between that of an overseas département and that of an overseas territory.

Saint-Pierre and Miquelon on the one hand, and Mayotte on the other, have very different status. Saint-Pierre and Miquelon (with 6041 inhabitants in 1983) have, in reality, a status very close to that of an overseas département; the differences result essentially from the very small nature of the territory and its population (see law No. 85–595 of June 11, 1985, concerning the status of Saint-Pierre and Miquelon). However, unlike the overseas départements which have two assemblies, a departmental assembly known as the regional council and a regional assembly known as the general council, Saint-Pierre and Miquelon have only one assembly, also called general council, elected in accordance with the electoral procedure applicable to elections of municipal councils in metropolitan communes having more than 35 000 inhabitants. In this assembly are concentrated all the functions of a general council, a regional council, and even of the assembly which was previously the highest assembly of the two islands when they were an overseas territory before 1975. Executive functions are entrusted to the president of the general council, as in the metropolitan and overseas départements. In 1985 this new status was the subject of a vote of the population of the two communes which constitute the new territorial entity. National law is applicable throughout the territory except in the areas of taxation and customs. With regard to European Community law, the archipelago is considered as not forming part of the Community customs area.

The island of Mayotte (with 56 800 inhabitants in 1983) is governed by Law No. 76–1212 of December 24, 1976 relating to the organization of Mayotte (JO of December 28, 1976, p. 7493). According to Art. 1, Mayotte is a part of the French Republic and may not cease to be so without the consent of the population. In reality, the elected representatives would have wished the island to become an overseas département, like Réunion, but the French legislature did not dare to go so far in integrating the island into the French Republic. Instead, Mayotte was endowed with a status that is both provisional and composite. It is provisional in so far as the law envisaged that a new consultation would be organized at the end of 1984, but in view of the hostility of the elected representatives, the French Government has not organized such a consultation. It is composite in so far as it borrows elements both from the status of the previous overseas territory of the Comores, of

which Mayotte was one part, and from the status of the overseas départements.

The representative assembly of Mayotte bears the name of a departmental assembly, i.e. general council. However, its rules of procedure and its functioning are taken from the old law of August 10, 1871 relating to the département, which is no longer applicable to the metropolitan and overseas départements since the law of March 2, 1982. The executive organ of the island is not the president of the general council, but the representative of the State. Mayotte is governed in accordance with the principle applicable to overseas territories, that new laws are not applicable there unless expressly so provided.

3. *The Principle of Self-Determination*

(a) The rights of secession or of option of the overseas territories under the settlement of the Fifth Republic

According to Art. 1 of the Constitution of October 4, 1958, the peoples of the overseas territories had the option of rejecting the draft constitution which was offered to them after the referendum of September 24, 1958.

In fact, the electorate in Guinea made use of this provision and the overseas territory of Guinea immediately left the French Republic.

According to Art. 76 of the Constitution, the overseas territories could either retain their status within the Republic, or become overseas départements of the Republic or States members of the Community. In order to obtain the latter status, and thereby leave the French Republic, the territorial assembly was required to deliberate upon the matter within four months following the promulgation of the Constitution. In fact, between October 14 and December 19, 1958, the following overseas territories chose to leave the Republic and to enter the Community: Madagascar, Senegal, Sudan, Upper Volta (now Burkina Faso), Dahomey (now Bénin), Ivory Coast, Niger, Mauritania, Chad, Oubangui-Chari (now Central African Republic), Gabon, and Congo. By taking no action, the other overseas territories conserved their status; but, in so doing, they also renounced the possibility of their enjoyment of the right of option offered by Art. 76 of the Constitution.

(b) Secession under the French Constitution

Art. 53, para. 3, of the Constitution of October 4, 1958, provides that no cession of, exchange of, or addition to territory is valid without the consent of the populations concerned. This provision is identical to that of Art. 27, para. 3, of the Constitution of October 27, 1946. The ambiguity of this article has posed two serious problems of interpretation.

In its Decision No. 75–59 of December 30, 1985 (Rec. 1975, p. 26), the Constitutional Council determined that the provisions of this article must be interpreted as being applicable not only in cases where France might cede a territory to a foreign State or aquire territory from such a State, but also in the case where a territory would cease to belong to the Republic in order to become an independent State or to rejoin such a State.

The Constitutional Council confirmed the constitutionality of the procedure followed by the French Government upon the attainment of independence by the Comores, an overseas territory of the French Republic. This procedure consisted in the adoption of a law organizing a vote of the people concerned, the effective vote of the people, and finally the adoption of a law providing for → secession. At the same time, the Constitutional Council implicitly approved the procedures followed previously upon the attainment of independence by the Algerian départements (1962) and by the overseas territory of the Afars and Issas (1977). It should be recalled that, in the case of Algeria, not only the Algerian population but also the whole of the electorate of the French Republic were able to give their opinion on the principle of secession; the reason was probably that overseas territories were not involved, but rather départements which are entities more closely integrated into the French Republic.

According to this interpretation, an overseas département or territory has no true right of secession since it may only exercise such a right with the consent of the French parliament. However, an overseas département or territory has the possibility of requiring from parliament that a consultation be organized on the question of remaining within the French Republic and, in case of support for secession by the population concerned, that the secession be authorized. Some authors have maintained that only the overseas

territories may secede. It is true that the overseas territories are usually considered as nations separate from France, which explains the fact that they may enact laws that are different from the national laws, whereas the overseas départements are in principle assimilated to the metropolitan départements. In any case, however, nothing prevents an overseas département from obtaining the status of overseas territory.

A more delicate question was posed in 1975 on the occasion of the attainment of independence of the overseas territory of the Comores. The question was whether the whole of the territory could become an independent State because the majority of its population had consented, or whether only those portions of the territory could do so in which a majority of the population had declared their agreement with independence. In Decision No. 75–59 DC of December 30, 1975, the Constitutional Council indicated on the one hand that the island of Mayotte, one of the islands of the archipelago of the Comores, is a territory in the sense of Art. 53, last sentence, of the Constitution, but, on the other hand, that this expression does not have the same significance as the expression "overseas territory" as employed in Title XI of the Constitution. As a consequence, the island could not leave the French Republic without the consent of its own population.

This solution is clearly contrary to the position adopted by the → United Nations General Assembly in its consideration of the same question. However, for the Constitutional Council, "the island of Mayotte is a part of the French Republic, a fact which can only be determined within the context of the Constitution, notwithstanding the intervention of any international body." In fact, following this decision, a consultation of the people of Mayotte was organized on February 11, 1976.

The question presented in such a consultation should be absolutely clear: It should require a choice between either attainment of independence, or continued membership in the French Republic. Thus, the question should not involve a choice between independence and the adoption of some future status the elements of which would be made known to the population.

Because this constitutional requirement of making any consultation unambiguous was not met, the Constitutional Council held to be unconstitutional the questions which were put to the electorate of New Caledonia (Decision No. 87–226 DC of June 2, 1987 (JO of June 4, 1987)). The form of presentation of the question found in this case is equivocal because it may give rise to the erroneous idea in the minds of the voters that the elements of status are already determined, whereas, in the light of Art. 74 of the Constitution, such a determination may only be made on the basis of a law adopted after consultation with the territorial assembly. In justifying its decision, the Constitutional Council expressly referred to para. 2 of the preamble of the Constitution of October 4, 1958 which sets out the principle of the free determination of peoples ("*libre détermination des peuples*").

(c) Other possibilities for change in status

On the basis of Art. 53 of the Constitution, a territory which is a protectorate may be transformed into an overseas territory with the consent of the population concerned. This was the case in Wallis and Futuna which was a form of protectorate until 1961. On December 27, 1959 a referendum was held and on July 29, 1961, Law No. 61–814 was promulgated conferring the status of overseas territory upon these islands, thereby adding a new territory to the territories of the French Republic.

Moreover, the texts being silent on this matter, an ordinary law may alter the status of an overseas territorial entity. Thus, Law 76–664 of July 19, 1976 (JO of July 20, 1976, p. 4323) transformed the overseas territory of Saint-Pierre and Miquelon into an overseas département, and Law 85–595 of June 11, 1985 (JO of June 14, 1985, p. 6551) transformed it again into a *sui generis* territorial entity.

Constitution of October 4, 1958, especially Paragraph 2 of the Preamble, and Arts. 72–74.

Laws relating to the overseas départements:

Law No. 82–1171 of December 31, 1982, Journal officiel, January 1, 1983; and Law No. 84–747 of August 2, 1984, Journal officiel, August 3, 1984, both relating to Guadeloupe, Guyane, Martinique and Réunion.

Laws relating to the overseas territories:

Law No. 55–1052, August 6, 1955 relating to the French Southern and Antarctic Lands, Journal officiel, August 9, 1955.

Law No. 61–814 of July 29, 1961, Journal officiel, July

30, 1961; and Law No. 78–1018 of October 18, 1978, Journal officiel, October 20, 1978, both relating to Wallis and Futuna.
Law No. 84–820 of September 6, 1984 relating to French Polynesia, Journal officiel, September 7, 1984.
Law No. 88–82 of January 22, 1988 relating to New Caledonia, Journal officiel, January 25, 1988.
Laws relating to other overseas territorial entities:
Law No. 76–1337 of December 24, 1976 relating to Mayotte, Journal officiel, December 28, 1976.
Law No. 85–595 of June 11, 1985, relating to Saint-Pierre and Miquelon, Journal officiel, June 14, 1985.
Decisions of the Conseil constitutionnel:
No. 75–59 DC of December 30, 1975, Recueil des décisions du Conseil Constitutionnel (Rec.) 1975, p. 26.
No. 79–104 DC of May 23, 1979, Rec. 1979, p. 27.
No. 80–122 DC of July 22, 1980, Rec. 1980, p. 49.
No. 81–129 DC of October 30 and 31, 1981, Rec. 1981, p. 35.
No. 81–131 DC of December 16, 1981, Rec. 1981, p. 39.
No. 82–141 of July 27, 1982, Rec. 1982, p. 48.
No. 82–147 DC of December 2, 1982, Rec. 1982, p. 70.
No. 82–152 of January 14, 1983, Rec. 1983, p. 31.
No. 82–155 DC of December 30, 1982, Rec. 1982, p. 88.
No. 83–165 DC of January 20, 1984, Journal officiel, January 21, 1984.
No. 84–169 DC of 28 February 1984, Journal officiel, March 2, 1984.
No. 85–187 DC of January 25, 1985, Rec. 1985, p. 43.
No. 85–196 DC of August 8, 1985, Rec. 1985, p. 63.
No. 86–208 DC of July 1 and 2, 1986, Rec. 1986, p. 78.
No. 87–226 DC of June 2, 1987, Journal officiel, June 4, 1987.
No. 87–241 DC of January 19, 1988, Journal officiel of January 21, 1988.

D.G. LAVROFF, Droit d'Outre-Mer de la Coopération (1971).

A. ORAISON and F. MICLO, Les îles Tromelin, Glorieuses, Juan de Nova, Europa et Bassas da India, Recueil Penant, Vol. 84 (1974) 136–170.

L. FAVOREU, La décision du 30 décembre 1975 du Conseil constitutionnel dans l'affaire des Comores, Revue du droit public et de la science politique, Vol. 92 (1976) 557–575.

J.C. MAESTRE, L'indivisibilité de la République Française et l'exercice du droit d'autodétermination, Revue du droit public et de la science politique, Vol. 92 (1976) 431- 461.

J.C. GAUTRON, La situation des départements d'Outre-Mer et des territoires d'Outre-Mer au regard de la Communauté économique européenne, Annuaire du Tiers-Monde (1977) 139–149.

A. MAGNIER, Le territoire des terres australes et antarctiques françaises, Revue juridique et politique, Indépendance et coopération, Vol. 31 (1977) 1057–1066.

Secrétariat d'Etat aux départements d'Outre-Mer – territoires d'Outre-Mer, L'intégration des départements d'Outre-Mer dans la Communauté économique européenne, Bulletin d'information du Cenadom (1979) 4–10.

M.H. FABRE, L'unité et l'indivisibilité de la République, réalité ? fiction ?, Revue du droit public et de la science politique, Vol. 98 (1982) 603–622.

T. MACHELON, La République française, une république qui s'ignore?, Revue du droit public et de la science politique, Vol. 98 (1982) 623–688.

L. FAVOREU, Le Conseil constitutionnel et les institutions administratives d'outre-mer, Revue du droit public et de la science politique, Vol. 99 (1983) 377–386.

S. JACQUEMART, La question départementale outre-mer (1983).

F. LUCHAIRE, La décentralisation dans les départements d'Outre-Mer, Actualité juridique droit administratif, Vol. 39 (1983) 120–127.

F. LUCHAIRE, La réforme régionale dans les départements d'Outre-Mer, Revue juridique et politique, Indépendance et coopération, Vol. 37 (1983) 567–573.

F. MICLO, La décentralisation outre-mer, in: F. Moderne, P. Bon et al. (eds.), La nouvelle décentralisation (1983) 413–427.

J.C. DOUENCE, Les départements d'Outre-Mer, Le régime juridique général, le régime communal, le régime départemental, le régime régional, in: Juris-Classeur, Les collectivités locales, Vol. 2 (1984) fascicules 1900–1 – 1942–14.

P. LAMPUÉ, Le régime constitutionnel des territoires d'Outre-Mer, Revue du droit public et de la science politique, Vol. 100 (1984) 5–20.

J.C. FORTIER and C. VITALIEN, Les compétences des régions mono-départementales d'Outre-Mer, in: Les nouvelles compétences locales (sous la direction de F. Moderne) (1985).

F. LUCHAIRE, La nature juridique des territoires d'Outre-Mer, Revue juridique et politique, Indépendance et coopération, Vol. 39 (1985) 815–817.

J. MOREAU, Administration régionale, départementale et municipale (7th ed. 1985).

J.P. NÉGRIN, Le contrôle de légalité des actes des collectivités locales dans les départements d'Outre-Mer, Revue française de droit administratif, Vol. 1 (1985) 228–241.

M. MASSIOT, Saint-Pierre et Miquelon, in: Juris-Classeur, Les Collectivités locales (1986).

T. MICHALON, Une nouvelle étape vers la diversification des régimes des collectivités territoriales: le nouveau statut de Saint-Pierre et Miquelon, Revue française de droit administratif, Vol. 2 (1986) 192–208.

P. SCHULTZ, Collectivités territoriales d'Outre-Mer: Mayotte et Saint-Pierre et Miquelon (fasc. 131), in: Juris-Classeur administratif, Vol. 1 (1986).

P. SCHULTZ, Le Territoire des Terres australes et antarctiques françaises, administration de mission ou service extérieur de l'Etat, Annuaire des Pays de l'Océan Indien (1986).

J. BURDON, J.M. PONTIER and J.C. RICCI, Droit des collectivités territoriales (1987).

J.C. FORTIER and C. VITALIEN, Régions d'Outre-Mer, in: Juris-Classeur, Les Collectivités locales (1987).
P. SCHULTZ, Départements d'Outre-Mer (fasc. 130), Territoires d'Outre-Mer (fasc 132), Territoire de la Nouvelle Calédonie (fasc. 133), in: Juris-Classeur administratif, Vol. 1 (1987).
D. TURPIN, Les régions (1987).

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FRONTIER DISPUTE CASE (BURKINA FASO/MALI)

1. Historical Background

The origin of this dispute goes back to colonial times (→ Colonies and Colonial Régime). The territories of both parties were formerly colonies in French West Africa. In 1919, from the colony of Upper Senegal and Niger, a separate colony named Upper Volta was established. The remaining territories became the French Sudan and Niger. Niger became independent in 1922; French Sudan, since 1959 the Sudanese Republic, became independent as the Federation of Mali in 1960, and in the same year, after the dissolution of the Federation, became the Republic of Mali. Upper Volta was abolished in 1932, but reconstituted in 1947 by a law stating that the boundaries were to be those of the former colony of Upper Volta of 1932. This reconstituted Upper Volta became independent in 1960 and took the name Burkina Faso in 1984. However, the Burkina-Mali frontier had never been properly delimited by the French colonial authorities and no legislative enactment existed to regulate this matter (→ Boundary Disputes in Africa).

In 1974 the border dispute led to a → war resulting in the establishment of a Mediation Commission within the → Organization of African Unity (OAU) charged to examine the dispute (→ Conciliation and Mediation). The Commission provided for the independent demarcation of the frontier by a neutral technical commission, thus inducing both States to renounce the → use of force as a means of settling their frontier dispute. However, the Commission never terminated its work and both States sought binding adjudication of the dispute before the → International Court of Justice.

2. Special Agreement

By a Special Agreement of September 16, 1983, both States requested the Court to decide the line of the frontier in the disputed area, which was rich in mineral resources. The disputed area consisted of a "band of territory extending from the sector Koro (Mali) Djibo (Upper Volta) up to and including the region of the Béli". This area represents a section of about 300 kilometres out of the whole frontier line of about 1300 kilometres.

According to Art. II of the Special Agreement the case was to be decided by a Chamber of the Court constituted according to Art. 26(2) of the Statute. After having duly consulted the parties as to the composition of the Chamber, the Court decided by an order of April 3, 1985 that the Chamber was to be composed of the Judges Lachs, Ruda and Bedjaoui as well as Judge *ad hoc* Luchaire to sit for Burkina Faso and Judge *ad hoc* Abi-Saab to sit for Mali.

3. Request for Interim Measures

Before the Chamber had had the opportunity to decide the question the dispute flared up into war on Christmas Day 1985 apparently because of a census carried out by Burkinabe authorities allegedly violating Malian → sovereignty. Both parties then asked the Chamber to indicate provisional measures in order to preserve their respective rights although, at the same time, they were engaged, since 1977, in a political mediation endeavour within a regional West African group under the Regional Non-Aggression and Defence Aid Agreement (l'Accord de non-agression et d'assistance en matière de défense, A.N.A.D.). On December 30, 1985, this group reached a common → declaration made by Burkina Faso and Mali containing the terms of a cease-fire but postponing the question of troop withdrawal which, according to Burkina Faso, should be ordered by the Court. With a view to the common declaration and the negotiation process under the auspices of A.N.A.D., Mali objected to the request. The Chamber stated that the → negotiations between the parties were not incompatible with the functions of the Court but concluded, with regard to this special item, that an order concerning the withdrawal of the troops required geographical and strategic expertise which the Chamber lacked so that the regulation of

this point was left to the A.N.A.D. process. The Chamber, on January 10, 1986, indicated provisional measures ordering the re-establishment of the *status quo ante* the armed conflict (→ Interim Measures of Protection).

4. *The Applicable Law*

Both parties had agreed that at the moment of independence there existed a definite frontier and that no modification had taken place since 1959 to 1960, so that it was the task of the Chamber to define this frontier line in the disputed area.

(a) In connection with the principle of → *uti possidetis juris* in accordance with the well-known resolution (AGH/Res. 16 (I)), adopted at the first session of the Conference of African Heads of State and Government in 1964, the parties had stated in the → preamble to the Special Agreement that the settlement of the dispute should be "based in particular on the respect for the principle of the intangibility of frontiers inherited from colonization". That meant the Chamber could not disregard the principle of *uti possidetis juris* which, according to the Chamber, is a firmly established principle of international law where → decolonization is concerned. Its obvious purpose was to prevent the independence and stability of new States being endangered by the challenging of frontiers following the withdrawal of the administering power by upgrading former administrative frontiers to international frontiers. This principle, according to the Chamber, might represent the wisest course to preserve stability; it might, however, be wondered that the principle had been able to withstand the new attitudes to international law that had developed, since at first sight it conflicts outright with the right of peoples to → self-determination. But as African States have selected the principle of *uti possidetis* among all other classic principles, the Chamber could not challenge it merely because in 1960, when both parties achieved independence, this principle had not yet been proclaimed.

(b) The Chamber then considered whether equity could be invoked and decided that only equity *infra legem*, that is that form of equity which constitutes a method of interpretation of the law in force, was to be considered; this is shown by the application which the Chamber made of equity in delimitating the frontier on the basis of the rules and principles applicable in the case (→ Equity in International Law). The relationship between the principle of *uti possidetis* and equity was, as had been underlined in the separate opinion of Judge Abi-Saab, relevant where the lawful possessions were not clearly definable by applying the principle of *uti possidetis*. Considerations of equity *infra legem* thus come into play to guide the Court in the exercise of its functions of interpreting and applying the law and the legal titles involved, since the Chamber had to draw a delimitation line and not only to indicate the principles on the basis of which the parties would themselves proceed to delimitation.

(c) As a last consideration concerning the applicable law the Chamber had regard to the French colonial law, *droit d'outre-mer*, since both of the parties had been part of French West Africa. As the frontier between the parties became an international frontier at the moment of independence, French law, according to the Chamber, could no longer play a role in itself but only as one factual element among others, or as evidence indicative of what has been called the "colonial heritage", because international law did not contain any *renvoi* to the law of the colonizing States. In this context, however, the Chamber met the criticism of Judge Abi-Saab, who considered that the Chamber had entered into too detailed examination of the French colonial law.

5. *Preliminary Questions*

The Chamber had two preliminary questions to examine.

(a) The first question concerned the argument of → acquiescence, objected to by Burkina Faso arguing that Mali had accepted as binding the solution of the dispute outlined by the OAU Mediation Commission. If this objection were well-founded there would have been no need for the Chamber to establish the frontier inherited from the colonial period. The Chamber, however, disposed of this objection because, on the one hand, both parties had agreed that the Commission had not been a judicial organ competent to issue legally binding decisions and, on the other hand, the Commission had never completed its work.

As to the official declarations of Mali concerning the acceptance of the binding character of the

solution to be found by the Commission, the Chamber stated that those declarations had not been made during negotiations between the two parties and thus could at most be regarded as → unilateral acts not intended to create legal obligations.

With regard to the last argument in this context, namely that Mali had acquiesced to the application of the principles of delimitation approved by the sub-commission and intended to serve as a basis for the final report of the Mediation Commission, the Chamber found that Mali's approach to those principles was of little significance: Since the Chamber had to decide on the basis of international law the principles found by the sub-commission had to be applied as such if they were elements of law; if not, they were of no importance since the Special Agreement did not refer to them.

(b) The second preliminary question concerned the classic problem of the interference into rights of third States not party to the dispute. Mali had argued that the Chamber was not competent to fix the tripoint Mali-Niger-Burkina Faso, forming the end-point of the frontier between the parties, without Niger's agreement. Burkina Faso considered that according to the Special Agreement the Chamber had to determine definitively all of the common frontier and thus to determine the tripoint. The Chamber disposed of this preliminary objection by finding that its jurisdiction was not restricted only because of the fact that the disputed area was adjacent to a third State, Niger, not party to the proceedings, whose rights, incidentally, were protected by Art. 59 of the Statute.

As to the second aspect of the question whether the need of safeguarding the interests of a third State concerned would require the Chamber to refrain from determining the whole course of the line as requested in the Special Agreement, the Chamber found that this would presuppose that those legal interests of the third State would form the very subject-matter of the decision which, however, was not the case here. In the present case, the Chamber had not so much to define a tripoint, as to indicate the ultimate point of the frontier which ceases to divide the territories of Burkina Faso and the Republic of Mali, and that implied logically that the territory of a third State lies beyond the end-point of that frontier.

6. Evidence relied on by the Parties

The Chamber then proceeded to examine the abundant evidence produced by the parties, particularly legislative and regulative texts and administrative documents, the legal force of which were disputed. As to → maps, the Chamber departed from the principle that they merely constitute information, and never territorial titles in themselves. They only had the value of "corroborative evidence endorsing a conclusion at which the Court has arrived by other means unconnected with the maps". However, two of the maps produced appeared to be of special significance, one of which, issued between 1958 and 1960 by the French Institut géographique national (IGN), a neutral body in relation to the parties, must be viewed as compelling where other evidence is lacking. Besides this material, also the colonial "*effectivités*", that is the conduct of the administrative authorities, had to be taken into consideration as proof of the effective exercise of territorial jurisdiction in the region, even though the role of these "*effectivités*" was rather complex and needed careful evaluation.

Despite the abundance of evidence submitted there were a number of shortcomings and inconsistencies which made a determination of the frontier rather complex, because the Chamber had to find out "where the frontier lay in 1932 in a region of Africa little known at the time by reference to legislative and regulative texts, not all of which were even published and maps which were sometimes of doubtful accuracy and reliability". Thus, finally, the Chamber could not be certain to decide on the basis of full knowledge of the facts.

7. The Determination of the Frontier

Finally, after having examined all evidence in detail and having determined what weight to attach to each aspect, the Chamber determined the frontier in the disputed area beginning with the endpoint of the frontier already established between the parties. Although this point had not clearly been indicated by the parties the Chamber could conclude that there was a point accepted by both parties. The Chamber then proceeded by drawing a series of straight lines in eight different sectors of the disputed area. The delimitation line was reproduced on a map annexed to the judgment.

8. *Reaction of the Parties*

Shortly after the judgment was delivered there was an unusual reaction by the parties which deserves to be mentioned briefly. Both parties sent a message to the President of the Chamber confirming the acceptance of the judgment, an action which underlined once more an aspect of voluntarism with regard to judgments of the Court and which had already found expression in Art. IV of the Special Agreement which stated that the parties accepted the judgment "as final and binding upon them". The Chamber did not miss the opportunity in its judgment to underline that the binding effect already resulted from Art. 94 of the → United Nations Charter. On the other hand, it must also be mentioned that the execution of the judgment, the actual demarcation of the frontier, had nevertheless not taken place within the period of one year agreed to in Art. IV of the Special Agreement. The three experts who according to the Special Agreement were to be nominated by the Court in order to assist the parties in the demarcation of the frontier line were designated by an order of April 9, 1987.

9. *Analysis*

In commenting on this judgment of the Court it must be stressed first of all that the case perhaps marks a change in the position of African States *vis-à-vis* the judicial settlement of international disputes, since African States had previously been rather reluctant to submit disputes to judicial settlement, preferring as a rule political forms of dispute settlement; this is underlined by the double procedure concerning the indication of interim measures undertaken on a political level, through the A.N.A.D., as well as on the judicial level before the Chamber.

A second observation has to be made concerning the principle of *uti possidetis*. For the first time this principle is described, without any ambiguity, as a general principle of international law in the decolonization process and not only as a principle or practice of regional application (→ Regional International Law). But what seems of even greater importance is the statement of the Chamber that there existed an apparent conflict between this principle and the principle of self-determination, but that African States had decided that maintenance of the territorial *status quo* was the wisest policy. Regrettably, the Chamber did not elaborate on this statement and this is not the place to discuss it in more detail. It may be said, however, that this dictum of the Chamber seems to imply the consequence that self-determination may transcend colonial boundaries, for otherwise no conflict between those principles would be possible. But since the Chamber only spoke of an "apparent" conflict, not of a real one, this controversial statement of the Chamber may also be understood – and that seems to be the preferable interpretation – in the sense that self-determination in the decolonization context is a right to be exercised only by a → non-self-governing territory to determine its political status and that upon independence its frontiers are deemed to be intangible due to the principle of *uti possidetis*. The latter then, and only then, applies with the effect of freezing the territorial titles existing after the exercise of the right of self-determination. This was the manner in which Judge Luchaire, with persuasive arguments, commented upon the ambiguous statement of the Chamber in his separate opinion which seems to be most in accordance with the accepted international law as formulated clearly in several international texts, among which may be cited as a particularly pertinent example the → Friendly Relations Resolution of the United Nations General Assembly (Res. 2625 (XXV) of October 24, 1970).

Frontier Dispute (Burkina Faso/Mali), Constitution of Chamber, ICJ Reports 1985, p. 6 et seq.
Interim Measures, ICJ Reports 1986, p. 3 et seq.
Judgment, ICJ Reports 1986, p. 554 et seq.
Nomination of Experts, ICJ Reports 1987, p. 7 et seq.

E. DÉCAUX, L'arrêt de la Chambre de la Cour Internationale de Justice dans l'affaire du différend frontalier (Burkina Faso/République du Mali) (Arrêt du 22 décembre 1986), AFDI, Vol. 32 (1986) 215–237.

J.-C. GAUTRON, Création d'une chambre au sein de la Cour Internationale de Justice, mesures conservatoires et médiation dans le différend frontalier entre le Burkina Faso et le Mali, Ordonnance du 10 janvier 1986, AFDI, Vol. 32 (1986) 192–214.

G. NALDI, Case concerning the Frontier Dispute between Burkina Faso and Mali: Provisional Measures of Protection, ICLQ, Vol. 35 (1986) 970–975.

G. NALDI, The Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): Uti possidetis in an African Perspective, ICLQ, Vol. 36 (1987) 893–903.

J.-P. QUENEUDEC, Le règlement du différend frontalier Burkina Faso/Mali par la Cour internationale de

Justice, Revue Juridique et Politique, Indépendance et Coopération, Vol. 42 (1988) 29–41.

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GANGES RIVER

1. Description

The Ganges is an → international river, about 2510 kilometres long, which flows through the territories of India and Bangladesh. Its major tributaries include the Jumna, Gandak and Kosi in India and the Brahmaputra in Bangladesh. It rises in the Himalayas and flows through Indian territory until it empties into the Bay of Bengal in Bangladesh. In India, where it has historically been a holy river of the Hindus, the Ganges is called the Ganga. In Bengal, it is locally known as the Padma and its large delta (→ River Deltas) therein lies mostly in Bangladesh.

Historically, the Ganges has been used for irrigation and inland navigation. Whereas the importance of irrigation has grown in modern times with the expansion of the agricultural base in the Indian sub-continent, the scope of inland navigation has decreased because of various factors including substitute infra-structural development. Inland water transportation is now limited mainly to the areas of West Bengal and Bangladesh. The → International Development Association (IDA) has financed several projects in Bangladesh (previously East Pakistan) relating to the development and rehabilitation of inland → ports and water transportation in the Ganges-Brahmaputra basin. The IDA has also financed several projects in Bangladesh, India and Nepal relating to the development of irrigation in the Ganges basin.

The Ganges basin has a tremendous potential for generation of hydro-electric power. A number of dams and barrages have been constructed at various points on the river and its tributaries. The Kosi Dam, Gandak Dam and Farakka Barrage are three international projects. The Kosi Dam was constructed pursuant to a bilateral treaty between India and Nepal signed in Kathmandu on April 25, 1954 and revised there on December 19, 1966. The Gandak Dam was also the result of a bilateral treaty between India and Nepal signed at Kathmandu on December 4, 1959. The Farakka Barrage, which is a bone of contention between India and Bangladesh, has been constructed by India and its thermal power project has been financed by the → International Bank for Reconstruction and Development (IBRD) and the IDA pursuant to three separate agreements signed by IBRD and India, IDA and India, and IBRD, IDA and National Thermal Power Corporation Ltd. (India) on July 11, 1980.

One of the main problems with the Ganges River is the deposit of silt in its delta region. Whereas India has sought to remedy the situation by storing water upstream and flushing the river downstream, Bangladesh is trying to solve the problem by dredging the river. International support has been made available to Bangladesh for the purpose. For example, Bangladesh and the Netherlands exchanged letters on May 26, 1981 concerning technical support to the Bangladesh Water Transport Authority with respect to activities related to dredging.

2. International Issues and Agreements

The significant international issues relating to the River Ganges are the diversion of its waters by India and the apportionment and sharing of its waters by and between India and Bangladesh.

(a) Diversion of waters

In 1951 India announced a plan to divert the waters of the river Ganges by constructing a barrage on the Ganges at Farakka, eleven miles upstream from the border with Bangladesh. Construction of the Farakka Barrage commenced in 1965 and was completed by the end of 1969. The purpose of the Farakka Barrage is to improve the navigability of the River Hooghly on the Indian side and to save the port of Calcutta which is threatened by the silting of the River Hooghly. The Farakka Barrage blocks a quantity of the water of the River Ganges and diverts it through a feeder canal into the Bhagirathi River which feeds the Hooghly River. The flow diverted by the Farakka Barrage is expected to flush the Bhagirathi-Hooghly River keeping it deep and clear of silt.

Bangladesh, as a lower riparian, is opposed to and has protested against the unilateral scheme of diversion of waters from the River Ganges (→ Protest). Although having too much water during

the wet season from June to October, Bangladesh has too little water during the dry season from November to May. The critical period in the dry season is March through May, during which Bangladesh is dependent on water from the Ganges for irrigation, navigation, and other purposes. Bangladesh contends that because of India's unilateral withdrawal of the Ganges waters at Farakka since June 1975, the critical lean season in Bangladesh now begins in December.

In anticipation of the effects of the barrage on what was then its eastern province (now Bangladesh), Pakistan had protested against the plan and a series of protracted → negotiations at various technical and official levels followed between Pakistan and India and later between Bangladesh and India. Negotiations between Pakistan and India were not conclusive and it was only when Bangladesh took over the negotiations after being established in 1971 that a series of agreements were concluded between India and Bangladesh on the apportionment and sharing of the Ganges waters.

(b) Apportionment and sharing of waters

In 1972, Bangladesh and India agreed to establish an Indo-Bangladesh Joint Rivers Commission (JRC) for the purpose of, *inter alia*, maintaining liaison between the two countries in order to ensure the most effective joint efforts in maximizing the benefits from common river systems and studying flood control and irrigation projects so that the water resources could be utilized on an equitable basis. The JRC was formed under the Statute of the Indo-Bangladesh Joint Rivers Commission dated November 24, 1972. Later, a Provisional Agreement on sharing the Ganges Waters was entered into between Bangladesh and India on April 18, 1975. This was followed by the so-called "Ganges Waters Treaty" dated November 5, 1977 on sharing the Ganges waters at Farakka and on augmenting its flow (Agreement on Sharing of the Ganges' Waters, ILM, Vol. 17 (1978) p. 103).

The Ganges Waters Treaty addressed itself only to the sharing of waters. It was silent on the diversion of international waters. Navigation had been the primary reason given by India for diverting the waters of the River Ganges. Bangladesh, on the other hand, had claimed these waters mainly for uses "essential to human life". The notable factor in the apportionment of waters in the Ganges Waters Treaty was the absence of distinction between the various uses of water in accordance with the Helsinki Rules which prescribe: "A use or category of uses is not entitled to any inherent preference over any use or category of uses" (Art. VI). As such, the Ganges Waters Treaty differed from the Indus Waters Treaty dated September 19, 1960 between India, Pakistan and the IBRD, which distinguishes between agricultural, domestic and non-consumptive uses of water (The Indus Basin Development Fund Agreement, with Annexes, including the Indus Waters Treaty, UNTS, Vol. 444, p. 259).

The purpose of the Ganges Waters Treaty was twofold: (i) to share the waters at Farakka, and (ii) to augment its flow during the dry season. Arts. I to VII dealt with arrangements for sharing of the Ganges waters at Farakka. Arts. VIII to XI dealt with provisions for long term arrangements, and Arts. XII to XV with provisions relating to review and duration.

The Ganges Waters Treaty, which entered into force upon signature, was to remain in force for a period of five years therefrom. It was reviewed and extended by the two countries in accordance with its terms. The extension was for a period of three years under the Provisional Agreement on the sharing of the Ganges Waters dated October 7, 1982. It was further agreed by Bangladesh and India on October 17, 1985 that the agreement concluded in 1982 would be extended for a further period of three years. Search for long-term arrangements is entrusted to the Joint Rivers Commission. The investigative functions of the JRC are, however, limited to schemes proposed by the two governments. Bangladesh has proposed the building of up-river storage dams in Nepal, while India has proposed a scheme to divert water from the Brahmaputra River to the Ganges through a link canal across Bangladesh territory. So far, each proposal has been rejected by the other side.

3. Evaluation

The Ganges Waters Treaty embodied the principle of equitable utilization of international waters. As such, the Treaty was another contribution to the growing acceptance of this principle in international jurisprudence. The principle is reflected in a number of treaties. It underlay the

decision of the → Permanent Court of International Justice in the case concerning the diversion of waters from the River Meuse and, in particular, the dissenting opinion of Judge Hudson, who emphasized the importance of equity as part of international law (→ Meuse, Diversion of Water Case (Belgium v. Netherlands); → Equity in International Law). The principle has been recognized by municipal courts in several countries. It has also been formulated in the Helsinki Rules and is compatible with the obligation laid down on upper riparians by the arbitral tribunal in the → Lac Lanoux arbitration.

Agreement on Sharing of the Ganges Waters, November 5, 1977, ILM, Vol. 17 (1978) 103–106.

Government of the People's Republic of Bangladesh (ed.), White Paper on the Ganges Water Dispute (1976).

Government of the People's Republic of Bangladesh (ed.), Deadlock on the Ganges (1976).

Government of India, Ministry of External Affairs, External Publicity Division (ed.), The Farakka Barrage.

M. HASAN, The Farakka Barrage Dispute: Pakistan's Case, Pakistan Horizon, Vol. 21 (1968) 356–360.

R.K. DIXIT, Indo-Pakistan Talks on Farakka Barrage and Related Matters, Indian JIL, Vol. 9 (1969) 215–220.

H.R. KÜLZ, Further Water Disputes Between India and Pakistan, ICLQ, Vol. 18 (1969) 718–738.

QATUBBUDIN, Clouds Over the Ganges, Pakistan Quarterly, Vol. 17 (1970) 2 et seq.

T. HASSAN, Ganges Waters Treaty, Bangladesh-India, entered into force November 5 1977, Harvard ILJ, Vol. 19 (1978) 708–725.

TARIQ HASSAN

GIBRALTAR

1. Historical Background

Gibraltar, also known as "the Rock", is a very small peninsula, a little over two square miles in area, in the region of south central Spain. Gibraltar is physically attached to Spain on the north by a low, sandy isthmus. It is bordered on the west by the Bay of Algeciras (Bay of Gibraltar), on the south by the Strait of Gibraltar, and on the east by the Mediterranean. Its southern end, about 15 miles from Morocco, rises rather abruptly to an eventual height of 1398 feet and then drops down equally abruptly on the north side to the isthmus mentioned. Most of the eastern side of Gibraltar is an uninhabitable rock slope used to catch rain water.

Gibraltar was first occupied and settled by the Moors in 711. They were led by Tarik ibn Ziyad, after whom Gibraltar is named (Gibraltar is a Spanish corruption of the Arab name Djabal Tarik which means "Tarik's Rock"). During the next six centuries it changed hands by force a number of times. In 1462 the Moors were permanently ousted and Gibraltar came under the crown of Castile. There it remained until 1704 when, during the War of the Spanish Succession (1702 to 1713), it was seized by a combined force of the Dutch and English navies, the allied land forces being commanded by a German officer who was the personal representative of the Austrian claimant to the Spanish throne.

In 1710 a Tory government, headed by Robert Harley, later Earl of Oxford, and Henry St. John, later Viscount Bolingbroke, came into power in Great Britain intent on ending the war. Louis XIV immediately initiated secret indirect → negotiations for peace. His proposals included the cession of Gibraltar to Great Britain. At that time Gibraltar still remained under military occupation having withstood a Franco-Spanish siege from 1704 to 1705 that probably was the beginning of the myth of its invincibility. Ultimately secret Preliminaries of Peace, with France acting on behalf of Spain, confirmed British title to Gibraltar and the Treaty of Utrecht of July 13, 1713 (CTS, Vol. 28 (1713–1714) p. 295) between Spain and Great Britain specifically transferred that title in terms which were to cause controversy almost from the date of the Treaty's signature.

2. The Treaty of Utrecht

The provisions of Art. X of the Treaty of Utrecht that have caused the major problems read as follows (in an English paragraphed translation of the original Latin):

> "The Catholic King does hereby, for himself, his heirs and successors, yield to the crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications, and forts thereunto belonging; and he gives up the said propriety to be held and

enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever.

But that abuses and frauds may be avoided by importing any kind of goods, the Catholic King wills, and takes it to be understood, that the abovenamed propriety be yielded to Great Britain without any territorial jurisdiction, and without any open communication by land with the country round about . . . .

And in case it shall hereafter seem meet to the crown of Great Britain to grant, sell, or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded, that the preference of having the same shall always be given to the crown of Spain before any others."

3. *Opposing Claims*

(a) Spanish

Spain has at times argued that under civil law the notion of "propriety" (in the Latin original: *proprietatem*) is something less than the common law "title" or "fee simple". If there is any merit to this contention, then the word used does not represent the intent of the parties. Throughout the negotiations the terms used with respect to the cession, such as "consent to give Gibraltar to the English", "yield to Us and Our successors forever", "cede", "absolute power" (*pouvoir absolu*), etc., uniformly contemplated a complete transfer of title and → sovereignty. Moreover, such an interpretation of the term "propriety" would render meaningless the final phrase of the first paragraph above, "to be held and enjoyed absolutely and with all manner of right forever, without any exception or impediment whatsoever".

The claim that Spain did not transfer absolute title and sovereignty to Great Britain in the Treaty is at times based on the contention that the words "without any territorial jurisdiction" in the second paragraph quoted above is a limitation on Great Britain's right to exercise sovereign powers within Gibraltar. It is inconceivable that any nation would have accepted a territorial cession which so restricted its authority (→ Territorial Sovereignty). Moreover, a reading of that paragraph in its entirety leaves little doubt that, in view of its purpose, the limitation on territorial jurisdiction referred to "the country about" Gibraltar and not to Gibraltar itself.

Further, Spain contends that the reversionary provision quoted above precluded Great Britain from making any changes in the status of Gibraltar without first obtaining Spain's consent, and that Great Britain's actions in this respect have nullified the 1713 grant and caused sovereignty over Gibraltar to revert to Spain. Every action taken by Great Britain to extend the degree of self-government on Gibraltar has resulted in Spanish counter-action against Gibraltar, the claim being that Great Britain "had reformed the political structure of the Rock, something which they were not entitled to do without consulting the Spanish Government".

(b) British

During the original negotiations Great Britain had on a number of occasions sought to obtain "an extent of ground, of two cannon shot round Gibraltar". This demand had been refused by Louis XIV of France, acting for Philip V of Spain, as well as by the latter directly when he adamantly declined to include in the cession "any other land than that which is contained within its [Gibraltar's] walls and fortifications". Subsequently his Minister advised the British that "the King maintains his resolve not to cede the two cannon shot extent of land for which he has been asked".

Nevertheless, soon after the signing of the Treaty, the British authorities began to assert that as a matter of customary law a transfer of title to land between sovereigns, such as that involving Gibraltar, automatically included surrounding land to the extent of two cannon shot. In view of the background of the negotiations there was no valid basis for this contention; but that did not prevent the British from gradually moving north from the outer line of fortifications on the Rock until they had occupied, and continue to occupy, more than half a mile of the isthmus, land to which they had, and have, no right.

4. *Recent Events*

Gibraltar became a British Crown Colony in 1830 (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories). With the advent of the → United Nations there has, of

course, been an emphasis on → self-determination for all colonial areas. In accordance with the provisions of Art. 73(e) of the → United Nations Charter, in 1946 Great Britain began submitting reports on Gibraltar as an "Administered Territory" (→ Non-Self-Governing Territories). After Spain became a member of the United Nations, each year she would file a "jurisdictional reservation" to Great Britain's action in this respect on the basis that Gibraltar was an integral part of Spain. While probably conceding this trend towards self-determination in international law and relations, Spain denies its applicability to the reversionary provision of the Treaty.

Paragraph 5 of United Nations General Assembly Resolution 1514(XV), of December 15, 1960, provides that "Immediate steps shall be taken, in . . . Non-Self-Governing Territories or all other territories which have not yet attained independence to transfer all powers to the peoples of those territories . . . ". Paragraph 6 of that resolution prohibits "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country". Principle VI of UN GA Res. 1541(XV) of December 15, 1960, provides that a non-self-governing territory can achieve self-government by becoming completely independent, by free association with an independent State, or by integration with an independent State.

The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, created by UN GA Res. 1654(XVI) of November 27, 1961, conducted its first hearings on Gibraltar in September 1963. The representatives of the two major opposing political groups on Gibraltar appeared and testified that the Gibraltarians desired free association with an independent State (Great Britain) pursuant to Principle VI of UN GA Res. 1541(XV). The Spanish representative urged the applicability of paragraph 6 of UN GA Res. 1514(XV).

After hearings in 1964 the Special Committee adopted a → consensus inviting Great Britain and Spain to enter into negotiations on the question. Before this could occur Spain took restrictive measures against Gibraltar to which Great Britain responded by refusing to negotiate under pressure. However, after the adoption of a resolution of the UN General Assembly confirming the consensus, Great Britain agreed to begin negotiations. During the course of those 1966 negotiations Great Britain submitted to Spain a draft → *compromis* which would have referred the legal issues of the dispute to the → International Court of Justice (United Kingdom, Gibraltar: Talks with Spain, May-October 1966, Cmnd. 3131, Misc. 13 (1966) p. 126). Spain declined this proposal. Then, just a week before new talks were scheduled to begin in 1967, Spain again elected to exacerbate the situation by notifying the → International Civil Aviation Organization of the establishment of a "protective zone" over Spanish land and waters around Gibraltar. Great Britain responded by conducting a referendum among the Gibraltarians, against the violent objections of both the Special Committee and Spain, in which 12 138 voters favoured retaining ties with Great Britain and 44 favoured passing under Spanish sovereignty. Then Great Britain again enlarged the powers of the local Gibraltarian authorities by issuing an Order in Council entitled The Gibraltar Constitution Order (1969). Spain promptly terminated all communications between Gibraltar and the mainland, which remained closed until they were partially reopened in December 1982.

5. Conclusion

When Spain became a member of the → North Atlantic Treaty Organization, the former made sovereignty over Gibraltar a major issue. However, a subsequent Spanish Government removed the barriers to access from Spain to Gibraltar and negotiations have been initiated for the joint operation of the Gibraltar airport. With the advent in 1992 of further changes in the European Economic Community, of which Spain is now a member, Gibraltar once again is looking forward to becoming the "Hong Kong of the Mediterranean", particularly in financial matters.

There are many problems to be resolved before there can be a final settlement between Spain and Great Britain with respect to the problem of Gibraltar. The only really viable solution appears to be the transfer of sovereignty to Spain, with appropriate agreed provisions to protect both the Gibraltarians and Great Britain.

LOPEZ DE AYALA, História de Gibraltar (1782).
J.M. DE AREILZA and F.M. CASTIELLA, Reivindicaciones de España (1941).
J. PLA CARCELES, Gibraltar (1955).
G. HILLS, Rock of Contention: A History of Gibraltar (1974).
T. FRANCK and P. HOFFMAN, The Right of Self-Determination in Very Small Places, New York University Journal of International Law and Politics, Vol. 8 (1975–1976) 331–386.
E. BRADFORD, Gibraltar: The History of a Fortress (1977).
H. LEVIE, The Status of Gibraltar (1983).

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GREAT LAKES

The Great Lakes of North America are national waters subject to the exclusive jurisdiction of the United States and Canada (→ Jurisdiction of States). They cover an area of 5000 square miles and constitute the largest body of fresh water in the world. As an integral part of the → St. Lawrence Seaway system, the Lakes enable ocean-going vessels to navigate 2400 miles into the North American hinterland.

In order to enjoy the effective use of the water resources, the two riparian States have undertaken a number of cooperative efforts which have generally been successful, although not always easily accomplished (see also → American-Canadian Boundary Disputes and Cooperation). The legal régime for the Lakes is a combination of rules of → international law and statutory law of the American and Canadian federal governments as well as eight American states and the Canadian Province of Ontario. In general, the applicable rules of international law are conventional rules rather than customary rules. The United States and Canada have concluded bilateral treaties governing such matters as navigation, use and control of boundary waters, preservation of the fishery, restoration of water quality, and the definition of the international boundary. Principles of → customary international law are important with regard to matters of admiralty and criminal jurisdiction in the local courts (→ Admiralty Law).

The single most important treaty relating to the Great Lakes is the Boundary Waters Treaty of January 11, 1909 (Martens NRG3, Vol. 4, p. 208), which deals with navigation rights on the Lakes and also establishes a comprehensive set of rules regarding non-navigable use of the boundary waters. In addition the treaty creates the International Joint Commission (IJC), a unique binational body with broad investigatory and quasi-adjudicatory powers dealing with the use of the water resources. The Commission is a major source of technical expertise as well as recommendations to the two States, and has played a vital role in matters relating to the use and diversion of waters of the Great Lakes basin.

Since the international boundary is an approximate median line through Lakes Ontario, Erie, Huron and Superior, Canada and the United States have established a treaty régime to ensure navigation rights throughout the entire system, including Lake Michigan and the St. Lawrence River, for their nationals. This legal régime was first set forth in the → Jay Treaty of 1794 and reiterated in other treaties including the Boundary Waters Treaty. These treaties do not deal with navigation rights for vessels of third States, but as a matter of policy both riparians permit transit by commercial vessels of third States to visit the ports of either State. In an exchange of notes on August 17, 1954 relative to the construction of the St. Lawrence Seaway (UNTS, Vol. 234, p. 210), the two parties agreed to consult if either party would undertake any action to exclude vessels of third States from the waterway system. However, this does not appear to have been a problem. Vessels of third States that are members of the GATT would appear to be able to claim a right of transit throughout the waterway system under Art. V of that agreement (→ General Agreement on Tariffs and Trade (1947)).

Fishing rights on the Great Lakes are limited to the nationals of Canada and the United States. International regulations to protect and conserve the Lakes' fishery are complicated by the fact that in the United States the eight riparian states and not the federal government control the fishery. Consequently, each of these states establishes its own regulations for fishing activities within its jurisdiction. In 1954 the two federal governments by treaty established the Great Lakes Fishery

Commission to promote and coordinate research activities relating to conservation of the fishery and to promote a comprehensive program for the control and eradication of the parasitic sea lamprey (Convention on the Great Lakes Fisheries, September 10, 1954, UNTS, Vol. 238, p. 97). Although the Commission may offer recommendations to the American states and the Province of Ontario, it has no regulatory authority.

In the recent past the problems of pollution and diversion of the waters of the Great Lakes have assumed primary importance. Throughout the 1960's the IJC undertook several studies for the American and Canadian governments regarding pollution problems. These investigative efforts led in 1972 to the conclusion of the Agreement on Great Lakes Water Quality, April 15, 1972 (UNTS, Vol. 837, p. 213), which set forth water quality objectives to be achieved by both sides. A major focus of the agreement was the reduction of phosphorus levels in the waters related to the use of detergents and to the effluents from waste-water treatment plants. Subsequent monitoring of water quality by the IJC indicates some success in achieving this goal. A second water quality agreement was concluded on November 22, 1978 (UST, Vol. 30, p. 1383), which adopted a broader perspective in order to restore and maintain the chemical, physical, and biological integrity of the ecosystem. As a part of this effort, the parties have focused on the need to develop a comprehensive toxic substances control strategy.

With regard to the non-navigable use of the waters of the Great Lakes, the United States and Canada have relied upon the Boundary Waters Treaty as the primary international legal instrument. In general, the treaty requires joint cooperation in the use of boundary waters (i.e. the four Lakes through which the international boundary passes), but permits each State to undertake unilateral action with regard to the use of tributary water (i.e. the waters that flow into the boundary waters). It should be noted, however, that the consequences of unilateral action undertaken in tributary waters, such as Lake Michigan, have been a matter of contention between the two States. The priority established by the treaty for the use of boundary waters is as follows: (1) domestic and sanitary purposes; (2) navigation; and (3) power and irrigation. Any project on either side that would involve the use, obstruction, or diversion of boundary waters requires the approval of the IJC. Principles governing such projects are set forth in the treaty.

The matter of consumptive uses and diversions has received increasing attention in the past two decades. At the present time, the major diversions into the Great Lakes, specifically into Lake Superior, occur at Long Lac and Ogoki. The diversions out of the Great Lakes system from Lake Michigan occur at Chicago and from Lakes Ontario and Erie at the Welland Canal.

These diversions, the most controversial of which is the Chicago diversion since the diverted water empties into the Mississippi River basin, have had some impact on water flows in the Great Lakes system. However, this impact has been relatively small considering the natural ranges of water-level on the Lakes.

One reason for recent attention is the record high water-levels on the Lakes during the past decades, especially in the 1980's, resulting in flooding and other Lake shore damage. This has prompted Canada and the United States to consider what measures might be undertaken to control the water-level fluctuations and to facilitate land use management. A new element introduced into the matter is the interest of areas outside the Great Lakes basins to undertake large-scale diversions from the Great Lakes into other waterway systems for local benefit. Such programs, if allowed, would result in a net loss of water from the entire basin and would raise substantial legal problems.

In 1970, at the request of the two federal governments concerned, the IJC undertook a comprehensive study of the impact of consumptive uses and existing diversions of the Great Lakes until the year 2000. The Commission in its 1985 report on the matter concluded that under current circumstances large-scale diversions of water outside of the Great Lakes basin were unlikely, but that small-scale diversion would probably increase in the future.

Boundary Waters Treaty, January 11, 1909, Martens NRG3, Vol. 4 (1911) 208–216.

Convention on Great Lakes Fisheries, September 10, 1954, UNTS, Vol. 238 (1956) 97–107.

Agreement Between the United States of America and

Canada Concerning the Great Lakes Water Quality, April 15, 1972, UNTS, Vol. 837 (1972) 213–269.
Agreement on Great Lakes Water Quality, November 22, 1978, UST, Vol. 30 (1978–1979) 1383–1487.
International Joint Commission, Second Biennial Report under the Great Lakes Water Quality Agreement of 1978 to the Governments of the United States and Canada and the States and Provinces of the Great Lakes Basin (1984).
International Joint Commission, Great Lakes Diversions and Consumptive Uses (1985).

D. PIPER, The International Law of the Great Lakes (1967).
C. BÉDARD, Les grands lacs de l'Amérique du Nord et le fleuve Saint Laurent: frontière, voie de navigation commerciale, nature juridique, Annuaire de Droit Maritime et Aérien, Vol. 3 (1976) 139–150.
Great Lakes Legal Seminar: Diversions and Consumptive Use, Case Western Reserve Journal of International Law, Vol. 18 (1986) 1–259.

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GREENLAND

1. History

Greenland is a huge → island in the northwestern Atlantic, covering 2 175 600 square kilometres, of which only 15 per cent is ice-free. Geographically, Greenland is considered part of the Americas, with Canada and Iceland as her closest neighbours.

Greenland was originally discovered and settled by Inuit (Eskimos) some 4000 years ago. It was not until the latter half of the 10th century A.D. that Norsemen established settlements on the west coast, but these had disappeared by the 15th century; the Europeans of that period had contact with, but never acquired control over, the Inuit. Following the arrival of Norwegian merchants and missionaries in the early 18th century, however, Greenland became a Norwegian colony and, upon the conclusion of the Peace Treaty of Kiel on January 14, 1814 (BFSP, Vol. 1, p. 194), a Danish overseas colony (→ Colonies and Colonial Régime). During this period and until the 1950s Greenland was administered by royal instructions and legislation from Copenhagen, without meaningful native participation. It was this colonial sovereignty which the → Permanent Court of International Justice confirmed in the 1933 → Eastern Greenland Case.

In 1946, under Chapter XI of the → United Nations Charter, Denmark listed Greenland as a → non-self-governing territory and subsequently submitted the required reports, thus acknowledging the colonial status of the island. In order to terminate this obligation and to strengthen her hold on the island, Denmark proceeded in 1953 to integrate Greenland as a province. The Danish Constitution was amended by means of parliamentary elections and a referendum in metropolitan Denmark, but the same method was not extended to Greenland, where the proposal was approved solely by a Provincial Council. The members of this Council, which was established in 1950 by Danish legislation as an advisory assembly expressly for the purposes of local administration, were therefore not elected to take fundamental constitutional decisions; furthermore, they could only choose between → *status quo* and integration because the options of independence and free association were never offered. Other substantive and procedural shortcomings characterized the integration process, including the information provided by Denmark to the → United Nations which prompted the → United Nations General Assembly by Resolution 849(IX) of November 22, 1954 to remove Greenland from the list of non-self-governing territories.

2. Legal Status

As a result of integration, the Danish Constitution entered into force on the island and Greenland obtained two seats in the Danish Parliament. Few other changes took place until 1979 when Greenland, again by Danish legislation but this time following lengthy consultations between the parties, was granted self-government (→ Autonomous Territories). While maintaining the unity of the realm and reserving Danish control over monetary, judicial, defence and foreign affairs, the Home Rule Act nevertheless delegated extensive powers over a variety of internal matters to the legislative and executive bodies of the Home Rule Government, as well as an advisory role relating to Danish national and international actions affecting Greenland's interests. By separate Danish legislation, Greenland's mineral

resources were placed under a scheme of joint decision-making.

In accordance with the outcome of a 1982 referendum, Greenland withdrew in 1985 from the → European Communities of which she had become part as a province of Denmark when the latter joined in 1973. The relevant treaty of March 13, 1984 and its protocol granted Greenland the status of Associated Overseas Territory and provided for special arrangements relating to fisheries.

Since 1984, Greenland has two fixed seats on the Danish delegation to the → Nordic Council. In 1985, the constituent assemblies of the → Faroe Islands, Greenland and Iceland, as equal partners, established the Westnordic Parliamentary Council. Furthermore, in 1977, along with other Inuit from Alaska and Canada, Greenland was a founding member of the Inuit Circumpolar Conference (ICC), a → non-governmental organization in consultative status with the → United Nations Economic and Social Council. Greenlanders have been active participants in ICC delegations to a variety of UN meetings.

3. Current Developments

Modern Greenland is inhabited by about 50 000 people, 85 per cent of whom are Inuit descendants of the original settlers. They are ethnically, culturally and linguistically different from the Danes. They also possess a strong subjective national identity, referring to their country as Kalaallit Nunaat and their capital as Nuuk (Godthaab).

In view of the historical background and current circumstances it would seem that the Greenlanders, as far as their international legal position is concerned, can choose between two alternative approaches.

First, if the islanders choose to remain an integral part of Denmark, the Inuit are entitled to the enjoyment of indigenous rights (→ Indigenous Populations, Protection). Denmark has not ratified the Indigenous and Tribal Populations Convention (ILO Convention No. 107, 1957, UNTS, Vol. 328, p. 247) and the United Nations has not yet completed its setting of international standards, but Denmark has come a long way towards meeting most if not all of the existing and prospective rights. The Home Rule Government, with its control over culture, education, commerce, transport, fishing, etc., would surely meet most autonomy requirements, notwithstanding a few handicaps such as the apparent unilateral power of the Danish Government to amend or abolish the home rule and mineral resources statutes by way of legislation or treaty.

Second, and more far-reaching, there is the option provided by the right to → self-determination, in the sense of external self-determination as exercised by colonial countries and peoples, leading in this case to either independence or free assocation. It would seem fairly clear that the Greenlanders fulfil all the → decolonization requirements as laid down by the UN General Assembly in the early "lists of factors" as well as in Resolutions 1514(XV) and 1541(XV) of December 14 and 15, 1960, respectively, as confirmed by later State practice. Special features which arise in the case of Greenland include geographic, ethnic and cultural distinctness; furthermore, from the beginning of Danish rule, Greenland has been run as a unit, separate from both Denmark proper and other Danish possessions, for administrative, legislative, judicial, economic and political purposes. All this clearly results in a position of subordination. In the light of these factors and certain other disadvantages in the integration process, such as the lack of options and proper consultations, strong arguments in favour of the right of the Greenlanders to external self-determination can be made on the basis of existing international law.

The choice between the two basic approaches is, of course, up to the Greenlanders themselves. Given that the first political parties on the island only came into being during the late 1970s and that the introduction of home rule and withdrawal from the European Communities were accomplished within a short time span thereafter, further developments are undoubtedly to be expected.

I. FOIGHEL, Home Rule in Greenland: A Framework for Local Autonomy, CMLRev, Vol. 17 (1980) 91–108.

G. ALFREDSSON, Greenland and the Law of Political Decolonization, GYIL, Vol. 25 (1982) 290–308.

F. HARHOFF, Det gronlandske Hjemmestyres grund og graenser, Ugeskrift for Retsvaesen, Vol. 116 (1982) 101–115.

F. HARHOFF, Greenland's Withdrawal from the European Communities, CMLRev, Vol. 20 (1983) 13–33.

A. GRAHL-MADSEN, Kalaallit Nunaat, Gronland paa vei til selvstyre (1986).

GUDMUNDUR ALFREDSSON

GULF OF AQABA *see* Aqaba, Gulf of

GULF OF EILAT *see* Aqaba, Gulf of

GULF OF FONSECA *see* Fonseca, Gulf of

GULF OF SIDRA *see* Sidra, Gulf of

HELIGOLAND

1. Introduction

Heligoland is an → island of rock some 6.4 square kilometres in area, settled by people of Friesian extraction, located in the German Bight 70 kilometres from the mouth of the river → Elbe and 54 kilometres from Schleswig-Holstein, the nearest mainland. From the eleventh century the island was under the suzerainty of the Danish Crown, in 1490 it fell under the domain of the Duke of Schleswig-Gottrop but from 1721 it reverted to the King of Denmark in his capacity as Duke of Schleswig. In 1807, the island was occupied by Great Britain, declared a crown colony and used as a forward base in Britain's fight against the Continental System.

By a treaty between Great Britain and the German Reich dated July 1, 1890 (Martens NRG2, Vol. 16, p. 894), Heligoland was exchanged for German rights over Wituland, which stood under German protection as a result of raids on it by the British-sponsored Sultan of Zanzibar. Heligoland was accordingly incorporated into the German Reich by legislation dated December 15, 1890 (German Reichsgesetzblatt (1890) p. 207) and into Prussia by a Prussian statute of February 18, 1891 (Gesetzessammlung für die Königlichen Preußischen Staaten (1891) p. 11).

Legal questions, not least in the international arena, have arisen repeatedly in respect of the following matters: the performance of the treaty of exchange; the special constitutional (Weimar Constitution, Art. 178(2)) and statutory provisions governing the status, administration and inhabitants of the island; the → demilitarization régime; the reservation contained in Art. 289 of the → Versailles Peace Treaty (1919) in favour of Great Britain but which was never invoked; and, finally, the war and occupation measures taken by Britain following the aerial attack on the island on April 18, 1945 and the subsequent occupation of the island on May 11, 1945 (→ Germany, Occupation after World War II; → Occupation, Belligerent).

2. The Constitutional Position and Local Government

As a unit of local government, Heligoland requires administrative support from and integration with the mainland. Since the larger local authority unit (the Kreis) can be selected from a number of eligible authorities depending upon the criterion used (e.g. the regional affiliation of the inhabitants, ease of communications, or the responsibility for administration), it is not surprising that the choice has varied over the years. Today the local government unit of Heligoland belongs to the Kreis of Pinneberg within the Land of Schleswig-Holstein.

After World War II, an ordinance issued by the British Military Government (No. 224 of January 10, 1951, Amtsblatt der Alliierten Hohen Kommission für Deutschland (1951) p. 734) forbade access to the island except with the permission of the military government. As a result, in November 1950 a Heligoland office was set up by the local Kreis authorities in Pinneberg and was charged with accounting for the people of Heligoland, who were spread out over 150 other localities, as well as attending to their needs. In June 1951, following representations made by associations of the islanders, a Heligoland committee was elected as a forerunner to a local council and a deputy was nominated with the powers of mayor (section 10 of the first Heligoland Law of March 15, 1952, Gesetz- und Verordnungsblatt für Schleswig-Holstein (GVOBl) (1952) p. 62). The first local council was elected on May 27, 1956 following the return of more than 500 individuals entitled to vote. The administration of the island is now regulated by the Schleswig-Holstein local government code (Gemeindeordnung für Schleswig-Holstein) and the second Heligoland Law of February 17, 1966 (GVOBl (1966) p. 25).

Ever since the acquisition of Heligoland by the German Reich, voting rights on the island had been a subject of great concern, since it was

considered important to safeguard the indigenous islanders' powers of local self-determination and to shield them from the danger of being outnumbered by outsiders (see the Heligoland clause in Art. 178(2) of the Weimar Constitution and the Prussian law concerning local elections on Heligoland of December 11, 1920 (Preußische Gesetzessammlung (1920) p. 541) which, as during the British period, required a five year period of domicile as a condition for the right to vote). The resettlement of the island after 1952 and the restoration of local self-government both took account of the rights of the islanders to their homeland.

By October 1, 1932 the gradual integration of Heligoland within the German legal system, apart from certain provisions relating to customs and trade, had been completed. Despite belligerent occupation, the expulsion of the islanders, the use of the island as a bombing target by foreign forces and its consequent devastation, the island never ceased to form a part of the German national territory. Moreover, contrary to the British view, Heligoland as a unit of local government did not legally cease to exist. Therefore, the island has continued to be governed by the German law in force at the capitulation of the Reich, unless such law has become obsolete, has been expressly abolished, or has been specially modified in relation to Heligoland. The fact that the island was for some time inaccessible to German citizens and German governmental authorities alike, is of as little legal moment as the fact that the island's affiliation with Prussia was changed to affiliation with Schleswig-Holstein.

A matter of great economic importance to the island is its recognition as a tax-free area (section 2, paragraph 3(2) of the Customs Law dated May 18, 1970 (German Bundesgesetzblatt (1970 I) p. 529) where German customs law does not apply (section 2(6) of the Customs Law). Corresponding to this provision, the island does not belong to the customs union of the European Economic Community (Art. 1 of the Council Order of July 23, 1984, Official Journal, L 197, p. 1).

In 1958 the Federal Constitutional Court ruled that a Schleswig-Holstein law of 1953, which provided for an import duty on goods entering the island, was *ultra vires* and constitutionally void (BVerfGE, Vol. 8, p. 260). In response, a federal law was passed on November 17, 1959 (German Bundesgesetzblatt (1959 I) p. 685) which, in accordance with Art. 71 of the German Basic Law, provided the necessary authority for a new Schleswig-Holstein law (dated December 7, 1959, GVOBl (1959) p. 213) on import duty on goods entering the island. The Schleswig-Holstein law in turn provided the necessary authority for the local import duty and tax ordinances of December 8, 1959 (GVOBl (1959) pp. 215, 217) according to which a local import duty is payable on goods such as alcoholic drinks, tobacco products, coffee and tea which are brought onto the island and would otherwise be subject to consumption tax. The duty paid goes to the Heligoland local authority (section 6 of the Second Heligoland Law).

3. International Legal Aspects

After World War I, the so-called Heligoland question concerned demands by the islanders which were based upon reservations on various questions of public and private law contained in the 1890 Treaty of Exchange. During the 1920s (like the later petition dated January 1, 1946 by 250 islanders born before 1890) individual groups of islanders petitioned the British Government, the Control Commission set up under the Versailles Treaty and the → League of Nations on the question of Heligoland's national affiliation. The petitioners sought international support for the autonomy, separate status or → internationalization of Heligoland. Art. 289 of the Versailles Treaty had reserved Great Britain's right to require the continuation of the Treaty of 1890. In November 1920, Great Britain waived this right (→ Waiver). Little by little, up to 1932, Heligoland was incorporated into the German legal system with due regard being had at all times to the island's special position. This process of integration followed upon the failure of various campaigns in support of special rights claimed on the basis of Art. 12(4) of the 1890 Treaty of Exchange. These campaigns, which consisted mainly of tax strikes, civil obstruction and declarations of autonomy, did not gain international support. One final issue of contention concerned the question whether the private law rights arising out of the British Governor's occasional grant of hereditary

ground leases (hereditary building leases within the meaning of the German Civil Code), for terms of between 60 and 80 years, were legally capable of being renewed beyond December 31, 1951. The answer to this question depends on whether the guarantee clause contained in Art. 12(4) of the Treaty of Exchange continued to have effect, at least as regards the sphere of private law, despite the fact that a state of war had existed between the contracting parties twice within 25 years (→ War, Effect on Treaties). This was a matter upon which opinions had differed even in the years immediately following World War I. In any event, at the time when regroupment was necessary as a result of the reconstruction programme, the Heligoland Committee in its resolution of August 21, 1953 assumed that the private property rights did continue to be valid.

The bombardment of the island before the capitulation in Germany, its occupation on May 11, 1945, its subordination to the British Admiralty alone (the island was not administered by the military government) and the deportation of the island population marked the beginning of a set of British measures which, according to the Admiral who took over the island on May 12, 1945 and also the naval commander in Cuxhaven in September 1946, were designed "to destroy the island to such an extent that it could be left to the sea to ensure that Heligoland would disappear from the face of the earth". However, as the result of a conference held by the British authorities in Hamburg on October 3, 1946, it was decided not to pursue this objective. Detonations, especially those which took place on April 18, 1947, which altered the island's characteristic profile, were aimed at destroying military installations. German → protests, which also found support from other countries and from some British commentators, concentrated on the illegality of the British measures under international law, the further devastation of the island once the military installations present on the island were destroyed, the requisition of the island for military target practice and the expulsion of the 2500 islanders. These protests led to debates on Heligoland in the British House of Commons on May 3 and July 28, 1950. These debates examined *inter alia* whether or not German references to the Hague Regulations on land warfare and the general rules of international law were justified (→ War, Laws of). In addition, the Heligoland issue was discussed from the point of view of rising East-West tension and the possibility of launching flights at eastern targets from the island.

The House of Commons debates, German efforts and general changes in the world political climate all led to a change in public opinion. On January 17, 1952 the Foreign Office issued a statement that the island would be returned to the Federal Republic of Germany on March 1, 1952. Once the island was transferred, the German administration began the work of resettling and rebuilding the island and re-introducing a system of self-administration.

Die Frage Helgoland - The Heligoland Issue. Memorandum des Sekretariats Friedensvertrag der Freien und Hansestadt Hamburg (1948).

Parliamentary Debates (Hansard), Fifth Series, Vol. 474 (1950), House of Commons, Official Report, Written Answers of May 3, 1950, cols. 198–199.

Parliamentary Debates (Hansard), Fifth Series, Vol. 478 (1950), House of Commons, Official Report of July 28, 1950, cols. 893–912.

Verhandlungen des Deutschen Bundestages, 1. Wahlperiode 1949, Stenographische Berichte of December 1, 1949, Vol. 1 (1950) 548–552; February 14, 1951, Vol. 6 (1951) 4469–4478; February 28, 1951, Vol. 6 (1951) 4624; March 16, 1951, Vol. 6 (1951) 4893–4894; April 11, 1951, Vol. 7 (1951) 5160, 5164, 5166.

Verhandlungen des Deutschen Bundestages, 1. Wahlperiode 1949, Drucksache Nos. 41, 166, 1758, 1988, 2017, 2018.

W. SCHAETZEL, Können die Helgoländer noch Sonderrechte aus dem deutsch-englischen Abtretungsvertrage von 1890 herleiten?, Zeitschrift für Internationales Recht, Vol. 29 (1921) 41–48.

A. HASENCLEVER, Zur Geschichte des Helgoland-Vertrages vom 1. Juli 1890, Archiv für Politik und Geschichte 5 (1925) 507–524.

H. HELFRITZ, Rechtsgutachten über den Fortbestand der der Gemeinde Helgoland gewährleisteten Gesetze und Gewohnheiten (1929).

M. WIGHT, The Development of the Legislative Council 1607–1945 (1946) 165 et seq.

H.P. IPSEN, Recht für Helgoland, in: Helgoland ruft, J. Packross and P. Rickmers (eds.) (1952).

H.P. IPSEN, Hamburgs Verfassung und Verwaltung (1956) 192 et seq.

R. LEUDESDORFF, Wir befreiten Helgoland (1987).

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HONG KONG

The British colony of Hong Kong, the "fragrant harbour" at the southeastern tip of the People's Republic of China, lies just south of the Tropic of Cancer and occupies a total land area of 1046 square kilometres. It has a population of about 5.5 million (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories).

The colony was acquired by Great Britain in stages over a period of nearly 60 years from 1842 to 1898 (→ Colonies and Colonial Régime). In the early 19th century the British had been prominent in the developing trade with China through the port of Canton. A striking feature of this trade, however, was that the principal commodity being supplied by the West to China was opium, in what has been described as the most long continued and systematic → international crime of modern times. In 1839 the Emperor of China took action to put an end to the traffic in opium, and the traders at Canton were required to give a solemn undertaking not to bring any further opium into China. The British refused to give this undertaking, but they were allowed to leave Canton and moved to Hong Kong. Anxious to open up trade with China in general, the British Government was persuaded to send a military force which defeated China in the so-called Opium War. In the subsequent Treaty of Nanking of August 29, 1842 (BFSP, Vol. 30, p. 389) the Emperor of China not only opened five → ports to settlement by foreign traders, thereby granting much more extensive rights to foreigners than had previously been enjoyed by the traders at Canton, where extremely restrictive conditions had been imposed by China, but also ceded Hong Kong Island to the British Crown (→ Territory, Acquisition).

On October 24, 1860, by the Convention of Friendship between Great Britain and China (BFSP, Vol. 50, p. 10), China ceded part of the Kowloon peninsula opposite Hong Kong Island to the British Crown in perpetuity, together with Stonecutters Island, following further military operations by the French and the British. On June 9, 1898 another Convention of Peking completed the process by granting to Britain a lease of part of the mainland adjoining the ceded part of the Kowloon peninsula and a group of islands for the term of 99 years from July 1, 1898 (Convention between Great Britain and China respecting an Extension of Hong Kong Territory, BFSP, Vol. 50, p. 17). This leased area is known as the New Territories. The effect of the lease, one of a number granted by China to Western States in the 19th century, was to make the New Territories part of the dominions of the Crown, or in other words subject to British sovereignty, to the same extent as if the area had been ceded to Britain, but only for the period of time expressed in the lease (→ Territory, Lease).

From the point of view of British constitutional law Hong Kong is a dependent territory administered under the Hong Kong Letters Patent 1917 to 1976 and the Hong Kong Royal Instructions 1917 to 1977. The administration is in the hands of the Governor, who must consult the Executive Council, though he is not bound by the Council's advice. The Executive Council consists at present of six official (*ex officio*) members, who include the Attorney General, the Financial Secretary and the Commander British Forces, and a further ten "unofficial" members appointed by the Governor who include leading figures from Hong Kong's financial and industrial establishment. The Governor presides at meetings of the Executive Council.

Legislative power is vested in the Governor with the advice and consent of the Legislative Council, subject to a (theoretical) → veto by Westminster in the interests of public order, public faith or good government (→ Ordre public (Public Order)). Until quite recently the Legislative Council was no more representative politically than the Executive Council and consisted exclusively of "officials", i.e. senior civil servants, and "unofficials", appointed by the Governor, though from a somewhat wider variety of professions than the Executive Council, but the Government has embarked upon a process of democratization which is creating considerable difficulty.

Hong Kong has Magistrates' Courts, a District Court and a Supreme Court. Appeals lie from the District Court and the Supreme Court to a Full Court, which consists of the Chief Justice and one or more other judges of the Supreme Court. In certain cases a final appeal lies to the Judicial Committee of the Privy Council in London. The law of Hong Kong consists of the law of England and Wales so far as applicable to the circumstances

of Hong Kong or its inhabitants, unless modified by local ordinance. Chinese customary law has been applied to questions of family relations and inheritance in the past but it is in the process of being replaced by English law.

As the ceded territory of Hong Kong Island and Kowloon would not be viable without the New Territories, it had long been recognized that expiry of the lease of the New Territories in 1997 would necessitate a re-examination of the position of Hong Kong as a whole. The People's Republic of China has always maintained that the treaties by which Britain acquired Hong Kong fall into the category of → unequal treaties which are not legally binding, but has found it advantageous to tolerate the continued existence of Hong Kong as a British colony. In September 1982 the People's Republic of China and Great Britain entered upon → negotiations to settle the future of Hong Kong after 1997. These negotiations culminated in the initialling of a Draft Agreement in Peking on September 26, 1984 (ILM, Vol. 23 (1984) p. 1366), which was ratified and entered into force on May 27, 1985.

Under the terms of the Agreement Britain will restore Hong Kong to the People's Republic of China with effect from July 1, 1997 and the People's Republic will resume the exercise of sovereignty over Hong Kong from that date. In accordance with Art. 31 of the constitution of the People's Republic of China, the People's Republic will establish the Hong Kong Special Administrative Region of the People's Republic of China. The National People's Congress will enact a Basic Law for the Hong Kong Special Administrative Region stipulating that the socialist system and socialist policies shall not be practised in the Hong Kong Special Administrative Region and that Hong Kong's capitalist system and lifestyle shall remain unchanged for 50 years – an arrangement which is summed up as "one country, two systems". The draft Basic Law was published in April 1988 for consultation. The Hong Kong Special Administrative Region is to enjoy a high degree of autonomy, except in foreign and defence affairs, and will be vested with executive, legislative and judicial power including the power of final adjudication (→ Autonomous Territories). The laws in force are to be maintained except for those that contravene the Basic Law and subject to amendment by the legislature. Provision is made for leases to be renewed or granted running to the year 2047 and a Land Commission has been set up to monitor the implementation of these provisions.

The Government of the Hong Kong Special Administrative Region will be composed of local inhabitants and the chief executive will be appointed by the Central People's Government on the basis of the results of elections or consultations to be held locally. The legislature is to be "constituted by a combination of direct and indirect elections". The employment of British and other foreign nationals in the public service may be continued and further recruitment of British and other foreign nationals is authorized with certain restrictions. Provision is also made for the continued use of English in addition to Chinese in the organs of government and the courts.

Freedom of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law. Private property, ownership of enterprises, legitimate rights of inheritance and foreign investment will be protected by law. The Hong Kong Special Administrative Region will retain the status of a → free port and a separate customs territory. It will also retain the status of an international financial centre; its markets for foreign exchange, gold, securities and futures will continue, as will free flow of capital (→ Capital Movements, International Regulation). The Hong Kong dollar will remain freely convertible. The region is to have its own finances and will not pay taxes to the Central People's Government.

The Hong Kong Special Administrative Region may, under the name "Hong Kong, China", maintain and develop economic and cultural relations and conclude relevant agreements with States, regions and international organizations. It is to continue to participate in the → General Agreement on Tariffs and Trade. It may issue its own travel documents for entry into and exit from Hong Kong.

Provision is made for the maintenance of Hong Kong as a centre of international and regional aviation, but in this matter authority will reside primarily in the Central People's Government.

A Sino-British Joint Liaison Group has been set

up to ensure a smooth transfer of government in 1997.

Until June 1989 the most difficult problem to have emerged in the run-down to 1997 was the extent to which democratic institutions can and should be established in Hong Kong before 1997. Elections have been held for district boards and suburban councils and some members of the Legislative Council were indirectly elected in 1985. Proposals for direct elections to the Legislative Council were included in a Green Paper published by the Hong Kong Government in May 1987 and some argue that a move to democratic government is Hong Kong's only safeguard against future political interference from Beijing. Not surprisingly, a different view is taken by the People's Republic and, in the event, the holding of direct elections has been postponed to 1991 at the earliest. The events of June 4, 1989 in Tienanmen Square have now cast a dark shadow over Hong Kong: many fear that Beijing will find any form of democracy unacceptable after 1997 and the British government is under considerable pressure to grant the right of abode in Britain to those Hong Kong residents, for example civil servants and police, who have served the colonial administration. The Basic Law was intended also to form a precedent for the cases of → Macau (to be returned to China in 1999) and ultimately → Taiwan; the fact of the matter is that it is very much in the interest of the People's Republic to maintain confidence in, and the stability of, Hong Kong down to and beyond 1997, but the suppression of the pro-democracy movement in China, seen by the world in Tienanmen Square, may have made this an impossible aim to achieve.

A Draft Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, ILM, Vol. 23 (1984) September 26, 1984, 1366–1387.

K. ROBERTS-WRAY, Commonwealth and Colonial Law (1966).

W.L. TUNG, China and the Foreign Powers (1970).

J.A. COHEN, Chinas's Practice of International Law (1972).

P.W. FAY, The Opium War, 1840–1842 (1976).

A. CASTEL, Le statut constitutionnel de Hong Kong, Revue Juridique et Politique, Indépendance et Coopération, Vol. 31 (1977) 989–1010.

D.J. LEWIS, A Requiem for Chinese Customary Law in Hong Kong, ICLQ, Vol. 32 (1983) 347–379.

P. WESLEY-SMITH, Unequal Treaty 1898–1997 (1983).

A.H.Y. CHEN, 1997: The Language of the Law in Hong Kong, Hong Kong Law Journal, Vol. 15 (1985) 19–47.

A.H.Y. CHEN, Hong Kong's Legal System and the Basic Law (1986).

A.H.Y. CHEN, The Legal System, in: J.Y.S. Cheng (ed.), Hong Kong in Transition (1986).

G. RESS, The Legal Status of Hong Kong after 1997, ZaöRV, Vol. 46 (1986) 647–699.

P. WESLEY-SMITH and A.H.Y. CHEN (eds.), The Basic Law and Hong Kong's Future (1988).

J. COTTRELL, "One Country, Two Systems": The Constitutional Future of Hong Kong, in: Comparative Constitutional Law, Festschrift in honour of P.K. Tripathi, ed. by M.P. Singh (1989) 77–105.

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ISLE OF MAN *see* Channel Islands and Isle of Man

ISRAEL AND THE ARAB STATES

1. History: (a) Background. (b) United Nations partition plan. (c) Proclamation of Israel. (d) Armed conflicts 1947–1982. – 2. Legal Issues: (a) Conflicting claims to self-determination. (b) State of war. (c) Aggression and self-defence. (d) Secure boundaries. (e) Methods and means of warfare. – 3. Criteria for a solution: (a) Security Council Resolution 242. (b) Camp David and the 1979 peace treaty. (c) Position of the Arab States.

1. History

(a) Background

The source of the conflict between Israel and the Arab States is a fundamental controversy between the Arab and Jewish peoples over the realization of → self-determination. This controversy began when the Zionist movement adopted as its political programme the establishment of a Jewish State in → Palestine (see Theodor Herzl, Der Judenstaat (1896)).

(b) United Nations partition plan

In 1947 the Government of the United Kingdom announced its intention to terminate the → mandate of Palestine and left responsibility for an adequate solution to the → United Nations. Arab and other Islamic members of the UN (Egypt,

Iraq, Iran, Lebanon, Pakistan, Saudi-Arabia, Syria and Yemen), from the beginning of the discussions, opposed the project to create two → States on the territory of Palestine (→ Dismemberment). They wanted a centralized Arab State with a certain protection for ethnic → minorities (see Report of Subcommittee 2 of the Ad Hoc-Committee on the Palestine Question (UNSCOP), UN Doc. A/AC.14/32 of November 11, 1947). The legal issues involved, above all with respect to self-determination, should have been submitted to the → International Court of Justice.

A majority of the → United Nations General Assembly (33 in favour, 13 against, with 10 abstentions including the United Kingdom), decided on a plan of partition allowing for a Jewish State in three unconnected sectors (UN GA Res. 181(II) of November 29, 1947). According to the UNSCOP majority report, this State was to have a total population of 905 000 (498 000 Jews and 407 000 Arabs) while an Arab State was planned in two sectors with 725 000 Arabs and only 10 000 Jews. The major part of the territory with a mixed population was assigned to the Jewish State, thus leaving unsolved the difficult problems which existed between the two ethnic groups following the considerable time they spent fighting each other in a → civil war. Bethlehem and Jerusalem with its suburbs were to be internationalized under the supervision of the Trusteeship Council (→ United Nations Trusteeship System). Access to the sea for this internationalized area was to be assured through a corridor on Arab territory. An economic union was to connect the three units.

The above-mentioned Arab States protested against the allegedly undemocratic, unjust plan, which they saw as contrary to the → United Nations Charter. UN organs were not able to implement it in view of continued hostilities between Jews and Arabs and the refusal of the United Kingdom to allow UNSCOP to enter the country.

(c) Proclamation of Israel

Under the condition that the mandate would come to an end, and only one day before it actually did so, the State of Israel was proclaimed on April 14, 1948. Immediately afterwards five Arab countries (Egypt, Iraq, Jordan, Lebanon and Syria) attacked Israel in order to prevent a unilateral realization of the partition plan. Israel's forces were able to resist the attack and even occupied territories which had been assigned to the Arabs by the United Nations under the partition plan in order to gain control over a coherent territory including the western part of Jerusalem. During these hostilities about one million Arabs had to leave their homeland in order to find refuge on the West Bank (conquered and later, in 1950, annexed by Jordan), in the Gaza Strip (occupied by Egypt) or in other neighbouring countries. Intensive endeavours of the United Nations concentrated on aiding these → refugees (→ United Nations Relief and Works Agency for Palestine Refugees) and on reaching a suspension of the hostilities. Eventually bilateral → armistice agreements were entered into between Israel and Egypt, Lebanon, Jordan and Syria, respectively, at different dates in 1949. In these instruments, the parties agreed to → demarcation lines and the abstention from future → aggression while a → recognition of the State of Israel or her → boundaries was avoided (→ Israel: Status, Territory and Occupied Territories).

On December 11, 1948 the General Assembly categorically requested that Israel provide for the → internationalization of Jerusalem together with the return of or at least a compensation for Arab refugees (UN GA Res. 194 (III) of December 11, 1948). Israel declared her readiness to comply with this resolution in order to fulfill the conditions for admission to the United Nations as a peace-loving State. Admission followed (see UN GA Res. 273 (III) of May 11, 1949), though no measures were introduced by Israel to comply with the promises concerning Jerusalem and the return of the refugees.

The demarcation lines were not fully respected by the parties to the armistice agreements. Frontier incidents and counter-actions increased the atmosphere of hostility. The hostility was further intensified by a full incorporation of the occupied territories together with an → expropriation of land belonging until then to the refugees. The receiving States hesitated to integrate the newcomers into their societies and did everything possible in the refugee camps in order to strengthen feelings of Palestinian identity.

(d) Armed conflicts 1947–1982

During the following years. three → armed conflicts resulted, on the one hand, in considerable territorial gains for Israel; on the other hand, however, they caused increasing isolation and a deterioration of Israel's international position.

The transfer of the seat of the Israeli Government to Jerusalem led to an economic → boykott by the Arab League (→ Arab States, League of). After an increase in armed attacks from both sides and in view of the menace posed by a considerable increase in the Egyptian war potential, on October 29, 1956 Israel, in agreement with France and the United Kingdom, waged war against Egypt. The Suez War (→ Suez Canal) resulted in Israeli occupation of the Gaza Strip and the Sinai Peninsula. Following a condemnation of the Anglo-French → intervention by a great number of UN members, the United Nations requested an armistice and a withdrawal of all troops to be supervised by a United Nations Emergency Force (UNEF; → United Nations Forces). This request was respected by Israel only after UNEF forces were stationed to secure free navigation through the Gulf of → Aqaba (→ Navigation, Freedom of).

This crisis fundamentally changed the international situation in the Near East. The Soviet Union took a pro-Arab position in the economic and military field. President Nasser of Egypt was enabled to gain the leadership of the Arab States and to found in 1964 the → Palestine Liberation Organization (PLO) with its own army (PLA), which directed numerous acts of sabotage on Israeli soil. These acts frequently led to counter-actions.

On request by Egypt, UNEF troops were subsequently withdrawn from the Sinai Peninsula. Egypt occupied Sharm el Sheikh and blockaded the Strait of Tiran (→ Blockade). This induced Israel on June 5, 1967 to attack preventively the air forces of Egypt, Iraq, Jordan and Syria, destroying a substantial part of them. In the course of this "Six Day War", the Israeli army occupied the old city of Jerusalem, the West Bank and the Golan Heights as well as the Sinai Peninsula up to the Suez Canal. Only after having reached all her objectives was Israel ready to conclude separate armistice agreements with her adversaries. Again, many refugees left the newly occupied territories. The → United Nations Security Council unanimously adopted, on November 22, 1967, Resolution 242, declaring inadmissible the acquisition of territory by war and requesting a final peace settlement on the basis of the "withdrawal of Israeli armed forces from territories occupied in the recent conflict".

Intensive efforts towards → conciliation and mediation, taken up first in 1968 by the UN mediator Gunnar Jarring, and later in 1970 directly by the Great Powers, remained without success. Israel repeatedly refused to withdraw from even minor parts of the territories occupied in 1967. Thus, the armed conflict with Egypt continued.

On the Arab side, the PLO gained political importance from 1968 to 1970 through the accession of a number of *fedayeen* organizations, the adoption of the Palestine National Charter and, finally, its recognition as the only legitimate representative of the Palestinian people by the parties to the Arab summit at Rabat in 1974. One of the main fields of PLO operations, South Lebanon, was frequently bombed by Israeli → aircraft.

On October 6, 1973, Egypt and Syria attacked Israel from two directions. Their unexpected action initially produced certain successes. Israeli counter-attacks, involving a massive use of → war material, resulted in great losses on both sides without reaching their final goals. Under extensive pressure from both of the superpowers, Israel accepted a cease-fire on October 25, 1973. Later, as a result of the shuttle diplomacy of Henry Kissinger, and after an international peace conference under the auspices of the United Nations failed to clear up the situation, Israel entered into a troop disengagement agreement. This agreement, something between a cease-fire and an armistice, was first concluded with Egypt, on January 18, 1974 (ILM, Vol. 13 (1974) p. 23), and later also with Syria, on May 31, 1974 (ILM, Vol. 13 (1974) p. 880).

In the following years the development was largely determined by three factors: a very intense effort to reach a solution by the United States, the dissociation of Egypt from the Soviet Union, and internal changes within Israel. Under Prime Minister Begin new political forces determined Israel's policies. American mediation paved the way for a settlement with Egypt after Israel found

herself constrained to make considerable concessions and to renounce considerable territorial gains from Egypt as well as some from Syria. The agreements of Camp David determined the conditions of a settlement with Egypt as well as those for a larger solution in the Near East (A Framework for Peace in the Middle East, September 17, 1978 (ILM, Vol. 17 (1978) p. 1463)).

Since ratification of the peace treaty between Israel and Egypt of March 26, 1979 (ILM, Vol. 18 (1979) p. 362; → Peace Treaties), the boundary between the two States has become identical with the previous boundary under the British Mandate, while the problems of the West Bank and the Gaza Strip remain pending a definite solution. In 1981 Israel annexed the Golan Heights by an enactment under internal law.

The Arab States more or less unanimously refused to follow the example of Egypt. The internal conflict in Lebanon led to serious hostilities between Israel and the PLO, also gravely affecting the Lebanese → civilian population. An attempt undertaken in 1983 to terminate hostilities by an agreement between Israel and Lebanon on the withdrawal of troops from Lebanon failed (ILM, Vol. 22 (1983) p. 708). Relations between Syria and some other States in the region have, furthermore, deteriorated as a result of this conflict. However, the war between Iran and Iraq has largely detracted the attention of world public opinion from the Israeli-Arab conflict.

For many years, plans for a new international peace conference for the Middle East have been discussed in many multinational fora as well as in bilateral contexts. One of the most controversial problems facing such a conference is the participation of the PLO.

A new element has been added to the conflict by the sustained rebellion (*intifada*) in the occupied territories which began December 1987. This reaction was apparently instigated neither by the PLO nor by neighbouring countries, but represents an expression of profound disillusion by young Arabs. The harsh reaction of the Israeli authorities was criticized worldwide. Moreover, an expulsion order against activists was condemned by the Security Council (UN SC, Res. 607 of January 5, 1988).

The uprising has had far-reaching political consequences. It seems likely that this development instigated Jordan to give up her claim to sovereignty over the West Bank by renouncing the legal and administrative links between the East and West Banks (see Hottinger (1988) p. 299). The *intifada* favoured the readiness of the PLO to enter into negotiations with Israel on the basis of the above-mentioned UN resolutions with the aim of creating an Arab State along side of Israel instead of a single Arab State comprising the whole territory of former Palestine. Finally, the reaction of the Israeli authorities has influenced the United States with regard to her support of Israeli claims, whereby a common basis has been achieved for cooperation with the Soviet Union in favour of a peaceful solution.

2. *Legal Issues*

(a) Conflicting claims to self-determination

Both peoples, the Arabs and the Jews, claim that their presence in Palestine or Israel is based on the principle of or the right to self-determination. Only during the course of the conflict has this former general principle gained the force of a legal right. It is not easy to indicate a fixed date for this development. However, the adoption of the → Friendly Relations Resolution (UN GA Res. 1625 (XXV) of October 24, 1970) is usually quoted in this regard.

According to the basic tenets of political Zionism, the Jewish people derives its right to settle in Palestine from a historic connection with the land and a biblical title to establish its national home there. These arguments are not sustained by international law. For → historic rights to exist under international law, specific requirements must be met which under no circumstances are fulfilled by this aspect of the Zionist political programme.

The Palestine Mandate, with its special provisions concerning the establishment of a national Jewish home, as well as the partition plan adopted by the General Assembly are both authoritative forms of realizing the principle of self-determination according to the legal standards valid at the time they came into being. Their validity cannot be questioned on the same basis. The principle of self-determination, furthermore, did not grant a title for the enlargement of the territory of Israel

outside the frontiers drawn by the UN partition plan in 1948.

The State of Israel, recognized by the → international legal community and accepted as a member of the United Nations, has rights equal to those of any other State (→ States, Sovereign Equality), and can, according to international law, defend her existence against any attempt to destroy her (→ Self-Defence), basing her actions on the principles recognized in Art. 2 of the UN Charter.

After about 1970 the legal situation changed. It is questionable whether measures taken after this date were compatible with the then recognized legal right to self-determination. The refusal to allow the population of the West Bank, the Gaza Strip and the Golan Heights to exercise State → sovereignty in these territories must be seen in this light. Additional consideration should also be given to the problems of the refugees living in neighbouring countries, particularly with regard to their right to return to their original homes.

One investigation of the problem has led to the conclusion that the right to exercise State sovereignty was originally suspended and about 1970 gained the force of a legal right (see Van de Craen). It is argued that the suspended "right" made illegal any acquisition of territories not allotted to Israel in the partition plan. In this way retroactive validity may be given to a later development.

(b) State of war

The problem whether and when a state of → war existed or exists between Israel and her Arab neighbours does not necessarily involve the question of the legitimacy of the armed conflicts. Illegitimate aggression can also create a state of war (see section 2(c) *infra*).

The controversy over the general compatibility of a state of war with the UN Charter has been raised during the Arab-Israeli conflicts. Israel has contended that such an incompatibility excludes a right of the Arab States to resume hostilities. Contrary to this thesis, the Arab side has expressed the opinion that the very existence of a Jewish State constitutes aggression and initiated a state of war. It is not clear how a non-existent State can participate in a war in the legal sense.

The doctrine that a state of war is in principle incompatible with the Charter has lost much of its weight since the international community sought to protect "human rights in armed conflict" in the → Geneva Red Cross Conventions and Protocols.

According to the majority view, a state of war began with the armed intervention of Arab States after the proclamation of the State of Israel. The General Armistice Agreements, concluded in 1949 between Israel on the one side and Egypt (February 24, 1949 (UNTS, Vol. 42, p. 251)), Jordan (April 3, 1949 (UNTS, Vol. 42, p. 303)), Lebanon (March 23, 1949 (UNTS, Vol. 42, p. 287)) and Syria (July 20, 1949 (UNTS, Vol. 42, p. 327)) on the other, set an end to actual fighting. They also prohibited its resumption for an undetermined period by providing that "[n]o aggressive action by the armed forces . . . shall be undertaken, planned or threatened against the people or the armed forces of the other" (common Art. I(2)). Under the Agreements, a violation of this duty was seen as a breach of the prohibition on the → use of force allowing for measures of self-defence. Peace was not restored by these Agreements. It is significant that the Security Council on September 1, 1951 emphasized the permanent character of the armistice régime, under which "neither party can reasonably assert that it is actively a belligerent" (Res. 95 (1951), para. 5), while on November 22, 1967 it requested a "termination of all claims or states of belligerency" (Res. 242 (1967), para. 1(ii)).

In summary, the following can be stated: Hostilities between Arabs and Jews before the intervention of Arab States in Israel constituted a non-international armed conflict or civil war. The state of war initiated by the intervention has not been terminated by the Armistice Agreements. This state of war also continues for Iraq, whose forces participated in the intervention. The "permanent character" of the Armistice Agreements precluded all acts of aggression, including blockades, between the contracting parties in the intervals between the periods of "hot war". The armed conflicts in 1956, 1967, 1973 and 1982 had the effect of transforming a continued formal state of war into "hot war" in relation to the States involved. This distinction has no influence on the duties of third States under neutrality rules (→ Neutrality, Concept and General Rules).

The Armistice Agreements after the "Yom

Kippur" War of 1973, designated only as steps towards the establishment of peace, similar to the Agreements of 1949, had the effect of bringing about a cessation of fighting. The same is true for the agreement between Lebanon and Israel on the withdrawal of troops of May 17, 1983 (ILM, Vol. 22 (1983) p. 708), denounced by Lebanon only one year later.

Egypt is the only Arab State which terminated the state of war by the conclusion of a peace treaty, signed in Washington on March 26, 1979.

(c) Aggression and self-defence

The General Armistice Agreements precluded a resumption of hostilities. It must be determined case by case whether acts leading to armed conflicts in 1948, 1956, 1967, 1973 and 1981 to 1982 constituted aggression and gave rise to a right to self-defence. Not always is sufficient information available to answer this question. Some authors argue that judicial inquiry would be necessary. This situation calls for great caution.

An authoritative definition of the concept of aggression was only first given in 1974 by the General Assembly (Res. 3314(XXIX) of December 14, 1974). The criteria of this definition may also be helpful to solve earlier cases.

Hostilities between Arabs and Jews before the proclamation of the State of Israel mainly constituted non-international armed conflicts, though some irregular forces from neighbouring countries were involved. From the Arab side, Jewish actions are qualified as acts of aggression with reference to the illegality of the partition plan itself and also to atrocities committed during the hostilities. If one applies the criterion of first use of force (see Art. 2 of Res. 3314), it appears more likely that the opponents of the partition plan were the aggressors. In Resolution 46 (1948) of April 17, 1948 the Security Council called for a cessation of hostilities by persons and organizations "without prejudice to their rights, claims or positions", thus abstaining from condemning an aggressor.

The actions taken by Egypt, Iraq, Lebanon and Syria after the proclamation of Israel were directed against the new State in order to prevent a realization of the partition plan. Jordan may have intervened mainly for the legitimate objective of protecting the territories allotted to the Arab State against possible future aggression. The theory that all five States were requested to intervene by Palestinian Arab authorities meets with some doubt, because a transitory government for all Palestine was established in Gaza only in September 1948, four months after the intervention occurred. The Arab League, however, had planned to intervene in Palestine already on September 19, 1947, long before the partition plan was adopted.

It is difficult to characterize the conflicts of 1956 (Suez War) and 1967 (Six Day War). Both sides may have been responsible, though certain measures by Egypt may be seen as amounting to an armed attack against Israel (see Q. Wright, Legal Aspects of the Middle East Situation, Law and Contemporary Problems, Vol. 33 (1968) p. 5). In both cases the Strait of Tiran was closed, constituting a blockade and, thus, aggression according to Art. 3(c) of the Declaration (see → Aqaba, Gulf of). In both cases, President Nasser announced the intention to destroy the State of Israel and Israel felt menaced by the extensive mobilizations of its neighbours on her frontiers. On the other hand, Israel attacked first, albeit preventively, and acted not only against Egypt. The Security Council indicated its position on November 22, 1967 in Res. 242 (1967), declared binding by Res. 338 (1973) of October 22, 1973. It requested a just and lasting peace without conditioning the request on an immediate withdrawal of all troops. Proposals to declare Israel an aggressor had already been rejected. Apparently the Security Council was also of the opinion that both sides were responsible. This approach permitted Israel to keep the cease-fire lines (see Rostow, p. 267).

In October 1973 Israel was met unprepared by Egyptian and Syrian surprise attacks. The illegality of this use of force may be distinguished from the illegality of the position of Israel in territories occupied in 1967 and her unwillingness to accept peacemaking procedures. The latter assertion of illegality is only convincing, however, if such readiness existed on the other side.

Only with great difficulty can actions during the armed conflict with Lebanon be qualified according to criteria of international law. An effective Lebanese Government with reliable forces at its disposal did not exist. Lebanon was unable to maintain order in the country while various

→ guerrilla forces were fighting each other. Aggression against neighbouring countries could not be prevented. Thus, PLO forces frequently shelled Israeli settlements adjacent to the border.

Countermeasures in response to these hostilities were not directed against the State of Lebanon but against the acting guerrilla groups. Such countermeasures can be qualified, however, as acts of self-defence only if the rule of → proportionality was respected. It is largely a question of fact whether the Israeli → bombardment of PLO concentrations in Lebanon, including the organization's headquarters in Beirut in July 1981, fulfilled this requirement. A positive conclusion cannot be excluded.

The invasion of Lebanon in June 1982 by about 30 000 Israeli soldiers who occupied one third of the country's territory and also caused war casualties among the civilian population is quite a different case. This assessment is true even if PLO military installations were illegally located too near to civilian settlements. The Lebanese Government subsequently participated in negotiations over a truce with Israel. That Agreement on Withdrawal of Troops from Lebanon of May 17, 1983 contained the clause "that the state of war between Israel and Lebanon has been terminated" (ILM, Vol. 22 (1983) p. 708, at p. 709). Unfortunately this Agreement has not had the desired effect.

(d) Secure boundaries

The right to live within secure and recognized boundaries, as formulated in Security Council Res. 242 (1967), and its influence on controversial territorial titles cannot be discussed here *in extenso*. The demarcation lines established by the General Armistice Agreements of 1949 certainly were not intended to constitute such secure and recognized boundaries. Clauses containing express reservations were inserted in these Agreements keeping open the determination of definite frontiers for future peace treaties (see Art. II, Sec. 2 of the agreement with Lebanon). The question is whether such agreements lose their provisional character if they remain in force for several years or even decades without any prospect for final settlement.

Under no circumstances can an → annexation of territories be based on the right to live within secure boundaries. Nevertheless, this argument has played a role in discussions on the legality and → effectiveness of the annexation of the Golan Heights on December 14, 1981 (see UN SC Res. 497 of December 17, 1981; Malanczuk).

(e) Methods and means of warfare

Hostilities between the Arab States and Israel belong to the cases in which States resorted to armed conflicts after the adoption of the UN Charter. To determine whether only legitimate forms of combat were implemented during these hostilities would require special case studies (→ Warfare, Methods and Means). It can not be excluded that even in inter-State conflicts the necessary respect for the protection of the civilian population required under the Geneva Red Cross Conventions was not always accorded by regular armies.

Actions of Arab guerrilla forces and Israeli commandos have not only taken place during the inter-State conflicts but also in the intermediate periods. As far as Israel was involved in these actions, only the rules of common Art. 3 of the 1949 Geneva Conventions are applicable, since Israel has not ratified the 1977 Additional Protocols. To the extent these Protocols codify already existing customary law, they are applicable without ratification. Inapplicable, in any event, is the recognition of → wars of national liberation as international conflicts (Art. 1(4) of the first Protocol). Neither the forces of the PLO nor those of other organized groups have been recognized by Israel as insurgents (→ Recognition of Insurgency). They have always been regarded as terrorists and treated as common criminals (→ Terrorism).

Acts of → economic coercion have been committed often in the context of the Arab-Israeli conflict (→ Economic Warfare). According to modern concepts, such acts are not regarded as illegitimate when they occur outside a state of war. At several summits the Arab League has obliged its members to impose boykotts on imports and exports to Israel and also on business entities in other countries maintaining relations with Israel. The General Assembly has requested all UN members to consider refusing any support or help for as well as collaboration with Israel in order to deter Israel from making annexations such as that

which occurred with respect to the Golan Heights (UN GA, Res. 1 (ES-IX) of February 8, 1982).

Blockades of the Suez Canal and of the Gulf of Aqaba have been declared by Egypt not only during actual hostilities but also in the intermediate periods. According to Art. 3(c) of the Declaration on Aggression, blockades are only regarded as such if directed against ports or coasts of a State. The closure of the Strait of Tiran may have corresponded to this requirement and entitled Israel to declare that she regarded this act as aggression. The Security Council held illegitimate the exclusion of Israeli ships from the use of the Suez Canal as long as the 1949 Armistice Agreements were in force (Res. 95 (1951)).

The Security Council strongly condemned Israel's military attack on the Iraqi nuclear reactor and research center near Baghdad on June 7, 1981 as a clear violation of Art. 2(4) of the UN Charter (Res. 487 (1981)). Attempts to justify this use of force neglect the fact that this provision covers not only acts against the → territorial integrity or political independence of any State but also those "in any other manner inconsistent with the Purposes of the United Nations".

3. *Criteria for a Solution*

To solve the conflict definitely has frequently been called impossible. It is evident that a successful solution is possible only through a → consensus based on compromise. A balance must be found between the conflicting views of two ethnic groups both claiming self-determination on the same territory. At the same time the national interests of the neighbouring States must be satisfied.

(a) Security Council Resolution 242

Security Council Res. 242 was adopted in the hope of terminating the Six Day War after Israel brought the whole territory of the former Mandate under her jurisdiction. Egypt, Jordan and Syria all lost portions of their territories in the conflict. The Resolution emphasizes in its Preamble the inadmissibility of the acquisition of territories through war (para. 2) and the principles of Art. 2 of the UN Charter (para. 3).

Two principles in particular were seen as governing a just and lasting peace. First, the Resolution demanded the "withdrawal of Israel armed forces from territories occupied in the recent conflict", without defining exactly which territories were meant. The deliberate omission of an article for the word "territories" left open whether later adjustments of demarcation lines or even larger changes should be permitted. Second, the Resolution requested a termination of the state of belligerency (the term "war" is avoided) and respect for the principles of Art. 2 of the UN Charter together with the right "to live in peace within secure and recognized boundaries", which at that time certainly did not exist and were difficult to define.

Thus, the Resolution reflects an unclear compromise meant to promote a consensus. It refers to the most urgent problem, the future destiny of the Arab population, with great caution by mentioning "a just settlement of the refugee problem" subject to further requirements. Years later, one of the main authors of the Resolution, Lord Caradon, admitted this weakness.

(b) Camp David and the 1979 peace treaty

The "Framework for Peace in the Middle East agreed at Camp David" (1978) calls Res. 242 (1967) a major milestone. More attention, however, is paid by the former to the problems of the Palestinians. In the Camp David Agreement, a concrete plan is developed for the future of the West Bank and the Gaza Strip. Step by step, these areas are envisaged as reaching "full autonomy". Finally, the population is seen as deciding on their own system of government. Whether autonomy includes the possibility of a → secession from Israel leading to an independent State is left open. Certain reservations expressed with regard to the security of Israel may raise doubts as to such a development.

The Camp David Agreement and the subsequent Treaty of Peace with Egypt of March 26, 1979 were made possible on the basis of considerable territorial concessions by Israel, particularly her withdrawal from the Sinai Peninsula. Under this condition, Egypt gave up her claim to the Gaza Strip.

Although the "Framework" expresses the hope that Jordan would agree to similar conditions, King Hussein showed more sympathy for the plan to associate the West Bank with Jordan. Only recently has he withdrawn his claims to the West

Bank in favour of Palestinian unity (see section 1(d) *supra*).

(c) Position of the Arab States

The Arab States' position is not uniform and has changed considerably. Rhetorical pronouncements in conferences do not always coincide with these States' actual political wishes. For instance, not all Arab States were willing to break off → diplomatic relations with Egypt and to dispense with making their own decisions.

A general condemnation of the Camp David Agreements was no longer repeated at the summit of the Organization of the Islamic Conference at Kuwait in January 1987, though criticism of Res. 242 (1967) was reaffirmed. The summits of the League of Arab States in Amman (November 11, 1987) and Algiers (June 9, 1988) paved the way towards a fundamental change in the Arab position. Communiqués adopted on both occasions referred globally to UN resolutions concerning the Near East conflict as a basis for an international peace conference (ILM, Vol. 27, pp. 1646 to 1659). These declarations were cited by Arafat before the UN General Assembly on December 13, 1988 and repeated at a press conference on the following day. Arafat declared that Res. 242 (1967) and Res. 338 (1973) were accepted as a basis for negotiations and that the PLO renounced terrorism. Only one month earlier, on November 15, 1988, the Palestine National Council had proclaimed the State of Palestine and solemnly acknowledged in the declaration of independence not only the above-mentioned resolutions of the Arab summit conferences but also, expressly, "the international legitimacy embodied in the resolutions of the UN since 1947". In the political communiqué issued on the same date, Res. 242 (1967) and Res. 338 (1973) are expressly mentioned together with a request for "Israel's withdrawal from all the Palestinian and Arab territories which it has occupied since 1967 (*sic* !), including Arab Jerusalem" (ILM, Vol. 27, p. 1660).

The Israeli Government has persistently objected to participation of the PLO in peace negotiations and has renewed this position in a declaration of November 23, 1988. In this respect the Israeli Government seems to be rather isolated following the declarations made by Arafat in his speech before the General Assembly. Only one day after the Israeli declaration, United States President Reagan authorized American authorities to enter into a bilateral dialogue with representatives of the PLO after a number of other States had already revised their position concerning this question.

Though it appears somewhat risky to speak of a "break-through in the Palestine problem", in view of the great number of questions which are still open, at least the prospects for uniting the parties at a common negotiating table have been improved.

A Framework for Peace in the Middle East, agreed at Camp David, September 9, 1978, ILM, Vol. 17 (1978) 1463–1474.

Egypt-Israel: Treaty of Peace, ILM, Vol. 18 (1979) 362–393.

S. ROSENNE, Israel's Armistice Agreements with the Arab States (1951).

G. KIRK, The Middle East 1945–1950, Survey of International Affairs (1954).

H. WAGNER, Der israelisch-arabische Konflikt im Völkerrecht (1971).

H. CATTAN, Palestine and International Law (1973).

J.N. MOORE (ed.), The Arab-Israeli Conflict, Vols. I and II, Readings; Vol. 3, Documents (1974).

E.V. ROSTOW, The Illegality of the Arab Attack on Israel of October 6, 1973, AJIL, Vol. 69 (1975) 272–289.

F. VAN DE CRAEN, Territorial Title of the State of Israel to Palestine, RevBelge, Vol. 14 (1978–1979) 500–538.

H.M.F. CARADON, Die Zukunft der Resolution 242, Vereinte Nationen, Vol. 27 (1979) 153–155.

E. GNESA, Die von Israel besetzten Gebiete im Völkerrecht, Thesis, University of Fribourg (1981).

P. MALANCZUK, Das Golan-Gesetz im Lichte des Annexionsverbotes und der occupatio bellica, ZaöRV, Vol. 42 (1982) 261–294.

Y. DINSTEIN, Legal Aspects of the Israeli Incursion into Lebanon and the Middle East Conflict, Institute of Jewish Affairs-Research Reports, No. 9 (1983).

F.C. BOYLE, International Law and Organizations as an Approach to Conflict Resolution in the Middle East, in: Thomas Buergenthal (ed.), Contemporary Issues in International Law, Essays in Honor of L.B. Sohn (1984) 515–540.

T. EITEL, Lebanon – A Legal Survey, GYIL, Vol. 29 (1986) 11–55.

T.W. MALLISON and S.V. MALLISON, The Palestine Problem in International Law and World Order (1986).

A. HOTTINGER, Der "Aufstand" der Araber in den besetzten Gebieten – Eine Wende in der Palästina-Frage, Europa Archiv, Vol. 43 (1988) 299–310.

A. HOTTINGER, Arafats Friedensangebot an Israel – Ein Durchbruch in der Palästina-Frage?, Europa Archiv, Vol. 44 (1989) 39–46.

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ISRAEL: STATUS, TERRITORY AND OCCUPIED TERRITORIES

A. Introduction

It is well known that the ancient land of → Palestine with its historic capital → Jerusalem has special significance for the three great monotheistic religions Judaism, Christianity and Islam. In the course of history Palestine has been the object of many battles and of interest to foreign powers, not only because of its strategic geographical location. Today the problems relating to the status of Israel, the territory of Israel, and the territories which Israel continues to occupy after the five Arab-Israeli wars that have been fought since the proclamation of the State of Israel in 1948 include some of the most complicated issues of the Middle East (see also → Israel and the Arab States). Overshadowed only temporarily by developments in the → Persian Gulf, these problems are intertwined with the old Palestinian refugee question (see → United Nations Relief and Works Agency for Palestine Refugees in the Near East) and the more recent Palestinian claim to → self-determination and independent Statehood, articulated by the → Palestine Liberation Organization (PLO) and supported, *inter alia*, by the Arab States (→ Arab States, League of). In addition to the regional aspects, there has always been an important global dimension to the Arab-Israeli conflict due to the strategic interests involved on the part of the United States and the Soviet Union which often seemed to entail the risk of a direct military confrontation threatening world peace.

It is difficult to analyze the problems arising from the Arab-Israeli conflict in terms of international law while ensuring that justice is done to the legitimate interests of the parties concerned. Indeed, it may be questioned whether the principles and rules of the "law in the books" can be adequately applied to this complex conflict in view of the latter's peculiar nature, a prolonged state of quasi-belligerency, which makes it extremely difficult to distinguish clearly between → peace and war. In essence, the conflict arises from the claims of two peoples to the same territory; so far, these claims have seemed irreconcilable and they have developed into a tragedy which can be understood properly only by taking the historical background into account.

B. Historical Background

There is continuing dispute as to whether it is possible to establish historical continuity between the modern State of Israel and the two ancient Jewish communities that existed in Palestine, the first emerging in the 13th century B.C. and the second following the return, with Persian goodwill, of the Jews from their exile in Babylon after the destruction in 586 B.C. of Jerusalem and the First Temple built by Solomon. The Jewish view emphasizes that in the Jewish community, scattered in the Diaspora in many countries throughout the world since the expulsion from Palestine by the Romans, there has always been a longing for the return to and a special spiritual orientation towards the ancient Jewish home. The same view further contends that a small Jewish population had always remained present in Palestine. The Arab-Palestinian side, on the other hand, stresses that Palestine was ruled by Rome and Byzantium until 638, by the Arabs from 638 to 1099, the Crusaders from 1099 to 1291, the Mamelukes from 1250 to 1516, and the Ottoman Empire from 1516 to 1917. It is further argued that the majority of the population consisted of Semite Arabs, who were either Moslems or Christians, and that during most of the time which elapsed since the Arab conquest Palestine was under Muslim rule.

From a legal point of view, this dispute may be neglected, for, under international law, mere historical or religious claims are not by themselves capable of establishing title to territory (→ Territory, Acquisition). For the purposes of this article it suffices to proceed from the undisputed fact that in 1917 the whole of Palestine had been part of the Ottoman Empire for centuries. It is true that certain privileges had been granted to other powers in connection with the → holy places and the protection of Christian minorities in Palestine. Thus, France had long enjoyed the prerogative to protect members of the Catholic clergy, and she continued to invoke this privilege even when Austrian, German, Italian and Spanish members of the clergy were concerned who already stood under the consular or → diplomatic protection of their own States. Similarly, ever since 1839 Great Britain was offering consular protection to the Jews in Jerusalem and in "the East" versus the Sublime Porte. It is also noteworthy that Art. 62 of the Treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of the Affairs in the East, signed at Berlin on July 13, 1878, established the principle of religious freedom and equality in the Ottoman Empire and recognized the right of the European powers concerned to exercise diplomatic and consular protection on behalf of religious minorities (→ Berlin Congress (1878)). However, such privileges granted to foreign powers did not affect the fact that → sovereignty over Palestine rested with the Ottoman Empire.

In order to more fully comprehend the complexity of the transformation that took place concerning Palestine after the dissolution of the Ottoman Empire, it is necessary to take into consideration the rise of Zionist and Arab nationalism and the policies adopted by the Allied Powers to benefit from these forces in their struggle with the Central Powers on the side of which the Ottoman Empire entered World War I in 1914.

The vulnerable position of the Jews in general had been well summarized by Edmund Burke in a speech before Parliament at the end of the 18th century as follows:

> "Having no fixed settlement in any part of the world, no kingdom, no country in which they have a Government, a community and a system of laws, they are thrown upon the benevolence of nations and claim protection and civility from their weakness as well as from their utility . . . From the east to the west, from one end of the world to the other, they are scattered and connected . . . Their abandoned state and their defenceless situation calls most forcibly for the protection of civilized nations . . . But the Jews have no such power and no such friend to depend on" (cited in Feinberg (1979), p. 229 et seq.).

In spite of the emancipation following the period called "enlightenment" in Europe and the equality introduced by the French Revolution, Jews continued to suffer under discrimination, oppression and merciless pogroms, especially in Russia and other parts of eastern Europe. However, emancipation also brought with it a challenge to Jewish identity which, in combination with other factors, helped the advance of a clear political and national orientation in discussing solutions to the "Jewish question".

The initiative for creating a new State of Israel did not come from the roughly 24 000 Jewish inhabitants living in Palestine in 1880 when the Jewish immigration movement from Europe commenced. This movement arose from a variety of sources which included the awaking of Jewish nationalism in an age of the general rise of nationalism, continuing anti-Semitism and persecution of Jews, particularly in Russia in 1880 and 1881 following the assassination of Czar Alexander II, socialist influences, as well as religious and political attachment to Israel as the Promised Land. Mt. Zion, one of the hills of Jerusalem with special biblical significance, supplying the city with a further name, inspired numerous religious and political movements in Jewish circles in the 19th century under the broad umbrella of the designation "Zionist".

There were authors who early advocated combining Jewish nationalism with plans to colonize Palestine. While the book entitled Rome and Jerusalem published in 1862 by Moses Hess, who put forward the idea of a Jewish State, failed to arouse much public interest, the publication of the work Auto-Emancipation by the Russian doctor Leo Pinsker had a considerable effect. Doubting, in the light of the experience in Russia,

that emancipation and assimilation would function, Pinsker's conclusion was that only a national home could supply the necessary basis to sustain Jewish self-respect and dignity, also in the Diaspora. Under the impact of this book and the pogroms of 1881, the movement of the so-called Lovers of Zion (Hovevei Zion) was formed in 1882. An offshoot of this movement, known as the Bilu from the Hebrew initials of a passage in Isaiah (Chapter 2, Verse 5: "House of Jacob, come let us go!"), began to settle in small agricultural communities in Palestine, such as Rishon-le-Zion (First to Zion), Rosh Pinna, Zikron Yakov and Gedera. In fact, although more renowned, these communities were not the very first such examples.

Influenced especially by the Dreyfus affair, it was Theodor Herzl (1860 to 1904), who effectively promoted the idea of the restoration of the Jewish State (his work Der Judenstaat was published in 1896) and became the founder of modern political Zionism. Originally, he had not limited his considerations concerning suitable settlement territory to Palestine but also mentioned Argentina. However, the first Zionist Congress held in 1897 in Basel proclaimed officially that the "aim of Zionism is to create for the Jewish people a home in Palestine secured by public law" (Laqueur and Rubin, eds. (1984), p. 11).

Apart from the efforts by Herzl and his collaborators to secure a national Jewish home with diplomatic means, which included the discussion of the Sinai and East Africa as alternative options and an attempt to enlist the support of the German Emperor to influence the Sublime Porte to grant special status to a Jewish community, there were "practical" Zionists, such as Chaim Weizmann and David Ben Gurion, who pursued a policy of actual Jewish settlement in Palestine in order to create facts. Land sales to Jews in Palestine, for economic reasons often with the approval of the Ottoman authorities, commenced in 1878. After 1880 Jews began to immigrate to Palestine in several waves ("Alija"), legally and illegally, to cultivate new settlement areas and to acquire land, including from non-Palestinian absentee landowners. It appears that the early Zionist leaders were originally not aware of the fact that Palestine was already inhabited by a significant Arab population. At least it was assumed that the local inhabitants would welcome the benefits of the innovations introduced by the settlers.

By 1914 there were 85 000 Jews in Palestine, about 11–12 per cent of the population, 45 000 of whom lived in Jerusalem. Founded in 1909 as a suburb of Jaffa, Tel Aviv became the first new Jewish city in Palestine. In the same year, the first kibbutz, Deganya, was established on the south banks of Lake Tiberias. Hebrew was revived and became the main language of the Jewish community in Palestine, which quickly moved to organize itself politically.

Arab nationalism, on the other hand, had emerged in the Ottoman Empire. It appears that the first open demand for the separation of the Arab lands from the Ottoman Empire was made by N. Azouri, a Christian Arab who was the editor of the Paris journal L'Indépendance Arabe before World War I. In 1905 he submitted a programme of the League of the Arab Fatherland which envisaged the separation of the civil and the religious power,

> "in the interest of Islam and the Arab nation, and to form an Arab empire stretching from the Tigris and the Euphrates to the Suez Isthmus, and from the Mediterranean to the Arabian Sea" (Laqueur and Rubin, eds. (1984), p. 5).

The programme assured that the concessions and privileges granted to Europe by the Turks would be respected, as would be the autonomy of the Lebanon, and the independence of the principalities of Yemen, Nejd, and Iraq. Arab nationalism developed more vigorously, particularly in Syria, following the Young Turk Revolution of 1908.

When the Ottoman Empire entered the war on the side of the Central powers, both Jews and Arabs collaborated with the Allies. While the Arabs sought freedom of their territories under Turkish rule, the Jews aspired to a home in liberated Palestine. In order to secure Arab support for the British war effort against Turkey, in 1915 Sir Henry McMahon, British High Commissioner in Cairo, concluded an agreement with Hussein Ibn Ali, the Sherif of Mecca, whose aim was to re-establish the Caliphate and secure the independence of all Arab territories. After the Arab uprising against Turkish rule in 1916, however, the dispute over whether the British

promise to the Arabs had been intended to include Palestine was to continue until 1939.

On the other hand, with approval in principle by Czarist Russia, in 1916 Britain and France concluded the secret 1916 Sykes-Picot Agreement on the post-war division of the Middle East, according to which Palestine was not to be independent but was to be placed under international administration. This pact envisaged that the Fertile Crescent, consisting of Iraq and Syria-Palestine, was to be divided into British and French → spheres of influence. France was given a free hand in coastal Syria, while Britain was to enjoy the control of the territories of Baghdad and Basra. Although an international administration was planned for Palestine in general, Britain was to retain control of Haifa and Acra. To the embarrassment of the Allies, the contents of the secret accord were leaked in the summer of 1917 by the Bolsheviks.

From 1916 General Allenby undertook the invasion of Palestine with a British and imperial army, a French contingent, and both Jewish and Arab assistance. A month before the fall of Jerusalem, the Balfour Declaration of November 2, 1917, formulated in a letter from the British Foreign Secretary to Lord Rothschild, stated that the British Government viewed "with favour the establishment in Palestine of a national home for the Jewish people", but added also, *inter alia*, that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine" (Laqueur and Rubin, eds. (1984), p. 18). This statement was based upon a draft prepared by Chaim Weizmann and Lord Rothschild and made after → consultations with other powers.

A British-French declaration of November 7, 1918 reassured the Arab side, where the Balfour Declaration had caused irritation, of their complete and permanent liberation. The Arabs argued that the Balfour Declaration conflicted with the McMahon-Hussein agreement and with a number of assurances and pledges given to them both before and after 1917 with respect to their independence after the war. General Allenby's campaign in 1918 freed the last Arab lands from the Turks and was supported by Feisal, the son of Hussein, backed by Arab forces which had been formed in the Hejaz, with the help of Syrian and other Arab officers and the Englishman known as Lawrence of Arabia.

Thus, not only divergent interests and conflicting commitments, or, at a minimum, deliberately vague Allied undertakings concerning the future of the region, but also the lack of clarity of the concept of the Jewish "national home", as well as the failure to give proper consideration to the interests of the Arabs and the wishes of the local population of Palestine, all helped to prepare the ground for the violent struggle between the two forms of nationalism which emerged with, in the end, mutually exclusive claims to the same territory.

At the Paris Peace Conference in 1919 the primary objective of the Zionist delegation was to obtain international confirmation of the Balfour Declaration and its inclusion in the text of the peace treaties (→ Peace Treaties after World War I). The Zionist position was to oppose the incorporation of Palestine into an Arab State as well as the → internationalization of Palestine, the whole of which was claimed on the basis of the reasoning, as expressed in a memorandum submitted on February 3, 1919 to the Supreme Council of the Allied Powers, that it was the historic home of the Jews from which they had been driven by force.

In this connection, it is worth recalling that there had been goodwill meetings between Arab and Jewish leaders, including Herzl, long before the war. At the Paris Peace Conference on January 3, 1919, the chief delegate of the Arabs, Emir Feisal, even signed an agreement with Weizmann who acted for the Zionist World Organization. The Feisal-Weizmann agreement confirmed the Balfour Declaration and recognized Palestine as separate Jewish territory with which the "Arab State" was supposed to entertain "the most cordial goodwill and understanding" (Art. I) (Laqueur and Rubin, eds. (1984), p. 19), subject, however, to the recognition by Britain and France of the Arab demands.

There was also an exchange of letters between Feisal and the American Zionist leader Felix Frankfurter, in which Feisal's letter of March 3, 1919 stated:

> "We feel that the Arabs and Jews are cousins in race, having suffered similar oppression at the hands of powers stronger than themselves, and

by a happy coincidence have been able to take the first step towards the attainment of their national ideals together" (Laqueur and Rubin, eds. (1984), p. 21).

It continued:

"We Arabs, especially the educated among us, look with the deepest sympathy on the Zionist movement. Our deputation here in Paris is fully acquainted with the proposals submitted yesterday by the Zionist Organization to the Peace Conference, and we regard them as moderate and proper. We will do our best, in so far as we are concerned, to help them through: we will wish the Jews a most hearty welcome home" (ibid.).

Referring to Dr. Weizmann, the letter further explained that he

"has been a great helper of our cause, and I hope the Arabs may soon be in a position to make the Jews some return for their kindness. We are working together for a reformed and revived Near East, and our two movements complete one another. The Jewish movement is national and not imperialist, and there is room in Syria for us both. Indeed I think that neither can be a real success without the other".

Nevertheless, the correspondence also gave an early indication of the problems arising in practice:

"People less informed and less responsible than our leaders and yours, ignoring the need for cooperation of the Arabs and Zionists have been trying to exploit the local difficulties that must necessarily arise in Palestine in the early stages of our movements. Some of them have, I am afraid, misrepresented your aims to the Arab peasantry, with the result that interested parties have been able to make capital out of what they call our differences" (ibid.).

Towards the end of the letter optimistic words of hope were expressed:

"I wish to give you my firm conviction that these differences are not on questions of principle, but on matters of detail such as must inevitably occur in every contact of neighbouring peoples, and as are easily adjusted by mutual goodwill. Indeed nearly all of them will disappear with fuller knowledge" (ibid).

How different reality was is apparent from the fact that ten years later Feisal, who had become King of Iraq in 1921, found it expedient to declare, with regard to the agreement with Weizmann, that "His Majesty does not remember having written anything of that kind with his knowledge" (Laqueur and Rubin, eds. (1984), p. 18).

C. The Palestine Mandate

After the war Feisal was installed by the British at the top of an Arab military administration to govern Damascus and the interior. The coast with Beirut came under French control while Palestine remained under British military occupation.

In July 1919 an Arab national congress met in Damascus to support the government of Feisal and to demand independence for Syria. In a Memorandum of July 2, 1919 presented to the King-Crane Commission, which had been appointed by President Wilson to advise on which of the Allies should act as the mandatory power for Palestine, the General Syrian Congress protested against Art. 22 of the Covenant of the → League of Nations because it placed the Arabs among the nations in the middle stage of development standing in need of a mandatory power. The Congress declared itself strongly opposed to French rule in any part of Syria and, whilst invoking the declarations of President Wilson, would have accepted, "without prejudice to our complete independence", technical and economic assistance from the United States or, with lesser enthusiasm, from Britain for a period of 20 years.

This also appears to be one of the earliest Arab documents opposing Jewish immigration to Palestine. The Congress stated:

"We oppose the pretensions of the Zionists to create a Jewish commonwealth in the Southern part of Syria, known as Palestine, and oppose Zionist migration to any part of our country; for we do not acknowledge their title but consider them a grave peril to our people from the national, economical, and political points of view. Our Jewish compatriots shall enjoy our common rights and assume the common responsibilities" (Laqueur and Rubin, eds. (1984), p. 32 et seq.).

The Congress further requested

"that there should be no separation of the southern part of Syria, known as Palestine, nor of the littoral western zone, which includes Lebanon, from the Syrian country. We desire that the unity of the country should be

guaranteed against partition under whatever circumstances" (ibid., p. 33).

The recommendations by the King-Crane Commission sympathized with the Arab cause and were clearly opposed to the "extreme Zionist Program" which, in the Commission's words, "looked forward to a practically complete dispossession of the present non-Jewish inhabitants of Palestine, by various forms of purchase" (Laqueur and Rubin, eds. (1984), p. 29).

Referring to one of Wilson's principles (→ Wilson's Fourteen Points), which called for the free acceptance of a settlement by the people immediately concerned, the Commission emphasized:

"If that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine – nearly nine-tenths of the whole – are emphatically against the entire Zionist program" (ibid.).

The Commission also pointed out that no British officer it had consulted believed that the Zionist programme could be carried out except by force of arms.

The future of Palestine was shaped by the policies of the Allied Powers concerning the Fertile Crescent region after the defeat of the Ottoman Empire. Britain entrusted France with effective control of what later became Syria and Lebanon where a French High Commissioner was appointed. In December 1919 battles commenced between French forces and those at the disposal of Feisal. A second Arab conference held in Damascus on March 8, 1920 again declared itself for total independence. On March 11, 1920 Feisal was proclaimed king of Syria without, however, gaining recognition by either France or Britain.

At the San Remo Conference in April 1920, the Allied Supreme Council, ignoring Arab demands, offered "Syria and Lebanon" to France and established that there was to be under the League of Nations a French → mandate for Syria and Lebanon and a British mandate for Palestine. France imposed her mandate by defeating the Arab army, occupying Damascus, dethroning Feisal and forcing him into exile. After recruiting a private army in the Hejaz to fight the French, his brother Abdullah established his dominance in Transjordan, the territory east of the Jordan River, in January 1921. Before Britain was confirmed as Mandatory power by the League of Nations in July 1922, she recognized Abdullah with his seat in Amman as the local ruler of the Emirate of Transjordan and in return obtained his recognition of the British mandate, which became effective in 1923.

Originally, the Treaty of Sèvres signed by the Allies and the Ottoman Government on August 10, 1920, had expressly provided that Turkey renounced her rights over the Arab territories and agreed to the establishment of the mandate system envisaged for Palestine, Syria and Iraq. Art. 95 of the Treaty incorporated the Balfour Declaration and stated that it was to be put into effect. When the Turkish nationalists seized power in 1922, they refused to ratify the Treaty and rejected that article. The substitute → Lausanne Peace Treaty, signed on July 24, 1923, did not contain any reference to the Balfour Declaration, but by renouncing Turkish rights and title to the territories in Art. 16 simply recorded that their future was "being settled or to be settled by the parties concerned".

The terms of the British Mandate, which had also been discussed with the United States, although the latter did not become a member of the League of Nations, contained a reference to the Balfour Declaration. The → preamble confirmed that "recognition has thereby been given to the historical connexion of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country" (Laqueur and Rubin, eds. (1984), p. 34).

The Mandate called upon the Mandatory to place the country

"under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion" (Art. 2).

Moreover, provision was made for an "appropriate Jewish Agency" to be recognized

"as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters

as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country" (Art. 4).

The same provision also clarified that the "Zionist Organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognized as such agency". Furthermore, the Mandatory Power was required, without prejudicing what was described as "the rights and position of other sections of the population", to "facilitate Jewish immigration under suitable conditions" and to encourage in cooperation with the Jewish Agency "close settlement by Jews on the land, including State lands and waste lands not required for public purposes" (Art. 6). The Mandatory also became responsible for the holy places.

Under Art. 25 of the Mandate, with the approval by the Council of the League of Nations on September 16, 1922, Britain declared the provisions concerning the Jewish national home and the holy places non-applicable with regard to Transjordan. In this way the area controlled by Abdullah, who renounced his intention of invading Syria, in effect split from the Mandate in 1923. The Emirate was unable to survive without financial assistance and was administered by a British High Commissioner. Its army, the Arab Legion, was organized by Sir John B. Glubb. Following an autonomy agreement between Britain and the Emir of Transjordan in 1928, the term Palestine was mostly used to refer to the territory west of the Jordan river only, although formally Transjordan, later known as Jordan, remained under the Palestine Mandate until obtaining its independence on March 22, 1946. The Emir assumed the title of King.

In contrast to the other A-Mandates, the Palestine Mandate failed to provide explicitly for independent Statehood of the local population. It has been argued that the *sui generis* nature of the Mandate for Palestine rested on the intention to first secure the establishment of a national Jewish home. But it has also been noted that this was difficult to reconcile with the claim of the Arab population to self-determination, the principle advanced by President Wilson and at least in theory underlying the League's mandate system and the spirit of Art. 22 of the Covenant.

From the beginning there were differences of opinion between the Zionist Organization and the Mandatory power concerning the interpretation of the Mandate. While the Zionists argued that the Jewish element in Palestine should not be submitted to minority status, British policy became more restrictive in view of the Arab interests. On the other hand, there were also Zionist "revisionists", such as W. Jabotinsky and M. Begin, who already in 1925 demanded to establish a Jewish State within its alleged historical borders on both sides of the Jordan. At the same time the Jewish community in Palestine commenced to develop its own institutions and organizations, including paramilitary forces (Haganah since 1920), to help establish, and to be integrated into, the structure of the future Jewish State which they envisaged. In percentages, the Jewish population, the total number of which had fallen during World War I to about 55 000, had grown from approximately 10 per cent in 1919, to 17 per cent in 1929 and to almost 30 per cent in 1939. Following the rise to power of the Nazis in Germany, this reflected a dramatic increase in the number of immigrants fleeing the terror imposed upon the Jewish people by the régime. In absolute numbers, in 1939 there were 445 000 Jews among a total population of about 1.5 million in Palestine.

While the Arab side had sent a Muslim-Christian Committee to the British Government in 1921 to protest against the Balfour Declaration, it also denounced the establishment of the Mandate and refused to cooperate with the Mandatory. Proposals by Britain to constitute an "Arab Agency" similar to the envisaged "Jewish Agency" were rejected several times. In 1923 the Arab Executive Committee which had emerged from the Muslim-Christian Committee explained that accepting such a proposal would imply acceptance of the Mandate and of Zionist policy. The Jewish immigration and land acquisition provoked active Arab resistance against the implementation of the Jewish national home programme. There were early attacks against the Jewish population starting in 1920 to 1921, followed by frequent unrest throughout the unfortunate history of the British Mandate.

The Churchill White Paper of 1922 sought to assure the Arabs that they were recognized as a

distinct community and that they would not be dominated by the Jews whose immigration would be regulated. As Jewish immigration seemed to decrease there was some moderation on the Arab side, the members of which found that it might be more effective for purposes of reaching their objectives to cooperate with the Mandatory. However, the decision in 1928 to establish the Jewish Agency provided for in the Mandate to support Jewish interests in Palestine gave rise to deep concern. Minor disputes between Arabs and Jews about religious rights led to the notorious Wailing Wall incident in August 1929 in Jerusalem. Such disputes were used by the Mufti of Jerusalem, Hajj Amin al-Husseini, who was the leader of the Supreme Muslim Council established by the British in 1921 to advise on religious matters, to ferment religious hatred against the Jews, resulting in serious riots

In its report submitted in March 1930 the Shaw Commission came to the conclusion that the riots were mainly due to frustrated Palestinian hopes for independence and to the fact that Jewish expansion was creating a landless and discontented Arab class. The Commission suggested restricting Jewish immigration. In October 1930 the Passfield White Paper (British Command Paper Cmnd. 3692) offered a more restrictive interpretation of the Balfour Declaration and of the Mandate and foreshadowed fresh restrictions on Jewish immigration and land purchases.

In view of the resignation of the chairman of the Jewish Agency, Chaim Weizmann, and under public pressure, the British Prime Minister MacDonald reassured Weizmann in a letter of February 13, 1931 that immigration could continue, but without prejudice to the rights and positions of other sections of the inhabitants of Palestine. While Arab leaders found that the Mandatory failed to prevent illegal Jewish immigration and the sale of land effectively and decided to boycott British goods and refused further cooperation, at the same time the Mandatory was confronted with Jewish protest against the existing restrictions on immigration.

Arab unrest led to clashes with the police in October 1933 and November 1935. In April 1936 the Arab Higher Committee, under the leadership of the extremist Mufti was formed to unite Arab resistance in Palestine which culminated in the 1936 to 1939 rebellion against the increasing Jewish immigration, land acquisition and the British Mandate administration with the aim of establishing an Arab State in Palestine. Rivalry among the then existing Arab States prevented them from acting effectively in foreign affairs and it was only in 1939 that they were able to take a joint initiative in favour of the Palestinian Arabs.

In its report submitted in July 1937, the Royal Commission (Peel Commission), appointed after the Arab riots in 1936, identified Arab fear and hatred of the Jewish national home and their striving for national independence as the true causes of the riots. As the Commission found it impossible to reconcile Arab and Jewish interests, it proposed the partition of Palestine. The Jewish State was to cover Galilee, the Yezreel Valley and the Coastal Plain to a point halfway between Gaza and Jaffa, about 20 per cent of the total area, while the rest, Arab Palestine, was to be united with Transjordan. The plan further suggested to retain Jerusalem, Bethlehem, a corridor to the Mediterranean, and, possibly, Nazareth and the Sea of Tiberias, as a British mandatory zone. While the Zionist Congress accepted the plan, albeit with qualifications and against substantial opposition, and Abdullah, the ruler of Transjordan, favoured partition hoping to incorporate the Arab part into his Emirate, the Arab Higher Committee flatly rejected it. An Arab meeting in Syria in September 1937 declared its opposition to the Peel Plan. Following Arab violence and terrorist action after the publication of the Peel Report, the Mandatory banned the Arab Higher Committee and arrested its leaders. The Mufti was among the few who escaped to Syria which became the base for permanent Arab insurrection in Palestine.

A new commission headed by Sir John Woodhead was appointed to reconsider the Peel proposals. The Woodhead Report published in November 1938 advised to reduce the Jewish portion of Palestine to about 400 square miles around Tel Aviv, the only area where there was a Jewish majority. This was rejected by both Arabs and Jews. Although the British Government was initially inclined to favour partition, in a Statement of Policy issued in November 1938 it arrived at the conclusion that this solution was for various reasons "impracticable".

While Jewish immigration had been admitted

more liberally at the beginning, following the failure of the partition plan and an unsuccessful attempt to reach an agreement at a Conference held in London in February-March 1939, with the famous White Paper of May 17, 1939 the British Mandatory decided to act on its own and, in fact, to a large extent met the Arab demands. To remove all doubts in connection with the interpretation of the Balfour Declaration and the expression of "a national home for the Jewish people", the British Government declared in the White Paper

> "unequivocally that it is not part of their policy that Palestine should become a Jewish State. They would indeed regard it as contrary to their obligations to the Arabs under the Mandate, as well as to the assurances which have been given to the Arab people in the past, that the Arab population of Palestine should be made the subject of a Jewish State against their will" (Laqueur and Rubin, eds. (1984), p. 66).

At the same time the White Paper reaffirmed what the 1922 Churchill Command Paper had interpreted as the meaning of the 1917 Declaration:

> "When it is asked what is meant by the development of the Jewish National Home in Palestine, it may be answered that it is not the imposition of a Jewish nationality upon the inhabitants of Palestine as a whole, but the further development of the existing Jewish community, with the assistance of Jews in other parts of the world, in order that it may become a centre in which the Jewish people as a whole may take, on grounds of religion and race, an interest and a pride. But in order that this community should have the best prospect of free development and provide a full opportunity for the Jewish people to display its capacities, it is essential that it should know that it is in Palestine as of right and not on sufferance. That is the reason why it is necessary that the existence of a Jewish National Home in Palestine should be internationally guaranteed, and that it should be formally recognised to rest upon ancient historic connection" (ibid., p. 67).

Without prejudicing the constitutional forms, the British Government declared that its objective was self-government in Palestine, meaning ultimately the establishment of an independent Palestine State, "in which the two peoples in Palestine, Arabs and Jews, share authority in government in such a way that the essential interests of each are secured" (ibid., p. 68). The Mandatory aimed at establishing such a State within ten years, in consultation with the Council of the League of Nations with a view to terminating the Mandate. It invited Arabs and Jews to take an increasing share in the administration.

Moreover, the White Paper of May 1939 decided to impose a restriction of a maximum of 75 000 Jewish immigrants in the following 5 years and to allow further immigration only with Arab consent. After reaching that level, a restriction of 1500 immigrants per month was imposed and, in fact, remained in force until the end of the Mandate. In addition, Britain made difficult the transfer of land from Arabs to Jews, by prohibiting it in some areas and restricting it in others, in accordance with regulations issued by the High Commissioner. The 1939 White Paper not only met with hostility on the Jewish side, but was also confronted with Arab demands that Palestine become an Arab State immediately, that no further Jewish immigrants be admitted, and that the status of every Jewish immigrant since 1918 be reconsidered.

While the Permanent Mandates Commission of the League of Nations raised objections to the new policy as being not in conformity with the Mandate, the outbreak of World War II prevented the Council, which was to convene early in September 1939, from considering the report. The policy adopted by the 1939 White Paper increased tension between the Jewish community and the Mandatory Power considerably. Jewish efforts concentrated on enabling illegal mass immigration from Europe of Jewish refugees for whom Palestine was almost the only place of asylum left and for many, to escape Nazi persecution, admission became a matter of life or death, particularly after 1942.

A meeting of American Zionists at the Biltmore Hotel in New York in May 1942, in which Weizmann and Ben Gurion participated, reformulated Zionist policy and demanded the creation of an independent State, to confer governmental authority upon the Jewish Agency and to open Palestine for Jewish refugees as a Jewish Commonwealth forming an integral part of the new democratic world. This programme found over-

whelming support in the Action Committee of the Zionist Organization on November 10, 1942. This was a clear indication that open confrontation with the Mandatory Power was to be avoided no longer. By the end of World War II, Zionist policy had succeeded in winning the support of the Government of the United States, which increasingly became involved.

The strict naval → blockade imposed by Britain and the detention in camps of illegal immigrants increased the bitterness among the Jewish community and was followed by terrorist acts by Jewish extremist groups against the authorities in Palestine (→ Terrorism). Towards the end of the war Zionist activity in Palestine tended to become more violent. While in the early years of the war the Jewish terrorist organization Irgun had followed the example of the more moderate paramilitary Jewish organization Haganah, the former later resumed its terrorist actions which were complemented by corresponding activity of a further extremist Jewish group known as the Stern Gang.

When the war ended in Europe, the Jewish Agency requested Britain in a memorandum to implement the Biltmore programme. In June 1945 a further memorandum demanded that 100 000 Jewish refugees be admitted immediately. While by September 1945 Haganah, Irgun and the Stern Gang decided to present a united front, the Jewish Agency was prepared to assume the provisional government of Palestine. As there was no unified Arab leadership in Palestine, Arab leaders from Egypt, Syria, Lebanon, Transjordan, Iraq, Saudi Arabia and Yemen, which in March 1945 had formed the League of Arab States, declared that they would defend the Arab cause in Palestine.

It appears that the central consideration for Britain in continuing to apply the rules introduced with the 1939 White Paper in the three years after World War II was, in view of the difficult transition in India, to avoid additional problems in the Middle East where the Arabs controlled access to oil, the passage to India, and important military bases in their countries. Even after the horrors of the Holocaust had become fully known, with Germany responsible for the death of 6 million Jews, Britain continued to reject the plea advanced by the May 1, 1945 Report of the Anglo-American Inquiry Committee, supported by President Truman, to admit immediately 100 000 Jewish survivors still in camps for displaced persons in Germany, Austria and Italy. Truman also endorsed the Committee's recommendation to rescind the immigration and land acquisition restrictions introduced by the 1939 White Paper. The Committee further proposed that both communities be eventually incorporated in a bi-national State under the trusteeship of the → United Nations (→ United Nations Trusteeship System).

Britain refused the central demand of the admission of 100 000 refugees, and, invoking the consequences that such admission would have for the Middle East, maintained the blockade. Of the 63 ships which from 1945 to 1948 made attempts to break it and transport illegal immigrants to Palestine, the *Exodus*, crowded with 4500 Jewish refugees, became the most famous. It is estimated that in the two years following the war more than 43 000 illegal immigrants managed to reach the coast of Palestine.

The Mandatory Power found it more and more difficult to adopt a consistent policy in dealing with the antagonism of the two forms of nationalism with which it was confronted in Palestine. It had failed in finding a constitutional solution acceptable to both sides. A further proposal by the Ihud (Association) group under the leadership of J.L. Magnes and M. Buber, suggested a bi-national solution, equal rights for Arabs and Jews and a federation of Palestine with the neighbouring countries. This proposal found only little support among the Jewish community and few Arab sympathizers, some of which were assassinated by followers of the Mufti who himself had found refuge during the war in Berlin. On the other hand, Jewish terrorist action against the Mandatory culminated in the blowing up of the King David Hotel in Jerusalem on July 22, 1946.

In view of the intransigence on both sides, attempts to hold Palestine Conferences in London in September 1946 and 1947 remained unsuccessful. So did other plans put forward, such as the Morrison-Brady plan of 1946 which envisaged Arab and Jewish "autonomous Provinces" under British rule and sole British control over Jerusalem, Bethlehem and the Negev. A further fruitless plan submitted by British Foreign Secretary Ernest Bevin on February 2, 1947, proposed a

large measure of local Arab and Jewish autonomy under a five year British Mandate supervised by the United Nations.

The failure of these proposals, rising tension and violence inside Palestine, continuing illegal Jewish immigration, and growing restiveness in Arab countries prompted the British Government to announce on February 14, 1947 that it would refer the problem of Palestine to the United Nations. Bevin explained that the Arabs would never agree to a partition of Palestine into two viable States while, on the other hand, the Mandate could not be administered in its present form.

D. The Creation of Israel

The British Government referred the question of the future government of Palestine to the United Nations in April 1947. On May 5, 1947 the → United Nations General Assembly decided in Res. 104 (S-1) that the First (Political and Security) Committee should deal with the item and grant a hearing to the Jewish Agency for Palestine. This organization had been set up by the 12th Zionist Congress in implementation of Art. 4 of the Mandate and must be distinguished from the Jewish Agency for Israel, which was created later immediately after the establishment of the State of Israel and received its Charter by virtue of the World Zionist Organization – Jewish Agency (Status) Law, 1952. The Jewish Agency took part in the relevant discussions in the First Special Session of the UN General Assembly in spring 1947 and the Second Special Session in spring 1948.

The task of the First Special Session was to discuss the views of the Arabs and Zionists with regard to the future government of Palestine and, in particular, the terms of reference for a special committee to be formed to examine the Palestine question and prepare a report for the General Assembly. The Arab States and the Arab Higher Committee, represented by Cattan, argued that the Covenant of the League of Nations had provisionally recognized the independence of Palestine, that the basic objective of the Mandate was to offer aid and advice to the people of Palestine until they could stand alone, and that the function of the committee was merely to recommend the termination of the Mandate, to recognize the independence of Palestine, and to form a democratic government. The Jewish argument focused on how to implement the plan for a Jewish national home in Palestine and favoured the continuation of the British Mandate and Jewish immigration into Palestine with the ultimate aim of independence once the Jews had become the majority of the population.

The United Nations Special Committee on Palestine (UNSCOP), with which the Arab Higher Committee refused to cooperate, was set up on May 15, 1947. Composed of eleven United Nations members, it did not include any of the five permanent members of the → United Nations Security Council in order to minimize the political influence of the → great powers and to secure as much objectivity as possible. While fighting in Palestine had continued, UNSCOP reported on August 31, 1947. The majority report (Canada, Czechoslovakia, Guatemala, Netherlands, Peru, Sweden and Uruguay) proposed the partition of Palestine into an independent Arab State and an independent Jewish State, with Jerusalem placed under a special United Nations trusteeship system. It envisaged an economic union of Palestine on a treaty basis. The minority report (India, Iran and Yugoslavia) favoured a federal State comprising an Arab State and a Jewish State with Jerusalem as its capital (UN Doc. A/364, 1947). Australia, also a member of the Committee, was unable to support either proposal.

Finally, on November 29, 1947, the UN General Assembly, with a vote of 33 to 10 with 10 abstentions, adopted the Partition Resolution (Res. 181 (II)), which followed the majority report of UNSCOP with some minor territorial adjustments. Under the plan the Mandate territory was to be divided, in a sort of chess-board pattern, into three Jewish sectors and three Arab sectors each, connected only by two crossing points. These sectors were to form parts of an independent Arab State and an independent Jewish State respectively, while Jerusalem was to be established as a *corpus separatum*. The plan provided for detailed constitutional and economic arrangements.

The adoption of UN General Assembly Res. 181 (II) was one of the rare occasions on which the United States and the Soviet Union remained able to agree after World War II. It was also facilitated by the largely passive attitude of Britain. A number of States decided in favour of the

resolution only after experiencing considerable pressure from the United States to ensure the necessary two-thirds majority. The resolution was carried by the United States, the Soviet Union and East European States (except Yugoslavia), the Scandinavian States, the majority of Latin American States, France, Belgium. the Netherlands, Luxembourg, Iceland, Canada, South Africa, Australia, New Zealand, Liberia and the Philippines. Those voting against it were the six Arab States, Afghanistan, Cuba, Greece, India, Pakistan, Iran and Turkey. Britain was among the abstaining members.

While the Jewish community, in spite of the status to be given to Jerusalem, was prepared to accept the implementation of the Partition Resolution, viewed by the Jewish Agency as the "indispensable minimum", the majority of Arabs in and outside of Palestine considered it unacceptable and declared their fierce opposition. The Arab side contended that there was no justification for alloting 55 per cent of the territory of Palestine to the Jewish minority which formed only one third of the population and most of which had come from abroad as colonists. In the United Nations debate Arab delegates further argued, *inter alia*, that, in deciding Palestine's future, the United Nations had failed to examine the legal validity of the Balfour Declaration and of the Palestine Mandate. Their request to submit these issues to the → International Court of Justice for an advisory opinion, however, was rejected by a narrow vote of 21 to 20 with 12 abstentions on November 24, 1947.

Following the adoption of the Partition Resolution, Arab States moved to openly support volunteers to engage in the local fighting in Palestine which escalated at the beginning of December 1947 in Jerusalem and increasingly spread to almost all of Palestine. However, the Security Council failed to take action to enforce the implementation of the plan adopted by the General Assembly.

According to the Partition Resolution, the Mandate for Palestine was to terminate "as soon as possible but in any case not later than 1 August 1948". By that date Britain was also required to have completed the withdrawal of her armed forces from Palestine. Furthermore, the Resolution called for the establishment of a five member Palestine Commission with which the Mandatory power was supposed to cooperate in implementing the plan. The Commission, which was composed of representatives from Bolivia, Denmark, Panama, the Philippines and Czechoslovakia, remained ineffective. It was described, in the words of its chairman before the Security Council, as "The Five Lonely Pilgrims which cannot be permitted to remain lonely if their pilgrimage is to have any effect" (UN Weekly Bulletin, Vol. 4, No.6, p. 20, citation in Weiss (1950/1951), p. 800). While the Commission did not have at its disposal the means necessary to enforce the mandate it had been given by the United Nations, Britain refused to cooperate to the degree regarded by the Commission as indispensable.

On January 21, 1948 Britain declared that the Mandate would terminate on May 15, 1948, but stressed that she would retain undivided control over the whole of Palestine until that date, instead of transferring control gradually as planned by the United Nations. As Britain expected tension to increase with the arrival of the Commission, she made it clear that the Commission could enter Palestine only about a fortnight prior to the termination of the Mandate. Britain also refused to implement the provision of the Partition Resolution according to which the Mandatory power was to ensure the evacuation of a seaport to enable substantial Jewish immigration. Thus, Britain was acting in conformity with the policy she had stated clearly at the beginning of the debate in the United Nations. This policy implied that she would not lend her armed forces as the instrument to impose solutions adopted by the United Nations upon a part of the local population against its will, whilst retaining her own freedom of action as widely as possible.

Debates in the United Nations on Palestine and the status of Jerusalem continued in 1948 and Security Council resolutions calling for an end to the acts of violence were issued without much effect on the actual conflict in Palestine. In the final phase of the Mandate the territory of Palestine was gradually split up between Arab and Jewish occupied portions, due partly to the devolution of control to local Jewish or Arab administrations by the withdrawing British troops, and partly to the armed struggle between Arabs and Jews for the conquest and defence of land. In

the United Nations there was a shift in the position of the United States which, in view of the impossibility of implementing the Partition Resolution by peaceful means, made the controversial suggestion to discuss a provisional trusteeship for Palestine, for which a special session of the General Assembly was convened for April 16, 1948. On May 14, 1948, however, the General Assembly decided to dissolve the Palestine Commission and appointed Count Folke Bernadotte as Mediator for Palestine.

The UN Security Council had established a Truce Commission for Palestine on April 23, 1948. Britain had warned the Arab States not to intervene with their armed forces before the end of the Mandate, which the Palestine Act of April 29, 1948 confirmed to be May 15, 1948. As a result of the → civil war, local Arab resistance in Palestine was already largely defeated and a significant part, by May 1948 estimated at 300 000, of the Arab population had fled from Palestine before the Mandate expired. In the last hours of May 14, 1948, in the name of the provisional State Council, the predecessor of the Knesset, the Israeli Parliament, Ben Gurion proclaimed the independence of the State of Israel in Tel Aviv. This step had been prepared by a meeting of the Zionist Action Committee on April 12, 1948 in Tel Aviv which created the provisional National Council and a 13 member provisional National Administration to act officially when the Mandate terminated. In fact, the Jewish community in Palestine had long succeeded in establishing an effective administrative and military structure with features, as already noted by the Peel Commission, resembling a sort of state within a state.

The Proclamation of Independence, drafted by Lauterpacht, referred to the Land of Israel as the birthplace of the Jewish people and the historical association of Jews and Palestine. It made further reference to Herzl's vision of the Jewish State, the proclamation of the First Zionist Congress in 1897 and the Balfour Declaration. It particularly mentioned the experience of the recent Holocaust as new evidence for the need

> "to solve the problem of the homelessness and lack of independence of the Jewish people by means of the re-establishment of the Jewish State, which would open the gates to all Jews and endow the Jewish people with equality of status among the family of nations" (Laqueur and Rubin, eds. (1984), p. 126).

The Proclamation also specifically referred to the 1947 Partition Resolution as a basis of a right recognized by the United Nations to establish the State of Israel. It further announced that the State of Israel would be ready to cooperate with the United Nations in the implementation of the Resolution "and will take steps to bring about the Economic Union over the whole of Palestine" (ibid., p. 127). The Proclamation called upon the Arab inhabitants of Israel to participate in the development of the State and offered friendly relations to all neighbour States.

However, following the British withdrawal on May 15, 1948, at the request of the Arab leadership in Palestine the armies of Egypt, Transjordan, Lebanon, Syria and Iraq intervened. The legal argument to justify the → intervention was based upon the reasoning that with the termination of the Mandate Palestine had become an independent State, the government of which had to be formed according to the principle of the self-determination of the people of this State. A telegram from the Secretary-General of the Arab League to the UN Secretary-General dated May 15, 1948 stated:

> "The Arab States recognize that the independence and sovereignty of Palestine which was so far subject to the British Mandate has now, with the termination of the Mandate, become established in fact, and maintain that the lawful inhabitants of Palestine are alone competent and entitled to set up an administration in Palestine for the discharge of all governmental functions without any external interference" (UN SC Official Records, 3rd Year, Supplement for May 1948, cited in J.A. Frowein, Das de facto-Regime im Völkerrecht (1968), p. 41).

The Arab States argued that they had to intervene to prevent the Jewish minority from destroying the unity of the State of Palestine and to suppress the rebellion and restore order. They emphasized that their intervention occurred in conformity with the will of the majority of the population in Palestine and at its invitation. The Jewish side argued that it was entitled to establish the State of Israel and invoked the right of → self-defence against armed → aggression by the Arab States.

Efforts by Bernadotte and the UN Security Council in its resolution of May 22, 1948, to achieve a cease-fire, were at first unsuccessful. Following the Security Council resolution of May 29, 1948, the parties agreed to a cease-fire of four weeks commencing on June 11, 1948. A call for an extension by the Security Council resolution of July 7, 1948 was rejected by the Arab side. On July 15, 1948 the Security Council determined that "the situation in Palestine constituted a threat to the peace" and prohibited any further military action with reference to Art. 39 of the → United Nations Charter and indicated the possibility of measures under Chapter VII of the Charter.

The second truce came into effect on July 18, 1948. While initially both sides complied with the resolution, new proposals put forward by Bernadotte were rejected by Israel, the Arab States and the Palestinians. Bernadotte was murdered by the Stern Gang in September 1948, an act from which Israel distanced herself and for which she paid reparations to the United Nations on June 14, 1950 (→ Reparation for Injuries Suffered in Service of UN (Advisory Opinion)). A new plan set out in the Progress Report of Bernadotte which was published three days after his death was also rejected by the parties. His successor Ralph Bunch adopted a new approach which refrained from searching for a detailed solution and instead aimed at establishing a general framework.

While Jewish forces had already made territorial advances in the previous phase of the war, they were able to make further considerable gains when the armed struggle recommenced in mid-October until the third cease fire was agreed upon on October 22, 1948. On November 4, 1948 the Security Council passed Res. 61 calling upon Israel and the other combatants to withdraw to the lines held before October 14. This withdrawal from conquered territory was supposed to be followed by the establishing of permanent truce lines. On November 16, 1948, the Security Council adopted a somewhat different approach with Res. 62, stipulating that no withdrawal should take place before concluding a final peace settlement and that no condition precedent should be required for the commencement of armistice agreements. However, fighting broke out again on December 23, 1948 with a successful Israeli offensive in the Negev. Following the adoption on December 29, 1948 by the Security Council of a British proposal in Res. 66, which called for an immediate cease-fire and for the implementation of Res. 61 and Res. 62, a fourth and final truce came into effect on January 7, 1949.

Israel finally concluded Armistice Agreements with Egypt on February 2, 1949, with Lebanon on March 23, 1949, with Transjordan on April 3, 1949 and with Syria on July 20, 1949. These agreements, of which the Security Council took note on August 11, 1949, established Mixed Armistice Commissions with senior UN officials as chairmen and → demarcation lines which essentially remained effective until the 1967 war. A United Nations Truce Supervision Organization (UNTSO) was created to observe and maintain the Armistice Agreements, in which the parties gave assurances that they would not attack each other and would respect each other's territories. These and other obligations were subsequently frequently disregarded. The system proved increasingly defective following continuous border incidents, terrorist operations of Arab → guerrillas in Israel, and Israeli military → reprisals, mostly in Syria and Gaza.

Although beyond the scope of this article, it must at least be mentioned that the 1948 war was also the primary source of the Palestinian refugee problem. Estimates of the total number of Arab refugees which fled Palestine in 1948 vary (some assume 800 000, while other estimates range from 600 000 to 700 000), but it appears that approximately 90 per cent of the Palestinian Arabs previously living in the territory held by Israel sought refuge in neighbouring Arab States. It is an old dispute, beset with propaganda, whether they departed voluntarily or by force. Today it appears that serious Israeli and Palestinian historians essentially agree that one third of the refugees left the combat areas voluntarily, one third was expelled by force, and the rest were "psychologically persuaded" by Jews and militant Palestinian nationalists sure of victory to leave the land (Wolffsohn (1988), p. 3). In the latter context, while atrocities occurred on both sides, one of the worst incidents still vivid in Arab memory was the massacre of about 240 to 250 inhabitants of the Arab village Deir Yassin by the Jewish terrorist group Irgun. On the other hand, it is sometimes

less noticed that Israel had to absorb a large influx of Jewish refugees from Arab countries.

From the beginning Israel resisted international demands for general repatriation of the refugees and was prepared to accept only a limited return of people on the grounds of family reunification. The reasons stated included the argument that a general → repatriation would threaten the existence of Israel, that Israel already had problems in integrating large numbers of Jewish refugees, and that a State for Arab Palestinians had already been established in Jordan. Israel was willing, however, to consider claims for compensation for property left behind prior to a final peace settlement. The advance of the Israeli army in the newly-occupied territories in the 1967 war caused the flight of a further 250 000 to 400 000 Palestinian refugees to neighbouring countries. Many of the refugees have remained stateless, as the special Palestinian citizenship created by Britain in 1925 ended with the Mandate in 1948 without any claim of the refugees to another → nationality. Arab host States often found it difficult to reconcile granting the refugees a new nationality with the claim of the Palestinians to return to Palestine.

E. The Status of Israel

1. Statehood and Boundaries

As far as the status of Israel as a → State is concerned, in view of Israel's existence for more than four decades, the old disputes on the legal significance of the Balfour Declaration, the validity of the Palestine Mandate and the legality and effect of the 1947 Partition Resolution have become obsolete. There is no doubt that Israel is regarded as established with the essential qualifications of Statehood in international law, as enumerated and considered as declaratory of → customary international law in Art. 1 of the Montevideo Convention of 1933 on the Rights and Duties of States, namely "(a) a permanent population; (b) a defined territory; (c) a Government; and (d) a capacity to enter into relations with other States".

As to the first criterion, in view of the Jewish home policy it was clear from the beginning that Israel would have a permanent population. When the State was founded it already included about 650 000 Jews, a number which grew rapidly in the first years, secured by the Law of Return passed by the Knesset on July 5, 1950, which guaranteed that "Every Jew has the right to immigrate to the country" (Art. 1). Although in 1988 the Jewish population of Israel had reached 3 600 000, it still only included 27 per cent of all Jews.

A law passed in 1952 granted Israeli citizenship to those Palestinians who had lived in Israel since 1948 and the number of Arab-Palestinian Israelis in 1948 was estimated at almost 150 000. Forty years later, in 1988, if one includes East Jerusalem, there were almost 800 000. In addition, there are more than 1.3 million Palestinian Arabs living in the other territories still occupied by Israel since 1967 who are not Israeli citizens, as compared with the additional 600 000 Palestinians living in refugee camps in Syria, Lebanon and the East Bank. There are also Palestinians living in other Arab States. Furthermore there are links between the Palestinians in the West Bank and the approximately 1 000 000 Palestinians who are part of the population of the Kingdom of Jordan east of the river. The political, legal and social integration of the Arab minority has become a major problem of Israel. In light of the demographic development in favour of the Arab section of the population, the question of the nature of Israel both as a "Jewish" State and a democracy, still the only true one in the region, has gained prominence.

The element of "defined territory" as a condition of Statehood has always been less clear in the case of Israel. As a result of the 1948 to 1949 war, Israel controlled all of Palestine (disregarding Transjordan), except for the West Bank of the Jordan River and East Jerusalem (occupied by Jordan) and the Gaza Strip (occupied by Egypt). Thus, Israel's rule extended to approximately 77.4 per cent of the previous Mandate territory, about 21 per cent or 2000 square miles more than was allocated to the Jewish State in the Partition Resolution. The Declaration of Independence used the term "Eretz-Israel", which may be construed as either meaning what is generally regarded as Palestine, or also including what had originally belonged to the Mandate and is now the State of Jordan, but avoided specifying any borders. The minutes of the legislative history of the Israeli Declaration of Independence show that there was a debate on whether to include the question of → boundaries in the proclamation. As

advised by Ben Gurion, who argued that any such commitment was unnecessary, it was decided not to do so.

Israel also refrained from enacting a formal constitution which might have clarified the boundary issue. Instead, on September 9, 1948, the Provisional State Council passed legislation extending the law of Israel to all territories declared by the defence ministry as military occupied territories. The Area of Jurisdiction and Powers Ordinance declared:

> "Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel."

Subsequent legislative terminology proceeded to designate indiscriminately all territory ruled by Israel in one way or another as Israeli State territory.

It is important to note that the 1949 Armistice Agreements were concluded expressly without prejudice to the rights, claims and positions of the parties. They provided for security arrangements, prohibited armed attacks and recognized the existing demarcation lines, but not as political or territorial boundaries. Furthermore, since the 1967 war in which Israel conquered the West Bank, including East Jerusalem, the Gaza Strip, the Golan Heights and the Sinai, Israel has remained in control of considerable additional territory, the status of which is controversial and some of which has annexed by Israel. However, while the status of Jerusalem as a whole has remained an open question and a final peace settlement with a determination of the border issues is still absent, it should be recognized that by now Israel has established her sovereignty in those areas which she conquered in the 1948 war beyond what was allocated to the Jewish State by the Partition Resolution, the boundaries of which Israel has rejected as indefensible. Indeed, few would today doubt that Israel will retain effective control of the territory within the pre-1967 borders, the "Green Line" separating "Israel proper" from the territories occupied in 1967.

It is consistent with this proposition that the calls upon Israel by the international community as well as from the Arab-Palestinian side to withdraw from occupied territories refer to the lines of 1967. On the other hand, in explaining the background and considerations relevant to the 1988 Declaration of the State of Palestine, which is dealt with in more detail below, the Chairman of the Legal Committee of the Palestine National Council has referred to earlier commitments given by Israel to the United States prior to its *de jure* → recognition and to the United Nations before admission as a member that the international boundaries of Israel were those of the Partition Plan, boundaries which Israel then rejected in the Lausanne Protocol of May 12, 1949 (see Third Progress Report of the Palestine Conciliation Commission, UN Doc. A/927 (1949)). It is noted, however, that the "present boundaries of Israel are the armistice lines that were established by armistice agreements with the neighbouring Arab States and recognized by the Security Council", followed by the comment that the question of boundaries of the Palestinian State, therefore, was "a complicated matter that could not effectively be dealt with in a declaration of independence, even had such a document been the proper place for its inclusion" (A.M. Al-Qasem, Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 326).

As far as the boundary with Egypt is concerned, all territorial matters have meanwhile been settled. It should be briefly recalled that the 1956 war, in which Israeli forces, acting in concert with the British and French intervention, reached the → Suez Canal, did not lead to a significant change of the territorial → *status quo*. By March 8, 1957, under the supervision of the United Nations Emergency Force (UNEF) (→ United Nations Forces; → United Nations Peacekeeping System), Israel had completed her withdrawal in stages from the Gaza Strip and the Sinai Peninsula with special arrangements regarding Sharm el Sheikh at the south tip to secure the passage to Eilat through the Gulf of Aqaba which Eygpt previously had blocked (→ Aqaba, Gulf of).

After the 1973 war, on January 18, 1974 Egypt and Israel concluded the Agreement on Disengagement of Forces in Pursuance of the Geneva Peace Conference (ILM, Vol. 13 (1974), p. 23). Under this agreement Israel withdrew from the

areas she controlled west of the Canal and from the area east of the Canal to the Mitla and Giddi Passes. A second partial disengagement agreement of September 4, 1975 (ILM, Vol. 14 (1975), 1450) provided for further Israeli withdrawal from 2500 square miles of Egyptian territory, including the Sinai oil fields at Ras Sadur and Abu Rudeis, and was implemented fully by February 22, 1976.

The March 26, 1979 Peace Treaty (ILM, Vol. 18 (1979), p. 362), prepared by the 1977 Camp David Accords, established a phased timetable for complete Israeli withdrawal, which occurred by April 25, 1982. Art. II of this Treaty stated:

> "The permanent boundary between Israel and Egypt is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . without prejudice to the issue of the status of the Gaza Strip".

The Gaza Strip, which had been administered by Egypt from 1948 to 1967 without raising any claim to title to the territory, has since remained under Israeli military occupation. A small area remained disputed at Taba from which Israel withdrew on March 15, 1989, following the award issued by the Egypt-Israel arbitral tribunal on September 29, 1988 (ILM, Vol. 27 (1988), 1421) and the subsequent Agreement Regarding the Permanent Boundary Between Egypt and Israel of February 26, 1989 (ILM, Vol. 28 (1989), p. 611) (→ Taba Arbitration).

With regard to the boundary with Lebanon, the Israel-Lebanon Agreement of May 17, 1983 (ILM, Vol. 22 (1983), p. 708 et seq.) concluded after Israel's invasion of Lebanon in 1982 in the operation named "Peace for Galilee" to oust the PLO from the country, confirmed the international boundary in Art. 1:

> "The Parties agree and undertake to respect the sovereignty, political independence and territorial integrity of each other. They consider the existing international boundary between Israel and Lebanon inviolable".

It further determined that "the state of war between Israel and Lebanon has been terminated and no longer exists" (Art. 2) and stipulates that the territory of each Party will not be used as a base for hostile or terrorist activity against the other Party. However, the agreement also expressly reserves the "inherent right of self-defense in accordance with international law" which Israel invokes to justify her frequent military strikes against targets in Lebanon. Israel continues to maintain a security zone in South Lebanon which she controls with the assistance of a Christian Maronite militia called South Lebanese Army since the Israeli withdrawal from the rest of the country in 1985.

Thus, while there is agreement on the international boundaries with Egypt and Lebanon, the border issues with Syria and Jordan are still unsettled. These territorial issues are difficult because they are linked to Israel's security concerns. They have become further complicated by the recent proclamation of the Palestinian State which, as noted above, has not specified any definite boundaries, but is generally understood to seek its basis in the West Bank and the Gaza Strip.

Although the precise territory of Israel and some of her international boundaries remain unclear, there is nevertheless no difficulty in acknowledging that the criterion of a "defined territory" as an element of Statehood is met. For it is recognized that the concept of territory does not necessarily require an exact delimitation of the boundaries of that territory. It suffices that there be an acceptable "consistency" of the territory at issue and of its population. In the case of Israel this has never been seriously questioned, nor has the existence of any of the other conditions of Statehood required by international law.

2. Recognition of Israel and Diplomatic Relations

On May 15, 1948, a few hours after the Proclamation of Independence, the United States became the first State to recognize Israel's provisional government as the "de-facto authority" of the new State, followed by Guatemala. A few days later the Soviet Union declared her *de jure* recognition of Israel. On December 17, 1948 the United States clarified before the Security Council that, as far as the *State* of Israel was concerned, the recognition was not *de facto* recognition, but "full recognition" without condition or qualification. The United States gave *de jure* recognition of the *Government* of Israel after the first elections to the Knesset on January 29, 1949. In January 1949, Britain and France

recognized Israel only *de facto*. By April 1949, within a year of its existence, Israel had been recognized by 53 States. The former Mandatory, however, withheld *de jure* recognition of Israel until April 27, 1950.

The Arab States, on the other hand, remained united for 30 years in refusing to negotiate a peace treaty with Israel and to recognize the permanent, lawful existence of the Jewish State. On October 1, 1948 a Palestine National Council met in Gaza to

> "declare the full and complete independence of all of Palestine, which is bordered by Syria and Lebanon to the north, Syria and the East Bank of Jordan to the east, the Mediterranean Sea to the West, and Egypt to the south" (Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 294).

The All-Palestine Government established by this meeting was recognized by all Arab States, except Jordan, and was invited by the Arab League to occupy the seat that had been allocated to Palestine when the League was founded in 1945. When no successor was appointed after the death in 1963 of the Prime Minister of the largely defunct All-Palestine Government, it was succeeded by the PLO, which was founded in 1964.

The 1964 National Covenant of the PLO proclaimed that Palestine with its boundaries at the time of the British Mandate was indivisible and indicated that the liberation of Israel was its ultimate goal, with ambiguous wording in Art. 24, stating that the PLO "does not exercise any regional sovereignty" over the West Bank and Gaza. The meaning of Art. 24 has been recently explained to imply that the PLO laid no claim to "any territorial sovereignty over the West Bank, the Gaza Strip or Al-Hammeh region [then under Syrian administration and now under Israeli occupation]" (Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 297).

The deletion of that article in the new Palestinian National Covenant adopted in 1968 was due to the fact that the PLO began to advance its proclaimed objective of establishing its own State in the West Bank and Gaza. The 1968 Covenant, however, clearly denies Israel's right to exist. Art. 2 states: "Palestine, with the boundaries it had during the British Mandate, is an indivisible territorial unit." Art. 19 declares: "The partition of Palestine in 1947 and the establishment of the State of Israel are entirely illegal, regardless of the passage of time . . . ". Finally, Art. 21 of the 1968 Covenant must be mentioned which stipulates:

> "The Arab Palestinian people, expressing themselves by the armed Palestinian revolution, reject all solutions which are substitutes for the total liberation of Palestine and reject proposals aiming at the liquidation of the Palestinian problem, or its internationalization".

Following the 1967 war, the Summit Meeting of the League of Arab States meeting in Khartoum on September 1, 1967 decided that there would be "No peace; no recognition; no negotiations with Israel". At the Summit in Rabat on October 29, 1974, the Arab States endorsed "the national rights of the Palestinians, in a way to be decided by the PLO" and confirmed the PLO as "the sole representative of the Palestinian people". Similarly, on October 14, 1974 the UN General Assembly, which in resolutions from 1969 onwards had reaffirmed "the inalienable rights of the people of Palestine", recognized the PLO as "the representative of the People of Palestine" (GA Res. 3210 (XXIX)).

From the Palestinian point of view it was a landmark in the process of the recognition of their national rights when the UN General Assembly adopted Res. 3236 (XXIX) on November 22, 1974, in which it reaffirmed

> "the inalienable rights of the Palestinian people in Palestine, including (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty".

At the same session the General Assembly accorded the PLO observer status and invited it to participate in its work (GA Res. 3237 (XXIX)).

The denial of Israel's right to exist is incompatible with UN Security Council Res. 242 of November 22, 1967 (UN Doc. A/7202 (1968)), which is generally considered as the basic framework for a solution to the Arab-Israeli conflict, although its meaning is controversial. Those parts of Res. 242 which are relevant here emphasize the need to achieve "a just and lasting peace in which every State in the area can live in security" and call for, *inter alia*,

> "respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and

their right to live in peace within secure and recognized boundaries free from threats or acts of force".

This resolution was confirmed by Security Council Res. 338 of October 22, 1973, calling for direct negotiations.

Until recently the PLO has consistently rejected both Res. 242 and Res. 338 because their wording perceives the Palestinian cause merely as a refugee problem and fails to recognize the Palestinian right to self-determination, and because of the recognition of Israel's right to exist. The Arab League has followed this view, as stated, for example, at the Amman Summit of November 1980:

"UN Security Council Resolution 242 is not compatible with the rights of the Arabs, and is not a suitable basis for a solution of the Middle East crisis or the Palestinian problem".

It may be noted that the June 1980 Venice Declaration of the heads of government of the nine member States of the → European Communities went a step further than Res. 242 by calling for the recognition of both the right of all the States in the region to exist, as well as of the legitimate rights of the Palestinian people (Keesing's Contemporary Archives, Vol. 30 (1980), p. 635).

By concluding the 1979 peace treaty Egypt was the first Arab State that clearly accepted Israel's right to exist. Egypt was expelled from the Arab League, but was readmitted at the League's Casablanca Conference in May 1989 and the seat of the organization is scheduled to return from Tunis to Cairo in September 1990. Recently, there has been a remarkable change in the position of the PLO. In November 1988, when at the 19th Extraordinary Session of the Palestine National Council an independent State of Palestine was declared (ILM, Vol. 27 (1988), p. 1660 et seq.), at the same Council session the PLO proclaimed itself the → government-in-exile of that State and rejected all forms of terrorism. There is the caveat, however, that the PLO does not consider resistance to the Israeli occupation of the West Bank and Gaza to be a form of terrorism, the definition of which is based upon UN General Assembly Res/27/159 and Res/40/61 as well as upon the Cairo Agreement of 1985. Most significant is that the PLO also agreed to accept Security Council Resolutions 242 and 338 as the basis for peace negotiations with Israel.

The recognition of these resolutions by the PLO is an implicit acceptance of Israel and of Israel's right to exist. The purpose of this step was to meet certain pre-conditions of the United States for commencing a "dialogue" with the PLO with which Israel has steadfastly so far refused to negotiate. However, the United States was not satisfied with the PLO's acceptance of Israel and the renouncement of terrorism because they were not explicit enough. By refusing to grant the PLO leader Arafat a visa to address the United Nations in New York shortly thereafter, the United States prompted the United Nations to move the session to Geneva. At a meeting on December 6, 1988, initiated by the Swedish Foreign Minister, with five American Jews, who did not represent major organizations, Arafat confirmed in writing the PLO's acceptance of Israel and that it renounced terrorism. As this statement still failed to meet the requirements of the United States and was dismissed as insufficient and ambiguous on key points, Arafat made an attempt to clarify the matter in his speech before the United Nations in Geneva on December 13, 1988. However, it was only after further clarification in English at a press conference the next day, in which Arafat stated that Israel has a right to exist, that the PLO renounces the use of terrorism in all its forms, and that the PLO agrees to Res. 242 as the basis for negotiations, that the United States declared herself prepared to commence the "dialogue" with the PLO.

Today Israel entertains diplomatic relations with more than 100 States, not all of which have recognized Israel explicitly. Israel, *inter alia*, in order not to endanger the Jews in the Soviet Union, originally sought to adopt a position of neutrality in the Cold War, was unable to maintain such a position and developed a strategic relationship with the United States. Israel depends on continuous and substantial American economic assistance, but the relationship has secured American protection of the existence of Israel, while the United States regards Israel as her foremost ally in the region.

The Soviet Union had severed diplomatic ties with Israel in February 1953 after reversing her pro-Zionist policy, but restored them quickly in July 1953. After the 1967 war the Soviet Union and the other east European States, except Rumania,

disrupted diplomatic relations with Israel. Following the political changes in Eastern Europe, Hungary was the first of the (former) socialist States to restore diplomatic relations in 1989. It is interesting to note that, according to the Ministry of Foreign Affairs of the Soviet Union, the Soviet Union endorsed the decisions of the Palestine National Council's extraordinary session in November 1988 and subsequent statements by Arafat,

> "which recognised the right of Israel as well as a Palestinian State to existence in peace and security, agreed to talks with Israel within the framework of an international conference on the basis of Security Council Resolutions 242 and 338 and confirmed the renunciation of terrorism in any form . . . " (The Foreign Policy and Diplomatic Activity of the USSR, International Affairs (1990), p. 28 et seq.).

So far the Soviet Union has engaged in the improvement of relations with Israel primarily on a lower level, for example in cultural and sporting matters. What is more important, the Soviet Union has finally admitted the free → emigration of Jews, the total number of whom in the Soviet Union ranges between 3 and 4 million, to Israel. In December 1989 Israel estimated that about 750 000 Jewish immigrants would arrive in Israel within the next three years. Under international pressure Israel, however, had to agree to conditions by the Soviet Union not to pursue an official policy of settling these new immigrants in the occupied territories.

In 1990 there have also been cautious developments in preparation of a normalization in the relationship between Israel and China, which has long-standing good relations with Arab States and has even accorded the PLO office in Peking the status of an embassy.

It is not surprising that the relationship between Israel and Germany has always remained delicate. On September 10, 1952, Israel and the Federal Republic of Germany concluded a treaty in Luxembourg under which the Federal Republic undertook, in view of the unspeakable crimes committed against the Jewish people during the National Socialist reign of terror and Israel's claim for a "global compensation", to pay Israel within a maximum period of 12 years the sum of 3450 million German Marks (of which 450 million were earmarked for the Conference on Jewish Material Claims against Germany) as compensation for the costs of admitting refugees from Germany and territories previously under German control. This compensation was an important contribution to the economic development of Israel, but it was only in 1965 that the two States established diplomatic relations. On the whole, these have been stable; nevertheless, in view of the historical background, on occasion irritation has been experienced on both sides at the highest political levels.

The German Democratic Republic, on the other hand, not only refused to accept any responsibility for the crimes of the Third Reich, but was also the most active eastern bloc supporter of the Arab-Palestinian cause and of the PLO. It was only after the revolution in autumn 1989 in East Germany that this attitude changed with the rise to power of the new leadership. For Israel the emerging prospect of the unification of the two German States was a source of unease, reflecting the psychological and historical experience of the Holocaust, in which one third of the Jews in the world were murdered. This will remain the dominant factor in the Jewish-Israeli attitude towards Germany. At the 25th anniversary of the establishment of German-Israeli diplomatic relations, in a letter sent in May 1990 to the Prime Minister of Israel, the Chancellor of the Federal Republic emphasized the everlasting special responsibility towards the Jewish people and Israel. He also stated that it would remain a central political aim to help secure the interest of Israel to exist in freedom and security. A parallel letter of the Foreign Minister to the Israeli Foreign Minister reassured the people of Israel that a united Germany would never forget the terrible suffering and sacrifices of the Jews and would always remain aware of the special nature of the relations between Germany and Israel.

3. Israel and the United Nations

After previous attempts to be admitted to the United Nations, following the cease fire agreement with Egypt, Israel finally obtained the required recommendation of the Security Council on March 4, 1949 and was accepted as a member State by the General Assembly on May 11, 1949.

The relevant resolution (GA Res. 273 (III)) recalled the Partition Resolution as well as GA Res. 194 (III) 1948 of December 11, 1948, which, *inter alia*, had established the UN Palestine Conciliation Commission and addressed the problem of Jerusalem. The General Assembly further took note of the declarations made by Israel before the Ad Hoc Political Committee (UN Doc. A/AC.24/SR 45–48,50 and 51) in respect of the implementation of those resolutions. The vote was 37 to 12 with 9 abstentions including that of Britain among the latter. The negative vote of the Arab States prevented the admission of Israel to the organization from being capable of being legally construed as a "recognition" of Israel binding upon them.

The Conciliation Commission which had been formed of three representatives from the United States, France and Turkey, in fact managed to arrange for Israeli and Arab representatives to meet in Lausanne and sign the above-mentioned protocol on May 12, 1949 which provided that the 1947 partition plan was to be the basis for discussions of territorial and related issues. But no agreement was possible. Although the Security Council resolution of August 11, 1949 required the parties to negotiate a peace settlement either directly or through the Palestine Conciliation Commission, the latter practically stopped its attempts to mediate between Israel and the Arab States after the failure of the Paris Conference convened by the Commission in autumn 1951 and hence limited its activity to compensation and other financial problems of the Palestinian refugees.

It is well known that from the beginning the United Nations, its Specialized Agencies, affiliated organizations and special bodies created for certain aspects of its work have been almost continuously occupied with the manifold problems arising from the Arab-Israeli conflict. In more recent years there has been an unfortunate tendency in the United Nations to discriminate against Israel by adopting a one-sided approach in favour of the legitimate Palestinian cause. The annual reports of the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, which was established by the General Assembly on December 19, 1968 by Res. 2443 (XXIII), for example, are considered in Israel as biased and not well prepared. Experience with the United Nations in the past decades has contributed to the development of Israeli mistrust of the capacity of international organizations to play an impartial and relevant role in the solution of the conflict.

While the general stance of the United Nations has in fact often become set against Israel, it must also be noted that Israel's frequent disregard of and barely disguised contempt for resolutions of the UN General Assembly or of the Security Council, even when the United States chose not to exercise her power of → veto to protect Israel, has made it easier to find a majority in the United Nations for decisions which tend to isolate Israel in the international community. It may well be that this process has been enhanced by the long duration of the misery and suffering of the Palestinian refugees, the unsettled situation of whom some enemies of Israel found politically expedient to maintain and exploit, and by the international recognition that has increasingly been accorded to the PLO and the existence of a legitimate Palestinian right of self-determination.

The UN General Assembly resolution of November 10, 1975 (GA Res. 339 (XXX)), which equated Zionism with racism and racial discrimination, was an unfortunate highlight in this development and must be considered as counterproductive to the formation of a climate of accommodation, trust and compromise, necessary for any real progress towards a solution of the conflict. Rather, following the example of South Africa, this development has culminated in moves to exclude Israel from membership in the United Nations and other international bodies. Most notably, since the annexation of the Golan Heights by Israel in December 1981, a decision of a special conference of the Council of the League of Arab States on February 13, 1982 to pursue the expulsion of Israel from the United Nations and its specialized organizations, and the Israeli invasion of Lebanon in 1982, there have been regular annual initiatives taken by Arab States and Iran to oust Israel from the United Nations by rejecting the credentials of the Israeli delegation in the General Assembly.

It is true that the only peace treaty so far concluded in the Arab-Israeli conflict was

negotiated without any involvement of the United Nations. However, in spite of all apparent deficiencies, it must also be noted that the United Nations and other international bodies do not always receive the credit they deserve for the broad range of efforts and contributions they have made in the past decades of the Arab-Israeli struggle. One could mention in this connection, for example, the work of the International Committee of the Red Cross (→ Red Cross), the task of UNRWA regarding the refugees, or the assistance of the → United Nations Educational, Scientific and Cultural Organization (UNESCO) in solving problems in the field of education in the occupied territories. One could also point to the peace-keeping and observer forces the United Nations has provided in the Sinai, the Golan Heights and in the Lebanon, although their effectiveness has often been doubtful and it is illuminating that Israel's final withdrawal from the Sinai was not based on supervision by the United Nations, but on a multilateral framework which operated outside the United Nations system. Most significant for the following is that the United Nations has succeeded in maintaining a consistent position on important legal aspects concerning the status of and the rules applicable to the territories occupied by Israel.

F. The Israeli-Occupied Territories

The territories which have remained under Israeli control since the 1967 war are the West Bank, including East Jerusalem, the Gaza Strip and parts of the Golan Heights. As noted above, Israel has withdrawn completely from the Sinai and continues to occupy only a limited security zone in South Lebanon. The legal status of these remaining territories is to a large extent controversial. While Israel has annexed East Jerusalem and parts of the Golan Heights, she has not formally incorporated the West Bank, for which she employs the biblical names Judea and Samaria, or the Gaza Strip, but continues to treat these territories, which are under military administration, formally as separate from Israel proper. The problems relating to the status of Jerusalem are dealt with in a separate article. The following is restricted to the remaining territories Israel continues to hold.

1. Legal Status of the Israeli-Occupied Territories

(a) The West Bank and Gaza

Of the territories still occupied by Israel, only the West Bank and Gaza formed part of the Palestine Mandate territory. They were allocated by the 1947 Partition Resolution to the envisaged Arab State. The West Bank and Gaza are the most important of the Israeli-occupied territories because of geographical, demographical, economic and political considerations. At the end of 1987, the Palestinian population was estimated at 860 000 in the West Bank and 564 100 in Gaza, a total of 1 424 100 (Roberts (1990), p. 83 with reference to Central Bureau of Statistics, Statistical Abstract of Israel 1988, p. 705). The political importance of the West Bank and Gaza arises from the fact that they are not only candidates for annexation by Israel, but are also now generally perceived as the prospective areas in which the right of the Palestinian people to self-determination is most likely to be exercised, in one form or another, with or without a Jordanian connection.

The situation of the Gaza Strip is less complicated than that of the West Bank in that no other existing State has ever claimed title to that territory. It was merely occupied by Egypt in the 1948 war. Although the 1949 Armistice Agreement between Israel and Egypt provided that Egypt should withdraw her armed forces to the west of the Egyptian-Palestinian border (Art. III), Egypt continued to occupy Gaza until she was displaced by Israel in 1967. Since the state of war with Egypt came to an end in 1979, the Gaza Strip has remained under the military administration of Israel.

The West Bank, the area between the Jordan River and Israel in its pre-1967 borders, on the other hand was not only occupied by Transjordan in the 1948 to 1949 war but also annexed in 1950. Transjordan based its claim on the contention that the Palestinian inhabitants of the West Bank had ceded their right to sovereignty to Transjordan as expressed by 5000 delegates from the West Bank present at the Second Palestine Arab Conference held at Jericho on December 1, 1948. On the basis of this resolution a joint parliament for Transjordan and the West Bank was elected with representatives from both areas. At the request of this parliament King Abdullah proclaimed the

Hashemite Kingdom of Jordan on April 24, 1950, which encompassed the East Bank, the West Bank and East Jerusalem. In contrast to the more hesitant attitude of most other Arab States towards the nationality status of the Palestinians on their soil, Jordan had already in 1949 enacted a law granting Jordanian nationality to all Palestinians under its rule, including the inhabitants of the West Bank.

Until the West Bank was occupied by Israel in 1967, Britain (with a reservation regarding East Jerusalem) and Pakistan remained the only States to recognize the annexation. The Arab League protested against any definite incorporation of the West Bank by Transjordan. Shortly before April 24, 1950, the Arab League had decided that the annexation of any part of Palestine by the Arab States that fought in the 1948 to 1949 war constituted a violation of the League's Charter and would entail → sanctions. On May 15, 1950 Arab States therefore demanded that Jordan be excluded from the League. Jordan prevented this by the ambiguous statement that the annexation could not be revoked until a final solution to the Palestine question was found. Upon the initiative of Iraq, at the time also ruled by a Hashemite, the League decided to consider Jordan's position with regard to the West Bank and East Jerusalem as that of a "trustee" only, pending a final solution. Art. 2 of the 1950 Annexation Law, which united the two Banks into "one single state" provided expressly:

> "Arab rights in Palestine shall be protected. These rights shall be defended with all possible legal means and this unity shall in no way be connected with the final settlement of Palestine's just cause within the limits of national hopes, Arab co-operation and international justice" (Whiteman, Digest of International Law, Vol. 2, p. 1166).

There has been room for argument whether this meant an implied recognition of the rights of the Palestinians or merely expressed the succession of Jordan to those rights as the new Arab State which was *de facto* recognized by the inhabitants of the West Bank and the international community. However, the National Covenant of the Palestinian National Council as amended in 1968, which has been referred to above, refused to recognize the validity of the 1950 annexation of the West Bank by Jordan.

While Jordan lost control of the West Bank in 1967, the Jordanian Government nevertheless continued to fund social and economic development in the area, to pay salaries to the territorial civil servants and to provide residents with Jordanian passports. The 1978 Camp David Agreements, signed by Egypt and Israel, provided for the establishment of a "self-governing authority" in the West Bank and Gaza for a transitional period of five years. This scheme met with strong criticism by other Arab States, the PLO and by the residents of the territories at issue. Subsequently, however, the parties failed to agree upon the meaning and implementation of these provisions.

The relationship between the PLO and Jordan has always been complex. When Palestinian resistance was crushed by Jordan's army in the power struggle in 1970 and 1971, the PLO had transferred its political and military headquarters to Lebanon, where the number of PLO fighters reached 12 000 in 1982 and about 300 000 Palestinian refugees are based. Following the Arab Summit in Rabat in 1974, however, Jordan was forced to follow the other Arab States and recognize the claim of the PLO to be the sole representative of all Palestinians, including those in the West Bank.

After the PLO was forced to withdraw from Beirut in August 1982, negotiations between the PLO and Jordan commenced in October 1982 and finally resulted in an agreement on February 11, 1985 to form a confederation between Jordan and the future State of Palestine. As the PLO remained inflexible on accepting UN Security Council Res. 242 as the basis for a political settlement, on February 19, 1986, King Hussein announced that his talks with the PLO were terminated and blamed the PLO for the failure of the peace process in the Middle East. On April 19, 1987 the PLO, after internal struggles, cancelled the 1985 agreement with Jordan.

Conditions began to change when the Palestinian uprising began in December 1987. The "intifadah" was soon understood as a manifestation of the existing strong Palestinian identity in the West Bank and Gaza challenging Israeli rule, but it hardly went unnoticed that it also displayed hostility towards Jordan. Furthermore, at the

Arab League emergency meeting held in Algiers in early June 1988, the Arab States recognized the PLO's representation of the West Bank inhabitants without crediting Jordan.

These developments led Jordan to reconsider her relationship with the West Bank. On July 28, 1988 Jordan cancelled a US $1.1 billion economic development plan for the West Bank which had been adopted in mid-1986 and found Israel's approval. Furthermore, on July 30, 1988, King Hussein dissolved the Lower House of the Jordanian Parliament, 50 per cent of whose members were representatives for the West Bank and Palestinian refugee camps on the East Bank. Finally, in a speech held on July 31, 1988, King Hussein declared that Jordan severed its legal and administrative ties with the West Bank and that Jordan ceded its sovereignty to the Palestine Liberation Organization which in turn announced that it would assume all responsibilities in the West Bank and Gaza.

Jordan's announcement was made to coincide with a meeting of the Central Council of the Palestinian National Council (PNC). It stated expressly:

> "Regarding the principle of Arab unity, we believe that such unity between two or more Arab people is a right of choice for every Arab people. Based on that, we responded to the wish of the representatives of the Palestinian people for unity with Jordan in 1950. Within this context, we respect the wish of the PLO, the sole legitimate representative of the Palestinian people, to secede from us in an independent Palestinian State. We say this in all understanding . . . " (Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 298).

In accepting the necessity for furthering the Palestinian cause by "dismantling the legal and administrative links between the two Banks" (ibid., p. 299), the statement clarified that the measures in no way affect the "Jordanian citizens of Palestinian origin in the Hashemite Kingdom of Jordan". It also emphasized that "Jordan is not Palestine; and the independent Palestinian State will be established on the occupied Palestinian land after its liberation, God willing" (ibid.).

On August 1, 1988, the Central Council of the PNC agreed to accept Jordan's decision and to enter into negotiations with Jordan on its implementation. Interpreting the decision as a dissolution of the "unity" of the West Bank with Jordan, without addressing its constitutionality or reasoning, the Palestinian leadership took the view that Jordan had relinquished any claim over the West Bank.

After subsequent negotiations with the PLO, Jordan announced that the bridges across the River Jordan would remain open, that services concerning civil registration, such as issuing birth, death, marriage, and divorce certificates, would not be affected, and that Jordan would continue to issue Jordanian passports to inhabitants of the West Bank which would be valid for two years, although this would not confer Jordanian nationality on the holders. Jordan further decided that all Jordanian employees working in government departments and agencies in the West Bank were to retire by August 16, 1988 and that the contracts of those employees not belonging to the civil service should be terminated by that date. This affected a total number of 24 305 employees. Thus, in 1988 Jordan enacted a Law cancelling the Order Regulating Governmental Agencies in the West Bank, "except for all departments, divisions, and sub-divisions that belong to the Ministry of Islamic Waqf and Holy Places and the [Sharia] Chief Justice" (Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 300). The Law of Occupied Territories, No. 27 of 1980, was repealed. In the Ministry of Foreign Affairs Jordan replaced the Ministry of Occupied Territories Affairs by a new Department of Palestinian Affairs.

As noted above, this development culminated in the Proclamation of the State of Palestine on November 15, 1988 by the Palestine National Council which proposed an international conference on the Middle East on the basis of Security Council Res. 242 and Res. 338. The proclamation of the State of Palestine found wide acceptance. The General Assembly by Res. 43/177 of December 15, 1988 decided with a vote of 104 to 2 (Israel and the United States) with 36 abstentions to acknowledge the proclamation and that the designation "Palestine" should be used instead of "Palestine Liberation Organization" in the United Nations, without prejudice to the observer status and function of the PLO within the UN system. After the United States threatened to withhold its

dues, in 1989 the General Assembly refrained from voting on a draft resolution that would have construed "Palestine" to be the State of Palestine. In May 1989, in view of a corresponding threat by the United States, the → World Health Organization voted to defer for a year an application for full membership by the PLO, claiming to represent a new State of "Palestine". The PLO announced that it would pursue its application also to other Specialized Agencies such as the → Food and Agriculture Organization, the → International Labour Organisation, the → International Telecommunication Union and UNESCO.

Although many governments appear to have recognized "the establishment of the State of Palestine", it is clear that under international law this entity, as yet, still fails to qualify as a State under the relevant criteria referred to above in connection with the discussion of the status of Israel. While the recognition by States of a government-in-exile is not by itself constitutive in the sense of being able to create a State, even the admission of "Palestine" to international organizations would only mean recognition as a member for the purposes of the particular organization under its charter.

In this connection it may be noted that on June 21, 1989 the Swiss Government received a letter from the Permanent Observer of Palestine to the United Nations Office in Geneva stating that the Executive Committee of the PLO

> "entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto" (International Review of the Red Cross, Vol. 30, No. 274, Jan.-Feb. 1990, p. 64).

The Swiss Federal Department of Foreign Affairs sent a copy of the communication to the States parties to the Conventions with the following comment:

> "Due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine, and as long as the issue has not been settled in an appropriate framework, the Swiss Government, in its capacity as depository of the Geneva Conventions and their Additional Protocols, is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the Conventions and their Additional Protocols" (ibid.).

Nevertheless, the renunciation by Jordan of any claim to the West Bank and the proclamation of the State of Palestine have added a new dimension to the controversy on the legal status of the West Bank and Gaza. These issues are complex and have been the subject of a long and continuing scholarly dispute with sophisticated legal argument on both sides.

In a nutshell, according to Israel and authors supporting her, both the West Bank and Gaza lacked a sovereign before they were conquered by Israel in 1967. It is argued that Jordan and Egypt established their rule in those territories illegally in violation of Art. 2 (4) of the United Nations Charter when their armies intervened in Palestine in 1948 and that they remained only belligerent occupants. While the annexation of the West Bank by Jordan in 1950 is regarded as unlawful, it is noted that Egypt never raised any claim to sovereignty over Gaza. Israel further argues that she occupied both areas in 1967 in the exercise of her legitimate right to self-defence against an imminent attack. It is submitted that, as neither Jordan nor Egypt had any reversionary rights with respect to the West Bank or Gaza, there was a "sovereignty vacuum" (Blum) which Israel has filled with a title better than that of any other contender. Therefore, Israel's rule in the West Bank and Gaza could not be simply viewed as belligerent occupation. Rather, as Israel is alleged to enjoy a stronger potential title which could change into an absolute title virtually undistinguishable from full sovereignty, this view in effect supports those who openly advocate, on the basis of historic-religious claims and for security reasons, a policy of annexation of the West Bank and Gaza, views known to be held by Likud and smaller extremist parties in Israel. Official Israeli sources consistently use the term "administered" rather than "occupied territories" for the West Bank and Gaza, indicating that Israel denies that the presence of the former occupants, Jordan and Egypt respectively, had been established legally or was based upon legitimate sovereignty.

The dispute rests on the question of where sovereignty in Palestine resides, which has pro-

duced various theories. In view of the jurisprudence of the International Court of Justice concerning Southwest Africa, especially the opinion given by Lord McNair (ICJ Reports 1950, p. 128; → South West Africa/Namibia (Advisory Opinions and Judgments)), the substantive relevance of which in the case of Palestine is not affected by the circumstance that Southwest Africa was a C-Mandate, the most plausible construction is that during the Mandate sovereignty was in abeyance and not vested in Great Britain but in the inhabitants of the Mandate territory, Jews and Arab alike. While, in the light of the decisions of the → Permanent Court of International Justice in the → Mavrommatis Concessions Cases, the legality of the Palestine Mandate itself cannot seriously be questioned, it is also no longer an issue that the UN General Assembly legally succeeded the League in its supervisory status over the Mandates.

The significance of the 1947 Partition Resolution has remained controversial and there are conflicting views on whether or not it was binding upon the parties. While there are authors supporting the Israeli cause who argue that the Partition Resolution, whether it was originally binding or not, became moot after the Arab military intervention and could no longer bind Israel since the United Nations remained silent in the face of Arab belligerency (Stone), it must be recalled that the Arab side in 1947 rejected the Partition plan as illegal and thus as a nullity from the beginning.

Considering that authors supporting the Arab-Palestinian view have continued to doubt its authority (Mallison and Mallison; Cattan), it is interesting to learn that the aforementioned "Second Declaration of Independence of the State of Palestine – 1988" makes express reference to the 1947 Partition Resolution:

> "Despite the historical injustice done to the Palestinian Arab people in its displacement and in being deprived of the right to self-determination following the adoption of General Assembly Resolution 181 (II) of 1947, which partitioned Palestine into an Arab and a Jewish State, that resolution nevertheless continues to attach conditions to international legitimacy that guarantees the Palestinian Arab people the right to sovereignty and national independence" (Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 302).

A commentary to the Declaration clarifies that this assumes that, in contrast to the immigrant Jewish community, the Palestinians as the native population did not require the Partition Resolution as a legal basis of their right to a State in Palestine. Therefore, the above reference to GA Res. 181 (II) was included not in the operative part, but only in the preamble of the Declaration with the purpose to refer to it

> "as a fact in the same way the Covenant of the League of Nations referred to the severance of Palestine from the Ottoman Empire and to the provisional recognition of the Palestinians as an independent nation" (M. Al-Qasem, Palestine Yearbook of International Law, Vol. 4 (1987/1988), p. 325).

The best view concerning sovereignty over Palestine during this period of transition seems that it remained in abeyance and vested in the local inhabitants. The Partition Resolution, as a mere recommendation of the UN General Assembly, was not binding as such without the consent of the parties involved. However, in reviving sovereignty in the territory of Palestine it constituted a sufficient legal basis upon which the Jewish State and the Arab State could be established in the exercise of the rights of the respective parts of the local population.

While the Jewish State came into existence, the rejection of the Resolution by the Arab side, which claimed the whole of Palestine, cannot be perceived as a renouncement of their right to sovereignty *per se*, but, as correctly observed by Kuttner (1977, p. 14), was merely a rejection of the limitations on that right provided for in the Resolution. Thus, although the Resolution was never implemented as such, it is not convincing to argue that there was a "sovereignty vacuum" after the termination of the Mandate. Nor is it possible to view the territory of Palestine as *terra nullius* which might have given any party the right of annexation.

With regard to the question of the alleged better title of Israel to the West Bank and Gaza, it is irrelevant whether or not the previous occupants, none of which now is making a territorial claim, were there legally or not. Nor does it matter whether Israel occupied the West Bank and Gaza

in → self-defence in accordance with Art. 51 of the United Nations Charter. For even if that proposition, which is disputed by the other side, is admitted for the sake of argument, it would still not endow Israel with any status beyond that of a belligerent occupant under international law (→ Occupation, Belligerent).

It is generally recognized that, at least since 1945, → conquest, even in lawful self-defence, is no longer a legal method of acquiring sovereignty over territory. The notion of "defensive conquest" suggesting that the taking of territory which the prior occupant held illegally may legitimize the acquisition of sovereign rights over a territory (Schwebel) fails to show why it follows that Israel has "better title" to the territory at issue from the mere premise that, in the case of the West Bank, Jordan had gained control unlawfully. That premise itself, in view of the proposition that the Arab States intervened at the invitation of the Arab inhabitants of Palestine, and considering the consent of the local population of the West Bank to Jordan's presence, is at least open to argument. Instead, however, it has been correctly observed that the only sound inference from that premise is that neither Jordan nor Israel ever acquired sovereignty over the West Bank.

There is also no room, with regard to the West Bank and Gaza, for application of the theory, very cautiously advanced by Cassese and rejected by himself as not relevant as regards the annexation of East Jerusalem (Palestine Yearbook of International Law, Vol. 3, pp. 13, 24), that the acquisition of sovereignty by military force "*might perhaps*" be admitted, however, only under the following "very strict" conditions:

> "(i) it must be *undisputed* that prior to the use of force *sovereignty* over the territory belonged to the same state which used force to expel the unlawful occupant, (ii) all possible means for a peaceful settlement of the dispute must have been used before resorting to armed violence and, in particular, recourse has been made to the appropriate U.N. bodies, but they have failed to dispossess the *unlawful* occupant of the territory; and (iii) the use of force has not gone beyond the limited goal of restoring sovereign rights over the territory" (ibid.).

Bearing in mind that, as yet, no formal annexation has occurred, even under this theory Israel could not establish title or claim to have a better (potential) title because she was definitely not the previous sovereign in either the West Bank or Gaza.

Finally, even the principle of → effectiveness which, under certain circumstances, may lead to the international recognition of a title to territory that was acquired illegally does not yield a different result. First, Israel has not formally annexed Gaza or the West Bank (with the exception of Jerusalem), but still continues to view them as separate territories. Second, the reaction of the international community cannot be construed as recognizing any territorial claim of Israel to the occupied territories. Rather, the international community has repeatedly, as for example in Security Council Res. 242, called for "the establishment of a just and lasting peace in the Middle East", *inter alia*, by "withdrawal of Israel armed forces from territories occupied" (according to the French version "*des territoires occupés*").

It must be admitted that the legal effect and the meaning of this resolution, *inter alia* whether signifying withdrawal from all territories as may be deduced from the French version, or only from some as it appears the English text requires, has remained controversial. However, the international community has left no doubt as to the general view that Israel holds the territories as a belligerent occupant. On the other hand, it is not a reasonable interpretation of Res. 242 and Res. 338 to suggest that they would require Israel to withdraw unilaterally prior to negotiations on a peace settlement which satisfies her security needs. Prolonged belligerent occupation may not be desirable and raises complicated issues with regard to the provisional nature of the presence of the occupant. International law, however, imposes no time-limit on belligerent occupation, especially if there is reason to maintain the occupation for security considerations in view of a refusal by the other side to negotiate a peace settlement.

(b) The Golan Heights

The Golan Heights were Syrian territory when they were occupied by Israel in 1967. In the 1973 war, Israel gained additional ground in the area. Following the Agreement on Disengagement between Israeli and Syrian Forces of May 31 and June 5, 1974 (ILM, Vol. 13 (1974), p. 880), Israel

withdrew partially from the Heights without surrendering their important strategic advantages. While the armistice line of 1973 has remained in effect, Israel annexed the Golan territory over which it had retained control by the Golan Heights Act of December 12, 1981.

As in the case of Jerusalem, under international law the annexation of the Golan Heights, never acquiesced to by Syria, is illegal and does not affect the legal status of the area as military occupied territory. This has been confirmed by the international community, as expressed in the unanimously adopted UN Security Council Res. 497 of December 17, 1981 and in the resolutions adopted by the General Assembly on December 17, 1981 (A/Res/36/226 B) and February 5, 1982 (A/Res/ES-9/1).

(c) South Lebanon

Israel had occupied parts of southern Lebanon during the Litani operation of March to June 1978 and invaded a larger area in the course of the June 1982 invasion termed "Peace for Galilee", the main purpose of which was to oust the PLO from its bases in the country. Israel did not establish a formal military-administrative system in Lebanon as in other areas. Following her withdrawal from the rest of the country in 1985, Israel continues to occupy a "security zone" in the south where she maintains some military compounds with about 1000 soldiers, assisted by the South Lebanese Army, a mainly Maronite Christian militia of at least 2000 men. Israel has raised no claim to Lebanese territory. Israel's position as an occupant has not been in dispute and her interest in the security zone must be seen in the light of the relevant provisions of the 1983 agreement with Lebanon.

2. The Law Governing Israeli Measures in the Occupied Territories

The relevant law governing military occupation is laid down in the 1907 Hague Convention IV, the annexed Hague Regulations of which are, at least since 1946, generally considered as embodying customary international law, and in the → Geneva Red Cross Conventions of 1949, at least parts of which are considered as declaratory of customary international law (see T. Meron, Human Rights and Humanitarian Norms as Customary Law (1989); T. Meron, The Geneva Conventions as Customary Law, AJIL, Vol. 81 (1987), p. 348; → War, Laws of). Furthermore, there is the 1954 Hague Cultural Property Convention with its 1954 Protocol (→ Cultural Property, Protection in Armed Conflict), and the 1977 Protocol I additional to the Geneva Conventions of 1949; some provisions of these instruments are also viewed as declaratory of customary international law. In addition, the question arises to what degree the law of → human rights, as laid down, for example in the Universal Declaration of Human Rights or the International Covenants of Human Rights, has blended with the law of armed conflict and applies, in particular, in a situation of prolonged occupation (→ Human Rights and Humanitarian Law; → Human Rights Covenants; → Human Rights, Universal Declaration (1948)).

The following brief comments must be restricted to some basic aspects of the problems of applying this body of law to the conduct of Israel in the occupied territories.

Israel is bound as a party to the 1954 Hague Cultural Property Convention and as a party to the 1949 Geneva Conventions. Israel is neither a party to the 1977 Protocol I additional to the Geneva Conventions nor, of course, to the 1907 Hague Convention. In the latter case, Israel accepts, however, that she is bound by the Hague Regulations insofar as they reflect norms of customary international law.

After some uncertainty at an earlier stage, it is now beyond doubt that Israel also accepts that the customary law rules embodied in the Hague Regulations apply to the occupied territories. Thus, to this extent, there is no dissent as regards the West Bank, Gaza and South Lebanon. However, if the annexation of the Golan Heights and of Jerusalem are null and void, it follows that the law of belligerent occupation must equally apply to those areas, regardless of the status accorded to them under domestic Israeli law.

One of the main problems concerns the applicability of the Fourth Geneva Convention of 1949 to the territories occupied by Israel. Israel has consistently denied that she is bound to apply the Fourth Geneva Convention to the occupied territories because the law of belligerent occupation, apart from protecting the civil rights of the local population, also has the function of

safeguarding the status and reversionary rights of the legitimate sovereign ousted by the occupant. As regards the West Bank, Israel feared that a strict application of the Convention could be construed as an implied recognition by Israel of Jordan's status as legitimate sovereign in the region. Art. 2 of the Convention provides that its terms shall apply "to all cases of partial or total occupation of the territory of a High Contracting Party". In a note to the Government of Israel of May 24, 1968, the International Committee of the Red Cross (ICRC) interpreted that article in the sense that an occupation such as to effect the automatic application of the Convention would exist "where territory under the authority of one of the parties passes under the authority of an opposing party" (cited in Kuttner (1977), p. 169). In her reply note of June 16, 1968, Israel rejected this interpretation of Art. 2, but expressed willingness to allow the ICRC to continue its humanitarian work in the territories.

Initially, the Labour Government took the position that the status of the West Bank and Gaza is *sui generis*, that Jordan's presence in the West Bank was that of a belligerent occupant which had invaded the territory unlawfully, and that territory controlled in war does not always become "belligerently occupied territory" to which the provisions of the Fourth Geneva Convention apply. Leaving the question of the applicability of the Convention open, since 1971, as first stated by the then Attorney-General of Israel (M. Shamgar, later President of the Supreme Court), the Government of Israel committed itself to act *de facto* in accordance with the humanitarian provisions of the Convention. The later Likud Government was more definite and rejected the applicability on the grounds that Jordan had illegally annexed the West Bank. However, it clarified that Israel continued to apply the humanitarian provisions of the Convention.

It has been noted, also by Israeli authors, that this position of Israel fails to acknowledge that the Fourth Geneva Convention is a humanitarian treaty not concerned primarily with territory and its legal status but with people and their rights. It is illuminating that Art. 4 of the 1977 Protocol I additional to the Geneva Conventions provides that the application of the 1949 Conventions and of the Protocol shall not affect the legal status of the parties to the conflict. It is also difficult to see why Israel should be considered as a belligerent occupant with regard to the Hague Regulations, but not also for the purposes of the Fourth Geneva Convention. While some interpret the term "humanitarian provisions", which Israel has declared herself willing to observe, to cover the entire Convention because of its humanitarian nature (e.g. Dinstein (1988), p. 175 et seq.), this is far from certain and no true substitute for the *de jure* applicability of the Convention. In fact it is the unanimous view of the international community, as expressed in numerous United Nations resolutions, that the Fourth Geneva Convention of 1949 is formally applicable to the Israeli-occupied territories.

There remains the complicated issue of the relevance of international human rights instruments in a situation of military occupation which is connected with the more general problem of the applicability of multilateral conventions in occupied territories. There has been extensive discussion of the applicability of the international law of human rights in the territories occupied by Israel which, however, has failed to produce a clear picture.

Without being able to enter into this discussion here, it should at least be noted that in a memorandum of September 12, 1984 prepared by the Office of the Legal Adviser of the Israeli Foreign Minister in response to a question on the applicability of seven human rights instruments, it was stated that Israeli policy in the West Bank and Gaza was in conformity with the 1950 Agreement on the Importation of Educational, Scientific and Cultural Matters, the 1960 Convention against Discrimination in Education, and the 1966 Convention on the Elimination of All Forms of Racial Discrimination. With regard to other instruments, in particular the 1948 Universal Declaration of Human Rights, at least some of which may perhaps be regarded as customary international law, and the two 1966 Covenants, the memorandum notes:

> "The unique political circumstances, as well as the emotional realities present in the areas concerned, which came under Israeli administration during the armed conflict in 1967, render the situation *sui generis*, and as such, clearly not a classical situation in which the normal

components of "human rights law" may be applied, as are applied in any standard democratic system in the relationship between the "citizen" and his government. Hence the criteria applied in the areas administered by Israel, in view of the *sui generis* situation, are those of "humanitarian law", which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety and security" (citation in Roberts (1990), p. 72).

Generalizations concerning the legality of Israeli policy and measures in the occupied territories must be avoided and the difficulties inherent in administering a prolonged occupation appreciated. However, there is a troubling record of international concern for and condemnation as illegal of many Israeli measures, including the demolition of houses as a form of collective punishment, the deportation of civilians, administrative detention, Jewish settlements in the occupied territories, and measures in dealing with the Palestinian uprising since the end of 1987.

While a serious discussion of these problems would exceed the limits of this article, it should at least be noted to Israel's credit that she, at least in principle, officially recognizes international law as a governing standard. However, Israel is averse to the idea that the legality of the measures taken by her military government in the occupied territories be subject to scrutiny by those international organizations which she regards as dominated by hostile countries. A rather unique aspect of the Israeli occupation is the function of the Supreme Court of Israel which is considered as a major factor in supervising the rule of law in the West Bank and Gaza. Sitting as a High Court of Justice, and applying, *inter alia*, customary international law, it has up to now reviewed in more than one hundred cases on individual petition the acts of and the legislation enacted by the military government in the occupied territories. While it may not be surprising that the Court finds particular praise in the writings of Israeli authors, it is also conceivable that Arab-Palestinian writers would be far less enthusiastic. As stated by one commentator, in the outcome, the role of the Court has proved disappointing and it is thus "only natural that Palestinians are increasingly turning away from using this judicial body" (Olwan (1986), pp. 240–241).

G. Conclusion

While the plan for a strictly limited autonomy on the basis of elections among Palestinians in the West Bank and Gaza which the Government of Israel advanced in May 1989 has been rejected by the PLO, the latter nevertheless indicated that certain of its elements could be used within a framework for an overall settlement. Prime Minister Shamir, on the other hand, dismissed the claim for a Palestinian State before the Knesset and ruled out that he would trade land for peace.

In September 1989, after extensive consultations, Egypt submitted a ten point plan with proposals for internationally supervised elections in Gaza and the West Bank, including – which Israel has so far always rejected – East Jerusalem. Negotiations on a final settlement are envisaged in three to five years time.

In the light of the uncertainties of the Middle East it remains to be seen whether the Arab-Israeli conflict escalates into another war or whether, in view of the Palestinian uprising in the occupied territories, the developments in the PLO and the Middle East diplomacy of the Soviet Union and the United States, the chances have improved for real steps towards a peaceful settlement. Such a settlement must be able to combine Israel's legitimate security interests with the legitimate rights of the Palestinian people.

Treaty of Peace between Egypt and Israel, March 26, 1979, ILM, Vol. 18 (1979) 362–385.

Israel-Lebanon: Agreement on Withdrawal of Troops from Lebanon, May 17, 1983, ILM, Vol. 22 (1983) 708–735.

Egypt-Israel Arbitration Tribunal, Award in Boundary Dispute Concerning the Taba Area, September 29, 1988, ILM, Vol. 27 (1988) 1421–1538.

Jordanian Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination, July 31, 1988, ILM, Vol. 27 (1988) 1637–1645.

League of Arab States, Communiqués from Summit Meetings in Amman, November 11, 1987, and Algiers, June 9, 1988, ILM, Vol. 27 (1988) 1646–1659.

Palestine National Council, Political Communiqué and Declaration of Independence, November 15, 1988, ILM, Vol. 27 (1988) 1660–1671.

United Nations Resolutions on Palestine and the Arab-Israeli Conflict, Vol. I: 1947–1974, ed. by G.J. Tomeh (3rd enlarged ed. 1975); Vol. II: 1975–1981, ed. by

R.S. Sherif (1988); Vol. III: 1982–1986, ed. by M. Simpson (1988).

Agreements Regarding the Permanent Boundary Between Egypt and Israel and Tourism in the South Sinai, February 26, 1989, ILM, Vol. 28 (1989) 611–619.

L. STEIN, The Balfour Declaration (1961).

K.B. DOHERTY, Jordan Waters Conflict, International Conciliation, Vol. 553 (1965) 1–66.

Y. Z. BLUM, The Missing Reversioner: Reflections on the Status of Judea and Samaria, Israel Law Review, Vol. 3 (1968) 279–301.

B. DÖLL, Die Mitwirkung der UNO bei der Entstehung des Staates Israel, Vereinte Nationen, Vol. 17 (1969) 116–125.

K. DOEHRING, Sind die Vereinten Nationen gescheitert oder erfolgreich?, Bemerkungen zu Heinhard Steiger, "Völkerbund, Vereinte Nationen und der Nahe Osten", Der Staat, Vol. 9 (1970) 475–487.

H. STEIGER, Völkerbund, Vereinte Nationen und der Nahe Osten, Der Staat, Vol. 9 (1970) 433–474.

A. LEVINE, The Status of Sovereignty in East Jerusalem and the West Bank, New York University Journal of International Law and Politics, Vol. 5 (1972) 485–502.

S.M. SCHWEBEL, What Weight to Conquest?, AJIL, Vol. 64 (1970) 344–347; reproduced in: J.N. Moore (ed.), The Arab-Israeli Conflict, Vol. II (1974) 315–318.

Q. WRIGHT, The Middle East Problem, AJIL, Vol. 64 (1970) 270–281; reproduced in: J.N. Moore (ed.), The Arab-Israeli Conflict, Vol. II (1974) 828–839.

S. BOYD, The Applicability of International Law to the Occupied Territories, Israel Yearbook on Human Rights, Vol. 1 (1971) 258–261.

M. SHAMGAR, The Observance of International Law in the Administered Territories, Israel Yearbook on Human Rights, Vol. 1 (1971) 262–277.

A. GERSON, Trustee-Occupant. The Legal Status of Israel's Presence in the West Bank, Harvard ILJ, Vol. 14 (1973) 1–49.

Y.Z. BLUM, Secure Boundaries and Middle East Peace, in: J.N. Moore (ed.), The Arab-Israeli Conflict, Vol. II (1974) 841–887.

H. CATTAN, Sovereignty and Palestine, the Arab-Israeli Conflict (1974).

J.N. MOORE (ed.), The Arab-Israeli Conflict, Vols. I and II: Readings; Vol. III: Documents (1974; abridged and revised ed. 1977).

H. PHILOS, Selected Bibliography on the Arab-Israeli Conflict and International Law, in: J.N. Moore (ed.), The Arab-Israeli Conflict, Vol. III: Documents (1974) 1200–1223.

H. KLINGHOFFER, Verfassungsrechtliche Probleme Israels, Jahrbuch des öffentlichen Rechts, Neue Folge, Vol. 24 (1975) 501–548.

H. CATTAN, Palestine and International Law (1976).

T.S. KUTTNER, Israel and the West Bank. Aspects of the Law of Belligerent Occupation, Israel Yearbook on Human Rights, Vol. 7 (1977) 166–221.

E.V. ROSTOW, "Palestinian Self-Determination": Possible Futures for the Unallocated Territories of the Palestine Mandate, Yale Studies in World Public Order, Vol. 5 (1977) 147–172.

M. DRORI, The Legal System of Judea and Samaria: A Review of the Previous Decade with a Glance at the Future, Israel Yearbook on Human Rights, Vol. 8 (1978) 144–177.

A. GERSON, Israel, the West Bank and International Law (1978).

T. MERON, Applicability of Multilateral Conventions to Occupied Territories, AJIL, Vol. 72 (1978) 542–557.

T. MERON, The International Convention on the Elimination of All Forms of Racial Discrimination and the Golan Heights, Israel Yearbook on Human Rights, Vol. 8 (1978) 222–239.

United Nations, The Origins and Evolution of the Palestine Problem, Parts I, II, III, UN Doc. ST/SG/SER.F/1 (1978–1984).

F.L.M. VAN DE CRAEN, The Territorial Title of the State of Israel to "Palestine": An Appraisal in International Law, RevBelge, Vol. 14 (1978/1979) 500–538.

N. FEINBERG, Studies in International Law with Special Reference to the Arab-Israeli Conflict (1979).

W.T. MALLISON and S.V. MALLISON, An International Law Analysis of the Major United Nations Resolutions Concerning the Palestinian Question, UN Doc. ST/SG/SER:F4 (1979).

T. MERON, West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition, Israel Yearbook on Human Rights, Vol. 9 (1979) 106–119.

E.A. NAKHLEH, The West Bank and Gaza, Toward the Making of a Palestinian State (1979).

American Society of International Law, Panel: Peace in the Middle East: Camp David and Beyond, with contributions from Y. Blum, N.A. Elaraby and J.F. Murphy, reported by T. Ramish, ProcASIL, Vol. 74 (1980) 106–129.

N. BAR-YAACOV, Keeping the Peace Between Egypt and Israel, 1973–1980, Israel Law Review, Vol. 15 (1980) 197–268.

M.C. BASSIOUNI, An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty, Case Western Reserve Journal of International Law, Vol. 12 (1980) 3–26.

S. BHUTANI, Hope and Despair. The United Nations and the Arab-Israeli Conflict (1980).

D.E. GEORGE, Israeli Occupation. International Law and Political Realities (1980).

W.W. HARRIS, Taking Root. Israeli Settlement in the West Bank, the Golan and Gaza-Sinai 1967–1980 (1980).

N. SAGI, German Reparations. A History of the Negotiations (1980; German ed. 1981).

S.R. SILVERBURG, A Select International Law Bibliography on the Arab-Israeli Conflict, Suffolk Transnational Law Journal, Vol. 4 (1980) 47–88 [with annotations].

H. BIN TALAL, Palestinian Self-Determination. A Study of West Bank and Gaza Strip (1981).

M. DAYAN, Breakthrough: A Personal Account of the Egypt-Israel Peace Negotiations (1981).

Y. DINSTEIN (ed.), Models of Autonomy (1981).

E. GNESA, Die von Israel besetzten Gebiete im Völkerrecht. Eine besetzungsrechtliche Analyse (1981).
R. HALABI, The West Bank Story (1981).
Israel National Section of the International Commission of Jurists, The Rule of Law in the Areas Administered by Israel (1981).
H. KÖCHLER (ed.), The Legal Aspects of the Palestine Problem (1981).
H.Z. NUSEIBEH, Palestine and the United Nations (1981).
S.R. SILVERBURG, An International Legal Bibliography on the Palestinian-Israeli Conflict, Journal of International Law and Policy, Vol. 10 (1981) 263–278.
O.M. SOFFER, The United Nations' Peacemaking Role in the Arab-Israeli Conflict between 1967–1977 (1981) [microfilm].
J. STONE, Israel and Palestine: Assault on the Law of Nations (1981).
V.J. BELFIGLIO, The Reversion of the Golan Heights to Israel, International Problems, Vol. 21 (1982) 19–26.
R. BUEREN, Ein palästinensischer Teilstaat?, Zur internen, regionalen und internationalen Dimension der Palästinafrage (1982).
M.J. COHEN, Palestine and the Great Powers 1945–1948 (1982).
D. ELZAR (ed.), Judea, Samaria and Gaza: Views of the Present and Future (1982).
Y. GOTLIEB, Self-Determination in the Middle East (1982).
C. HERZOG, The Arab-Israeli Wars. War and Peace in the Middle East (1982).
P. MALANCZUK, Das Golan-Gesetz im Lichte des Annexionsverbots und der occupatio bellica, ZaöRV, Vol. 42 (1982) 261–294.
M. SHAMGAR (ed.), Military Government in the Territories Administered by Israel 1967–1980. The Legal Aspects (1982).
J. SINGER, The Establishment of a Civil Administration in the Areas Administered by Israel. Israel Yearbook on Human Rights, Vol. 12 (1982) 259–289.
United Nations, Committee on the Exercise of the Inalienable Rights of the Palestinian People, United Nations, The Legal Status of the West Bank and Gaza (1982).
J.H.H. WEILER, Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible, Texas ILJ, Vol. 17 (1982) 287–385.
J. BUNZL, Israel and the Palästinenser. Die Entwicklung eines Gegensatzes (1983).
N. CAPLAN, Futile Diplomacy: Early Arab-Zionist Negotiation Attempts 1913–1931, Vol. 1 (1983).
U. DAVIS, The Golan Heights under Israeli Occupation 1967–1981 (1983).
D. DINER, Grenzprobleme im Palästinakonflikt (1983).
F. ERMACORA, Die Menschenrechte in Israel und in den von Israel besetzten arabischen Territorien, in: F. Ermacora, Menschenrechte in der sich wandelnden Welt, Vol. II (1983) 479–550.
A. FLORES and A. SCHÖLCH (eds.), Palästinenser in Israel (1983).
M. FLORY, Naissance d'un État palestinien, RGDIP, Vol. 93 (1983).
M.A. HELLER, A Palestinian State. The Implications for Israel (1983).
R. ISRAELI (ed.), PLO in Lebanon. Selected Documents (1983).
B. KIMMERLING, Zionism and Territory. The Socio-Territorial Dimensions of Zionist Politics (1983).
E. MURLAKOV, Das Recht der Völker auf Selbstbestimmung im israelisch-arabischen Konflikt (1983).
E. NAIM, Entre le Liban et Israel, de l'armistice de 1949 aux négociations de 1982–1983, Panorama de l'actualité, Vol. 7 (1983) 11–21.
E. NATHAN, Israeli Civil Jurisdiction in the Administered Territories, Israel Yearbook on Human Rights, Vol. 13 (1983) 90–115.
S. ROSENNE, Recognition of Israel by the Security Council in 1948, Israel Yearbook on Human Rights, Vol. 13 (1983) 295–330.
D. ALLEN and A. PIJPERS, European Foreign Policy Making and the Arab-Israeli Conflict (1984).
N.H. ARURI (ed.), Israel over Palestine (1984).
E. COHEN, International Criticism of Israeli Security Measures in the Occupied Territories, Jerusalem Papers on Peace Problems, Vol. 37 (1984).
A.H.J. GUNNEWEG, Geschichte Israels bis Bar Kochba (5th ed. 1984).
W. LAQUEUR and B. RUBIN (eds.), The Israel-Arab Reader (4th ed. 1984).
Y. LUKACS (ed.), Documents on the Israeli-Palestinian Conflict, 1967–1983 (1984).
S.V. MALLISON and W.T. MALLISON, The Juridical Bases for Palestinian Self-Determination, Palestine Yearbook of International Law, Vol. 1 (1984) 36–67.
P. MARANTZ (ed.), Peace-Making in the Middle East. Problems and Prospects (1984).
M. MA'OZ, Palestinian Leadership on the West Bank. The Changing Role of the Arab Mayors under Jordan and Israel (1984).
T. NAFF and R.C. MATSON, Water in the Middle East: Conflict or Cooperation (1984).
D. NEWMAN (ed.), The Impact of Gush Emunim. Politics and Settlement in the West Bank (1984).
N.A. PELCOVITS, Peacekeeping on Arab-Israeli Fronts. Lessons from the Sinai and Lebanon (1984).
I.S. POGANY, The Security Council and the Arab-Israeli Conflict (1984).
J. QUIGLEY, United States Complicity in Israel's Violations of Palestine Rights, Palestine Yearbook of International Law, Vol. 1 (1984) 95–120.
G. ROWLEY, Israel into Palestine (1984).
S.A.A. SAHLIEH, L'Etat religieux d'Israel et le droit international, Etudes Internationales (1984) 34–57.
S. SANDLER and H. FRISCH, Israel, the Palestinians, and the West Bank. A Study in Intercommunal Conflict (1984).
D.J. SCHNALL, Beyond the Green Line. Israeli Settlements West of the Jordan (1984).
F.A. BOYLE et al., Israeli West Bank Settlements, the

Reagan Administration's Policy Toward the Middle East and International Law, ProcASIL, Vol. 79 (1985) 217–232.

E.R. COHEN, Human Rights in the Israeli-Occupied Territories 1967–1982 (1985).

A. EL KADIRI, Sur la dénonciation de l'accord israélo-libanais, Revue Juridique Politique et Economique du Maroc. (1985) 109–123.

A.M. FARID (ed.), Israel and Arab Water, an International Symposium, Amman, February 25 and 26, 1984 (1985).

G. FOHRER, Geschichte Israels (4th ed. 1985).

F.C. HOF, Galilee Divided: The Israel-Lebanon Frontier, 1916–1984 (1985).

T. KOSZINOWSKI, Das Nahostproblem und die Vereinten Nationen, Zeitschrift für internationale Fragen, Vol. 36 (1985) 302–310.

R. SHEHADEH, Occupier's Law – Israel and the West Bank (1985).

J.H. WEILER, Israel and the Creation of a Palestinian State. A European Perspective (1985).

M. BENEVISTI, 1986 Report: Demographic, Economic, Legal, Social and Political Development in the West Bank (1986).

M.J. BERLINER, Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law, Loyola of Los Angeles International and Comparative Law Journal, Vol. 8 (1986) 551–592.

N. CAPLAN, Futile Diplomacy: Vol. 2: Arab-Zionist Negotiations at the End of the Mandate (1986).

E.R. COHEN, Justice for Occupied Territory?, The Israeli High Court of Justice Paradigm, ColJTransL, Vol. 24 (1986) 471–507.

J.R. GAINSBOROUGH, The Arab-Israeli Conflict: A Politico-Legal Analysis (1986).

I. GEFEN, An Israeli in Lebanon (1986).

D GROSSMAN, Jewish and Arab Settlements in the Tulkarm Sub-District (1986).

J.R. HILTERMAN, Al-Haq's Response to the Chapter on Israel and the Occupied Territories in the U.S. State Department's "Country Reports on Human Rights Practices for 1984" (1986).

J.R. HILTERMAN, Israel's Deportation Policy in the Occupied Territories, Palestine Yearbook of International Law, Vol. 3 (1986) 75–89.

A. KASPI, La France et la reconnaissance de L'Etat d'Israel (mai 1948-janvier 1949), in: Enjeux et Puissances: Mélanges en l'honneur de J.-B. Duroselle (1986) 319–329.

R. LAPIDOTH, The Right of Return in International Law, with Special Reference to the Palestinian Refugees, Israel Yearbook on Human Rights, Vol. 16 (1986) 103–125.

R. LAPIDOTH, The Taba Controversy, Jerusalem Quarterly, No. 37 (1986) 29–39.

L.T. LEE, The Right to Compensation: Refugees and Countries of Asylum, AJIL, Vol. 80 (1986) 532–567.

W.R. LOUIS (ed.), The End of the Palestine Mandate (1986).

W.T. MALLISON and S.V. MALLISON, The Palestine Problem in International Law and World Order (1986).

A.D. MILLER, The Arab States and the Palestine Question: Between Ideology and Self-Interest (1986).

B. MORRIS, The Causes and Character of the Arab Exodus from Palestine: The Israel Defence Forces Intelligence Branch Analysis of June 1948, Middle Eastern Studies, Vol. 22 (1986) 5–19.

C. MOWLES, The Israeli Occupation of South Lebanon, Third World Quarterly, Vol. 8 (1986) 1351–1356.

F. ODEH and M. AL-RFOUH, Quest for Peace – United Nations and Palestine (1986).

E. PLAYFAIR, Administrative Detention in the Occupied Territories (1986).

W.B. QUANDT, Peace-Making and Politics (1986).

L.W. ROGER and R.W. STOOKEY (eds.), The End of the Palestine Mandate (1986).

S.M. ROY, The Gaza Strip: A Demographic, Economic, Social and Legal Survey (1986).

M. TABORI, The Multinational Force and Observers in the Sinai (1986).

S. BERMAN, Antiquities in Israel in a Maze of Controversy, Case Western Reserve Journal of International Law, Vol. 19 (1987) 343–360.

F.A. BOYLE, Creating the State of Palestine, Palestine Yearbook of International Law, Vol. 4 (1987/1988) 15–43.

W.M. BRINNER, The Arabs of Israel: The Past Twenty Years, Middle East Review, Vol. 20 (1987) 13–21.

N. CAPLAN and A. SELA, Zionist-Egyptian Negotiations and the Partition of Palestine, 1946 (Documents), Jerusalem Quarterly (1987) 19–30.

H. CATTAN, Recollections on the United Nations Resolution to Partition Palestine, Palestine YIL, Vol. 4 (1987/1988) 260–264.

S.J. DALLAL, Israeli Human Rights Violations and Palestinian Violence, Syracuse Journal of International Law and Commerce, Vol. 13 (1987) 109–124.

S.N. EISENSTADT, Die Transformation der israelischen Gesellschaft (1987).

For the Record – Palestine: From Partition to Independence 1947–1988, Palestine Yearbook of International Law, Vol. 4 (1987/1988) 247–362.

A. GERSON, The United Nations and Racism: The Case of the Zionism as Racism Resolution as Progenitor, Israel Yearbook on Human Rights, Vol. 17 (1987) 68–73.

R. GORGÉ, Genf 1973 – Kein Vorbild. Gedanken zu einer Nahost-Friedenskonferenz, Vereinte Nationen, Vol. 35 (1987) 349–360.

R. HERRMANN, Soviet Policy and the Arab-Israeli Conflict: Actions, Patterns, and Interpretations, Political Science Quarterly, Vol. 102 (1987) 417–440.

P.E. HERZOG, The European Communities: A Model for a Settlement in the Middle East?, Syracuse Journal of International Law and Commerce, Vol. 13 (1987) 509–542.

D. HOROWITZ, Israel and Occupation, Jerusalem Quarterly (1987) 21–36.

O. KADAR, Peace in the Middle East Through Human Rights, Syracuse Journal of International Law and Commerce, Vol. 13 (1987) 489–507.

S.V. MALLISON and W.T. MALLISON, The Changing U.S. Position on Palestinian Self-Determination and the Impact of the Iran-Contra Scandal, Journal of Palestine Studies, Vol. 16 (1987) 101–114.

A.D. MILLER, The Arab-Israeli Conflict, 1967–1987: A Retrospective, Middle East Journal, Vol. 41 (1987) 349–360.

B. MORRIS, The Birth of the Palestinian Problem (1987).

A. PELLET, La destruction de Troie n'aura pas lieu, Palestine Yearbook of International Law, Vol. 4 (1987/1988) 44–84.

R. PETKOVIC, The International Community and the Arab-Israeli Conflict, Review of International Affairs, Vol. 38 (1987) 8–11.

F. SCHREIBER and M. WOLFFSOHN, Nahost. Geschichte und Struktur des Konflikts (1987).

Special File, The Intifadah – An Act of Self-Defence, Palestine Yearbook of International Law, Vol. 4 (1987/1988) 85–152.

G. TALHAMI, The Palestinian Perception of the Human Rights Issue, Syracuse Journal of International Law and Commerce, Vol. 13 (1987) 475–488.

J.R. WEINER, Terrorism: Israel's Legal Responses, Syracuse Journal of International Law and Commerce, Vol. 13 (1987) 183–207.

M. WOLFFSOHN, Israel: Politik, Gesellschaft, Wirtschaft (1987).

A. BEKER, UN North-South Politics and the Arab-Israeli Conflict, Jerusalem Journal of International Relations, Vol. 10 (1988) 44–59.

V. BELFIGIO, The Palestinians and the Israeli Occupied Territories, International Problems, Vol. 27 (1988) 27–32.

S. BRUCE, Raising the Flag over Jerusalem: The Search for a Palestinian Government, American-Arab Affairs (1988) 9–27.

H. CATTAN, The Palestine Question (1988).

M.J. COHEN, Palestine to Israel. From Mandate to Independence (1988).

Y. DINSTEIN, The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families, Israel Yearbook on Human Rights, Vol. 18 (1988) 173–188.

A. DOWTY, The Use of Emergency Powers in Israel, Middle East Review, Vol. 21 (1988) 34–46.

L. GORDENKER, The United Nations as a Third Party in Israeli-Arab Conflicts, Jerusalem Journal of International Relations, Vol. 10 (1988) 60–76.

A. HOTTINGER, Der Aufstand der Araber in den besetzten Gebieten. Eine Wende in der Palästina-Frage, Europa-Archiv, Vol. 43 (1988) 299–310.

F. LANGER, Landenteignung in den besetzten Gebieten Israels – Autonomie eines Konfliktes, Demokratie und Recht, Vol. 16 (1988) 143–151.

P.E. MARCUS, The Treatment of Terrorists in the Israeli Occupied Territories, American University Journal of International Law and Policy, Vol. 3 (1988) 451–480.

P.J. MORGAN, Recent Israeli Security Measures under the Fourth Geneva Convention, Connecticut Journal of International Law, Vol. 3 (1988) 485–500.

W. OLSON, UN Security Council Resolutions Regarding Deportations from Israeli-Administered Territories: The Applicability of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Stanford Journal of International Law, Vol. 24 (1988) 611–636.

B. RIVLIN, Changing Perspectives on Internationalism at the United Nations; The Impact of the Ideological Factor on the Arab-Dispute, Jerusalem Journal of International Relations, Vol. 10 (1988) 299–310.

A. ROBERTS, Decline of Illusions: The Status of the Israeli-Occupied Territories over 21 Years, International Affairs, Vol. 64 (1988) 345–359.

S. SANDLER, Israel and the West Bank Palestinians, Publius, Vol. 18 (1988) 47–62.

R. SHEHADEH and J. KUTTAB, The West Bank and the Rule of Law. A Study. The International Commission of Jurists and its West Bank Affiliate Law in the Service of Man (revised ed. 1988).

M. TABORY, Universality at the UN: The Attempt to Reject Israel's Credentials, Israel Yearbook on Human Rights, Vol. 18 (1988) 189–209.

M. WOLFFSOHN, Vierzig Jahre Israel: Versuch einer historischen Einordnung und Bilanz, Aus Politik und Zeitgeschichte, Beilage zur Wochenzeitung Das Parlament B16/88, April 1988, 3–15.

Le désengagement jordanien de Cisjordanie, Maghreb-Machrek (1988) 99–108.

H. DING and E.S. KOENIG, Boundary Dispute Concerning the Taba Area, AJIL, Vol. 83 (1989) 590–595.

G.W.M. GEESTERANUS, Palestine: A State in Embryo, Leiden Journal of International Law, Vol. 2 (1989) 79–83.

J. QUIGLEY, Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood, Boston Univery Journal of International Law, Vol. 7 (1989) 1–33.

Y. SAYIGH, Struggle Within, Struggle Without the Transformation of PLO Politics Since 1982, International Affairs, Vol. 65 (1989) 255–271.

D. VINCENT-DAVIS, The Occupied Territories and International Law: A Research Guide, Boston University Law Journal, Vol. 7 (1989) 575–665.

F.L. KIRGIS, Admission of "Palestine" as a Member of a Specialized Agency and Witholding the Payment of Assessment in Response, AJIL, Vol. 84 (1990) 218–230.

A. NEUSTADT, Israelische Reaktionen auf die Entwicklung in Deutschland, Europa-Archiv, Folge 11 (1990) 351–358

A. ROBERTS, Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967, AJIL, Vol. 84 (1990) 44–103.

PETER MALANCZUK

JAN MAYEN

1. Location; Historical Background

Jan Mayen is a Norwegian → island lying in the western Norwegian Sea, which is a part of the North Atlantic Ocean. Its total area is about 373 square kilometres. Jan Mayen lies about 540 miles west of northern Norway, 290 miles north-east of Iceland and 250 miles east of → Greenland.

Jan Mayen was known to early Icelanders and was rediscovered by the Dutch explorer Jan Jacobsz May in 1614. The island remained *terra nullius* until 1929, when it was claimed by Norway and formally incorporated in the following year (→ Territory, Acquisition).

The advent of 200-mile limits was accompanied by the need to establish → boundaries between the zones of Jan Mayen and Iceland and Jan Mayen and Greenland (→ Maritime Boundaries, Delimitation). The boundary with Iceland has been agreed, but that with Greenland remains in dispute.

2. Jan Mayen and Iceland

The questions of delimitation relating to Iceland were dealt with in two arrangements signed in 1980 and 1981. In 1975 Iceland had extended its fishery limits to 200 miles (→ Fishery Zones and Limits). Following the third United Nations Conference on the Law of the Sea (→ Conferences on the Law of the Sea), the fishery zone was substituted in 1979 by a 200-mile → exclusive economic zone. When Norway in 1979 planned to extend to Jan Mayen the 200-mile economic zone which had previously been created in 1976 for the mainland, Iceland objected immediately. The parties entered into → negotiations dealing with the questions whether Jan Mayen was entitled to a → continental shelf or to its own 200-mile economic zone and how the delimitation between Jan Mayen and Iceland should be made. Since Iceland is not a party to the Geneva Convention on the Continental Shelf (1958) (UNTS, Vol. 499, p. 311) and the United Nations Convention on the Law of the Sea had not yet been adopted (December 10, 1982, UN Doc. A/CONF.62/122 with Corr.), the legal basis for the negotiations was → customary international law.

There was in fact no need to apply customary international law because the first agreement (1980) established the boundary between the economic zones of Jan Mayen and Iceland granting Iceland a 200-mile zone which formed the boundary where the distance between Iceland and Jan Mayen was less than 400 miles. The agreement also laid down arrangements for the management of fish stocks in the Jan Mayen area. Finally, it established a → conciliation commission to recommend a continental shelf boundary. This arrangement was based on two assumptions originally opposed by Iceland: firstly, that Jan Mayen being an inhabited island with an economic life of its own is entitled to a 200-mile economic zone; and secondly that Jan Mayen has its own continental shelf and is not a small protuberance on Iceland's continental shelf.

Following a recommendation of the conciliation commission (ILM, Vol. 20 (1981) p. 797), the second agreement (1981) laid down a continental shelf boundary between Iceland and Jan Mayen which is the same as the economic zone boundary established by the first agreement. It laid down cooperative arrangements for the exploration and exploitation of petroleum resources in an area overlapping the continental shelf of the two islands. Both the delimitation and the provisions on exploration and exploitation have been criticized as an inequitable solution, because Iceland had been granted wide privileges by Norway. From another perspective, however, since Iceland is 276 times the size of Jan Mayen and unlike Norway is heavily dependant on fishery, the regulations of the two arrangements can be considered as an equitable solution (→ Equity in International Law).

3. Jan Mayen and Greenland

The boundary questions between these two islands, still in dispute, were released from the complicating factor of the → European Communities' fishery interests when Greenland left the Communities in 1985. Both Denmark and Norway are parties to the 1958 Convention on the Continental Shelf. Under Art. 1 of this convention the delimitation of a common continental shelf creates no problem as the continental shelves of the islands do not meet, since the sea-bed has a depth of over 2000 metres and is clearly not exploitable. The immediate problem is the delimitation of the 200-mile fishing zone boundary since

the minimum distance between Greenland and Jan Mayen is about 250 miles. Norway takes the view that the boundary between the 200-mile zone of Greenland and Jan Mayen should be the median line. Denmark on the other hand is of the opinion that Greenland's 200-mile zone should be given full effect. This view is based on the notion that special circumstances apply which cannot affect the extent of Greenland's fishing zone. The median line as suggested by Norway would not take into consideration the facts that Greenland is much larger, has a "natural population" of some size and is heavily dependant on fishing for its economic livelihood. On the other hand, the 200-mile limit off Greenland advocated by Denmark would not take account of the fact that the area of eastern Greenland opposite Jan Mayen is extremely sparsely populated. The above factors thus suggest a reasonable fishery and economic zone delimitation which lies between the two proposals of Denmark and Norway.

Agreement concerning Fishery and Continental Shelf Questions between Norway and Iceland, May 28, 1980, Overenkomster med fremmede stater (1980) 912–915.

Agreement on the Continental Shelf between Iceland and Jan Mayen, October 22, 1981, ILM, Vol. 21 (1982) 1222–1226.

M. FYHN, The Jan Mayen Conflict with Iceland (Jan Mayen konflikten med Island), Norsk Utenrikspolitisk Årbok (1978) 78–102.

B. BJARNASON, Some Icelandic Viewpoints in the Jan Mayen Case (Noen islandske synspunkter i Jan Mayen saken), Internasjonal Politikk (1979) 669–678.

A. KLEPSVIK, Norway's Continental Shelf and Exclusive Economic Zone (Norges kontinentalsokkel og eksklusive okonomiske sone), Internasjonal Politikk (1979) 343–387.

R. CHURCHILL, Maritime Delimitation in the Jan Mayen Area, Marine Policy, Vol. 9 (1985) 16–38.

DIETER STUMMEL

JERUSALEM

A. Introduction

Jerusalem is the historic capital of → Palestine and one of the ancient cities of the world. In the course of its history, in which the "City of Peace" was conquered more than 35 times and suffered several destructions, Jerusalem acquired a unique significance as a holy city and intersection for the three great monotheistic religions of Judaism, Christianity and Islam.

Under international law, the question of Jerusalem has two main aspects, which, although they are related, must be distinguished. The first aspect concerns the → holy places in Palestine, most of which are situated in Jerusalem and virtually all of these in East Jerusalem, within the walls of the Old City. Many monuments are of particular importance to the whole world, either as outstanding buildings in their own right or as centres of pilgrimage, and are included on the World Heritage List of the → United Nations Educational, Scientific and Cultural Organization (UNESCO). The Wailing Wall, the Western Wall of the ruins of the ancient Jewish Temples, is the holiest site for Jewish worship. The Church of the Holy Sepulchre, with the rotunda of the Resurrection dating from the 4th century, is shared by major denominations of Christianity, almost every sect of which has an ecclesiastical embassy in Jerusalem. The Haram-El-Sherif, where the Wailing Wall is located, is for Islam the holiest place in Jerusalem, the city towards which Moslems originally directed their prayers and, with the Dome of the Rock and Al-Aqsa, the famous mosques built at the end of the 7th century, is still considered as second only to Mecca and Medina.

The second aspect of the Jerusalem question concerns the status under international law of the city as such. The discussion of this highly controversial question is complicated by the fact that the future of the city is one of the most difficult and sensitive political problems of the Arab-Israeli conflict (→ Israel and the Arab States). Basically, the legal issues and their historical background are the same as those concerning the status of Israel and the occupied territories in general (→ Israel: Status, Territory and Occupied Territories).

B. Historical Background

Since the conquest of Jerusalem by Khalif Omar in 637, the control of and access to the holy places have concerned outside powers and broader international interests. The holy places were sometimes a cause for → war, for example the military expeditions by the Christians of Europe in the 11th, 12th and 13th centuries, during which the kingdom established by the Crusaders, with Jerusalem as its capital, fell again to Muslim rule. The holy places have also been the object of long-lasting quarrels between the various Christian dominations themselves.

Following the incorporation in 1517 of Palestine into the Ottoman Empire, which exercised exclusive → sovereignty over Jerusalem until the end of World War I, these Christian disputes began to play a more prominent role in the diplomacy of European powers, also in view of the importance of Palestine for the routes to India and the Far East. European powers rivaled to extend their protection and patronage over the Christian Holy Places and the Christians under the rule of the Ottoman Empire. While France emerged as the protector of Latin Christians, Russia assumed the position of the protecting power of the Orthodox Christians.

In the 19th century, Great Britain, Austria, Prussia and Italy were involved in the venture to have set aside in their favour the economic and political privileges which were attached to the Capitulations the Ottoman Empire had granted to France and Russia. It is said that the religious passions arising from the disputes connected with the holy places and the political interests for which they were used contributed to the outbreak of the → Crimean War. But the → *status quo* of the holy places which had been established remained in effect and is basically still applicable today. With regard to disputes on ownership concerning the Christian sites and the concomitant right to hold services, *status quo* was a settlement which favoured the Eastern Churches, and consequently it continued to give rise to irritation particularly to the Vatican and Roman Catholic powers (→ Holy See).

For the seven centuries prior to World War I, the question of the holy places, although connected with more secular interests, was in the forefront of the diplomacy of the European powers. With the end of the Ottoman Empire the question of sovereignty over Jerusalem, together with the issue of the administration of the holy places, remained a matter concerning European contenders, primarily the United Kingdom, France, Italy and the Vatican. Gradually, especially from 1936 onwards, Jerusalem became primarily an Arab-Israeli question.

C. The League of Nations Mandate

The British-Arab discussions between Sir Henry McMahon, British High Commissioner in Cairo, and Sherif Hussein of Mecca during World War I, the Sykes-Picot Agreement of May 1916 between Britain and France, and the Balfour Declaration of November 2, 1917, which helped to prepare the ground for the struggle for the control of Palestine between Arab and Zionist nationalism, also left the future of Jerusalem unsettled. British military and administrative control of Jerusalem, established after the city had fallen to General Allenby on December 9, 1917, was formalized by the → League of Nations in a Mandate for Palestine of 1922 (→ Mandates). Although the Mandate contained provisions concerning the protection of the holy places (Arts. 13 to 16), it did not accord any special status to Jerusalem which would have distinguished the city as such legally from the rest of Palestine. Nevertheless, Jerusalem was the natural seat of the authorities of the Mandatory Government.

Art. 14 of the Mandate provided for the appointment, subject to the approval by the League Council, of a special commission "to study and define the rights and claims relating to the different religious communities in Palestine". However, differences between Italy and France on the question of the holy places prevented an agreement on the implementation of this provision. Thus, as the Mandatory Government became responsible for settling disputes with regard to the holy places, in 1924 Britain withdrew from the law courts of Palestine any case in connection with such rights and claims and vested jurisdiction in those cases in the British High Commissioner, whose decisions were to be final and binding on all parties.

Significantly, the first clash between Arabs and Zionists in Jerusalem had occurred already in April 1920. But it was the famous Wailing Wall

incident in 1929 which drew international attention to the conflict situation in Palestine. Under the *status quo* of the holy places the Wailing Wall, or Wall al-Buraq, was recognized Moslem property, to which the Jews had customary rights, only, however, if they were exercised in conformity with the *status quo*. Disputes over these rights in 1929 resulted in a week of fierce Arab-Jewish battles which ended with high casualties. An international *ad hoc* commission with members drawn from Sweden, Switzerland and the Netherlands was appointed in May 1930 under Art. 13 of the Mandate with the approval of the Council of the League of Nations to investigate the claims of the two religious communities. It held that the Muslims had the sole proprietary rights to the Wailing Wall and the pavement in front of the Wall. It also confirmed that the Jews had the right of free access to the Wall at all times for the purpose of worship, but limited strictly the bringing of religious appurtenances to the Wall, and forbade the blowing of the ram's horn. In accordance with the findings of the commission, the Mandatory Government issued detailed instructions concerning the use of the Wall, which became law on June 8, 1931 and remained in effect until the end of the Mandate

The Arab uprising in 1936, however, made it apparent that this administrative measure was unable to solve the underlying political problem of the increasing confrontation of the two nationalisms, for which the holy places offered a convenient arena. The Arab revolt in 1936 was directed not only against the increasing numbers of Jewish immigrants, but constituted at the same time a challenge of the legitimacy of the rule of the Mandatory power.

In response to these events, the Royal Commission Report of 1937 (Peel Report, Cmd. 5479) recommended to partition Palestine into an Arab State and a Jewish State and to create an → enclave for Jerusalem and Bethlehem, including all of the holy places, with a special international régime under a new Mandate supervised by the League of Nations. Neither the League Council nor the Permanent Mandates Commission raised any objections to the British proposal to retain a British mandate over Jerusalem. A new commission appointed in March 1938 to elaborate the Royal Commission's partition plan (Woodhead Commission), however, arrived at the conclusion that a partition was impossible. The British restriction of Jewish immigration and the plan envisaging the establishment of a Jewish-Arab State in Palestine, as set out in the White Paper of May 17, 1939, led to differences of opinion in the Permanent Mandates Commission on whether the new British policy was in accordance with the Mandate. However, there was agreement that the considerations of the 1937 Report and the idea of partition were still relevant. Later, for example, the Anglo-American Morrison-Grady plan of July 31, 1946 proposed autonomous provinces for Arabs and Jews and the retention of British control over Jerusalem and Bethlehem. The proposal was rejected by both sides and in the end dropped by the United States.

D. The United Nations Partition Resolution

Although the 1937 scheme was not realized, it had some influence on the discussion in the → United Nations, to which Great Britain referred the question of Palestine ten years later. The Partition Resolution, adopted by the → United Nations General Assembly on November 29, 1947 (Res. 181 (II)) by a vote of 33 to 10 with 10 abstentions, provided that Palestine be partitioned into an Arab State and a Jewish State and that the "City of Jerusalem shall be established as a *corpus separatum* under a special regime and shall be administered by the United Nations". The Resolution further designated the Trusteeship Council "to discharge the responsibilities of the Administrating Authority on behalf of the United Nations" (Part III) (→ United Nations Trusteeship System).

The General Assembly thus rejected the concept of a federal State in Palestine with Jerusalem as its capital and a functional → internationalization of the holy places, as proposed by the minority report of the United Nations Special Committee on Palestine (Report to the General Assembly, Vol. I, Doc. A/364, 1947). It further requested the Trusteeship Council to draft a Statute for Jerusalem which was to enter into force not later than October 1, 1948. Finally, the Resolution established the United Nations Palestine Commission with the task of implementing the partition of Palestine.

The Partition Resolution was never implemen-

ted, although it was carried by the United States, the East European States (except Yugoslavia), the Scandinavian States, the majority of Latin American States, Australia, Belgium, Canada, France, Iceland, Liberia, Luxembourg, the Netherlands, New Zealand, the Philippines and South Africa. Britain abstained from voting in the General Assembly, but made it clear that she was not prepared to accept responsibility for the implementation of the resolution, unless the solution was acceptable to both sides. The Jewish community in Palestine, albeit reluctantly, was prepared to accept the internationalization of Jerusalem as the price it had to pay for an independent Jewish State recognized by the United Nations.

There was strong Arab opposition, however, both to the partition of Palestine and to the internationalization of Jerusalem. The Arab Higher Committee for Palestine as well as Iraq, Pakistan, Saudi Arabia, Syria and Yemen rejected the Partition Resolution as illegal and declared that the General Assembly was exceeding its competence. Within days of the adoption of the Resolution, there existed a state of virtual → civil war in Palestine, which Britain found difficult to control. In view of the Arab opposition, the United Kingdom refused to cooperate with the Palestine Commission and to transfer authority to it before the mandate officially terminated on May 15, 1948.

E. The 1948 to 1949 Arab-Israeli War

While the Trusteeship Council had completed its work on the draft Statute on Jerusalem on April 21, 1948, the General Assembly, fully aware of the conflict situation, on April 26, 1948, adopted Res. 185 (S-II) which requested the Trusteeship Council to study measures for the protection of Jerusalem. On May 6, 1948, in Res. 187 (S-II), the General Assembly approved the report from the Trusteeship Council and called for the appointment of a special municipal commissioner, who was actually appointed, but unable to function effectively.

The Arab-Israeli war from 1948 to 1949 made the draft Statute on Jerusalem obsolete because it resulted in the *de facto* partition of the city, corresponding largely to the existing communal division. While Jewish forces retained control over the New City, or West Jerusalem, the Arab Legion held East Jerusalem with the Old City. The cease-fire agreement of November 30, 1948 established the truce line in Jerusalem and allowed for a regular convoy service to the Israeli enclave behind Arab lines on Mount Scopus, where the Hebrew University and a hospital had been founded during World War I. This → demarcation line was recognized by the General Armistice Agreement between Jordan and Israel signed on April 3, 1949 (UNTS, Vol. 42, p. 303).

The debate in the United Nations on Jerusalem continued in spite of the *de facto* partition of the city. The preliminary proposals for a Palestine settlement submitted in June 1948 by Count Folke Bernadotte, the United Nations Mediator for Palestine, included Jerusalem in the Arab State. They were rejected categorically by Israel. On December 11, 1948 the General Assembly adopted Res. 194 (III) based on the recommendations made in a progress report by Bernadotte shortly before his assassination. It established the Conciliation Commission for Palestine and confirmed that the "Jerusalem area" should receive "special and separate treatment from the rest of Palestine" and that it "should be placed under effective United Nations control".

A special Committee on Jerusalem and its Holy Places created by the Conciliation Commission attempted to obtain the agreement of the conflict parties to an internationalization of Jerusalem. While the Arab States, except Jordan, had reversed their position and declared themselves now generally prepared to accept the principle of an international régime for Jerusalem guaranteed by the United Nations, Israel was only willing to accept an international régime for, or the international control of, the Holy Places in the City, most of which were, in fact, under Jordan's control. Jordan, however, resisted this "functional internationalization" of the holy places which Israel was willing to implement as distinct from the "territorial internationalization" of Jerusalem. On September 1, 1949 the Commission approved a plan which accepted the partition of the city as a *fait accompli* and was limited basically to the internationalization of the holy places, the protection of which was to be one of the tasks of a United Nations Commissioner.

Apart from this plan, the General Assembly at its fourth session had two further proposals before

it. Sweden and the Netherlands submitted a proposal resembling the "functional" internationalization concept acceptable to Israel. It advocated limiting the responsibility of the United Nations to the protection of the Holy Places. The other option presented by Australia suggested a return to the territorial internationalization envisaged by Res. 181 (II) of November 29, 1947. The Australian draft resolution was opposed not only by the parties directly involved, Israel and Jordan, albeit, of course, for different reasons, but contested also by the United States, the United Kingdom and the Scandinavian countries. However, it found a majority with the support of the Arab States (except Jordan), the Socialist bloc and the majority of Catholic nations influenced by the Vatican's position. Thus, on December 9, 1949, the General Assembly adopted Res. 303 (IV) by which it reaffirmed Resolutions 181 (II) and 194 (III) and its intention to establish an international régime for Jerusalem as a *corpus separatum*. It requested the Trusteeship Council to revise its earlier Statute of Jerusalem and to "proceed immediately with its implementation".

The reality was that without the → use of force it was impossible to persuade Israel and Jordan to surrender to international control the sections of the city under their respective rule. Israel had declared on August 2, 1948 that West Jerusalem was "Israeli-occupied territory", established her Supreme Court in the New City in September 1948 and convened the first meeting of the Knesset there in February 1949. In West Jerusalem also, in 1949, the first President of Israel, Dr. Chaim Weizmann, took his oath of office, and the ministries, except for the defence ministry, were moved there. On January 23, 1950, the Israeli Parliament declared Jerusalem the capital of Israel.

East Jerusalem was eventually absorbed by Jordan which, after inter-Arab political difficulties, annexed the West Bank region in 1949 and replaced military rule in her section of Jerusalem with civil administration on the day the Armistice Agreement with Israel was signed (→ Armistice). In order not to endanger the position of Amman as Jordan's capital, the King of Jordan merely appointed a Supreme Custodian of the Holy Places in Jerusalem. The "second capital", East Jerusalem, remained the political, economic and cultural centre of the West Bank.

The United Nations was unable to prevent these developments or to change the situation. On April 17, 1950 the Soviet Union informed the → United Nations Secretary-General of her withdrawal of support for territorial internationalization. In December 1950 the General Assembly considered two draft resolutions, one submitted by Belgium, which in substance reflected the Roman Catholic preference for *corpus separatum*, the other by Sweden, advocating "functional internationalization". Neither proposal found the necessary majority and the Assembly completed its work in that year without adopting any resolution regarding Jerusalem. Jerusalem was not discussed at the sixth session of the General Assembly in 1951. A further attempt in 1952 by the Philippines to have the General Assembly confirm the 1947 partition plan was, as in the case of the Belgian proposal two years earlier, vigorously opposed by the United States and Britain and failed. Nor did the debate following the transfer of the Israeli Ministry of Foreign Affairs on July 13, 1953 to Jerusalem, after the intention to do so had been announced on May 4, 1952, lead to any different result. While this was protested by the United States and the United Kingdom, followed by other States, the United Nations failed to act. In fact, the question of the international status of Jerusalem no longer appeared on the agenda of the United Nations, until 1967.

F. The June 1967 War and Subsequent Developments

Jerusalem remained divided until the war in June 1967 when Israel gained control over the whole of the city. Solemn words of Moshe Dayan on the day of the conquest of East Jerusalem became the hallmark of the official Israeli position on Jerusalem:

> "The Israeli Defence Forces have liberated Jerusalem. We have reunited the torn city, the capital of Israel. We have returned to this most sacred shrine, never to part from it again" (Gnesa (1981) p. 24).

The municipal government of West Jerusalem began to take immediate steps to remove the physical barriers between both parts of Jerusalem and to incorporate East Jerusalem administra-

tively. Furthermore, on June 27, 1967 the Knesset approved of three laws for the unification of West and East Jerusalem. The Law and Administration Ordinance (Amendment No. 11) Law provided that the "law, jurisdiction and administration of Israel should apply in any area of Eretz Israel designated by the Government by order". The Municipal Corporations Ordinance (Amendment) Law authorized the Minister of the Interior to enlarge the boundaries of any municipality by including within them any area designated by the first law. Finally, the Knesset simultaneously adopted a "Protection of Holy Places Law" providing, sanctioned by punishment by imprisonment, that the Holy Places shall be protected from desecration and any violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places (Laws of the State of Israel, Vol. 21, p. 77).

On June 28, 1967, an expanded East Jerusalem, including the Old City, Kalinda Airport and some Arab neighbouring areas, was designated by order to constitute territory to which Israeli law and administration applied. On November 29, 1968 the right of access to the holy places was specifically extended to citizens of those Arab States which still declared themselves at war with Israel, or which refused to recognize Israel as a sovereign State. Nevertheless, Moslems and Christian Arabs in Arab States continued to raise complaints regarding access to their holy places.

Israel thereby treated East Jerusalem differently from the other territories that she had conquered in 1967. On July 10, 1967 the Israeli foreign minister Eban made the following statement to the Security Council:

> "The term annexation used by supporters of the resolution is out of place. The measures adopted relate to the integration of Jerusalem in the administrative and municipal spheres, and furnish a legal basis for the protection of the Holy Place of Jerusalem" (UN Doc. A/6753; ILM , Vol. 6 (1967) p. 846).

This statement has found different interpretations. Some authors take it to mean that the annexation had in fact been declared already much earlier, when Israel designated Jerusalem as her capital after 1948. This view can rely on several statements made by Ben Gurion at the time and, *inter alia*, on a motion approved by the Cabinet and a Knesset Committee in January 1950, declaring "With the creation of a Jewish State, Jerusalem again became its capital". Others interpret Eban's statement more as a refusal to admit an unwelcome legal characterization of the measures taken in 1967 on the international plane and qualify it as rhetoric in Israel's defence, making distinctions which were merely semantic. Be that as it may, a number of decisions of the Supreme Court of Israel in the following years clarified that, under the law of Israel, East Jerusalem was an integral part of the territory of the State of Israel, as distinct from the "occupied territories".

The Israeli policy towards East Jerusalem was disapproved of by the United Nations. In Res. 2253 (ES-V) of July 4, 1967 and Res. 2254 (ES-V) of July 14, 1967, the General Assembly considered the measures taken by Israel to change the status of the city as "invalid". While the well-known Security Council Res. 242 of November 22, 1967 called for the withdrawal from occupied territories, it did not mention East Jerusalem specifically. The first resolution of the Security Council which explicitly dealt with the city was Res. 252 of May 21, 1968. It recorded the Council's view "that all legislative and administrative measures and actions taken by Israel ... which tend to change the legal status of Jerusalem are invalid and cannot change the status". Subsequent Resolutions of the Security Council concerning East Jerusalem adopted in 1969, 1971, 1973 and 1975 confirmed this position.

From 1971 onwards UNESCO also became increasingly involved with the Jerusalem question. It condemned Israeli archaeological excavations in Jerusalem and the alleged altering of the historic character of the city in a series of resolutions. This culminated in the seemingly unrelated General Conference decision of November 22, 1973 to exclude Israel from the European Region of UNESCO, which was not reversed until November 1976.

In the Camp David → negotiations between Egypt and Israel the Jerusalem question proved so sensitive that it was not even mentioned in the final 1978 Accords. The respective positions were merely stated in side letters. With regard to the

implementation of the agreement as to the autonomy to be negotiated for Palestinians living in Israeli occupied territory, one of the fundamental disagreements between Egypt and Israel from the very beginning concerned the issue of whether East Jerusalem should be included or not and this problem has remained unresolved.

In 1980 there were two resolutions of the Egyptian Parliament by which Israel felt particularly provoked. The resolution of April 1, 1980 declared that:

> "Arab Jerusalem is an integral part of the West Bank, which was occupied by military force. Action must be taken to preserve the historical and legal Arab rights in the city in their entirety . . . ."

The resolution of July 1, 1980 stated: "Jerusalem must be under Arab sovereignty . . . Jerusalem must be regarded as the capital of the Palestinians" (see Kollek (1981) p. 1042).

These developments supplied the background to the "Basic Law: Jerusalem the Capital of Israel", adopted by the Knesset on July 30, 1980. It declared, *inter alia*, that "Jerusalem united in its entirety is the capital of Israel" (Art. 1), that "Jerusalem is the seat of the President of the State, the Knesset, the Government and the Supreme Court" (Art. 2); and that the

> "Holy Places shall be protected against any desecration or any sacrilege or anything which is apt to interfere with the freedom of access of all religious adherents to their Holy Places or to injure their feelings towards these places" (Art. 3) (Laws of the State of Israel 5470–1979, Nr. 81, p. 209).

The legislation did not introduce anything substantially new. It rather confirmed in more formal legislative terms the existing situation and the established Israeli position on Jerusalem. It met condemnation as "null and void" in resolutions adopted by both the United Nations General Assembly and the Security Council.

G. Current Legal Situation

1. The Position of Israel

Israel has repeatedly emphasized that she is not prepared to negotiate on her position that Jerusalem will remain united and the capital of the State. Israel's legal justification of the occupation and annexation of Jerusalem is to a large extent identical with her general position regarding the occupied territories. Israel's claim to Jerusalem has found the support of sophisticated legal argument by scholars, such as, for example, E. Lauterpacht, Y. Blum, J. Stone and S. Schwebel. As in the case of the West Bank, Israel contends that, both in 1948 and in 1967, she acted in → self-defence and that Jordan never exercised → territorial sovereignty over East Jerusalem. It is argued that after the Partition Resolution failed to be accepted by the Arab side, there was a "legal vacuum" in which Israel had the better title to Jerusalem. In addition to the religious basis of her claim, Israel points out that Jews have always lived in Jerusalem, the City of David and the capital of the ancient Jewish Kingdom, and that they have constituted the majority in the city in modern times at least for the past one and a half centuries.

The central legal argument rests on the proposition that, while Jordan had annexed East Jerusalem illegally, Israel acquired title to West and East Jerusalem in the lawful exercise of self-defence. As far as West Jerusalem is concerned, it is argued that the United Nations failed in its attempt to provide a legal framework for Jerusalem and that legal sovereignty over the mandated territory was then in abeyance. As sovereignty was suspended, it was possible to acquire title to the territory by lawful means, as Israel did by acting in lawful self-defence against an armed attack. The partition proposals are considered as legally abortive and without effect on this development. It is further argued that the United Nations acquiesced in the new legal situation (→ Acquiescence).

2. The Arab and Palestinian Position and Islamic States

The Arab and Palestinian legal argument made with regard to Jerusalem is also largely the same as presented in the general context of the dispute on the status of Israel and the occupied territories. It is supported with elaborate reasoning by authors such as H. Cattan, H. bin Talal, and W.T. and S.V. Mallison. While Arab and Islamic declarations have repeated again and again that the Israeli measures with regard to Jerusalem are illegal, it was the 1980 Basic Law that provoked a particularly strong reaction. The Conference of 43 Arab

and Islamic Foreign Ministers meeting at Fez on September 20, 1980 called for a holy war (*jihad*) over Jerusalem and decided to seek Israel's exclusion from the UN General Assembly.

It appears that the demand for the withdrawal of Israel from "Arab Jerusalem" in the more recent statements is limited to the section of the city conquered in 1967, but it is far from clear what implications this has for the argument concerning the status of the whole of Jerusalem. The continuing importance of Jerusalem to the Arab cause was reconfirmed in a statement made by the League of Arab States at its Summit Meeting in Amman in November 1987, which provided, *inter alia*, "that peace in the Middle East will not be achieved except through the recovery of all the occupied Arab territories, foremost among which is Al-Quds Al Charif (Jerusalem) . . . " (ILM, Vol. XXVII (1988) p. 1652; → Arab States, League of).

In conformity with the Fez Plan of 1982, which explicitly called for East Jerusalem to be the capital of a Palestinian State in the West Bank and Gaza, the "Declaration of Independence" issued by the Palestine National Council on November 15, 1988 declared "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem" (ILM, Vol. XXVII (1988) p. 1670). This wording, as well as the demand for Israeli withdrawal from "Arab Jerusalem" in other parts of the document, seem to indicate the possibility of a limitation of the claim.

3. *The Vatican Position*

The position of the Vatican is of particular interest. Since 1948 the consistent position of the Vatican, one of the few non-Moslem entities which, because of its concern for the holy places, refused to enter into normal diplomatic relations with the State of Israel, has been that Jerusalem should be internationalized. Following the war of 1967 it at first continued to press for a guaranteed international status of the city in the sense of a *corpus separatum*, as laid out in the 1947 United Nations Partition Resolution. The failure of a corresponding draft resolution presented on June 30, 1967 by a group of Latin American States, inspired by the Vatican, to attract a sufficient majority in the General Assembly, as well as Israel's indication of a willingness to negotiate regarding the status of the holy places, led the Vatican to reconsider its position. From August 1967 it no longer made the customary references to the territorial internationalization of the city when demanding a special internationally guaranteed statute for Jerusalem and the holy places.

After the first official talks between Israel and the Vatican on Jerusalem had been held in January 1973, when Golda Meir visited Pope Paul VI, it was the aforementioned modified position of the Vatican which was presented by the Pope to the UN General Assembly in 1979 and then explained in a detailed → note drawn up by the Vatican's Permanent Observer at the United Nations. This document, while reaffirming the customary demand for "a special statute, internationally guaranteed for Jerusalem", emphasized the role of Jerusalem as a "place of encounter and concord for the three great monotheistic religions" and their equal rights in the city in the interest of religious pluralism. The final part mentioned the need

> "to define the territory and list the Holy Places, as well as provide for the guarantees and for the supervision which the international community will have to give to the 'statute' and for the juridical form of this commitment and of the accord of the interested parties".

Jean-Paul II confirmed this position in an apostolic letter dated April 19, 1984.

The Foreign Office of Israel responded to this letter by declaring Israel's position unchanged that Israel has always been the capital of the Jewish people and that it would remain the capital of Israel "for ever". It further pointed out that for the first time in history freedom of worship and freedom of access to the holy places in Jerusalem was guaranteed to all faiths. Jerusalem's mayor, T. Kollek, denies that the existing freedom of access could be enhanced by some framework of international guarantees or supervision, holding that such a framework would only be an unnecessary complication, although there could be ways of formalizing by agreements with the various Christian churches the existing *de facto* arrangements. He also does not fail to mention that the Roman Catholic Church is only one of more than 30 Christian denominations represented in Jerusalem, of which the Greek Orthodox is the oldest and owns over half of the holy places.

4. The Position of other States

In view of the continuing efforts to establish an international régime for Jerusalem, neither the UN General Assembly nor the Security Council reacted by any specific condemnation to the annexation by Israel of West Jerusalem. However, Great Britain, the United States and a large number of other States protested formally to Israel and denied that such acquisition of territory was legal. The opinion seemed to prevail that the status of Jerusalem was still to be determined. It was recognized, however, that Israel was exercising *de facto* authority in the part of the city under its control. Largely the same view was taken with respect to the annexation of East Jerusalem by Jordan, an act which Pakistan was the only State to recognize.

When the Foreign Ministry of Israel moved to Jerusalem in 1953, a boycott of the Ministry was declared by the United States and the United Kingdom, followed by other States. Many States did not allow their diplomats to conduct business or attend official functions in Jerusalem. Communications were sent to the Ministry's liaison office in Tel Aviv. When in 1955 the United States indicated willingness to permit the State Department to deal with the Ministry in Jerusalem, the boycott was gradually relaxed.

It has also been the practice of most States not to permit their → consuls in Jerusalem to present their commissions to either the Israeli or the Jordanian Government but to the District Commissioner of Jerusalem. With the notable exception of the Federal Republic of Germany, however, all States which established diplomatic relations with Israel from 1956 to 1976 established missions in Jerusalem. A further practice indicating the → non-recognition of the annexation of Jerusalem is the long-standing policy of western States with separate embassies in Tel Aviv and consulates in Jerusalem of holding separate social receptions for Arabs and Jews on major events, such as Christmas and their national holidays. The only exception is the consulate of the United States in Jerusalem which since 1984 has held single receptions.

The steps taken by Israel to incorporate East Jerusalem were either ignored by the international community because they were considered as internal acts which did not affect the basic legal status of military occupation, or they were rejected as illegal acts of annexation unable to alter the status of the city under international law. This is clear from the resolutions adopted by both the UN General Assembly and the Security Council. While, generally speaking, resolutions of the UN General Assembly are not legally binding, and while it must also be admitted that the relevant resolutions of the Security Council are only recommendations, as they were not adopted under Chapter VII of the → United Nations Charter, this does not mean that they may be easily dismissed as irrelevant (→ International Organizations, Resolutions). At a minimum, they reflect the legal views shared by a very large number of States in the General Assembly as well as the common position of the States represented in the Security Council.

At the end of April 1980, out of 45 States, only 13, among them the Netherlands and a number of Latin American countries, had moved their embassies to Jerusalem, without thereby recognizing any → annexation of Jerusalem. However, in reaction to the 1980 Basic Law in 1981, all of them relocated their embassies to Tel Aviv. When in April 1984 Costa Rica and El Salvador decided to retransfer their embassies to Jerusalem, the Jerusalem committee of the Islamic Conference Organization in a special meeting called on member States to sever all diplomatic, economic and cultural links with these two States. The first formal announcement of such a break was made by Egypt, whose membership in the Islamic Conference Organization had been suspended in 1979 because of the Camp David Accords, although Egypt was subsequently invited back. In September 1986 the Ivory Coast, which restored diplomatic relations with Israel in 1985 after their rupture in 1973, was the third State to open an embassy in Jerusalem.

While it has been the general policy of the United States not to recognize any unilateral alteration of the status of Jerusalem and to avoid taking any further position in the dispute, the Middle East initiative advanced in September 1981 by President Reagan stated that Jerusalem should remain undivided, but confirmed that its future should be negotiated by the parties. The government successfully opposed legislative action in 1984 in the United States Congress calling for a

move of the US embassy and ambassador's residence from Tel Aviv to Jerusalem.

The common position of the (then 9) member States of the → European Communities on Jerusalem was laid down in the Declaration of the European Council adopted in Venice on June 13, 1980. It declared unacceptable any unilateral alteration of the status of Jerusalem and thereby refused to recognize East Jerusalem as part of the territory of Israel. It also stated that any agreement on the status of the city should include the guarantee of free access for all to the holy places.

Finally, it should be mentioned that, in a recent certificate issued in legal proceedings under cover of a letter dated January 28, 1987, the Government of the United Kingdom confirmed the statement made in Parliament on April 27, 1950 (House of Commons, Hansard, Vol. 438, cols. 1137–1139) that it was unable to recognize the sovereignty of Israel over that part of Jerusalem which Israel occupies pending a final determination of the status of the area, but it recognized that Israel exercises *de facto* authority in that area. It was certified, "second, that the government recognises, as regards that part of Jerusalem known as 'East Jerusalem' which has been occupied by Israel since June 1967, Israel as having the rights, powers and obligations of a military occupant" (see ICLQ, Vol.37 (1988) p. 986).

H. Evaluation

Some authors (e.g. Cassese) argue that Israel is bound by the assurances she had given with regard to the implementation of UN General Assembly Resolutions 181 (II) and 194 (III), assurances which were specifically mentioned in the resolution of the General Assembly admitting Israel as a member to the United Nations. It has also been emphasized that Israel gave those assurances although both resolutions had been rejected by the Arab States. The purpose of this reasoning is to show that Israel's assurances were not contingent upon reciprocal action on the Arab side (→ Reciprocity).

While the legal significance of the resolutions mentioned and of the events to which they related is not easy to determine, it is hardly in dispute that, at least since 1945, the acquisition of territory by → conquest is no longer recognized as a legal title. Although there are authors supporting the notion of "defensive conquest" under certain conditions (Schwebel), the prevailing view is that the lawful exercise of the right to self-defence cannot confer title to territory, although it may justify a longer period of military occupation of foreign territory. Therefore, even if Jordan was the aggressor both in 1948 and in 1967, it does not follow that Israel acquired sovereignty over Jerusalem by acting in self-defence.

The view that Israel is only a military occupant of Jerusalem, and that any measures of annexation remain invalid, prevails in the international community. The recognition is therefore also lacking which, under certain circumstances, might be able to give legal effect to an illegal act of annexation in accordance with the principle of → effectiveness in international law. This applies to the status of Jerusalem as a whole. While some authors (e.g. Gnesa) accept that Israeli sovereignty is established at least over West Jerusalem, it appears difficult to accept this proposition *de lege lata* in view of the clear position of the international community to the contrary. Wherever, in theory, sovereignty over Jerusalem may currently reside, the United Nations still has to play a role with regard to the settlement of the question of Jerusalem as a whole, including the holy places. This is conceivable only as part of an overall solution of the Arab-Israeli conflict.

P. BERGER, The Internationalization of Jerusalem, The Jurist, Vol. 10 (1950, reprint 1978) 357–387.

G. WEISS, Die internationale Stellung Jerusalems, in: Völkerrechtliche und staatsrechtliche Abhandlungen, Carl Bilfinger . . . gewidmet (1954) 513–557.

E.B. GLICK, The Vatican, Latin America, and Jerusalem, International Organization, Vol. 11 (1957) 213–219.

R. FALAIZE, Le statut de Jérusalem, RGDIP, Vol. 62 (1958) 618–654.

S.M. BERMAN, Territorial Acquisition by Conquest in International Law and the Unification of Jerusalem, International Problems, Vol. 7 (1968) 11–21.

E. LAUTERPACHT, Jerusalem and the Holy Places (1968).

T. MERON, The Demilitarization of Mount Scopus: A Régime that was, Israel Law Review, Vol. 3 (1968) 501–525.

S. SHEPHARD JONES, The Status of Jerusalem: Some National and International Aspects, Law and Contemporary Problems, Vol. 33 (1968) 169–182.

E.M. WILSON, The Internationalization of Jerusalem, The Middle East Journal, Vol. 23 (1969) 1–13.

S.M. SCHWEBEL, What Weight to Conquest?, AJIL, Vol. 64 (1970) 344–347.

H.E. BOVIS, The Jerusalem Question, 1917–1968 (1971).

W. ZANDER, Israel and the Holy Places of Christendom (1971).

A. LEVINE, The Status of Sovereignty in East Jerusalem and the West Bank, New York University Journal of International Law and Politics. Vol. 5 (1972) 485–502.

Y.Z. BLUM, The Juridical Status of Jerusalem (1974).

D. HIRST, Rush to Annexation: Israel in Jerusalem, Journal of Palestine Studies, Vol. 3 (1974) 3–31.

E. LAUTERPACHT, Jerusalem and the Holy Places, in: J.N. Moore (ed.), The Arab-Israeli Conflict, Volume 1 Readings (1974) 929–1009.

R.H. PFAFF, Jerusalem: Keystone of an Arab-Israeli Settlement, in: J.N. Moore (ed.), The Arab-Israeli Conflict, Volume 1 Readings (1974) 1010–1062.

S. SHEPHARD JONES, The Status of Jerusalem: Some National and International Aspects, in: J.N. Moore (ed.), The Arab-Israeli Conflict, Volume 1 Readings (1974) 915–928.

H. KLINGHOFFER, Verfassungsrechtliche Probleme Israels, Jahrbuch des öffentlichen Rechts NF, Vol. 24 (1975) 501–548.

A. REYNER and J. PHILIPS, Jerusalem: A Factual Background, World Affairs (1975) 326–335.

N. SOFER, The Political Status of Jerusalem in the Hashemite Kingdom of Jordan, Middle Eastern Studies, Vol. 12 (1976) 420–433.

M. AARONSON, A Regime for the Holy Places, IntRel, Vol. 6 (1978/1980) 859–898.

J. MORZELLEC, La question de Jérusalem devant l'Organisation des Nations Unies (1979).

The Status of Jerusalem, Prepared for, and under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People (1979).

H. BIN TALAL, A Study on Jerusalem (1979).

J. TULMAN, The International Legal Status of Jerusalem, ASILS International Law Journal, Vol. 3 (1979) 39–62.

H.F. CARADON, The Future of Jerusalem: A Review of Proposals for the Future of the City (1980).

A. CASSESE, Legal Considerations on the International Status of Jerusalem, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980) 144–153.

M. CRANE, Middle East: Status of Jerusalem, Harvard ILJ, Vol. 21 (1980) 784–793.

G.I.A.D. DRAPER, The Status of Jerusalem as a Question of International Law, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980) 154–163.

M. GRUHIN, Jerusalem: Legal and Political Dimensions in a Search for Peace, Case Western Reserve Journal of International Law, Vol. 12 (1980) 169–213.

S. JIRYIS, Israeli Laws as Regards Jerusalem, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980) 181–191.

H. KÖCHLER (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980).

M. RIEDMAIR, Souveränität über Jerusalem – Rechtliches und Zeitgeschichtliches zum politischen Problem, Vereinte Nationen, Vol. 28 (1980/1982) 195–200.

R.P. STEVENS, The Vatican, the Catholic Church and Jerusalem, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980) 173–181.

G. STUBY, The Status of Jerusalem and the Right of Self-determination of the Palestinian People, in: H. Köchler (ed.), The Legal Aspects of the Palestine Problem with Special Regard to the Question of Palestine (1980) 120–143.

H. CATTAN, Jerusalem (1981).

H. CATTAN, The Status of Jerusalem under International Law and United Nations Resolutions, Journal of Palestine Studies, Vol. 10 (1981) 3–15.

E. GNESA, Die von Israel besetzten Gebiete im Völkerrecht (1981).

L. KLETTER, The Sovereignty of Jerusalem in International Law, ColJTransL, Vol. 20 (1981) 319–363.

T. KOLLEK, Jerusalem: Present and Future, Foreign Affairs, Vol. 59 (1981) 1041–1049.

R.P. STEVENS, The Vatican, the Catholic Church and Jerusalem, Journal of Palestine Studies, Vol. 10 (1981) 100–110.

J. STONE, Israel and Palestine (1981).

B. COLLIN, Recueil de documents concernant Jérusalem et les Lieux Saints (1982).

P. RANDOT, Jérusalem, Ville Sainte pour l'Islam, Défense Nationale, Vol. 38 (1982) 99–103.

E.M. WILSON, The Question of Jerusalem, American-Arab Affairs, Vol. 1 (1982) 111–119.

P. MATTAR, The Role of the Mufti of Jerusalem in the Political Struggle over the Western Wall, 1928–29, Middle Eastern Studies, Vol. 19 (1983) 104–118.

M.H. ARMACOST, U.S. Position on Jerusalem, DeptStateBull, Vol. 84 (1984) 62–63.

S. SLONIM, The United States and the Status of Jerusalem 1947–1984, Israel Law Review, Vol. 19 (1984) 179–252.

Y. YISHAI, Israeli Annexation of East Jerusalem and the Golan Heights: Factors and Processes, Middle Eastern Studies, Vol. 21 (1985) 45–60.

A. CASSESE, Legal Considerations on the International Status of Jerusalem, Palestine Yearbook of International Law, Vol. 3 (1986) 13–39.

W.T. MALLISON and S.V. MALLISON, The Palestine Problem in International Law and World Order (1986) 207–443.

G. TALHAMI, Between Development and Preservation: Jerusalem under Three Regimes, American-Arab Affairs (1986) 93–107.

J.A. FROWEIN and S. OETER, Ost-Jerusalem und das deutsch-israelische Sozialversicherungsabkommen. Die Nicht-Anerkennung der Eingliederungsmaßnahmen und die Frage nach der Methodik der Vertragsauslegung, ZaöRV, Vol. 48 (1988) 18–34.

T. KOLLEK, Sharing United Jerusalem, Foreign Affairs, Vol. 67 (1988) 156–168.

PETER MALANCZUK

KASHMIR

1. The State of Jammu and Kashmir

Since the end of British rule over the Indian subcontinent in 1947 there has been a dispute between India and Pakistan over the former Himalayan State of Jammu and Kashmir (→ Decolonization: British Territories). In the years 1948, 1965 and 1971 the dispute flared up into → armed conflict, but even in times of relative peace strong tensions have prevailed between India and Pakistan on account of the Kashmir issue (→ Boundary Disputes in the Indian Subcontinent).

The State of Jammu and Kashmir was founded in 1846, when the British Government, represented by the British East India Company, transferred the provinces of Jammu, Kashmir, Gilgit, Baltistan and Ladakh to the Maharaja of Jammu, Gulab Singh, in the Treaty of Amritsar of March 16, 1846 (BFSP, Vol. 38, p. 800). These provinces, which the Company had acquired from the Sikh State shortly before, were transferred to Gulab Singh and his heirs in "independent possession", subject, however, to the "supremacy" of the British Government. According to the census held in 1941 the State had about four million inhabitants. Two million lived in Jammu and 1.7 million in the vale of Kashmir. About 77 per cent of the State's population were Muslims. They mainly settled in the province of Kashmir and in the western part of Jammu. On the other hand, almost the entire Hindu population of the State, about 20 per cent of the total population, were living in Jammu. Sikhs and Buddhists formed smaller minorities. Beyond the end of British rule the State was governed by the Hindu dynasty founded by Gulab Singh.

Jammu and Kashmir was the largest of the 562 Indian Princely States which constituted about 45 per cent of the subcontinent's total area. Whereas the provinces of British India were administered directly by the British Government, the Indian States were governed by their princes subject to the suzerainty of the British Crown. After the adoption of the Government of India Act, 1935 (25 & 26 Geo. V, c. 42), the authority of the British Crown over the Princely States was exercised by the Crown Representative. In practice the offices of Governor-General of British India and of Crown Representative were both held by the same person, the last being Lord Mountbatten of Burma.

2. The Partition of British India and the Question of the Princely States

(a) The partition of British India

The fight for independence from British rule was overshadowed by the conflict between the Indian National Congress and the Muslim League, which at the time of the transfer of power, August 15, 1947, led to the partition of British India according to the Indian Independence Act, June 11, 1947 (10 & 11 Geo. VI, c. 30). This British Act took into account the demand of the Muslim League to allow the establishment of the Muslim State of Pakistan consisting of those areas in the North East and North West of the British Indian territories where the Muslim population formed a majority. According to the constitution of each of the new Dominions the Head of State was a Governor-General who was no longer subject to the instructions of the British Government. In the Dominion of India the office of Governor-General was held by the last Governor-General of British India, Lord Mountbatten of Burma.

(b) The accession of the Princely States

The British Government considered that the suzerainty over the Princely States could not be effectively exerted after the end of its rule over British India. Accordingly, the Indian Independence Act, 1947 released the States from all their obligations to the Crown. All that the Dominion Governments inherited from the paramount power was the proviso to section 7 of the Indian Independence Act, which provided for the continuance, until denounced by either of the parties, of agreements between the Indian States and the Central and Provincial Governments of former British India in regard to specified technical matters, such as customs, posts and telegraphs. The problem of the future relationship of the Princely States to the new Dominions, and especially the question which Dominion a Princely State should eventually accede to, were not only likely to create future tensions between the Dominion governments and the Princely States; they also provided sufficient reason for the even

more dangerous conflict between the two Dominions themselves.

On Independence Day almost all of the 562 Indian States had signed instruments of accession to one of the new Dominions or had at least signed a standstill agreement with the Dominion to which they intended to accede. Three princes, however, whose choice was of special political importance because of the size and the geographical situation of their States had not made known their intent to accede to one of the Dominions at this time. These were the Nizam of Hyderabad, the Nabob of Junagadh and the Maharaja of Jammu and Kashmir. Immediately after attaining independence, India and Hyderabad were involved in a major conflict in the course of which, on August 21, 1948, the Nizam of Hyderabad called upon the → United Nations Security Council for help against India. On September 13, 1948 Indian troops entered Hyderabad and occupied the State. On September 22, 1948 the Nizam communicated to the → United Nations Secretary-General that he had advised his delegation to withdraw the case. In his Firman of November 23, 1949, the Nizam declared the new constitution of India to be applicable to Hyderabad.

The State of Junagadh lay on the West coast of the subcontinent and had no common border with Pakistan. The Nabob, a Muslim, ruled over a population consisting of 80 per cent Hindus and 20 per cent Muslims. On September 15, 1947 Pakistan made known that Junagadh had acceded to Pakistan. In response to Indian → protests characterizing the accession as an attempt by Pakistan to break the unity of India, Pakistan justified her acceptance of the Nabob's accession by pointing out that the principles according to which British India had been divided had not been meant to govern the question of the accession of Princely States to one of the new Dominions. Pakistan declared that the States had been completely free in their decision as to which Dominion they wanted to accede to. On November 9, 1947 Indian troops occupied the State of Junagadh. In February 1948 a → plebiscite was held in Junagadh on the question of the State's accession to India or Pakistan. As India communicated to the UN Security Council, 190 000 voters had voted in favour of India, but only 91 in favour of Pakistan. Pakistan has refused to accept this result on the grounds that the plebiscite was neither valid nor impartial.

3. The Accession of Jammu and Kashmir to India

(a) The events leading to accession

By the end of British rule in India, Maharaja Hari Singh, the ruler of Jammu and Kashmir, had not made known whether he intended to declare his State's accession to one of the new Dominions. Since his State had common borders not only with both of the Dominions, but also with other States (Afghanistan, China) he apparently hoped to be able to keep his State independent. On August 12, 1947 he sent identical telegrams to the future Dominion Governments, which were due to assume power on August 15, proposing the conclusion of standstill agreements in every matter in which there had been agreements with British Indian authorities. These agreements should continue to be valid between his State and the Dominions until replaced by new agreements. Pakistan accepted this proposal on August 16, 1947. The Indian Government proposed that the parties enter into negotiations for a standstill agreement at Delhi. Because of the events which followed, such negotiations were not entered into.

On October 22, 1947 several thousand members of the Muslim tribes living in the border area between Pakistan and Afghanistan entered western Jammu and Kashmir. According to Pakistan this was a spontaneous reaction to the cruelties of the Maharaja's troops against the Muslim population in the district of Poonch, Province of Jammu, and against the Muslim refugees who crossed the State on their way from East Punjab to West Punjab. The tribal warriors moved through the valley of the Jhelum river and on October 25 arrived at a point close to Srinagar. They devastated and looted the towns on their way. India contended that Pakistan had supplied the tribesmen with military equipment, means of transport and fuel. Pakistan maintained that it was impossible to prevent the invasion; Pakistan nationals who had participated had been persons fighting for the freedom of the population of the State voluntarily and without a mandate of the Pakistan Government. On October 24, 1947 the Maharaja asked the Indian Government for

military assistance. The Defence Committee of the Indian Government, under the chairmanship of Governor-General Lord Mountbatten, considered the Maharaja's appeal and resolved to take a decision only after the Maharaja had declared the accession of his State to the Dominion of India; only a formal accession would provide a legal basis beyond any doubt for a military → intervention by India. This was explained to the Maharaja on October 26 at Jammu, where the Maharaja had fled the night before.

As a result, the Maharaja signed the instrument of accession on the same day. In a letter accompanying the instrument he explained to Lord Mountbatten his reasons for this step, concluding that he had no choice but to ask for the assistance of the Dominion of India and that naturally this help could not be provided unless his State accede to the Dominion. On October 27 the Governor-General of India signed his declaration of acceptance of the instrument of accession. In a letter of the same date informing the Maharaja he stated:

> "Your Highness's letter dated 26 October 1947 has been delivered to me by Mr. V.P. Menon. In the special circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State's accession should be settled by a reference to the people. . . ."

On the same day Indian troops were flown to Srinagar. By December 1947 they had pushed the tribesmen back to a line about 30 kilometres from the Pakistan border. There the front stabilized. On the other side of the front the Azad (Free) Kashmir Government, which had been proclaimed as a → Government-in-exile in Pakistan in October 1947, took over command. From May 1948 onwards the Pakistan army officially participated in the fighting. In the sparsely populated northern territories of the State where heavy fighting was going on Pakistan took over command in May 1948.

(b) Pakistan's legal point of view

Pakistan held the accession of Jammu and Kashmir to India to be "null and void" for four reasons: (1) The State of Jammu and Kashmir had executed a standstill agreement with Pakistan on August 15, 1947, which debarred the State from entering into any kind of negotiation or agreement with any other country. (2) The Maharaja had no authority left to execute an instrument of accession, because his people had successfully revolted, compelling him to flee from the capital. (3) The act of accession was brought about by violence and fraud and as such it was invalid *ab initio*. (4) The Maharaja's offer of accession was accepted by the Governor-General of India on the condition that as soon as law and order had been restored, the question of the accession of the State would be decided by a reference to the people. The Indian Constitution Act made no provision for conditional accession. The action of the Maharaja and of the Government of India had, therefore, no validity in law.

In the course of the debates in the UN Security Council Pakistan also stated that the acceptance of the State's accession by India was debarred by the so-called "Two Nations" theory which, as Pakistan claimed, had underlain the partition of the subcontinent. According to Pakistan it had been universally assumed that those Princely States the population of which consisted of Muslim majorities would accede to Pakistan.

(c) India's legal point of view

In the view of India the State of Jammu and Kashmir had become part of India by accession on October 26, 1947. The standstill agreement between Pakistan and Jammu and Kashmir had had no effect on the competence of the Maharaja to sign the instrument of accession to India. The standstill agreement had been relevant only with regard to administrative agreements which had been in force between the State and former British India and her provinces. The Maharaja's government had not been overthrown by a successful revolution. On the contrary, the Maharaja had been justified in asking a friendly neighbour for help. Nor had the Governor-General of India

exceeded his constitutional competence. The acceptance of the State's accession was declared unconditionally. Furthermore the accession had not been brought about by "fraud and violence". Only after an invasion from Pakistan territory had India decided to accept the Maharaja's instrument of accession. Finally, India had never agreed to the "Two Nations" theory. Especially in the question of the accession of Princely States the religion of the population had been irrelevant.

4. Attempts by the United Nations to Settle the Conflict

(a) UN Security Council and UNCIP

On January 1, 1948 India lodged a complaint with the UN Security Council against Pakistan under Art. 35 of the → United Nations Charter (Doc. S/628, p. 139). India alleged that a situation existed which was likely to endanger the maintenance of international peace and security. Pakistan denied having given aid to the invaders, brought to the attention of the Security Council, under Art. 35 of the Charter, the existence of other disputes (especially concerning Junagadh) and requested that appropriate measures be adopted for their settlement.

On January 20, 1948 the Security Council decided to set up the United Nations Commission for India and Pakistan (UNCIP), to investigate the facts (UN Charter, Art. 34; → Fact-Finding and Inquiry) and to mediate between the two Dominion governments (Doc. S/654, p. 64; → Conciliation and Mediation). On April 21, 1948 the Security Council recommended specific measures for a settlement of the conflict, aiming at a restoration of peace and order and the preparation and holding of a plebiscite (Doc. S/726, p. 8). The resolution was repudiated by both governments because, as they asserted, the plan of settlement did not take into account their *locus standi* towards Jammu and Kashmir. However, both governments declared themselves willing to enter into dialogue with the Commission.

(b) The UNCIP resolutions of August 13, 1948 and January 5, 1949

In the course of its mediation efforts the commission submitted to the governments of India and Pakistan its proposals, which were contained in two complementary resolutions of August 13, 1948 (Doc S/1100, p. 32) and January 5, 1949 (Doc. S/1196, p. 23). Both governments finally accepted these resolutions. In later debates in the Security Council they both asserted that, apart from general international law, a legal obligation to settle the Kashmir conflict could be based on these resolutions only (Doc. S/PV 761 para. 115; S/PV 767, para. 97).

The resolution of August 13, 1948 contained a settlement proposal consisting of three parts. The first part called for a cease-fire order which should be controlled by United Nations military observers (→ Suspension of Hostilities). In the second part the Commission recommended a truce agreement envisaging the → demilitarization of the State. According to part three, the two governments should reaffirm their wish that the future status of Jammu and Kashmir should be determined in accordance with the will of the people (→ Self-Determination). They should agree to enter into → consultations with the Commission to determine fair and equitable conditions whereby such free expression would be assured. Since Pakistan was not willing to accept this resolution unless Part III of the resolution was amplified by specific rules dealing with the final settlement, the Commission on December 11, 1948 elaborated a catalogue of additional "Basic Principles for a Plebiscite" (Doc. S/1196, Annex 3, p. 33). The first principle was that the question of the accession of the State of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite. The plebiscite should be held when it was found by the Commission that the cease-fire and truce arrangements had been carried out and arrangements for the plebiscite had been completed. Other principles dealt with the nomination of a Plebiscite Administrator and the final demilitarization of the State. In view of the explanations given by the Commission on the interpretation of its proposals both India and Pakistan finally accepted the Commission's proposals, including its resolution of August 13, 1948. Thereafter the Commission passed its resolution of January 5, 1949 (Doc. S/1196, p. 23) containing the basic principles for a plebiscite as proposed on December 11, 1948. The Commission reported to the Security Council that India and Pakistan had

accepted the mediation plan contained in these resolutions.

(c) Implementation of the UNCIP resolutions

Part I of the resolution of August 13, 1948 led to a cease-fire on January 1, 1949. India and Pakistan agreed on a cease-fire line on July 27, 1949 which has hitherto been altered only slightly. The implementation of the cease-fire has been observed by the United Nations Military Observer Group for India and Pakistan (UNMOGIP) ever since (→ United Nations Peacekeeping System). The mediation efforts of the Commission to bring about a truce agreement according to Part II of the resolution of August 13, 1948 have, however, failed. The Commission was confronted with three main impediments to a truce agreement. These were the synchronization of the withdrawal of Indian and Pakistani troops; the question whether the disarmament of Azad (Free) Kashmir troops should be dealt with in the truce agreement or only at the time of the realization of the principles for a plebiscite; and finally, the problem whether India should be allowed to maintain garrisons in the northern areas of the State. The attitudes of both governments regarding these problems stem from the premises which form the basis of their cases: Whereas India considers Jammu and Kashmir as part of her territory, Pakistan maintains that the accession was null and void. In its resolution of March 14, 1950 (Doc. S/1469) the Security Council replaced the UNCIP by a United Nations Representative for India and Pakistan (UNRIP). The UNRIP (Sir Owen Dixon, followed by Frank P. Graham), however, remained unsuccessful, as were the mediation efforts of the Presidents of the Security Council (General McNaughton and Gunnar Jarring).

(d) India's withdrawal from the UNCIP resolutions

On February 5, 1964 India declared in the Security Council (Doc. S/PV 1088, p. 13) that she no longer felt bound by the two UNCIP resolutions. Moreover, under no circumstances would India agree to the holding of a plebiscite. India contended that the basis for a plebiscite had disappeared because Pakistan had not "vacated its aggression" and because, by the passage of time and the intervention of various factors, the resolutions had become obsolete. Holding a plebiscite in Kashmir would pose a threat to the integration of India and a danger to the principle of secularism. Accordingly, when acceding to the international → human rights covenants, India declared that the words "the right of self-determination" appearing in Art. 1 of the Covenants applied only to the peoples under foreign domination and not "to sovereign independent States or to a section of a people or nation – which is the essence of national integrity". Pakistan has denied the validity of India's position (S/6292), pointing out that the agreement to negotiate a truce agreement and to hold a plebiscite could not be nullified by India's unilateral action; neither had there been a breach of Pakistan's obligations under the resolutions in the course of negotiations, nor a fundamental change of circumstances (→ Clausula rebus sic stantibus).

In their Declaration of Tashkent (January 10, 1966, UNTS, Vol. 560, p. 39) and of Simla (July 3, 1972, ILM, Vol. 11 (1972) p. 954) the two States ended the armed conflict which had broken out at that time between them; they did not, however, succeed in overcoming their disagreement on the main issues. The points of view of both States being irreconcilable, the crisis over Jammu and Kashmir seems doomed to continue for the foreseeable future.

Treaty of Amritsar of March 16, 1846 (BFSP, Vol. 38, p. 800).

India Independence Act, 10 and 11 Geo. VI, Ch. 30.

Instrument of Accession, S.C.O.R., 12th year, Supplement for January, February and March 1957, p. 55.

Government of India (ed.), White Paper on Jammu and Kashmir (1948).

Government of India (ed.), White Paper on Indian States (1950).

United Nations Commission for India and Pakistan, First Interim report S/1100 Nov. 22, 1948 (S.C.O.R., 3rd year, Supplement for November 1948); Second Interim Report S/1196 Jan. 10, 1949 (S.C.O.R., Supplement for January 1949); Third Interim Report S/1430 (S.C.O.R., 4th year, Special Supplement No. 7).

T. DAS, Status of Hyderabad During and After British Rule in India, AJIL Vol. 43 (1949) 57–72.

LORD MOUNTBATTEN OF BURMA, Time Only to Look Forward (1949).

G.M.D. SUFI, Kashmir, Being a History of Kashmir, 2 vols. (1949).

C. EAGLETON, The Case of Hyderabad before the Security Council, AJIL Vol. 44 (1950) 277–302.
P. POTTER, The Principal Legal and Political Problems Involved in the Kashmir Case, AJIL Vol. 44 (1950) 361–363.
A.A. KHAN, Verdict on Kashmir (1951).
H. ALEXANDER, Kashmir (1952).
A. CAMPBELL-JOHNSON, Mission with Mountbatten (1952).
P.N. BAZAZ, The History of the Struggle for Freedom in Kashmir (1953).
M. BRECHER, The Struggle for Kashmir (1953).
P. DIWAN, Kashmir and the Indian Union: The Legal Position, ICLQ (1953) 333–353.
M.K. NAWAZ, The Kashmir Problem, Indian Yearbook of International Affairs, Vol. 2 (1953) 181–192.
J. KORBEL, Danger in Kashmir (1954).
C.H. ALEXANDROWICZ-ALEXANDER, Le Cachemire: Aspect juridique du conflit Indo-Pakistanais, ÖZÖR Vol. 7 (1956) 296–308.
C.B. BIRDWOOD, Two Nations and Kashmir (1956).
M.M.R. KHAN, The United Nations and Kashmir (1956).
V.P. MENON, The Story of the Integration of the Indian States (1956).
T.S.R. RAO, Some Problems of International Law in India, Indian Yearbook of International Affairs, Vol. 6 (1957) 3–45.
C.J. CHACKO, India's Contribution to the Field of International Law Concepts, R.d.C. Vol. 93 (1958 I) 121–221.
S.M.I. KHAN, The Kashmir Saga (1965).
S. GUPTA, Kashmir; a Study in Indian-Pakistan Relation (1966).
A. LAMB, Crisis in Kashmir 1947 to 1966 (1966).
H.S.G. RAO, Legal Aspects of the Kashmir Problem (1967).
R. GEIGER, Die Kashmirfrage im Lichte des Völkerrechts (1970).
M.S. CHAUDHRY, Der Kashmirkonflikt, Vol. 3 (1977).
H.O. AGARWAL, Kashmir Problem: Its legal Aspects (1979).
T.S.R. RAO, India's International Disputes, Some Legal Aspects, AVR Vol. 22 (1984) 22–44.

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KIEL CANAL

1. General Background

The Kiel Canal is an artificial waterway (→ Canals) which connects the → Baltic Sea with the North Sea between Holtenau at the Kiel Förde and Brunsbüttel at the mouth of the → Elbe River. The Canal is situated entirely on German territory; its approaches are also in the → internal waters of the Federal Republic of Germany.

Built from 1887 the Canal was opened on June 21, 1895. From 1907 to 1914 it was enlarged for the first time, and since 1965 it has again been deepened and broadened. The Kiel Canal is 98.729 kilometres long, presently 102.5 metres wide at the surface and 44 metres at the bottom (in the future 162 metres and 90 metres), and 11 metres deep. Its nine bridges have a clearance of 42 metres. There are locks at both entrances to the Canal. Loaded cargo ships with approximately 20 000 tons deadweight and passenger ships with approximately 56 000 tons deadweight can navigate in 7 to 9 hours through the Canal, which is approximately 250 nautical miles shorter than the passage around the Skagerrak.

In 1987, 45 324 ships (including 1217 military vessels; → Warships), nearly 48 per cent of which sailed under foreign flags (→ Flags of Vessels), with about 58 000 tons cargo, passed through the Kiel Canal making it the most frequented inter-oceanic canal in the world. In comparison, in 1986, 11 996 ships with about 128 000 tons cargo passed through the → Panama Canal, and 18 403 ships with about 263 000 tons cargo passed through the → Suez Canal.

2. Status in International Law

(a) Historical analysis

According to para. 1 of the law of March 16, 1886 concerning the construction of the Kiel Canal (German Reichsgesetzblatt 1886, p. 58), the German Reich was authorized to build a waterway navigable by the German naval fleet. From 1895 until June 1919, the Canal was "an internal and national navigable waterway, the use of which by vessels of states other than the riparian state ... [was] left entirely to the discretion of that state", as the → Permanent Court of International Justice (PCIJ) observed in the case of the → *Wimbledon* (PCIJ, Series A, No. 1 (1923) p. 22).

The German Government unilaterally opened the Canal for the passage by day and night of → merchant ships of all nations. In practice, passage was granted without discrimination between German and foreign merchant ships or among

foreign ships. Foreign warships had to obtain prior permission through diplomatic channels to pass through the Canal. In February 1904 during the war between Russia and Japan, for example, the German Government refused to permit the passage through the Canal of 15 Russian warships on their way to East Asia. During the First World War the Canal remained open for ships of neutral States.

In the "Clauses Relating to the Kiel Canal" (Part XII, Sec. VI, Arts. 380 to 386), the → Versailles Peace Treaty established on June 28, 1919 an international régime for the Canal (→ Internationalization): "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" (Art. 380). In the case of the English steamship *Wimbledon*, which was chartered by a French company to carry munitions and artillery stores to Poland during the Russo-Polish war, the PCIJ held that the German refusal to let the ship pass through the Canal in March 1921 violated Art. 380 (PCIJ, Series A, No. 1, p. 33).

The Versailles Peace Treaty stipulated for the first time a legal right to "be treated on a footing of perfect equality in the use of the Canal" for nationals, property and vessels of all Powers, and it confined the German jurisdiction over the movement of foreign persons or vessels to reasonable and uniform regulations concerning police, customs, sanitation, → emigration or → immigration and the import or export of prohibited goods (Art. 381). Only charges levied to maintain and improve the navigability of the Canal and its approaches were allowed (Arts. 382, 384). Germany was bound to remove any obstacle to navigation and to ensure the maintenance of good conditions of navigation (Art. 385). Moreover, in order to ensure free passage into the Baltic Sea for all nations, Germany had to demolish all fortifications in a zone which included most of the Canal (Art. 195).

In its note of November 14, 1936 (German Reichsgesetzblatt 1936 II, p. 361), the German Government declared that it considered itself no longer bound by those articles of the Versailles Peace Treaty relating to waterways on German territory or by any international convention flowing therefrom. The note justified this position on the ground that the articles in question were dictated to Germany and not freely negotiated. It went on, however, by stating that navigation on the waterways in Germany is free on the basis of → reciprocity for ships of all nations at peace with Germany. Including the question of charges, there was to be no discrimination between German and foreign ships.

Only the French Government expressly protested (→ Protest), in a note of December 3, 1936, against the repudiation of the provisions of the Versailles Peace Treaty by Germany. On December 2, 1936, the British Government made reservations regarding the legal position created by the German action concerning the Kiel Canal. Poland and Belgium expressed generally their regret concerning the German action, whereas a protest by Czechoslovakia, the expressions of regret made by Romania and Yugoslavia, and the refusal by the Netherlands to recognize the action were related to the régimes of rivers only. No further protests, reservations or regrets were expressed, when on August 15, 1937 Germany again required foreign warships to obtain prior permission through diplomatic channels for passage through the Kiel Canal.

After the Second World War the Allied Powers did not re-establish an international régime for the Kiel Canal, although Denmark suggested an internationalization of the Canal at the Conference of Deputy Ministers for Foreign Affairs in London on January 31, 1947. The States concerned did not renew their protests or reservations, when the Federal Republic of Germany proceeded with the practice of maintaining the Canal as a national waterway unilaterally opened to international navigation.

Consequently, in 1950, the Supreme Court of Justice for the British Zone in occupied Germany suggested in the *Log* and *Auslag* Case the possibility that, because of the absence of serious opposition by the signatory powers of the → Versailles Peace Treaty (1919) against the German note of 1936, Germany had effectively terminated the internationalization of the Kiel Canal (Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Zivilsachen, Vol. 4 (1950) p. 194, at p. 198). In 1954, the Higher Regional

Court of Schleswig observed in the *Ari* Case that the restoration of German → sovereignty over the Canal in 1936 had not been affected by the end of the war in 1945 (JIR, Vol. 7 (1956) p. 405, at p. 406). Therefore, contrary to the opinion of various authors, who still regard the Kiel Canal as internationalized pursuant to Arts. 380 to 386 of the Versailles Peace Treaty, since 1936 the Canal has no longer been regulated by the international legal régime established by that Treaty either in the domestic law of Germany or in international law.

(b) Present status

Although the Kiel Canal is no longer internationalized, the present legal situation concerning the passage of foreign ships through it differs considerably from that which prevailed between 1895 and 1919.

Under the condition of reciprocity, the German note of November 14, 1936 provides a basis in international law for the free passage through the Canal of ships of all nations without discrimination. This was restated in para. 6 of the regulations for the operation of the Canal (*Betriebsordnung*) of 1939, which were in force until 1971. The fact that there existed no corresponding provision concerning rivers or other waterways reveals that the German Government considered itself bound by its note of 1936 with regard to the Kiel Canal. The note has not been revoked since then.

In addition, the Federal Republic of Germany is a party to the Barcelona Convention and Statute on the International Regime of Maritime Ports of 1923 (LNTS, Vol. 59, p. 285; → Ports). According to Art. 2 of the Statute, foreign merchant vessels passing through the Canal on their way to or from a German maritime port enjoy → most-favoured-nation treatment and must not be discriminated against. Similar provisions are contained in most bilateral shipping agreements of the Federal Republic. A customary international right of free passage through the Kiel Canal, however, does not exist.

The mentioned unilateral provisions and international agreements concerning passage through the Canal do not refer to foreign warships and auxiliary vessels or to foreign government ships operated for non-commercial purposes. Such ships must obtain prior permission through diplomatic channels for their passage. Foreign merchant ships passing through the Canal are subject to the same laws and jurisdiction applicable to other internal waters of the Federal Republic, except that ships in transit are exempt from customs duties.

J. MAUPAS, Le Canal de Kiel, Revue de Droit International, Vol. 20 (1937) 49–63.

V. BÖHMERT, Zur völkerrechtlichen Lage des Kieler Kanals, Internationales Recht und Diplomatie (1958) 170–190.

R. BAXTER, The Law of International Waterways with Particular Regard to Interoceanic Canals (1964).

W.O. LAMPE, Die völkerrechtliche Situation des Kieler Kanals gestern und heute (1985).

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KOREA

1. Background

Korea has a long history, beginning in 2333 B.C. After the period of the Three Kingdoms (57 B.C. to 688 A.D.), Korea became unified under the Kingdom of Silla, with Kyongju as capital, then one of the four cultural centres of Asia. The new dynasty of Koryo, founded in 935 A.D. and considered as the Golden Age of Korean Buddhism, lasted until the Mongolian invasions in the 14th century. In 1392, a general, Yi Song-gye, seized power and created the Chosun dynasty, which ruled until the → annexation of Korea by Japan in 1910; under this dynasty the influence of Buddhism on the State's institutions was supplanted by that of Confucianism, which became the State cult and national religion.

From the 16th century onward, Korea was exposed to Japan's territorial ambitions and sought the protection of China, whose influence became predominant. Korea cut herself off from contact with all other foreign countries (the "hermit" Kingdom). During the 19th century, however, Western influences penetrated through China and Korea came under pressure from all the → Great Powers to open her ports and markets. In 1876 Korea was forced by Japan to conclude a treaty of commerce and friendship providing for unilateral concessions and this was followed by similar treaties concluded with the United States, Great

Britain, Germany, Russia, France and Belgium (cf. → Unequal Treaties).

The Tonghak rebellion in 1895 gave to China – acting on the request of Korea – and to Japan, acting unilaterally, the opportunity to intervene militarily. A Japanese force expelled the Chinese from Korea and together with the Government's forces crushed the rebellion. In a surge of national feeling and despite evident weakness, Korea adopted in 1897 the name "Great Han Empire" and the King took the title of Emperor. The Japanese victory over China in 1895 and over Russia in 1905 excluded these two rivals of Japan from the Korean scene.

By the treaty of Shimonoseki of April 17, 1895 (Martens NRG2, Vol. 21, p. 642) China recognized the independence of Korea and by the treaty of Peace of Portsmouth of September 5, 1905 Russia acknowledged the predominant interest of Japan in Korea (→ Spheres of Influence). In the Treaty of Alliance with Great Britain of January 30, 1902 (Martens, NRG2, Vol. 30, p. 650) Japan had obtained British consent for this move and in the secret Taft-Katsura agreement, the United States had recognized Japan's prerogatives in Korea (→ Treaties, Secret).

On November 17, 1905, a treaty establishing a → protectorate was concluded between Korea and Japan (Martens NRG2, Vol. 34, p. 727) under which Japan obtained the right to conduct the foreign affairs of Korea and to establish in Korea a Resident-General. This treaty is often mentioned as an example of a void treaty because it was obtained through the use of physical violence (→ Treaties, Validity). In 1910 Japan annexed Korea (Treaty of August 22, 1910, Martens NRG3, Vol. 4, p. 24). The → consular jurisdiction of foreign States was abolished, as well as the tariff privileges provided for in the treaties of commerce.

An armed resistance movement developed inside and outside Korea; it culminated in 1919 in a general uprising which was non-violent, but soon was brutally suppressed. A provisional government was then established in Shanghai which tried, in vain, to arouse the interest of the → League of Nations in the fate of Korea. During World War II, this government was also militarily active in promoting the cause of independence and in February 1945 it declared → war on Japan; as the annexation of Korea had been recognized by the international community, such a declaration was deprived of juridical value.

In the Declaration of Cairo of December 1, 1943, the United States, Great Britain and China expressed their determination "that in due course Korea shall become independent". This was reaffirmed at Potsdam on July 26, 1945 (→ Potsdam Agreements on Germany (1945)). When the Soviet Union entered the war against Japan on August 8, 1945, she publicly announced her adherence to the Cairo and Potsdam Declarations. By the act of capitulation of August 14, 1945, Japan accepted the Declaration of Potsdam, thereby renouncing → sovereignty over Korea; this was definitively enacted in Art. 2(a) of the → Peace Treaty with Japan of September 8, 1951.

The occupation of Korea by Soviet and American forces which, on the Soviet side, preceded and, on the American side, followed the Japanese capitulation was thus the peaceful occupation of a friendly and liberated country (→ Occupation, Pacific). Korea was divided into two zones of occupation. The → demarcation line, which went along the line of 38° North latitude, had been set up by the American authorities and it met with no objection on the Soviet side; official notice of it was given by General McArthur, on the occasion of the formal signing of the Japanese → surrender, in General Order No. 1 of September 2, 1945. It was agreed consequently that the Soviet forces would accept the surrender of the Japanese forces north of the 38th parallel and the American forces south of that line.

The occupation of Korea was meant to be only of short duration. The Moscow Conference of December 16 to 26, 1945 considered placing Korea for a brief period under a Four-Power trusteeship. Finally, a joint American-Soviet Commission was set up with the task of framing proposals as to the constitution of a government. After two years of fruitless discussions, a provisional people's Committee under the presidency of Kim Il Sung was established in the North, and the American Government decided to put the question before the → United Nations General Assembly.

Through UN GA Res. 112 (II) of November 14, 1947, the General Assembly expressed itself in favour of free elections in the whole of Korea and created the United Nations Temporary Commis-

sion on Korea for purposes of observation to this end. However, the Commission was not permitted to enter the Northern zone, so that the elections took place only in the South on May 10, 1948. Following the elections, the Constitution of the Republic of Korea was adopted on July 12, 1948, and a government was established, while in the North the Democratic Popular Republic of Korea was proclaimed. Both Constitutions claimed to be valid for the whole of Korea. The Government of the Republic of Korea invoked in its own behalf the UN GA Res. 195 (III) of December 12, 1948, which declared it to be a lawful government based on free and observed elections and the only such government in Korea. It is, however, questionable whether the General Assembly meant by this that the Government referred to was thereby given legitimacy to rule over the whole of the country. *De facto*, there already existed at that time two governmental organizations, each of them exercising, under the supervision of an occupying Power, governmental competences in a certain part of Korea. Their territorial effectiveness was limited by a dividing line which had been accepted by the occupying Powers and was therefore of international significance in that it obliged the two Korean Governments to respect the dividing line and not to try to impose their authority on the other side of the border. To that extent, the situation was different to that of a → civil war.

The same resolution of the UN General Assembly, which was later reaffirmed in essence by GA Res. 293 (IV) of October 21, 1949, provided for the establishment of a Commission on Korea in order to accelerate the process of reunification.

At the end of 1948, the Soviet forces retired from North Korea; at the end of June 1949 the American forces left South Korea.

2. The Korean Conflict

On June 25, 1950 the North Korean armed forces crossed the 38th parallel without prior warning. On the same day the → United Nations Security Council adopted a resolution which held the armed attack to be a breach of the peace; the resolution called for the immediate cessation of hostilities and the withdrawal of the North Korean armed forces to behind the 38th parallel. The subsequent resolution of June 27, 1950 recommended that the member States of the United Nations furnish the necessary assistance to the Republic of Korea in order to repel the armed attack and to restore international peace and security in the area. On the same day the United States intervened to support the weak armed forces of South Korea. In its resolution of July 7, 1950, the UN Security Council recommended that the member States which had provided military help to the Republic of Korea place their armed forces under a unified command which was to be designated by the United States and authorized this command to use the flag of the United Nations (→ Emblems, Internationally Protected). Subsequently, the South Korean troops were also placed under this command.

The formal legality of this resolution, which was adopted in the absence of the Soviet Union, was questioned in view of the wording of Art. 27 (3) of the → United Nations Charter, probably with justification; nevertheless, the resolution remained valid as long as the Security Council itself did not replace it. Apart from that, it was controversial whether the action represented enforcement measures of the United Nations, and if so of what sort, or whether it was taken in exercise of the right of → self-defence. Both would have been possible at the same time: as a consequence of the → aggression in breach of international law, Korea was entitled to act in self-defence under general international law, as were the States which provided help in the form of → collective self-defence. The Security Council was also entitled to adopt measures for the restoration of international peace; the military assistance provided to South Korea did not formally meet the requirements of measures of enforcement provided for in Chapter VII of the UN Charter, but in material terms they represented a realization of the principles of the prohibition of the → use of force and → collective security laid down in Art. 2(4) and (5).

Within the framework of collective → sanctions, 16 States reacted by providing military support in response to the call by the Security Council (Australia, Belgium, Canada, Columbia, Ethiopia, France, Greece, Great Britain, Luxembourg, New Zealand, Netherlands, Philippines, South Africa, Thailand, Turkey and the United States – 53 States had agreed to provide help in

one form or another). These States were not as such involved in the conflict; their armed forces, which were placed at the disposal and under the command of the United Nations, acted as an organ of the Organization (→ United Nations Forces).

After the Soviet Union had resumed her seat in the UN Security Council, the Korean question was removed from its agenda on January 31, 1951. The UN General Assembly immediately took up the question and on the next day declared the People's Republic of China, which had been involved in the conflict since October 1950, albeit with "volunteers", guilty of aggression. The General Assembly did not allow itself to be misled by the description of the Chinese troops as volunteers; the intervention was quite clearly regarded as a participation in a conflict within the meaning of international law, although not a war in the formal sense. The competence of the General Assembly to establish the existence of the attack as well as to recommend measures of self-defence or enforcement measures has been doubted. By its Resolution 377 (V) of November 3, 1950 (→ Uniting for Peace Resolution), the General Assembly had however already attempted to bypass the inactivity of the Security Council by recognizing its own competences in the sphere of the maintenance of peace; although this system never came fully into operation, it nevertheless led to a shift in the balance between the two principal organs of the United Nations.

3. *The Armistice*

The relevant commanders agreed on a general cease-fire in Panmunjom on July 27, 1953 (→ Armistice). It provided for the establishment of a demarcation line across the Korean peninsula (in the western part somewhat north of the 38th parallel), the setting up of a demilitarized zone (→ Demilitarization) four kilometres wide along the demarcation line, the maintenance of the military → *status quo* and the → repatriation of → prisoners of war. The political questions were reserved for a political conference; this was held in Geneva from April 26 to June 15, 1954, but it proved impossible to resolve the Korean question and the conference was adjourned.

The implementation of the armistice was to be supervised by three special organs. The first, which still exists, is a joint commission composed of five senior officers of each party, known as the Military Armistice Commission. It is entrusted with the task of supervising the application of the Armistice Agreement and regulating any eventual breaches by means of negotiation.

Of the other two organs, the Neutral Control Commission and the Neutral Repatriation Commission, the former also still exists. It is composed of four members, all senior army officers, nominated by neutral States; the latter also provide the necessary supporting personnel. Of the four neutral States, two – namely Sweden and Switzerland – were chosen by the supreme commander of the armed forces of the United Nations, and two – Poland and Czechoslovakia – were chosen by the other side, whereas in the case of the Neutral Repatriation Commission the five neutral States were designated by both parties jointly. This formal difference in procedure was not significant because in both Commissions each party agreed to the choice made by the other party. Both Commissions may be regarded as common organs of the treaty parties. The members of the Neutral Commissions were and are nominated *ad personam* by their national State and are thus independent in fulfilling their duties; however, the internal regulation of the national delegations themselves is subject to the arrangements made by the respective sending States.

The Neutral Control Commission was conceived purely as a commission of enquiry entrusted with the supervision of the treaty provisions relating to the replacing of troops and the importation of → war materials. It reported to the Military Armistice Commission which had the sole competence to establish the existence of a breach of the Armistice Agreement. In order to fulfil its duties the Control Commission was provided with groups of inspectors of whom ten were stationed at places laid down in the treaty (ports of entry) and ten could be brought into service as necessary. The effectiveness of the system of control by the Control Commission proved to be questionable. Its territorial competences were excessively limited; moreover, the Commission could take no initiative alone but could only mobilize its groups as required by the Armistice Commission. The composition of the Commission hindered also its operations so that the majority principle adopted

in the regulation was in practice not applied and the control activities became one-sided.

In May 1956 the representative of the United Nations Command in the Armistice Commission informed the other side that in view of the inactivity of the Commission in the North and the massive importation of war material in breach of the Agreement into North Korea, the United Nations Command would provisionally give no effect to the requirements concerning the activities of the Control Commission in South Korea. The Control Commission then decided to withdraw its stationary groups from South and North Korea on June 9, 1956. Since then its tasks have been limited to the interpretation of the information supplied by the parties concerning changes in the composition of the forces and weapons and also to the control of the demilitarized zone. In June 1957 the South Korean side renounced those provisions of the Armistice Agreement which prohibited the importation of new weapons into Korea. Thereby, the Commission was relieved of its duty to analyze the information provided from both parties concerning the transport of war material. Its presence is thus now mostly of a symbolic nature.

The activities of the Repatriation Commission were the object of an additional agreement dated June 8, 1953. The Commission was composed of five members each of whom was nominated by one neutral State (Czechoslovakia, India, Poland, Sweden and Switzerland). The President of the Commission was the Indian delegate who in addition was appointed as arbitrator and executive organ of the Commission. The decisions of the Commission were to be taken by a majority vote; in the absence of any provision dealing with the quorum, the Commission considered itself capable of taking decisions only when all members were present.

The duties of the Repatriation Commission were to take charge of the prisoners of war who declined to be repatriated (mostly North Korean and Chinese prisoners of war), and to ensure over a period of three months that representatives of their State of origin could explain to them their rights and elucidate other questions connected with repatriation, in reality could attempt to persuade them to return. The envisaged political conference already referred to had the task of determining the future of those prisoners of war who had not exercised their right to be repatriated. If no decision was made within thirty days, the Commission was empowered to announce the transfer of these prisoners of war to civilian status; those expressing such a wish were to be provided with the means to emigrate to a neutral country (→ Emigration). The Commission was then to declare itself dissolved.

The solution devised for the question of the prisoners of war corresponded to UN GA Res. 610 (VII) of December 3, 1952, according to which no force was to be used against prisoners of war either to prevent them returning to their State of origin or to compel them to return. It was questioned, however, whether the refusal of the United Nations to repatriate the prisoners of war against their will was compatible with the provisions contained in Arts. 7 and 118 of the Geneva Convention relating to the Treatment of Prisoners of War of August 12, 1949, which had been declared as applicable by all parties to the conflict (→ Geneva Red Cross Conventions and Protocols). As these provisions were made in the interests of prisoners of war, however, they should not be applied in such a way as to defeat that intention. The solution provided in the Armistice Agreement represents thus a reasonable interpretation of the Geneva Conventions.

In accordance with the Additional Agreement of August 27, 1953, the prisoners of war were transported to the demilitarized zone and handed over to the Repatriation Commission. The Commission, which was not to be regarded as the detaining power in the sense of the Geneva Conventions, only exercised the rights and duties of this power as a representative thereof. As the overwhelming majority of the prisoners did not wish to return to their home country and the Conference of Geneva did not obtain any result, a practical solution had to be found outside the framework of the Armistice agreement. A Swedish proposal to free the prisoners of war was not accepted by the Repatriation Commission. Eventually the North Korean and Chinese prisoners of war were set free by the United Nations Command. On February 21, 1954 the Commission declared itself dissolved, although under protest of the delegates of Poland and Czechoslovakia.

The armistice is still valid today; its significance in practice is that it guarantees the demarcation line despite the latter's provisional character. The armistice is binding on both North Korea and

China as well as the United Nations as the military signatories were acting in the name of the political authorities within the framework of an overall regulation. South Korea is thereby also indirectly bound, as her armed forces were placed under the command of the United Nations; besides, she has frequently made reference to the armistice. The maintenance of a unit of the United Nations Forces in South Korea should remove any doubt about the further continuing validity of the Armistice Agreement. On the other hand, there exists a Mutual Defence Treaty between the Republic of Korea and the United States which was signed in Washington on October 1, 1953 and entered into force on September 1, 1954.

4. Two States – One Korea

From the very beginning each of the two Korean Governments claimed to represent the whole of Korea. The Republic of Korea refused for several years to have diplomatic relations with foreign States which had recognized the Democratic People's Republic (→ Diplomatic Relations, Establishment and Severance; → Recognition). After President Park had indicated in 1970 that South Korea was willing to accept North Korea as a *de facto* party to South-North negotiations, the Republic of Korea abandoned this strict doctrine. Today the Republic of Korea has diplomatic relations with 125 States and the Democratic People's Republic with 102; 68 States have diplomatic relations with both, and both Koreas maintain diplomatic missions in 42 States. As for intergovernmental organizations, the Republic of Korea is a member of 17, and the People's Republic of 10. However neither is a member of the United Nations, although in 1973 the Republic of Korea suggested that both Koreas become members under the condition that this would not impede reunification; the applications presented in 1949 in this respect by both Governments are therefore still in abeyance. In the meantime, each has the status of → observer.

The consolidation of the factual situation over the years has led to a wide recognition of the existence of two Korean States. However, this situation is considered as provisional and the efforts towards reunification are intensifying (→ Divided States).

The unification was from the very beginning a standing preoccupation on each side of the dividing line. The means advocated and used were however different: use of force on one side, negotiations on the other. Even after the two Koreas had agreed in 1972 that unification should be achieved peacefully, they continued to differ on the practical methods to be applied. North Korean proposals tend to favour the immediate establishment of a federal State, under the ancient name of Koryo, while South Korea prefers a more cautious approach, creating first an atmosphere of confidence tested through collaboration in various fields.

The relations between the two Koreas have been characterized by the alternation of periods of tension and easing of tension; the talks which began in 1971 were often suspended and then reopened. A way of understanding has been found in inter-Red Cross talks (→ Red Cross): plenary Red Cross Conference meetings have been held, leading to an agreement on the exchange of home visiting groups; after their suspension for some years, these meetings have recently been resumed. In other fields also, such as economics and sport, joint meetings have taken place. For the first time since 1976, the question of Korea was put on the agenda of the UN General Assembly in 1989 and members of both Governments had the opportunity to make statements on their conceptions about the way to achieve reunification. The evidence shows that the relations between the two Koreas and the prospects for reunification depend on the evolution of the international situation, in particular on the relations between the superpowers.

Report of the UN Temporary Commission on Korea, First and Second Part, UN Docs. A/575 and A/575/Add. 1–4.

Report[s] of the UN Commission on Korea, UN Docs. A/936; A/936/Add. 1; A/1350.

Report[s] of the UN Commission for Unification and Rehabilitation of Korea, UN Docs. A/1881; A/2187; A/2441; A/2711; A/2947; A/3172; A/3672.

Unified Command's Special Report on Korean Armistice with text of the Agreement, UN Doc. S/3079.

Report of the UN Command on the Operation of the Neutral Nations Repatriation Commission, UN Doc. A/2642.

Report[s] of the Neutral Nations Repatriation Commission, September 9, 1953 – February 21, 1954, UN Doc. A/2641.

Le CICR et le Conflit de Corée, Recueil de Documents, Vol. 1, 26 juin 1950 – 31 décembre 1951, Vol. 2, January 1 – June 30, 1952.

The Soviet Union and the Korean Question (Documents), Soviet News (1950).
The United States and the Korean Problem: Documents 1943–1953 (83rd Congress, 1st Session, Senate Document No. 74) 1953.
The Korean Problem at the Geneva Conference. April 26 – June 15, 1954 (United States Department of State Publication 5609).
La Documentation française, Notes et Etudes documentaires: La Corée, Nos. 753, 754 and 864 (1947); Documents relatifs à l'armistice de Corée, No. 1791 (1953); La République de Corée depuis 1945, No. 3404 (1967); J.-R. Chaponnière, La République de Corée, un nouveau pays industriel, Nos. 4667–4668 (1982).

F. NELSON, Korea and the Old Order in Eastern Asia (1945).
S. McCUNE, The thirty-eighth Parallel in Korea, World Politics (1949) 223–232.
A.L. GREY, jr., The thirty-eighth Parallel, Foreign Affairs, Vol. 29 (1950/1951) 482–487.
Y. LI LIANG, Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council, AJIL, Vol. 44 (1950) 694–708.
P.B. POTTER, Legal Aspects of the Situation in Korea, AJIL, Vol. 44 (1950) 709–719.
E. FRAENKEL, Korea – ein Wendepunkt im Völkerrecht? (1951).
L.C. GREEN, Nature of the 'War' in Korea. International Law Quarterly, Vol. 4 (1951) 462–468.
L. GROSS, Voting in the Security Council. Abstention from Voting and Absence from Meeting, Yale Law Journal, Vol. 60 (1951) 210–257.
J.L. KUNZ, Legality of the Security Council Resolutions of June 25 and 27, 1950, AJIL, Vol. 45 (1951) 137–142.
M.S. McDOUGAL and R.N. GARDNER, The Veto and the Charter. An Interpretation for Survival, Yale Law Journal, Vol. 60 (1951) 258–292.
E.G. MEADE, American Military Government in Korea (1951).
H.J. TAUBENFELD, International Armed Forces and the Rules of War, AJIL, Vol. 45 (1951) 671–679.
R.R. BAXTER, Constitutional Forms and some Legal Problems of International Military Command, BYIL, Vol. 29 (1952) 325 et seq.
P.F. BRUGIÈRE, La règle de l'unanimité des membres permanents du Conseil de Sécurité. Droit de veto (1952).
M. FRANKENSTEIN, L'Organisation des Nations Unies devant le conflit coréen (1952).
N. KOGAN, United Nations – Agent of Collective Security?, Yale Law Journal, Vol. 61 (1952) 1–13.
L.B. SCHAPIRO, Repatriation of Deserters, BYIL, Vol. 29 (1952) 310 et seq.
D. BINDSCHEDLER-ROBERT, Les Commissions neutres instituées par l'armistice de Corée, Schweizerisches Jahrbuch, Vol. 10 (1953) 89–130.
J.P. CHARMATZ and H.M. WIT, Repatriation of Prisoners of War and the 1949 Geneva Convention, Yale Law Journal, Vol. 62 (1953) 391–415.
J.A.C. GUTTERIDGE, The Repatriation of Prisoners of War, International Law Quarterly (1953) 207 et seq.
H.L. HU, Le problème coréen (1953).
C.E. LUNDIN, Repatriation of Prisoners of War: The legal and political aspects, American Bar Association Journal, Vol. 39 (1953) 559–563.
J. MAYDA, The Korean Repatriation Problem and International Law, AJIL, Vol. 47 (1953) 414–438.
M. FLORY, Vers une nouvelle conception du prisonnier de guerre?, Revue générale, Vol. 58 (1954) 53–75.
G. WINT, What happened in Korea?, A Study of Collective Security (1954).
J. BROWNLIE, Volunteers and the Law of War and Neutrality, International Law Quarterly, Vol. 5 (1956) 570 et seq.
A. GERVAIS, Les armistices palestinien, coréen et indochinois et leurs enseignements, AFDI, Vol. 2 (1956) 97–121.
L.M. GOODRICH, Korea: A Study of United States Policy in the United Nations (1956).
L.C. GREEN, Armed Conflict, War and Self-Defense, ArchVR, Vol. 6 (1956/1957) 387–438.
D.H.N. JOHNSON, The Korean Question and the United Nations, Nordisk Tidsskrift, Vol. 26 (1956) 25–36.
A.K. PYE, The Legal Status of the Korean Hostilities, Georgetown Law Journal, Vol. 45 (1956) 45–74.
W.H. VATCHER, Panmunjom: The Story of the Korean Military Armistice Negotiations (1958).
LEE IN SANG, La Corée et la politique des puissances (1959).
G. SCHMID, Die rechtliche Stellung von Mitgliedern der Schweizer Delegation in einer neutralen Waffenstillstandskommission (1974).
P. SPINNLER, Das Kriegsgefangenenrecht im Koreakonflikt. Traditionelles Kriegsrecht im Spannungsfeld moderner Konfliktsreformen (1976).
C. SHIELDS DELESSERT, Release and Repatriation of Prisoners of War at the End of Active Hostilities (1977).
F.M. BUNGE (ed.), North Korea. A country Study (1981).
M.P. SRIVASTAVA, The Korean Conflict. Search for Unification (1982).
JONG-CHUN BAEK, Probe for Korean Reunification. Conflict and Security (1988).

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KURIL ISLANDS

1. General Background and Geography

Since the end of World War II, the Soviet Union has exercised → sovereignty over the Kuril Islands, the Habomai Islands and the Isle of Shikotan. Negotiations over a peace treaty be-

tween Japan and the Soviet Union have consistently failed due to Japan's demand that the Isles of Kunashir(i) and Etorofu, the Habomai Islands and the Isle of Shikotan be returned to Japan.

The Kuril Islands are a chain of about 36 islands, extending 1200 kilometres in a north-westerly direction, between the Kamchatka Peninsula and the Ochotsk Sea. Generally, three groups of islands can be distinguished: the southern group, with Kunashir(i) and Etorofu (Iturup), the central group, with Urup(pu), and the northern group with Paramushir(o) and Shimushir(u). There is a dispute whether the Habomai Islands and Shikotan also belong to the Kuril Islands. According to Japan, the former are an extension of the peninsula of Hokkaido, whereas the Soviet Union calls them the "Little Kurils".

The location of the islands indicates their eminent strategic importance. The islands are of considerable economic value for fishery and some also have mineral resources.

2. Historical Development

The present conflict can only be understood in the context of a rivalry lasting more than 200 years over the arc of islands between Japan and Russia. Japanese and Russians both claim that their ancestors were the first to discover and civilize these islands which were partly inhabited by people known as the Ainu. Actually, Japan started the occupation of the Kuril Islands in the south as far as Iturup (Etorofu), whereas Russia concentrated on the northern islands as far as Kunashir(i). Efforts by one side or the other to extend its area of influence regularly provoked minor open hostilities. The constant effort of both parties to take possession of the island of Sakhalin, a territory which each regarded as its own, also affected the dispute.

The Treaty of Shimoda (Treaty of Commerce, Navigation and Delimitation between Japan and Russia, January 26 (February 7), 1855, CTS, Vol. 112, p. 467), the first attempt to establish a boundary, provided for a line drawn between Urup(pu) and Etorofu (Iturup). Sakhalin remained undivided. This demarcation soon proved to be inefficient. Therefore, in the Treaty of Petersburg (Treaty for the Mutual Cession of Territory between Japan and Russia, April 25 (May 7), 1875, CTS, Vol. 149, p. 179), Japan renounced all rights to Sakhalin. In return the Tsar transferred to Japan "the group of the Kuril Islands which he possesses at present . . . ", which at that time numbered 18 islands. This agreement occurred in the period of the Meiji Restoration, during which leading Japanese politicians sought to avoid external conflicts.

Russia's activities in Manchuria subsequently led to the Russian-Japanese War of 1904–1905. In the Peace Treaty of Portsmouth (September 5, 1905, CTS, Vol. 199, p. 144), southern Sakhalin was awarded to Japan.

During the Russian → civil war, Japan supported the White Russian troops and Japanese military units occupied the northern part of Sakhalin. In the Soviet-Japanese Convention of 1925 (January 20, 1925, LNTS, Vol. 34, p. 31) Japan recognized the new Soviet Government and undertook to withdraw from northern Sakhalin. In return, the Soviet Union recognized the Peace Treaty of Portsmouth. Consequently, Japan retained sovereignty over southern Sakhalin and the entire chain of the Kuril Islands.

After Japan entered the Axis in 1940, she concluded a → non-aggression pact with the Soviet Union in 1941 (April 13, 1941, BFSP, Vol. 144, p. 839). This enabled Japan to realize her expansion policy in East Asia.

Since 1945/1946 the Soviet Union has justified her control over the Kuril Islands by reference to several declarations issued by Japan's enemies during World War II. In the opinion of the Soviet Union, these instruments clearly stipulated that the islands would be transferred to the Soviet Union after the war.

The Cairo Declaration of November 27, 1943 (DeptStateBull, Vol. 9, No. 232 (1943) p. 393) does not include provisions for the post-war future of the Kuril Islands. On the contrary, the Allies began this declaration with the principle laid down in the → Atlantic Charter (1941) in which they indicated that they did not intend territorial expansion. They further declared that "Japan shall be stripped of all the islands in the Pacific which she has seized and occupied since the beginning of the first World War in 1914 and that all the territories Japan has stolen from the Chinese . . . shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed."

Japan, however, obtained sovereignty over the Kuril Islands through the provisions of the Treaty of Petersburg.

The secret Yalta Agreement of February 11, 1945 (BFSP, Vol. 148, p. 88), concluded among "the leaders of the three Great Powers, the Soviet Union, the United States and Great Britain", contains a clear statement concerning the future of the Kuril Islands. Stalin joined the Allies' war against Japan only under the condition "that the former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored" (condition no. 2, implicitly referring to southern Sakhalin, Dairen with Port Arthur and Manchuria) and that "the Kuril Islands shall be handed over to the Soviet Union . . . " (condition no. 3). The Allied Powers agreed "that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated".

The Potsdam Declaration of July 26, 1945 (DeptStateBull, Vol. 13 (1945 II) p. 137), signed by the United States, Great Britain and China, and joined by the Soviet Union on August 9, 1945, is particularly relevant with regard to the question of sovereignty over the Kuril Islands as Japan had to accept the terms of this instrument in its declaration of unconditional → surrender. Concerning the Kuril Islands, the Potsdam Declaration contains the following contradictory clause: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." The limitation of Japanese territory to the four major islands would have resulted in the exclusion of the Kuril Islands from Japanese sovereignty. However, the Cairo Declaration did not provide that Japan should lose the latter islands.

As promised, the Soviet Union declared → war on Japan on August 8, 1945. After Japan's surrender, Red Army troops occupied southern Sakhalin and the Kuril Islands with the consent of the Allies. Japanese inhabitants of these areas were arrested and later sent to the main islands. On September 20, 1945 the Soviet Union declared the Kuril Islands to be Soviet territory. The islands were integrated into Soviet political administration and Soviet settlement started. Soviet currency was introduced and Japanese geographical names were replaced by Russian names. The population of the Kuril Islands participated in elections for the Supreme Soviet. Finally, the Soviet Constitution was amended to include the Kuril Islands as an integral part of the Soviet Union. United States President Truman, however, in an exchange of letters with Stalin, as early as August 1945 requested military bases "preferably in the central group" of the Kuril Islands. Stalin refused and requested military bases on the Aleutian Islands.

A Conference of Foreign Ministers met in December 1945 and founded an Allied Council and a Commission for the Far East mandated to specify Japan's duties under the declaration of surrender. Soon it was clear that no agreement on a common approach for a peace treaty with Japan could be reached. The political post-war development in general, but in particular the Proclamation of the People's Republic of China on October 1, 1949 and the outbreak of the Korean War on June 25, 1950, led to an American initiative for a separate peace treaty with Japan, to be joined in by other Western orientated States. Such a treaty was intended to integrate Japan into a Western military alliance (→ ANZUS Pact (1951)).

The → Peace Treaty with Japan of September 8, 1951 attempts to achieve the aims laid down at the war conference of the Allies without simultaneously accepting the Kuril Islands as Soviet territory. Consequently, Japan renounces "all right, title and claim" to the Kuril Islands and southern Sakhalin under Art. 2(c), and recognizes "the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war . . . , as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace" under Art. 8(a). It remains open to question for whose benefit Japan renounces such a claim. The Treaty stipulates, however, that only the Allied Powers as defined in the Treaty may profit from the Treaty. An express exception is made for Korea and China (Art. 21). Art. 25 excludes "any rights, titles or benefits" for any other States. By these means, the parties sought to avoid a final disposition for the Kuril Islands.

Together with its ratification of the Peace Treaty, the United States made a declaration which repeats the contents of Art. 25 and

underlines "that nothing in the said treaty, or the advice and consent of the Senate to the ratification thereof, implies recognition on the part of the United States of the provisions in favor of the Soviet Union contained in the so-called [Yalta Agreement] . . . " (→ Yalta Conference (1945)). El Salvador made a reservation with regard to the right to → self-determination and the transference of the Kuril Islands.

Japan declared afterwards that her renunciation was only related to the northern part of the Kuril Islands, but not to the Habomai Islands or the southern group with Kunashir(i) and Etorofu (Iturup), and demanded the return of the latter territories. An American → Aide-mémoire of September 7, 1956 (UNTS, Vol. 277, p. 267) gave support to the Japanese position. This document denied any legal effect to the Yalta Agreement by interpreting the Agreement as a mere declaration of intention. At that time, the United States wanted to prevent a reconciliation between the Soviet Union and Japan and a recognition of the → *status quo* on the Kuril Islands. In this connection, the United States threatened to force Japan to recognize Okinawa as falling under American sovereignty.

The state of war between the Soviet Union and Japan was terminated finally without a peace treaty by the Joint Declaration of October 19, 1956 (UNTS, Vol. 263, p. 99) which was followed by an Agreement on Trade and Commerce (UNTS, Vol. 263, p. 119). In the Joint Declaration, the Soviet Union agreed "to transfer the Habomai Islands and the Island of Shikotan, the actual transfer to Japan to take place after the conclusion of a peace treaty".

When, in 1960, Japan renewed the Agreement on Security with the United States (January 19, 1960, UNTS, Vol. 373, p. 179), the Soviet Union informed Japan that the Habomai Islands and Shikotan could not be returned as long as this Agreement was in force. Since then the positions of both sides have not changed in substance. During the Breshnev era, the Soviet Union stereotypically indicated that between both States there were no open territorial questions. Only recently has the Soviet Union given up this formula so that a more open approach can be expected.

3. Evaluation

The initial question in the dispute between Japan and the Soviet Union over the Kuril Islands is whether the Soviet Union ever gained a valid title to the disputed territory. If the Soviet Union bases her claim on declarations and agreements made during World War II, she must face the counter-argument that unequivocal provisions were only made clear in the secret Yalta Agreement. This Agreement, however, can hardly be taken as a valid basis under international law for the acquisition of title. The Agreement's form is insufficient: A preamble is missing; the Agreement only contains the signature of the participants without notification of their functions and the State represented by them; there is no provision indicating when the Agreement shall enter into force, or concerning its duration or conditions for termination. The Agreement was not ratified or published at the time; publication occurred only in 1946. Furthermore, the relevant passages concern Japan, which was not a party to the Agreement. Consequently, the Agreement is ineffective as a treaty which attempts to burden a third party (→ Treaty, Effect on Third States).

Similar arguments apply to qualification of the Agreement as an *accord en forme simplifiée*, i.e. as an executive or military agreement by the American President. In this context, it is necessary to note the limitations on the executive power of the President of the United States with respect to concluding such agreements. Thus, the Yalta Agreement should be understood only as a political declaration of intention in which the parties take notice of the prospective demands of the Soviet Union after the termination of war.

Another possible basis for acquisition of title by the Soviet Union is the Japanese declaration of surrender in which Japan recognized the limitation of her territory to the four main Japanese populated islands by accepting the terms of the Potsdam Declaration. This could be interpreted as a conclusive declaration of abandonment (→ Territory, Abandonment). However, on the basis of what has been said above, the Potsdam Declaration cannot be regarded as a → treaty under international law. This is made additionally apparent by the informal accession of the Soviet Union to the Potsdam Declaration. Likewise,

Japan's declaration of surrender also does not constitute a treaty under international law.

The Soviet Union does not argue that she acquired the disputed territory through → annexation, although the actual events support such an interpretation. However, annexation cannot be accepted as providing for a valid title in view of the prohibition on the → use of force. The seizure of the Kuril Islands also cannot be justified as a counter-annexation, because Japan did not attack the Soviet Union. Indeed, the pact of neutrality between both States was still in effect at the time of the declaration of war by the Soviet Union.

The Peace Treaty with Japan presents in this connection a particularly difficult problem. Japan's renunciation of sovereignty over the islands mentioned in this Treaty has two different legal consequences – for Japan on the one hand and for the Soviet Union on the other. The renunciation in itself did not automatically effect a transfer of sovereignty, particularly since a lawful successor was intentionally not identified. Japan did not expressly renounce rights in favour of the Soviet Union.

Through the declaration of renunciation, Japan's subjective rights expired; to achieve this the declaration did not require any acceptance. Japan was authorized to dispose of the islands in dispute, which had expressly been exempted from Allied occupation, and acted with *animus delinquendi*. Accordingly, the Soviet Union could acquire this *territorium nullius* by occupation. Efforts to exclude this legal consequence are not convincing, as the Soviet Union was not party to the Peace Treaty. Consequently, Japan cannot claim parts of the Kuril Islands on the basis of a continuing title to the extent that these parts were included within the renunciation.

With regard to the scope of the renunciation, Japan insisted for a certain period that the southern islands, Kunashir(i) and Etorofu (Iturup), did not belong to the Kuril Islands and therefore were not covered by the renunciation. According to Japan, the islands had always belonged to Japan and had never been under foreign rule; furthermore, in the treaties of 1855 and 1875, the term "Kuril Islands" had indicated only the northern part of the chain.

A clear wording in a treaty, however, does not allow for further interpretation (→ Interpretation in International Law), in the interest of legal certainty. Since "Kuril Islands" is an unequivocal geographical term referring to the whole chain of islands, Japan should have made a declaration of interpretation in connection with the conclusion of the Peace Treaty if she wanted to avoid the broader meaning.

Japan's additional argument that the islands Shikotan and Habomai are not covered by the renunciation is much stronger, because these islands can be considered geographically as protrusions of the eastern edge of Hokkaido. Soviet troops also occupied these islands in 1945 on the basis of a special Allied agreement. The Soviet Union may have indicated acceptance of the Japanese argument by expressing a willingness in the Joint Declaration of 1956 to "transfer" these two islands to Japan after the conclusion of a peace treaty. The subsequent unilateral declaration of the Soviet Union that she would not return the islands is ineffective under international law (→ Unilateral Acts in International Law). Consequently, the Soviet Union remains under an obligation to take up → negotiations over a peace treaty and to transfer these two islands back to Japan.

The provisions of agreements concluded by the former Allies during the Second World War which were also realized in the Peace Treaty of 1951 were based on a general waiver of territorial expansion. Seen from this perspective, the title of the Soviet Union to the Kuril Islands is not indisputable. It is to be hoped that Japan will be able to react with flexible and unconventional responses to the current changes in the domestic and foreign policy of the Soviet Union so that a solution to the dispute over the Kuril Islands may be achieved within the foreseeable future.

E. MENZEL, Der Friedensvertrag mit Japan, Europa Archiv, Vol. 7 (1952) 5261–5266, 5355–5368.

L. FOCSANEANU, Les Traités de Paix du Japon, AFDI, Vol. 6 (1960) 256–290.

P.A.N. NARASIMHA MURTHY, The Kurile Islands in Japan's Relations with the Soviet Union, India Quarterly, Vol. 20 (1964) 281–311.

L. HALKIN-DESTRÉE, Le différend territorial Nippo-Soviétique – Les îles Kouriles et Sakhaline, Chronique de Politique Etrangère, Vol. 18 (1965) 293–340.

B. LANGEN, Die Gebietsverluste Japans nach dem Zweiten Weltkrieg (1971).

Z. OHIRA, Japan's Northern Territories After World War II, in: Multitudo Legum ius unum, Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag, J. Tittel et al. (eds.), Vol. 1, Allgemeine Rechtslehre und Völkerrecht (1973) 337–349.

J.J. STEPHEN, The Kuril Islands, Russo-Japanese Frontier in the Pacific (1974).

K. TAIJUDO, Japan's Early Practice of International Law in Fixing Its Territorial Limit, Japanese Annual of International Law, Vol. 22 (1978) 1–20.

T. KOTANI, A Theoretical Approach to the Problems of the Kurile Islands, Japanese Annual of International Law, Vol. 24 (1981) 1–11.

P. FISTIÉ, Le problème territorial des Kouriles du Sud dans les relations nippo-soviétiques, Etudes Internationales, Vol. 13 (1982) 23–51.

Y. PROKHOROV and L. SHEVCHUK, Japan's Territorial Claims to the USSR. International Affairs, Vol. 65 (1989) 42–47.

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LAKE CHAD

1. Background

Lake Chad (lac Tchad), situated in the mostly arid or semi-arid Sahelian zone of Africa just south of the Sahara desert, is bordered by Cameroon, Chad, Niger and Nigeria. The lake is an extremely shallow body of freshwater (maximum depth: 10 metres) which since the turn of the 20th century has varied in surface area between 10 000 and 25 000 square kilometres according to seasons and years. The hydrographic Lake Chad Basin, the natural drainage area of the lake and its tributaries as circumscribed by the watershed limits, covers a region of approximately 2 335 000 square kilometres comprising a large part of the Central African Republic and certain border areas of Algeria and Sudan, all of which may thus hydrographically be considered as co-basin States. In fact, most of the principal water supply of the lake, from the Shari River and its Logone tributary, originates in the Central African Republic which, though not a riparian State of Lake Chad, contributes well over 40 per cent of the total inflow. Except for flood-season overspills from the Logone to the Niger River system via its Benoué tributary, the Lake Chad Basin is a land-locked drainage area without connection to any sea.

While the navigational use of Lake Chad and its tributaries is negligible and hydro-power development in the basin so far remains a distant prospect, the traditional and potential yield of fishery uses is considerable; pilot projects using lake-water for agricultural irrigation have been initiated, particularly in the Nigerian sector. However, the severe droughts of 1972 to 1973 and 1982 to 1984 severely affected the entire basin so that in 1973, as previously in 1907, the lake was divided into two separate parts, the northern one of which no longer received any river inflow and in 1976 went completely dry, with the former lakeshore town of Nguigmi in Niger now at a distance of over 150 kilometres from the water. The southern part continued to shrink and by 1986 had become a series of disconnected pools, the actual "core lake" being reduced to a water surface measuring less than 50 kilometres in diameter, and shared between Chad and Cameroon only (map by G. Edelmann in: G. Dusouchet, Les ombres du lac Tchad, Géo Magazine No. 103, September 1987, p. 12).

2. Boundaries

In a joint declaration adopted at N'Djamena (formerly Fort-Lamy) on December 21, 1962, the heads of the four riparian States agreed to recognize the existing national → boundaries on Lake Chad. Together with the subsequent solemn Resolution AHG/16(I) adopted at Cairo on July 24, 1964 by the → Organization of African Unity, this implied the recognition of pre-independence agreements between colonial powers to the extent that these are relevant for the determination of boundaries (→ Boundary Disputes in Africa).

Towards the end of the 19th century, Lake Chad had indeed become a geopolitical tripoint at which the territorial claims and → spheres of influence of the three major colonial powers (France, Germany and Great Britain) in western and Central Africa intersected (→ Colonies and Colonial Régime; → Berlin West Africa Conference (1884/1885)). The relevant international legal instruments and → maps delineating the lake's boundaries include the following: three British-German agreements signed in Berlin on November 15, 1893 (Martens NRG2, Vol. 20, p. 276) and in London on December 12, 1902 (Hertslet, Vol. 3, p. 930) and on March 19, 1906 (Martens NRG3, Vol. 2, p. 691); two related

boundary protocols signed at Ullgo on February 24, 1904 (Hertslet, Vol. 3, p. 933) and at Kofa on February 12 and March 11, 1907 (approved by exchange of notes on March 5, 1909; Martens NRG3, Vol. 2, p. 700); and two French-German conventions signed in Berlin on March 15, 1894 (Martens NRG3, Vol. 1, p. 603, English translation in AJIL, Vol. 6 (1912) p. 95) and on April 18, 1908 (Martens NRG3. Vol. 1, p. 612), the subsequent convention of November 4, 1911 (Martens NRG3, Vol. 5, p. 651, English translation in AJIL, Vol. 6 (1912) p. 4) having been repealed by Art. 125 of the → Versailles Peace Treaty (1919).

The French-British territorial arrangements under the convention signed in London on June 14, 1898 (Martens NRG2, Vol. 29, p. 116), modified after the → Fashoda incident by the joint declaration of March 21, 1899 (Martens NRG2, Vol. 30, p. 264) and unilaterally denounced by France as of October 22, 1936 (Hertslet, Vol. 2, p. 785), had been superseded by the following: two conventions signed in London on April 8, 1904 (Martens NRG2, Vol. 35, p 352) and on May 29, 1906 (Martens NRG2, Vol. 35, p. 463); a related boundary agreement of February 19, 1910 (Martens NRG3, Vol. 7, p. 362); a bilateral declaration signed in London on July 10, 1919 (Martens NRG3, Vol. 15, p. 263); and an exchange of notes in London on January 9, 1931 (Martens NRG3, Vol. 25, p. 478), also referred to in the British Cameroons Trusteeship Agreement approved by the → United Nations General Assembly on December 13, 1946 (UNTS, Vol. 8, pp. 119, 135; → United Nations Trusteeship System).

The delineation of the lake boundary between the former French colonies of Chad and Niger goes back to an unpublished administrative agreement of 1957 between the two colonial governors, based on a delimitation survey carried out in 1939 by the French Institut Géographique National (Burt, International Boundary Study No. 73: Chad-Niger Boundary, United States Dept. of State, 1966).

All these treaties and declarations confirm the principle of the lake's territorial division into national sectors, determined by a combination of astronomical and geographical reference points connected by straight lines, sometimes cutting across permanent or seasonally flooded → islands such as the salt-encrusted Bogomeron Archipelago (now dry land) in the Chad-Nigeria sectors. In the wake of the recent droughts, sovereignty disputes arose over newly emerged unmarked islands, leading to a serious military confrontation between Chad and Nigeria in April and May 1983, with 300 casualties reported (see RGDIP, Vol. 87 (1983) pp. 893–894). This dispute was settled by bilateral → negotiations and a protocol signed on July 11, 1983, which referred the question of permanent border demarcation and security in the area to the quadripartite Lake Chad Basin Commission.

3. International Cooperation

On May 22, 1964, the Convention and Statute relating to the Development of the Chad Basin was adopted at N'Djamena by Cameroon, Chad, Niger and Nigeria (Journal Officiel de la République fédérale du Cameroun, Vol. 18 (1964) p. 1002; different English version in: Nigeria's Treaties in Force 1960–1968 (1969) p. 217). Preparatory expert meetings had been held since 1962 under the auspices of the Commission for Technical Cooperation in Africa (CCTA, established in 1950 and subsequently integrated into the Organization of African Unity). A provisional secretariat was established by the Government of Chad in November 1963. The 1964 Statute has been amended by protocols signed at Yaoundé on October 22, 1972 (ZaöRV, Vol. 34 (1974) p. 936) and at Enugu in Nigeria on December 3, 1977 (Journal Officiel de la République unie du Cameroun, Vol. 10 (1978) p. 927).

While several provisions of the Chad Basin Convention and Statute parallel those of the 1964 Niamey Agreement on the Niger River (UNTS, Vol. 587, p. 9; especially Arts. 6, 7, 8, 11, 17 and 18), the Statute does not provide for → internationalization of navigation on the lake and its tributaries as historically guaranteed on the Niger (→ Niger River Régime; → International Rivers). Instead, Art. 3 declares the basin open to the use of all Member States only, without prejudice to the sovereign rights of each, and subject to the establishment of common rules for the purpose of facilitating navigation on the lake and on the navigable waters in the basin pursuant to Art. 7.

The key provision of the Statute in terms of international water law is Art. 5 which requires prior consultation before the initiation of measures likely to have an appreciable effect on water quantity or quality in the basin, except as regards

specified categories of existing projects (→ Water, International Regulation of the Use of; → International Watercourses Pollution). Arts. 8 to 17 of the Statute specify functions and procedures of the Lake Chad Basin Commission, which according to Art. 7 of the Convention may also act as a dispute settlement body, with eventual recourse to the Organization of African Unity (→ Peaceful Settlement of Disputes).

A major motive for the adoption of the 1964 Convention and Statute was the need to create an institutional framework for multilateral development assistance in the Lake Chad Basin, particularly from the → United Nations Development Programme (UNDP), which also provided initial support for the Commission and its secretariat, and financed a number of development surveys and projects in the basin, executed mainly by the → United Nations Educational, Scientific and Cultural Organization (UNESCO) and by the → Food and Agriculture Organization of the United Nations (FAO). With a view to eventual financial self-sufficiency on the basis of regular contributions from the riparian States, an Agreement for the Establishment of the Lake Chad Basin Commission Development Fund was concluded at Yaoundé on October 22, 1972 (ZaöRV, Vol. 34 (1974) p. 80) and amended by a protocol signed at Enugu in Nigeria on December 3, 1977 (Journal Officiel de la République unie du Cameroun, Vol. 10 (1978) p. 929).

The Commission normally meets twice a year. It consists of eight members (two from each riparian State), whose decisions are taken by unanimity. There are presently six sub-commissions (on agriculture, animal husbandry, civil engineering and telecommunications, water resources, fisheries and forestry, and administration and finance). The small permanent secretariat of the Commission, temporarily evacuated to Maroua in Cameroon during the Chad civil war, returned to its N'Djamena headquarters in 1986.

4. Outstanding Issues

While the primary objective of the Lake Chad Basin Commission is the joint management of surface and groundwater resources in the basin as defined in the map annexed to the 1964 Convention (i.e., an area of approximately 427 300 square kilometres), the Commission also serves as a general forum for regional cooperation among the riparian States on a wide range of other issues. For example, an Agreement on Joint Regulations on Fauna and Flora was adopted by the Heads of State at Enugu on December 3, 1977 (Journal Officiel de la République unie du Cameroun, Vol. 10 (1978) p. 930; → Wildlife Protection). In response to a request from Chad and Nigeria in 1983 for assistance in the settlement of their lake boundary dispute, the Commission established two expert working groups on border demarcation and security, which first met in 1984; a mixed naval unit headed by a Chadian officer patrols the lake to ensure compliance. One potential problem is the continuing exercise of customary fishing rights by Nigerian tribes in the remaining "core lake" area which now lies entirely within the sectors of Chad and Cameroon.

As the old colonial agreements do not provide an adequate basis for the allocation of the lake's water resources, a draft agreement on water utilization and conservation in the Lake Chad Basin was prepared and discussed by the Commission, with technical assistance from the FAO in 1971 and 1972 (YILC, Vol. 2, Part 2 (1974) p. 335). However, in view of the radical change of environmental circumstances during the subsequent drought periods, further consideration of the draft had to be postponed until after the completion of a new survey of the lake's water resources and shorelines. Furthermore, the 5th conference of heads of the lake's riparian States meeting at Lagos on April 29, 1985 decided to invite the Central African Republic to join the Lake Chad Basin Commission and the 1964 treaty, with a view to extending the geographical limits of the conventional basin to an area of approximately 984 455 square kilometres (i.e., more than double the present area). Negotiations to this effect are underway, and are bound to have a major impact on further arrangements for international water management in the region.

Following a recommendation adopted by the first African Ministerial Conference on the Environment (Cairo, December 16–18, 1985), the → United Nations Environment Programme (UNEP) initiated the preparation of a "regional development plan for the environmentally sound management of the Lake Chad Basin". Endorsed by the 34th session of the Lake Chad Basin Commission (N'Djamena, October 19 to 29, 1987), the draft plan comprises a series of

measures to re-establish an "optimum" water level for the lake, including a feasibility study for the transfer of water resources from the upper Ubangi to the upper Shari River in order to increase and secure future lake inflow. Since the Ubangi in turn is a major tributary of the Congo/Zaire River, the UNEP project envisages the participation not only of the Central African Republic but also of the Republic of Zaire (→ Regional Cooperation and Organization: African States).

E. HERTSLET, The Map of Africa by Treaty, 3 vols. (3rd ed. 1909).
L.B. SOHN, Basic Documents of African Regional Organizations, Vol. 3 (1972) 995–996, 1045–1052.
I. BROWNLIE, African Boundaries: A Legal and Diplomatic Encyclopedia (1979) 445–469, 533–540, 553–587, 607–616.

I.O. AGORO, The Establishment of the Chad Basin Commission, ICLQ, Vol. 15 (1966) 542–550.
C.E. GISCHLER, A Hydrological Synthesis of the Chad Basin, Nature and Resources (UNESCO), Vol. 3, No. 3 (1967) 9–15.
L.V. KORBUT and Y.Y. BASKIN, The International Legal Regime of Africa's Rivers, Soviet Yearbook of International Law (1968) 247–258 [in Russian].
R. YAKEMTCHOUK, Le régime international des voies d'eau africaines, RevBelge, Vol. 5 (1969) 480–515.
F. WODIE, Les institutions internationales régionales en Afrique occidentale et centrale (1970).
P. PONDAVEN, Les lacs-frontière (1972).
B.O. TONWE, The Lake Chad Basin Commission, Journal of African Law, Vol. 16 (1972) 343–344.
P.H. SAND, Development of International Water Law in the Lake Chad Basin, ZaöRV, Vol. 34 (1974) 52–76.
H. DIPLA, Le tracé de la frontière sur les lacs internationaux, in: L. Caflisch and R. Zacklin (eds.), The Legal Regime of International Rivers and Lakes (1981) 247–306.
Lake Chad Basin Commission, Water Resources of the Lake Chad Basin, Management and Conservation: Proceedings of the International Seminar held in N'Djamena on June 3–5, 1987 (1988).

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LAKE CONSTANCE

Lake Constance – Bodensee, Lac de Constance – is surrounded by the Federal Republic of Germany (the Länder of Baden-Württemberg and Bavaria), Switzerland (the Cantons of St. Gallen and Thurgau) and Austria (the Land of Vorarlberg). The lake has a surface area of 538 square kilometres and a maximum depth of 252 metres. Its geographically clearly distinguishable parts are the main lake, known as the "Obersee", and the "Untersee" which is separated from the former by a small part of the → Rhine river from Constance downwards. The "Überlinger See", a prolongation of the Obersee from the line Constance-Meersburg to the west, is sometimes treated separately and sometimes considered a part of the Obersee.

1. Boundaries

In the case of the Untersee there exists a treaty establishing the international → boundary, concluded in 1854 between Switzerland and the then sovereign Grand-Duchy of Baden. The median line in the Rhine and in the Untersee is the frontier between the Federal Republic of Germany and Switzerland. Another treaty concluded between Switzerland and Baden on April 28, 1878, formally recognized as valid by an agreement between Switzerland and the German Reich on June 24, 1879, lays down the boundary in the bay of Constance (Konstanzer Trichter). For the much larger remainder of the lake there are no formal agreements fixing the boundaries.

As for the Überlinger See, which is totally surrounded by German territory, a long-standing practice shows that this part is considered to be fully under German sovereignty.

For the Obersee, which is the largest part of the lake, different positions have been taken by the three bordering States. Switzerland has always argued that the international boundary runs along the median line and that the lake is divided between the three States in this way. Swiss State practice is based on that theory. Austria has long taken the view that there exists a → condominium of the three States bordering the lake so far as the Obersee is concerned. Only the area up to a depth of 25 metres is claimed as Austrian territory (the so-called *Halde*). Different positions were taken by the German states Bavaria, Württemberg and Baden during the 19th century. The Federal Republic of Germany has avoided taking a clear stand on the matter. The Federal Government has formally stated that it has not opted for one or the other position (German Bundestag, Drucksache No. 7/3439, p. 14). This is possible since treaties exist which regulate all practical matters. The

Convention concerning Navigation on Lake Constance of June 1, 1973, concluded by Austria, the Federal Republic of Germany and Switzerland, stipulates in Art. 1(2) that it does not affect the delimitation of boundaries, thereby leaving this issue open. During the two World Wars from 1914 to 1918 and 1939 to 1945 the German Government prohibited the use of the lake beyond the median line by Germans. Defence installations, such as ships with anti-aircraft guns, operated only on that part of the lake which would be German if a division along the median line existed.

In literature, all the positions mentioned above have received some support. It would seem that the three States are in agreement that matters relating to the lake should be treated as of common concern to them. However, the practice during the wars is difficult to reconcile with the theory of a condominium and speaks rather for a division along the median line.

2. *Navigation*

The first treaty concerning navigation on the lake was concluded in 1867 between Switzerland, Austria, Baden, Württemberg and Bavaria. Freedom of navigation was introduced as a main principle and the parties agreed to treat all ships on the lake equally. Uniform safety measures and rules for navigation were introduced.

In the Convention concerning Navigation on Lake Constance between Austria, the Federal Republic of Germany and Switzerland, signed on the lake on June 1, 1973, the agreement of 1867 was abrogated. Freedom of navigation and equal treatment of all ships were confirmed (Art. 2). Uniform rules of navigation based on Art. 5 were agreed upon. For the implementation of the treaty three enforcement areas (*Vollzugsbereiche*) were established, dividing the lake basically along the median line where no agreement on the boundary exists. Each State takes measures of implementation in its area but is also competent in other parts if there are special reasons, such as accidents, → hot pursuit or particular requests. However, there are exclusive zones of two to three kilometres from the shore where only the shore-State may exercise jurisdiction based on the treaty (Art. 11). The establishment of an International Commission for Navigation on Lake Constance was provided for by the treaty (Art. 19).

3. *Fisheries and Hunting*

Fishing in the Obersee is still regulated by the agreement signed at Bregenz on July 5, 1893 between Austria-Hungary, Baden, Bavaria, Liechtenstein, Switzerland and Württemberg, which does not apply to the Untersee. The agreement is based on the principle that fishermen of all border States holding a valid licence may fish on the whole Obersee including the Überlinger See if they comply with the rules laid down in the treaty. Special measures of protection for specific fish were agreed as early as 1893. Fishing in the shore area is regulated by the bordering States individually. An International Conference of Delegates for Fishery on Lake Constance (Internationale Bevollmächtigtenkonferenz für die Bodenseefischerei), based on the treaty of 1893, is the organ which discusses all problems concerning fishery on the lake. The resolutions agreed upon in this conference are to be implemented individually by member States. In Baden-Württemberg, for instance, which has the longest shore line on the lake, such implementation is effected by a special regulation for fishing on Lake Constance (Bodenseefischereiverordnung).

For the Untersee, Baden-Württemberg concluded an Agreement on Fisheries with Switzerland on November 2, 1977. Concerning the Untersee, there exists also a special agreement on hunting on the lake concluded by Baden-Württemberg and the Swiss canton of Thurgau in 1954.

4. *Protection and Use of Water from the Lake*

On October 27, 1960 a treaty for the protection of Lake Constance against pollution was concluded by Baden-Württemberg, Bavaria, Austria and Switzerland. The two German Länder (rather than the Federal Government) were enabled to conclude such a treaty under Art. 32(3) of the German Constitution (Grundgesetz), with the consent of the Federal Government, because the subject-matter fell within their legislative competence. The parties agreed to cooperate for the purposes of protection of the lake. They will notify the other parties of any plans which might jeopardize the objectives of the treaty and will not implement such plans without common discussion. An International Commission for Protecting the Waters of Lake Constance (Internationale Ge-

wässerschutzkommission für den Bodensee) was established. Besides controlling the quality of the lake water, the Commission can recommend measures and the States agreed to seriously consider implementation of those recommendations. It is generally recognized that the water quality of the lake has considerably improved on the basis of the activities of the Commission.

An agreement for taking water from Lake Constance was concluded on April 30, 1966. The Federal Republic of Germany, Austria and Switzerland have agreed that each State must take into consideration the interests of the other two when taking water from the lake. Where the volume taken goes beyond a specified quantity the other States must be given the chance to make their position known. Where one of them objects to the plan, a Consultative Committee has to discuss it and must try to reach an agreement. If that proves impossible and no diplomatic solution can be found, an arbitration commission must take the final decision if one State so requests (Art. 11).

5. Special Legal Problems

The lack of agreement as to the status of the Obersee between the States bordering the lake does not seem to have had any impact on the exercise of jurisdiction on the lake since all important matters have been regulated by treaty. It plays a role, however, in national decisions, especially where the applicability of criminal law or tax law is concerned. A general tendency seems to exist not to apply national criminal law or tax law in those areas which are under the exclusive jurisdiction of the other States as far as the treaty on navigation is concerned, although it is clear that this treaty does not regulate those matters.

There exists an agreement of 1880 for the registration of births and deaths occurring on the lake, according to which the flag State of the ship is competent, otherwise the shore State.

Problems sometimes arise because private exclusive fishery rights are claimed in the area near Bregenz (Austria). However, Austria as well as the other States does not recognize exclusive fishery rights except in the immediate shore area up to a depth of 25 metres.

A good example for solving new problems on the lake in a cooperative spirit is the procedure that was applied when a mine, apparently from German underwater defence installations set up in World War II, broke loose and was seen on the lake on December 31, 1985. On January 1, 1986 police officers of the Baden-Württemberg Water Police (Germany) and the Thurgau Lake Police (Switzerland) exploded the mine in the middle of the lake.

Convention between Austria, Baden and Wurtemberg for the Repression of Contraband Traffic upon Lake Constance, February 20, 1854, CTS, Vol. 111 (1853/1854) 310–312.

Treaty between Baden and the Swiss Confederation relative to the Frontier, October 20/31, 1854, CTS, Vol. 112 (1854/1855) 250–258.

Règlement for the Navigation of Lake Constance agreed between Austria, Baden, Bavaria, Switzerland and Wurtemberg, September 22, 1867, CTS, Vol. 135 (1867) 373–396.

Règlement for the Navigation of Lake Constance and the Rhine between Constance and Schaffhausen agreed between Baden and Switzerland, September 28, 1867, CTS, Vol. 135 (1867) 407–430.

Delimitation Convention between Baden and Switzerland, April 28, 1878, CTS, Vol. 152 (1877/1878) 497–500.

Convention between Germany and Switzerland for the Recognition by Germany of the Delimitation Convention of April 28, 1878 between Baden and Switzerland, June 24, 1879, CTS, Vol. 155 (1879/1880) 143–144.

Übereinkommen zwischen der Schweiz und den Bodensee-Uferstaaten betreffend das Verfahren bei Beurkundung von Geburts- oder Sterbefällen auf dem Bodensee oder wenn eine Leiche aus dem See aufgenommen wird, 1880, Verträge der Bundesrepublik Deutschland, Series A, No. 321, Vol. 27 (1969) 145.

Agreement respecting the Adoption of Identical Regulations respecting the Fisheries in Lake Constance between Austria-Hungary, Baden, Bavaria, Liechtenstein, Switzerland and Wurtemberg, July 5, 1893, CTS, Vol. 179 (1893/1894) 37–52.

Vereinbarung zwischen dem Kanton Thurgau und dem Lande Baden-Württemberg betreffend die gemeinschaftliche Wasserjagd auf dem Untersee und Rhein, June 5, 1954, Thurgauer Rechtsbuch (loose-leaf), Vol. 4 (1979) No. 922.5.

Übereinkommen über den Schutz des Bodensees gegen Verunreinigung, October 27, 1960, Sammlung der eidgenössischen Gesetze (AS) (1961) 907–910; Austrian Bundesgesetzblatt (1961) 1411–1412; Verträge der Bundesrepublik Deutschland, Series A, No. 453, Vol. 33 (1970) 374–377.

Agreement regulating the Withdrawal of Water from Lake Constance, April 30, 1966, UNTS, Vol. 620 (1968) 191–209.

Convention concerning Navigation on Lake Constance (with Annex and Additional Protocol), Lake Constance, June 1, 1973, UNTS, Vol. 1003 (1976) 51–71.
Treaty concerning Navigation on the Untersee and the Rhine between Konstanz and Schaffhausen, June 1, 1973, UNTS, Vol. 1016 (1976) 57–67.
Vertrag über die Fischerei im Untersee und Seerhein (Unterseefischereiordnung), November 2, 1977, AS (1978) 1755–1778.

F. VON MARTITZ, Die Hoheitsrechte über den Bodensee, Annalen des Deutschen Reichs für Gesetzgebung, Verwaltung und Statistik, Vol. 18 (1885) 278–299.
H. HUBER, Gebietshoheit und Grenzverlauf im Bodensee, SchweizJIR, Vol. 21 (1964) 192–207.
K. BERCHTOLD, Die Hoheitsverhältnisse am Bodensee, Juristische Blätter, Vol. 87 (1965) 401–483.
O.L. BRINTZINGER, Hoheitsrechte am Bodensee, Jahrbuch für Internationales Recht, Vol. 15 (1970) 448–483.
C. GRAF SCHELLING, Die Hoheitsverhältnisse am Bodensee unter Berücksichtigung der Schiffahrt (1978).
H.-W. STRÄTZ, Der Bodensee als Rechtsobjekt, Deutsche Richterzeitung, Vol. 59 (1981) 54–61.
P. STÄHELIN, Das Staatsvertragsrecht am Bodensee aus der Sicht eines Schweizerischen Kantons, Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung, Vol. 86 (1985) 137–151.

JOCHEN ABR. FROWEIN

LAKE GENEVA

Lake Geneva is surrounded by Switzerland and, on the southern side between Hermance and St. Gingolph, by France.

Since time immemorial the boundary has followed the lake's median line (→ Boundary Waters). Mediaeval fishermen of Vaud could only sell fish caught on their side of the lake. Art. 20 of the Arbitration Treaty between Lausanne and the Duke of Savoy and Berne of October 30, 1564, declared the middle (*milieu*) of the lake as constituting the boundary between the parties' territories. This was confirmed on March 16, 1816, by the Turin Treaty on Cession and Frontiers between Sardinia and Switzerland (CTS, Vol. 65, p. 448).

On February 25, 1953, France and Switzerland concluded the Convention on the Determination of the Boundary of Lake Geneva (Recueil officiel des lois fédérales, 1957, p. 884). According to Arts. 1 and 2 of the Convention and the annexed map, the boundary is formed by the lake's median line and, on either end of the latter, by two transversals. The median line is defined by the centres of circles inscribed within the French and Swiss lake sides. For practical purposes, namely to achieve a compensation of areas, a hexagonal line replaces the median line. The transversals are drawn perpendicularly to the median line and lowered to Hermance and St. Gingolph, respectively. The transversals are, therefore, neither defined as equidistant lines nor do they simply prolong to the median line the thalweg of the rivers flowing through Hermance and St. Gingolph.

The lake's Swiss area falls under Switzerland's status of permanent neutrality (→ Permanent Neutrality of States). The → neutralization of two provinces in Upper Savoy by Art. 92 of the Final Act of the → Vienna Congress (1815) implicitly extended to the Sardinian and later French lake area, albeit apparently with little practical effect. On March 16, 1928, the Swiss Government abrogated this neutralization.

According to the 1932 judgment of the → Permanent Court of International Justice in the → Free Zones of Upper Savoy and Gex Case, the French customs' border remains withdrawn from the political frontier to a line behind the Free Zones (→ Customs Frontier). The customs border thus reaches the lake east of Hermance and west of St. Gingolph. As regards customs jurisdiction on the lake, Art. 3 of the 1816 treaty stated that the customs line would be drawn "along the lake [*le long du lac*] to Meillerie", a village west of St. Gingolph, and that no customs service shall be effected either on the lake or in the Sardinian Free Zones. Switzerland, which undertakes customs controls on her area, maintains that Art. 3 relates to the Free Zones régime and concerns the French lake area. France maintains that Art. 3 concerns both States. Since 1939, and under protest of the Swiss Government, a French fiscal boat patrols the French lake area. The Court's 1932 judgment did not treat this issue, though it confirmed France's right to collect fiscal, rather than customs, duties in the Free Zones. Accordingly, France maintains her → jurisdiction to fiscal surveillance on her side of the lake.

The utilization of the lake's waters is not

governed by a treaty (→ Water, International Regulation of the Use of). This issue has been discussed by a Franco-Swiss Commission since 1924 and was also partly addressed by a Concordat between the Swiss Cantons of Geneva, Vaud and Valais of December 17, 1884.

Navigation on the lake falls under a Franco-Swiss Agreement of December 7, 1976 (Journal officiel de la République Française (J.O. (1978) p. 1987), which deals with the admittance and safety of vessels on the lake and the prevention of pollution. The annexed regulations unify navigation rules. Fishery on the lake is governed by a Franco-Swiss Agreement of November 20, 1980 (J.O. (1981) p. 3489), which aims at harmonizing national fishing legislation and at protecting the fish and their habitat.

Severe pollution, namely the lake's phosphatic eutrophication, led to the Franco-Swiss Convention concerning the Protection of the Waters of Lake Geneva against Pollution of November 16, 1962 (UNTS, Vol. 922, p. 50; → International Watercourses Pollution). This Convention provides for cooperation rather than substantive obligations and has established an International Commission with a permanent secretariat operating in Lausanne. The Commission has made investigations into the nature and origin of the lake's pollution and has addressed recommendations to both States. Lack of financial means has impeded the implementation of some recommendations. For this reason, and upon instigation of the Canton of Geneva, an Agreement on the Dephosphorization of the Waters of Lake Geneva of November 20, 1980 (J.O. (1981) p. 3489) has been ratified by the French and Swiss Governments, the latter acting in the name of the Canton of Geneva. According to this Agreement, Geneva will contribute to the costs of dephosphorization measures undertaken by communities on the French lake side. The Agreement thus departs from one traditional notion according to which costs involved in abating → transfrontier pollution are borne by the municipal entities in which the pollution originates.

On the whole, Franco-Swiss cooperation in respect of Lake Geneva provides an apt example of good neighbourliness (*bon voisinage*) between → neighbour States. Lake Geneva also serves as a model for delimiting boundary waters. The lake's pollution remains the most pressing problem requiring substantial further joint efforts for its resolution.

P. PONDAVEN, Le statut international du lac Léman, RGDIP, Vol. 78 (1974) 60–120.

L. CAFLISCH, La Suisse et la protection des eaux douces dans le cadre du droit international (1976) 157–158, 207–220.

J. WITMER, Grenznachbarliche Zusammenarbeit. Das Beispiel der Grenzregionen von Basel und Genf (1979) 14, 61–71.

H. DIPLA, Le tracé de la limite sur les lacs internationaux, SchweizJIR, Vol. 36 (1980) 14–16.

MARK E. VILLIGER

LIECHTENSTEIN

The Principality of Liechtenstein is a sovereign → State situated between Austria and Switzerland with an area of 160 square kilometres and approximately 27 000 inhabitants (→ Micro-States). Liechtenstein is a parliamentary monarchy with institutions of direct democracy.

The former counties of Schellenberg and Vaduz, both fiefs of the Roman Empire, came into the possession of the house of Liechtenstein in 1699 and 1712 respectively. In 1719, they were constituted as the Principality of Liechtenstein by Emperor Charles VI. When the Holy Roman Empire was dissolved in 1806, Liechtenstein became an independent State. Liechtenstein was a member of the Rheinbund (1806–1813) and of the Deutsche Bund (1815–1866).

From 1852 to 1919 Liechtenstein formed a → customs union with Austria, used the Austrian currency and was represented diplomatically by Austria in third States. After World War I Liechtenstein loosened her ties with Austria and entered a closer relationship with Switzerland. Liechtenstein remained neutral in both World Wars (→ Neutrality, Concept and General Rules).

Liechtenstein's international status is marked by a close relationship with Switzerland. Since 1919, Liechtenstein has charged Switzerland with her representation in third States. Liechtenstein is

free, however, to withdraw this mandate at any time and to establish diplomatic representations with other States or international organizations (→ Diplomatic Agents and Missions). Liechtenstein maintains an embassy in Bern and a permanent representation at the → Council of Europe in Strasbourg. Switzerland, on the other hand, has no embassy in Liechtenstein's capital Vaduz. Liechtenstein and Austria maintain diplomatic relations by non-residing ambassadors. Some States maintain consulates in Vaduz (→ Consular Relations).

By the Treaty regarding the Inclusion of the Principality of Liechtenstein in the Swiss Customs-Area of March 29, 1923 (LNTS, Vol. 21, p. 231), the territory of Liechtenstein was incorporated into the Swiss customs area. The Swiss customs legislation and the agreements on tariffs and trade concluded between Switzerland and third States apply also to Liechtenstein. Following Switzerland's accession to the → European Free Trade Association (EFTA) in 1960 a special Protocol was concluded on March 27, 1961 between the EFTA members and Liechtenstein (UNTS, Vol. 420, p. 130). Similarly, when Switzerland concluded a free trade agreement with the → European Economic Community (EEC) in 1972, an additional agreement on the applicability of the agreement to Liechtenstein was concluded on July 22, 1972 between the EEC, Switzerland and Liechtenstein (Cmnd. 5181, Misc. 53 (1972)).

As to → immigration of nationals of third States and their status, an agreement between Switzerland and Liechtenstein of November 6, 1963 (Sammlung der Eidgenössischen Gesetze (1964) p. 5) provides that Swiss legislation on these matters is applicable in Liechtenstein. In view of a growing immigration in recent years Liechtenstein has limited the number of her foreign (including Swiss) population.

Swiss currency was introduced in Liechtenstein by Liechtenstein's own legislation in 1924. A treaty between Switzerland and Liechtenstein on monetary questions was concluded on June 19, 1980 (Sammlung der Eidgenössischen Gesetze (1981) p. 1715), providing that the Swiss legislation concerning these questions is applicable in Liechtenstein.

By a treaty of November 10, 1920 (LNTS, Vol. 2, p. 305), which was replaced by a new treaty of January 9, 1978 (Sammlung der Eidgenössischen Gesetze (1979) p. 25), Switzerland undertakes the postal and telecommunication services in Liechtenstein. Swiss legislation and treaties between Switzerland and third States relating to postal and telecommunication matters apply also to Liechtenstein (→ Telecommunications, International Regulation). Liechtenstein, however, has her own postage stamps.

Contraventions of Swiss legislation applicable in Liechtenstein fall under the competence of the Liechtenstein judiciary whose decisions, however, can be brought by appeal to the higher Swiss courts.

In 1920, Liechtenstein applied for membership in the → League of Nations, but was not admitted in view of her small size. Liechtenstein became a party to the Statute of the → International Court of Justice in 1950 and was a party before the Court in the → Nottebohm Case. Liechtenstein joined several of the → United Nations Specialized Agencies and became a member of the Council of Europe in 1978. Liechtenstein is a party to many multilateral conventions, including the → European Convention on Human Rights, and takes part in international conferences (e.g. the → Helsinki Conference on Security and Cooperation in Europe) with her own representatives. On December 14, 1989, the Diet of the Principality decided, on the Government's proposal, to apply for membership in the United Nations.

W.S.G. KOHN, The Sovereignty of Liechtenstein, AJIL, Vol. 61 (1967) 547–557.

P. RATON, Liechtenstein, Staat und Geschichte (1969).

G. BALTINER, Die völkerrechtlichen und politischen Beziehungen zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft, in: Liechtenstein, Politische Schriften, Beiträge zur liechtensteinischen Staatspolitik, Vol. 2 (1973) 21–48.

W.B. GYGER, Das Fürstentum Liechtenstein und die Europäische Gemeinschaft, in: Liechtenstein, Politische Schriften, Vol. 4 (1975) 1–244.

D. NIEDERMANN, Verhältnis der Schweiz zu Liechtenstein, in: Riklin/Haug/Binswanger (eds.), Handbuch der schweizerischen Aussenpolitik (1975) 903–919.

D. NIEDERMANN, Liechtenstein und die Schweiz, Eine völkerrechtliche Untersuchung, in: Liechtenstein, Politische Schriften, op. cit., Vol. 5 (1976) 1–175.

H. MERLIN, Das souveräne Fürstentum Liechtenstein aus der Sicht des Völkerrechts, in: C. Schreuer (ed.),

Autorität und internationale Ordnung, Aufsätze zum Völkerrecht (1979) 111–128.

B.M. MALUNAT, Die Verträge zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft; Politische Implikationen und völkerrechtliche Beurteilung, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 36 (1986) 329–363.

B.M. MALUNAT, Der Kleinststaat im Spannungsfeld von Dependenz und Autonomie; eine Fallstudie über das Fürstentum Liechtenstein (1987) 1–329.

G. BALTINER, Liechtenstein und die europäische Integration (1989) 1–31.

DIETRICH SCHINDLER

LÜBECK, BAY OF

Lübeck Bay is formed by the clearly recognizable indentation of the → Baltic Sea coastline, on which the cities of Lübeck and Travemünde are located. Today the frontier between the Federal Republic of Germany and the German Democratic Republic runs through the bay following the old border between Schleswig-Holstein and Mecklenburg-Schwerin.

The bay is of interest for international law because of some peculiar historical features which are still of importance today for the two German States. On July 7, 1928 the Staatsgerichtshof für das Deutsche Reich gave judgment in a dispute between the German Länder of Lübeck and Mecklenburg-Schwerin. The Court found that Lübeck had → historic rights to regulate and exercise fishery and navigation in a part of the bay belonging to Mecklenburg-Schwerin (→ Servitudes). In reaching this conclusion the Court examined the matter on the basis of public international law which it considered applicable between the states of a federal State where no constitutional rules are pertinent (→ Federal States). In this case, the rights had existed when the states concerned were sovereign and belonged to the German Confederation (→ Confederations and Other Unions of States). Since Lübeck had been in possession of these rights for many centuries the Court found that this created a presumption of lawful title (cf. → Minquiers and Ecrehos Case).

According to the Protocol of September 12, 1944 on zones of occupation in Germany, the Allied Powers established the border between the Soviet and British zones of occupation along the western frontier of Mecklenburg-Schwerin (→ Germany, Occupation after World War II). This had the consequence that the rights of Lübeck were to be exercised in the Soviet zone of occupation. After the Federal Republic of Germany and the German Democratic Republic came into existence, Lübeck, belonging to the Federal Republic of Germany, claimed these rights in the territorial waters of the German Democratic Republic.

On June 29, 1974 an agreement was concluded between the two German States according to which 110 Lübeck fishermen have the right to fish in an area of the territorial waters of the German Democratic Republic corresponding to the historic rights. The agreement is valid from 1974 to 1994. If it is not denounced one year before its termination it will be automatically prolonged for another ten years. The delimitation between the territorial waters of the Federal Republic of Germany and the German Democratic Republic was laid down in an agreement of September 20, 1973 (→ Maritime Boundaries, Delimitation).

Entscheidung des Staatsgerichtshofs in der Streitigkeit des Landes Lübeck gegen das Land Mecklenburg-Schwerin betreffend die Feststellung der Hoheitsrechte in der Lübecker Bucht, July 7, 1928, Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 122, Anhang: Entscheidungen des Staatsgerichtshofs (1929) 1–16.

Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Deutschen Demokratischen Republik über Grundsätze zur Instandhaltung und zum Ausbau der Grenzgewässer sowie der dazugehörigen wasserwirtschaftlichen Anlagen, September 20, 1973, German Bundesgesetzblatt (1974 II) 1241–1242.

Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Deutschen Demokratischen Republik über den Fischfang in einem Teil der Territorialgewässer der Deutschen Demokratischen Republik in der Lübecker Bucht, June 29, 1974, German Bundesgesetzblatt (1974 II) 1243.

L.J. BOUCHEZ, The Regime of Bays in International Law (1964) 122 et seq.

JOCHEN ABR. FROWEIN

MACAU

1. History

Portuguese ships first arrived at the Pearl River in 1517. As an acknowledgment for assistance in the fight against pirates in the South China Sea (→ Piracy), the Chinese viceroy of Canton ceded the peninsula of Macau and the islands of Taipa and Coloane to the Portuguese for a yearly impost of 500 Taëls. At first the Chinese inhabitants remained under Chinese jurisdiction. Far into the 19th century, China exerted an influence on the domestic affairs in the ceded area by, for example, limiting the number of ships present in Macau at the same time, establishing a Chinese customs office and requiring application of Chinese criminal law. After 1849 all Chinese officials were expelled from the city and the impost to be paid to the viceroy of Canton was no longer discharged. Eventually, China recognized the permanent Portuguese occupation and government of Macau including its dependencies under Art. II of the Sino-Portuguese Protocol of December 1, 1887 (Martens NRG2, Vol. 18, p. 787).

Macau was administered as a colony (→ Colonies and Colonial Régime). In the Portuguese Constitution of 1933, Macau was mentioned as a territory under Portuguese → sovereignty. In 1951, Macau was declared an overseas province. Until the reform in 1976, Macau was administered by a Governor, who was advised by the Legislative Council, composed of residents and officials. During the Cultural Revolution in the People's Republic of China, revolutionary activity also took place in Macau, but the Portuguese authorities were able to restore law and order with the approval of China.

The People's Republic of China did not recognize Portugal's sovereignty over Macau pursuant to the Protocol of 1887, which the Chinese saw as an → unequal treaty. The People's Republic considered Macau part of Chinese territory. Following the Chinese demand, Macau was excluded in 1972 from the list of non-autonomous territories prepared by the United Nations Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Official Records, 27th session, Supplement No. 23, p. 27). However, a confidential offer on the part of Portugal to return Macau to China was rejected, as China wanted to maintain the *status quo* for economic reasons despite its claim of sovereignty. Therefore, the Portuguese Government expressly declared that Macau was not included among the Portuguese territories to be decolonized. Nevertheless, according to a confidential arrangement, both sides agreed that Macau should no longer remain under Portuguese sovereignty but should henceforth be administered by Portugal. To this extent, the Protocol of 1887 became irrelevant. In the Portuguese Constitution of April 2, 1976 Macau is not included among the territories under Portuguese sovereignty, but is referred to only as a territory under Portuguese administration.

After China and Great Britain on December 19, 1984 agreed on the return of → Hong Kong to China by establishing a Hong Kong Special Administrative Region (SAR) under Chinese sovereignty as of July 1, 1997 (Joint Declaration on the Question of Hong Kong, ILM, Vol. 23 (1984) p. 1366), a similar arrangement was also proposed for Macau. Sino-Portuguese negotiations finally resulted in the Joint Declaration of Beijing of March 26, 1987 (Official Journal of the Government Council of the People's Republic of China 1987, No. 16, p. 549). In this instrument the Government of the People's Republic of China and the Portuguese Government stated that the Macau area is Chinese territory and the Government of the People's Republic of China will resume the exercise of sovereignty over Macau with effect from December 20, 1999.

2. Present Status

According to Portuguese municipal law, the status of Macau is governed by the Basic Statute of Macau (Estatuto Orgánico de Macao) of February 17, 1976 (Lei No. 1/76, Diário do Governo I Série, Número 40, p. 327). According to Art. 2 of the Statute, the territory of Macau constitutes a legal personality under internal public law (*pessoa colectiva de direito público interno*) with administrative, economic, financial and legislative autonomy within the framework of the Portuguese Constitution. The Portuguese executive is represented by a Governor who is nominated by the

Portuguese President after consultation with the Macau Legislative Assembly and representatives of social interests. The Governor is the supreme executive authority of Macau. Legislation may be enacted by the Governor, moreover, in cooperation with the Legislative Assembly consisting of 17 members, 5 of them nominated by the Governor, 6 directly elected by the citizens entitled to vote and 6 indirectly elected by the associations. A Consultative Council must be heard in connection with the introduction of a bill and the proposal of administrative projects, especially in the field of developmental planning.

The judiciary remains part of the Portuguese administration of justice. Administration of finances is specially regulated. Macau has its own currency, the Pataca, corresponding approximately to the Hong Kong dollar.

Externally, Macau is represented by the Portuguese President. The President is authorized to delegate competences to the Governor (Art. 3, para. 2), a possibility employed to a large extent in the field of neighbourly relations.

Macau's particular status under public international law is determined by the Sino-Portuguese Joint Declaration of Beijing of March 26, 1987, which was signed by the heads of State of both countries on April 13, 1987 and came into force on January 15, 1988. This agreement provides for the present status as well as the future development of Macau after December 20, 1999.

In the Joint Declaration, Macau's status as Chinese territory under Portuguese administration, as already provided by secret arrangements, is confirmed. According to the Declaration, Macau is part of China, which possesses territorial sovereignty, while Portugal administers territorial sovereignty. Thus, only Portuguese administrative authority prevails in Macau. As regards public international law, Portugal is solely responsible for Macau.

Nevertheless, Portugal has agreed to cooperate with China, especially in continuing to promote the economic growth of Macau and to maintain its social stability during the transitional period until December 19, 1999. China has pledged her cooperation in this connection Annex II of the Joint Declaration contains arrangements for the transitional period. Accordingly, a Sino-Portuguese Joint Liaison Group has been established to conduct consultations on the implementation of the Joint Declaration and to exchange information and conduct consultations on other subjects as may be agreed by the two sides. Moreover, a Sino-Portuguese Land Group has been created as an organ for handling land-leases in Macau and related matters on behalf of the two governments.

The Joint Declaration of 1987 has determined that the People's Republic of China will resume the exercise of sovereignty over Macau with effect from December 20, 1999, i.e. that the Portuguese administration will expire on December 19, 1999.

In line with the principle of "one country, two systems" corresponding to Art. 31 of the Chinese Constitution, China has engaged to establish a Macau Special Administrative Region which will be vested with executive, legislative and independent judicial powers, including the power of final adjudication. The chief executive will be appointed by the Chinese Government on the basis of the results of elections or consultations to be held in Macau. The current social and economic systems in Macau will remain unchanged. The laws currently enforced in Macau will remain basically unchanged. All rights and freedoms of the inhabitants and other persons in Macau, including those of the person, of speech, of the press, of assembly, of association, of travel and movement, of strike, of choice of occupation, of academic research, of religion and belief, of communication and of the ownership of property, will be ensured by law.

The Macau Special Administrative Region will decide policies on its own in the fields of culture, education, science and technology and will protect cultural relics in Macau according to law. In addition to Chinese, Portuguese may also be used in organs of government, in the legislature and in the courts.

Special economic relations with Portugal and other States may be maintained and further developed. Macau will remain a → free port and a separate customs territory. There will be free flow of capital. The Pataca, as the legal tender, will continue to circulate and remain freely convertible. Macau will continue to have independent finances.

The special status of Macau is agreed for a period of 50 years until December 19, 2049.

C.R. BOXER, Macao na Época da Restauraçao (1942).
G.V.H. MOSLEY, New China and Old Macao, Pacific Affairs, Vol. 32 (1959) 268–276.
G.V.H. MOSLEY, A nova China e o velto Macao, Revista Brasileira de Política Internacional, Vol. 3 (1960) 51–66.
N. MACQUEEN, Macao: End of a Special Case, The World Today, Vol. 41 (1985) 167–169.
R. ALFONSO and F. GONÇALES PEREIRA, The Political Status and Government Institutions of Macao, Hong Kong Law Journal, Vol. 16 (1986) 28–57.
R.D. CREMER (ed.), Macau, City of Commerce and Culture (1987).
L. FOCSANEANU, La déclaration conjointe sino-portugaise sur Macao, RGDIP, Vol. 91 (1987) 1279–1303.
Y.-H. NIEH, Die Zukunft Macaus – Kommentar zu dem chinesisch-portugiesischen Abkommen vom 13. April 1987, China aktuell, Vol. 16 (1987) 320–322.
L. RAYNER, Macau, The Round Table, Vol. 76 (1987) 199–206.

WALTER RUDOLF

MARMARA SEA *see* Dardanelles, Sea of Marmara, Bosporus

MEKONG RIVER

The Mekong, the eighth longest river in the world, rises in → Tibet, flows through the mountain ranges in China, then forms the → boundary dividing Laos from Burma and Thailand, before flowing through Kampuchea and emptying into the South China Sea near Ho Chi Minh City (Saigon) in → Vietnam. The Mekong drainage basin, downstream from that point where the borders of Burma, Laos and Thailand meet, is commonly referred to as the lower Mekong basin.

Until the conclusion of the Geneva Accords of 1954, three of the four lower Mekong basin countries – Cambodia, Laos, and the Republic of South Vietnam – were French → protectorates (→ Decolonization: French Territories). The legal régime of the lower Mekong in this period was based mainly upon agreements entered into between France and Siam (now Thailand). In the period of colonial expansion the French made efforts to control and gain freedom of access to the Mekong and thereby to expand their trading and commercial interests (see e.g. the treaty concluded between Siam and France on August 15, 1856, BFSP, Vol. 47, p. 993).

Although the lower Mekong served as a boundary river between the French protectorate and Siam from 1893, the exact delimitation of the river boundary was finally decided upon in a convention concluded between French Indochina and Siam on August 25, 1926 which defined the river frontier of the Mekong as the thalweg (LNTS, Vol. 69, p. 313, Art. 3(1); → International Rivers).

The navigational rights of the three Mekong basin States, *inter se*, were spelled out in a number of treaties, the most detailed of which, the Treaty of February 14, 1925 between Siam and France, assured the freedom of commercial navigation to vessels of the riparian States exclusively (LNTS, Vol. 43, p. 189, Art. 4; → Navigation, Freedom of).

Cambodia, Laos and South Vietnam, following their attainment of independence in 1954, concluded a treaty which regulated more completely their navigational rights, and in an explanatory note preserved Thailand's rights under the 1926 treaty (see Paris Convention of December 29, 1954, AFDI, Vol. 8 (1962) p. 112).

Between the 1920s and the 1950s, a number of international commissions were created by the lower Mekong riparian States: the Permanent Franco-Siamese High Commission for the Mekong, established by the 1926 Convention between Siam and France (Art. 10); the Mekong Consultative Commission, established by the Pau Convention of December 23, 1950 between Cambodia, Laos, Vietnam and France (UN Doc. E/CN.11/WRD/MKG/L.237 (1968)); and the Mekong Commission established under the 1954 Paris Convention (Art. 10), which never became operative. These commissions had only a sporadic operational existence but they had some success in improving the navigability of the lower Mekong.

In 1957, in response to a recommendation of the United Nations Economic Commission for Asia and the Far East (ECAFE; → Regional Commissions of the United Nations), the Committee for Co-ordination of Investigations of the Lower Mekong Basin (hereafter, Mekong Committee) was established by the Governments of Cambodia, Laos, Thailand and the Republic of Vietnam (South Vietnam). The area of jurisdiction of the Committee was defined in its Statute as that area of the drainage basin of the Mekong situated in the

territory of the participating governments. The Committee is composed of four members, each participating government being entitled to appoint "one member with plenipotentiary authority and such alternates, experts and advisers as it desires" (Statute, Art. 1).

In December 1958, the Committee decided to appoint an Executive Agent, with auxiliary staff, to be stationed in Bangkok with authority to take decisions on a day-to-day basis on its behalf. The Committee also appointed an international Advisory Board to meet twice a year and advise on technical aspects of projects. To ensure that the Committee's activities neatly mesh with local planning, each of the riparian member countries has set up its own National Mekong Committee.

The → United Nations and some of its agencies have played an integral part in the financing and functioning of the Mekong Committee. The executive agent is appointed by the → United Nations Secretary-General and is "subject to the direction and guidance of the Executive Secretary of ECAFE in regard to policy matters" (UN Doc. E/CN.11/WRD/MKG/R.10 (1958)) but receives his or her mandate from the Mekong Committee.

According to Art. 4 of its Statute the functions of the Mekong Committee are:

> "to promote, coordinate, supervise and control the planning and investigation of water resources development projects in the lower Mekong Basin. To these ends the Committee may (a) prepare and submit to participating governments plans for carrying out coordinated research, study and investigation; (b) make requests on behalf of the participating governments for special financial and technical assistance and receive and administer separately such financial and technical assistance . . . ; (c) draw up and recommend to participating governments criteria for the use of the water of the main river for the purpose of water resources development."

While compelled by the Statute to cooperate with the ECAFE, the Committee retains an independent identity (e.g. entitled to adopt its own rules of procedure, see Statute, Art. 5, para. 1). The interests of the member States are protected in as much as it is provided that the Statute shall not affect previous or future agreements entered into by the interested governments (Art. 8) and that decisions shall be taken unanimously (Art. 5(3)).

The Mekong Committee has interpreted its functions as delineated by its Statute (Art. 4) broadly. Its activities have included tributary dam projects, pump irrigation, fishery development, building of river craft and hydraulic networks, soil surveys, fishery surveys, geological surveys, health surveys, environmental studies, hydrographic work and flood control studies. These activities have been financed by the member States, contributing governments and aid organizations, especially the → United Nations agencies, with contributions totalling about US $590 million for the period 1957 to 1985.

At the conclusion of the Vietnam war in 1975 the functioning of the Mekong Committee was interrupted but the work of the Secretariat continued. In 1978, Laos, Thailand and the unified Socialist Republic of Vietnam agreed to establish the Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin without the participation of the Khmer Rouge Government of Pol Pot and Ieng Sary (Democratic Kampuchea). The Interim Committee was intended to function only until Kampuchea resumed its participation in the Committee (see Declaration concerning the Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin of January 5, 1978, Art. 3).

The functions of the Interim Committee were to be similar to those of the dormant Mekong Committee, viz. to "promote the water resources development of the Lower Mekong basin to increase agricultural and power production" (Declaration, Art. 4; see also Art. 4 of the Interim Committee's Rules of Procedure of September 1983).

Following the deterioration in relations between Thailand and Vietnam and between Thailand and Laos after Vietnam's invasion of Kampuchea in 1979, Laos and Vietnam expressed opposition to any development of the Mekong's mainstream resources until the People's Republic of Kampuchea was able to take its place as a member in the full committee. Such a resumption is complicated by the recognized representation of Kampuchea at the United Nations being that of

Democratic Kampuchea rather than of the People's Republic of Kampuchea.

Statute of the Committee for Co-ordination of Investigations of the Lower Mekong Basin, October 31, 1957, in: Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation, UN Doc. ST/LEG/SER.B/12.

P.K. MENON, The Lower Mekong Basin: An Inquiry into the International Legal Problems of the Development Programme of the Lower Mekong Committee, Thesis, University of New York, School of Law (1970).

V.M. WHEELER, Co-operation for Development in the Lower Mekong Basin, AJIL, Vol. 64 (1970) 594–609.

P.K. MENON, The Legal Regime of the Lower Mekong River Basin, Revue de Droit International, Vol. 49 (1971) 303–331.

P.K. MENON, The Lower Mekong River Basin – Some Proposals for the Establishment of a Development Authority, IntLawyer, Vol. 6 (1972) 796–818.

P.K. MENON, Some Institutional Aspects of the Mekong Basin Development Committee, Revue Internationale des Sciences Administratives, Vol. 38 (1972) 157–168.

B. BINSON, The Lower Mekong Basin Development, in: M. Zaman (ed.), River Basin Development, Proceedings of the National Symposium on River Basin Development 4–10 December 1981, Dacca, Bangladesh, 69–184.

Mekong Committee Secretariat, Co-operation in the Lower Mekong River Basin, in: United Nations Department of Technical Co-operation for Development, Natural Resources Series No. 10, Experiences in the Development and Management of International River and Lake Basins, UN Doc. ST/ESA/120 (1983) 245–251.

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MONACO

The Principality of Monaco is a sovereign → State situated on the Mediterranean coast, surrounded on the land side by French territory. Monaco has an area of 1.18 square kilometres and 27 000 inhabitants (→ Micro-States). Monaco is a hereditary and constitutional monarchy and has been ruled by the House of Grimaldi since 1297 except during the French Revolution. From 1524 to 1641 Monaco was a → protectorate of Spain, and from 1641 to 1793 a protectorate of France. From 1815 to 1860 Monaco was placed under the protection of the Kingdom of Sardinia. In 1861 a treaty with France was concluded by which Monaco's territory was reduced to its present size by detaching Menton and Roquebrune. A → customs union with France was established in 1865.

The fundamental provisions on Monaco's relations with France are contained in the Treaty Establishing the Relations of France with the Principality of Monaco of July 17, 1918 (UNTS, Vol. 981, p. 359). Under this instrument, Monaco may not conclude treaties with third States or take any other measures concerning international relations without the previous consent of the French Government. Previous consent is also necessary for any measures concerning a regency or a succession to the Crown. France may place military forces on the territory of Monaco in order to maintain the security of both States. In view of these prerogatives conceded to France Monaco has been characterized as a quasi-protectorate. The treaty of 1918 also provides that in the event of a vacancy in the Crown the territory of Monaco would become a State under the protection of France.

The Government of Monaco is formed by a Minister of State as its head and three Councillors of Government, all appointed by the Prince and responsible to him only. According to an agreement with France the Minister of State is a French national appointed by the Prince from a list of three candidates submitted to him by France. The Councillor for the Interior must also be a French citizen. After a crisis in the relations between Monaco and France in 1962 and 1963, due mainly to questions of taxation, a series of new conventions between the two States were concluded on May 18, 1963 (Journal officiel, 1963, pp. 8684–8692). These conventions, however, did not alter the treaty of 1918.

Monaco has diplomatic and consular representation in many States (→ Diplomatic Agents and Missions), is a member of several → United Nations Specialized Agencies and has acceded to many multilateral conventions. Monaco has, however, not joined the → Council of Europe. As Monaco forms a customs union with France (Customs Convention of May 18, 1963). Monaco is part of the customs area of the → European

Economic Community (EEC). The EEC Treaty, however, does not apply to Monaco.

Treaty Establishing the Relations of France with the Principality of Monaco, July 17, 1918, UNTS, Vol. 981 (1975) 359–367.

Convention fiscale, May 18, 1963, UNTS, Vol. 658 (1969) 393–423.

J.P. GALLOIS, Le régime international de la Principauté de Monaco (1964).

J. PILLON and J.-F. VILOTTE, Les institutions politiques de la Principauté de Monaco, Revue du droit public et de la science politique en France et à l'étranger (1982) 355–376 (with the text of the treaties with France).

G. BOREL, Le statut international de la Principauté de Monaco, Thesis, University of Lyon (1985).

DIETRICH SCHINDLER

MOSELLE RIVER

Originating in the Vosges Mountains, the Moselle River connects the French industrial areas in Lorraine with Western Europe's central waterway, the → Rhine River. After passing through French territory, the Moselle marks the boundary between the Grand Duchy of Luxembourg and the Federal Republic of Germany. This boundary, which extends over approximately 36 kilometres, is administered by the two States as a → condominium. In the Federal Republic, the Moselle River meanders through hilly vineyards before entering the Rhine at Coblenz.

It took more than 140 years until an international river régime for the Moselle was established by the conclusion of a convention between the Federal Republic of Germany, France and Luxembourg concerning the canalization of the Moselle on October 27, 1956 (German Bundesgesetzblatt (1956 II) p. 1838; → International Rivers). Such a régime had already been envisaged by Arts. 1 and 4 of Annex 16 C of the Final Act of the → Vienna Congress (1815). It is true that the principles of freedom from dues and of equal treatment of nationals of all signatory States, laid down in Arts. 3 to 5 of the revised convention relating to navigation on the Rhine of October 17, 1868, also applied to the Moselle (Convention of Mannheim, German Bundesgesetzblatt (1969 II) pp. 598–604). Until the adoption of the Rhine régime and the attribution of regulatory powers to a river commission, however, these provisions did not become operative. Nevertheless, freedom of navigation on the Moselle was expanded during the mid-19th century by the conclusion of several bilateral treaties between the interested States.

Further development was impeded by the state of the natural river-bed and by political factors. The irregular water-level did not permit the deep-draught navigation needed for the growing French coal, iron and steel industry in Lorraine. Following the German-French war of 1870 to 1871, as a result of which France ceded Alsacia and parts of Lorraine to Germany, an agreement on the necessary dredging and construction of sluices, originally envisaged in the → Frankfurt Peace Treaty (1871), was never concluded due to the unfavourable state of relations between the two parties. After the First World War, Germany was bound by Art. 362, No. 1 of the → Versailles Peace Treaty (1919) not to oppose the extension of the powers of the Central Rhine Navigation Commission to the Moselle. This provision, however, was never utilized since plans for construction did not ripen.

It was only after the Second World War that a favourable situation for the establishment of an international river régime for the Moselle arose. In 1955, the population of the → Saar Territory voted in a referendum against their territory being given a special European status (→ Plebiscite). In return for its consent to the reincorporation of the Saarland into Germany, France demanded that the Federal Republic agree to establish an international river régime for the Moselle and participate in the necessary construction works. Thus, the Moselle Treaty was signed by the three riparian States, not without opposition from the Netherlands which asserted a claim to participate derived from the Convention of Mannheim.

The Moselle River régime applies to the transboundary transport of goods and persons between Metz and Coblenz (Art. 28), thus not covering → cabotage transports. Although the régime has been largely assimilated to that of the Rhine, there are some notable differences, the most important being the existence of dues for the use of the waterway. The construction works, resembling in some respects the canalization on the → St. Lawrence Seaway, were financed and

supervised by the International Company of the Moselle, a body established under German law by the signatory States. The dues collected serve to cover a part of the costs of the construction. A taxation for that purpose is consistent with the principle of freedom of dues laid down by Art. 3 of the Convention of Mannheim. This is confirmed by Art. 2 of the Final Protocol to that Convention. The amount of the dues is approximately based on the amount charged with regard to the German rivers Main and Neckar.

As on the Rhine, the principles of freedom of navigation for the ships of all nations and equal treatment for the use of public ports and certain installations apply to the Moselle régime (Art. 29). The customs régime and the provisions concerning passports, river police, public health, social security, inspection of vessels and minimum manning in force on the Rhine also apply for the Moselle. Changes in the Rhine régime in these fields can be adopted for the Moselle by a decision of the Moselle Commission.

The Moselle Commission consists of representatives of the signatory States of the Moselle Treaty. All decisions are taken unanimously. The Commission has its seat in Trèves, Federal Republic of Germany. In 1988, it was finally accorded legal personality by virtue of a third Protocol to the Moselle Treaty. Unlike France has done for the Central Rhine Navigation Commission, the Federal Republic has so far not accorded diplomatic privileges and immunities to either the Commission or to its members (→ International Organizations, Privileges and Immunities). The Commission decides upon the modalities of the dues and upon the adoption of the regulations of the Rhine régime concerning navigation. It gives recommendations concerning the construction and the maintenance of the waterway and determines its own budget. The Commission has no powers with respect to the use of the water (→ Water, International Regulation of the Use of). According to the preferable view and constant practice, the decisions of the Commission are directed towards the signatory States who give effect to them under their domestic law.

By virtue of a protocol of December 20, 1961 (UNTS, Vol. 940, p. 211), the signatory States have established, apart from the Moselle Commission, an International Commission for the protection of the Moselle against pollution (→ International Watercourses Pollution). The decisions of the latter have merely a recommendatory character. By means of a recommendation of this Commission on October 4, 1985, which has been incorporated into a decision of the Moselle Commission of March 27, 1986 (German Bundesanzeiger, Vol. 38 (1986 I) p. 8110), the signatory States have come to an accord concerning certain modalities of the operation of the French nuclear power plant Cattenom, located on the banks of the Moselle River in the immediate vicinity of Luxembourg and the Federal Republic (→ Nuclear Energy, Peaceful Uses). It is doubtful, though, whether this decision has binding force, since the treaty provision invoked as its basis is ambiguous as to its scope and content.

Following the model of the Rhine Shipping Tribunals, the Moselle Treaty provides for independent Moselle Shipping Tribunals. Their powers exceed those of the Rhine Shipping Tribunals insofar as they are also competent to decide over disputes concerning dues. As under the system of the Convention of Mannheim, each party has the choice to appeal either to a designated national court or to the Moselle Commission itself. The decision within the Commission is taken by an independent appeal board. Its members are free of instructions, irremovable, hold their offices for a four-year term and must be either judges or professors of law. Thus, the board is a true case of a body exercising international jurisdiction (→ International Courts and Tribunals). Disputes arising between the signatory States themselves are referred by the treaty to an as yet unused obligatory international arbitration procedure (→ Arbitration Clause in Treaties).

For the determination of the international legal status of the Moselle it is necessary to consult, apart from the Moselle Treaty, the law of the → European Communities. For instance, Community regulations concerning inland navigation also apply to the traffic on the Moselle. In contrast to the situation which prevails under the Central Rhine Navigation Commission, the cooperation between the Moselle Commission and the Communities has never been institutionalized. This seems to be due to the fact that only member States of the Communities participate in the Moselle Commission. The conventions concluded

at the → Barcelona Conference (1921) are in force only for two of the signatory States of the Moselle Treaty. These agreements are of a subsidiary character since their provisions are encompassed by those of the Moselle Treaty. In sum, the system installed by the Moselle Treaty has worked well and has not given rise to serious disagreement between the signatory States or between these States and third States.

Vertrag zwischen der Bundesrepublik Deutschland, der Französischen Republik und dem Großherzogtum Luxemburg über die Schiffbarmachung der Mosel, October 27, 1956, German Bundesgesetzblatt (1956 II) 1838–1862.

Protokoll über die Errichtung einer Internationalen Kommission zum Schutz der Mosel gegen Verunreinigung, December 20, 1961, UNTS, Vol. 940, p. 211.

Protokoll zur Änderung des Vertrages vom 27. Oktober 1956 über die Schiffbarmachung der Mosel, November 28, 1974, German Bundesgesetzblatt (1975 II) 1110.

Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung des Großherzogtums Luxemburg über Unterhaltung, Erneuerung und Betrieb der gemeinsamen Strecke des Mosellaufs, September 14, 1976, German Bundesgesetzblatt (1976 II) 1972–1975.

Zweites Protokoll zur Änderung des Vertrages vom 27. Oktober 1956 über die Schiffbarmachung der Mosel, June 21, 1983, German Bundesgesetzblatt (1984 II) 539–540.

Vertrag zwischen der Bundesrepublik Deutschland und dem Großherzogtum Luxemburg über den Verlauf der gemeinsamen Staatsgrenze, December 19, 1984, German Bundesgesetzblatt (1988 II) 415–420.

Drittes Protokoll zur Änderung des Vertrages vom 27. Oktober 1956 über die Schiffbarmachung der Mosel, May 12, 1987, German Bundesgesetzblatt (1988 II) 587.

Stichting Verkeerswetenschappelijk Centrum, Het Regime voor de Scheepvaart op de Moezel – Le régime relatif à la navigation de la Moselle (1960).

D. RUZIÉ, Le régime juridique de la Moselle, AFDI, Vol. 10 (1964) 764–812.

G. FLESKES, Der internationale Rechtsstatus der Mosel (1969).

R. GOY, Jurisprudence française en matière de droit international public – Fleuves internationaux – Moselle, RGDIP, Vol. 86 (1982) 174–184.

W. RUDOLF, Das deutsch-luxemburgische Kondominium, AVR, Vol. 24 (1986) 301–313.

G. HOOG, Flüsse und Kanäle der Bundesrepublik Deutschland, AVR, Vol. 25 (1987) 202–231.

M. KLOEPFER, Internationalrechtliche Probleme grenznaher Kernkraftwerke, AVR, Vol. 25 (1987) 277–293.

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MUNDAT FOREST

Mundat Forest is an uninhabited area covering 696 hectares at the Franco-German frontier near the town of Weissenburg/Wissembourg (Alsace), which obtains its water from several sources impounded there. In addition, the area is used for agricultural and forestry purposes. Until 1949 Mundat Forest was undisputed German territory.

At the Six Power Conference held in London from February 23, to June 3, 1948, the United States, France, Britain and the Benelux countries adopted a recommendation to convene a constituent assembly in the western zones of the defeated German Reich and issue an occupation statute. At the same time it was suggested to the six governments that the western frontier of Germany be subjected to "minor provisional territorial adjustments". The minutes of the Conference, which were published in Paris on March 26, 1949 as a Six Power communiqué concerning "Provisional Rectifications along the Western German Frontier", listed Mundat Forest among the contemplated adjustments (Royal Institute of International Affairs (ed.), Documents on Germany under Occupation 1945–1954, p. 368).

The separation of territory in question was carried out under, and rendered effective by, Ordonnance No. 212 of the French Military Government of April 23, 1949 (Journal Officiel du Commandement en Chef Français en Allemagne, No. 262, p. 1967). Art. 1 of the latter includes the following provision:

"Le tracé de la frontière occidentale de l'Allemagne est provisoirement modifié comme suit en ce qui concerne les territoires de la Zone Française d'Occupation:

4.

Entre la France et l'Allemagne (Etat Rhéno-Palatin) dans la forêt du Mundat, la vallée du Burbach et les sources alimentant en eau

potable la ville Wissembourg, se trouveront en territoire français."

(The alignment of the western frontier of Germany is provisionally modified as follows so far as the territories of the French Occupation Zone are concerned:

4.

Between France and Germany (Land of Rhineland-Palatinate) in Mundat forest, the Burbach valley and the springs supplying drinking water to the town of Wissembourg shall be located in French territory.)

In the 1950s, the Federal Republic of Germany sought to obtain the return of Mundat Forest through → negotiations with France. In Chap. 1 of the Convention of October 23, 1954 on the Settlement of Matters Arising out of the War and the Occupation (German Bundesgesetzblatt, 1955 II, p. 405), the fourth sentence of Art. 1(1) expressly provides for amendment of the occupation law by which the provisional boundaries of the Federal Republic had been established, but states that such amendment is subject to the consent of the Three Powers (→ Boundary Settlements between Germany and Her Western Neighbour States after World War II).

On July 31, 1962 the Federal Republic and France concluded a treaty settling various frontier matters (Journal Officiel de la République Française, August 8, 1963, p. 7356), Art. 8 of which stated that the two parties recognize as final the existing course of the frontier in the area of Wissembourg, subject to slight modifications. At the same time it was agreed that properties covering approximately 620 hectares situated in France near the frontier, which had been sequestrated as → enemy property, would be returned to their German owners. The French National Assembly gave its consent to this treaty. In the German Bundestag, there was no consenting majority owing to local resistance in the Land Rhineland-Palatinate and fundamental reservations about setting a precedent for German frontiers in the East.

In subsequent years, the Federal Republic sought re-negotiation. Not until 1984, after the Federal Republic had agreed to make certain payments relating to damages caused during World War II, did these efforts lead to a settlement.

The exchange of notes dated May 10, 1984, which does not require ratification by the contracting parties, provides for France's recognition of German territorial jurisdiction and control over the disputed Mundat Forest area by its consent to the repeal by the German parliament of Art. 1(4) of Ordonnance No. 212 of April 23, 1949 as occupational law. The Federal Republic undertook to grant France ownership of the property in Mundat Forest registered in the relevant German Land Register in the name of the Federal Republic as successor to the German Reich and in the name of Rhineland-Palatinate as successor to Bavaria (for text of the notes, see Journal Officiel de la République Française of January 16, 1985, p. 569; → State Sucession).

On February 18, 1986, the German Bundestag repealed Art. 1, No. 4 of Ordonnance No. 212 of April 23, 1949 relating to Mundat Forest by means of Art. 14 of the First Act Revising the Law on Administrative Procedure (German Bundesgesetzblatt, 1986 I, p. 268). When this Act came into force on May 1, 1986, territorial jurisdiction and control over Mundat Forest passed to the Federal Republic. As required by Art. 1, Chap. 1 of the Convention on the Settlement of Matters Arising out of the War and the Occupation, the Three Powers gave their consent in a joint note of August 27, 1984 in the exercise of their rights and responsibilities retained under Art. 2 of the Convention of October 23, 1954 on Relations between the Federal Republic of Germany and the Three Powers (German Bundesgesetzblatt, 1955 II, p. 301).

After this 1984 Franco-German agreement, local resistance emerged to granting France ownership of the properties in Mundat Forest. It was claimed that the Federal Republic could not dispose of the estate of the German Reich since the Basic Law of the Federal Republic and its Art. 134, regulating succession to former properties of the German Reich, had come into force only after Mundat Forest was separated from the Land Rhineland-Palatinate and territorially attached to France. Consequently, the German Reich continued to be proprietor of the estate in question but could not act. On May 4, 1988, a local court appointed a "custodian of the German Reich for the properties in Mundat Forest" on the grounds

that legal uncertainty existed regarding the proprietor. The appointed custodian declared he would not allow this estate to be transferred to France.

Following an appeal by the Federal Republic, the appointment of the custodian was revoked by the superior court on November 15, 1988 and this decision was upheld in the next and final instance. The court of appeal concluded that Mundat Forest had not been annexed to France but only provisionally detached from Rhineland-Palatinate, to which it continued to belong and which one month later became part of the Federal Republic of Germany. Therefore, the Basic Law also applied in Mundat Forest and made the Federal Republic owner of the Reich properties there. Even if an annexation of Mundat Forest by France were assumed, the repeal of Ordonnance No. 212 of April 23, 1949 by the German parliament in 1986 restored the *status quo ante*, when Mundat Forest had already belonged to Rhineland-Palatinate, now forming part of the Federal Republic of Germany. Accordingly, the Basic Law applies automatically in Mundat Forest and needs no special enacting. Therefore, in any case, Art. 134 of the Basic Law vests the Federal Republic with ownership of said properties of the German Reich. Since there are no doubts about ownership, no "custodian of the German Reich" is needed.

In conclusion it can be said that the settlement arrived at in 1984 does not transfer territorial sovereignty over Mundat Forest back from France to the Federal Republic, but merely territorial jurisdiction and control, since France had neither annexed Mundat Forest nor acquired it by lapse of time; the Ordonnance of April 23, 1949 had merely placed the area provisionally under French administration. Acquisition by lapse of time foundered on the objection by the Government of the Federal Republic.

A. VERDROSS, B. SIMMA and R. GEIGER, Territoriale Souveränität und Gebietshoheit (1980).

J. MYARD, L'accord du mai 1984 sur le Mundat, AFDI, Vol. 31 (1985) 884–892.

K. BERTZEL and E. DENGER, Die deutsch-französische Mundatwaldvereinbarung vom 10. Mai 1984 – ein kaschierter Sonderfriedensvertrag?, Neue Juristische Wochenschrift, Vol. 39 (1986) 1403–1404.

U. FASTENRATH, Staatsrechtliche Probleme im Zusammenhang mit der Rückgabe des Mundatwaldes von Frankreich an Deutschland, Deutsches Verwaltungsblatt, Vol. 101 (1986) 1039–1044.

S. JUTZI, Mundatwald und Sequesterland – Bereinigung letzter Kriegsfolgen zwischen Deutschland und Frankreich, AVR, Vol. 24 (1986) 277–300.

H. DÜNISCH, Der Mundatwald – Zur Bereinigung letzter Kriegsfolgenprobleme zwischen Deutschland und Frankreich (1989).

SIGISMUND BUERSTEDDE

NAMIBIA

1. General Background

Namibia, with a territory of 823 144 square kilometres, borders on Angola, Zambia, Zimbabwe, Botswana, and the Republic of South Africa. The population, consisting of the following ethnic groups, totalled approximately 1 230 000 in 1987: Wambos, mainly located in the north (49 per cent), Kavangos (9 per cent), Damras (7 per cent), Hereros (7 per cent), whites (7 per cent), Namas (5 per cent), Caprivians (4 per cent), coloureds (4 per cent), Bushmen (3 per cent), Basters (2 per cent), Tswanas (1 per cent) and others (1 per cent). Since the country is rich in natural resources, mining is by far the most important economic activity. Large areas of Namibia suffer from aridity.

The Namib Desert, extending north to south alongside the Atlantic Ocean, inspired the territory's name, which was recognized by the → United Nations in 1968 as replacing the designation South West Africa (UN GA Res. 2372 (XXII)). The change demonstrated not only the growing involvement of the United Nations in the Namibian question, but was meant to emphasize the legal claim of the Namibian people to → self-determination and to terminate South Africa's rule over the territory.

2. History until 1945

During the 19th century several English and German trading posts and missions were founded in the territory of Namibia. Private purchases of land by German settlers from the indigenous peoples in 1883 were followed in 1884 by the occupation of the whole territory by the German

Reich. The British Empire had previously shown no serious interest in the area except for → Walvis Bay and some offshore islands which were occupied by the British in 1878 and, consequently, never belonged to the German colony (→ Colonies and Colonial Régime; → Protectorates). The Berlin Conference of 1885 affirmed the new situation (→ Berlin West Africa Conference (1884/1885)). German military forces were needed after 1889 to stabilize the colonization process.

At the beginning of the new century several rebellions by the Herero and Nama tribes were cruelly suppressed. A consolidation of German administration and an acceleration of the colony's economic development took place after 1908. Following the outbreak of World War I, the South African Government decided to invade the German colony. The German forces there surrendered in July 1915; for the five following years the territory was administered by South Africa under martial law.

During the Peace Conference, the then South African Defence Minister, General Smuts, gained a profound influence on the shaping of United States President Wilson's idea of creating a → League of Nations. Smuts succeeded in having adopted his proposal to introduce a → Mandate system providing for different stages of development. Art. 22 of the League's Covenant, thus, foresaw three classes of Mandates (A, B and C). South West Africa as well as some South → Pacific Islands were expressly attributed to class C, meaning that these territories could best be administered under the laws of the Mandatory Power as an integral portion of its territory. This classification could be understood to amount to → annexation in all but name, an interpretation apparently affirmed by the Mandate instrument of December 17, 1920 (LNTS, Vol. 2 (1922) p. 89) by which "the territory which formerly constituted the German Protectorate of South West Africa" was "conferred upon his Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa". According to Art. 2 of the instrument,

> "the mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require".

The Mandate, on the other hand, was defined as a "sacred trust of civilization". The international accountability of the Mandatory was underlined by Arts. 6 and 7 of the instrument, which obliged South Africa to present annual reports, to obtain the consent of the Council of the League for any modification of the terms of the Mandate, and to submit any dispute between the Mandatory and another member of the League relating to the interpretation or the application of the provisions of the Mandate to the → Permanent Court of International Justice, if the dispute could not be settled by → negotiations.

In the face of such legal ambiguity, the supervising practice of the League became decisive. Although the Council of the League, irrespective of some early attempts by the Permanent Mandates Commission, did not strive to impose a strict control over the conduct of South Africa, the League maintained the international character of the Mandate. This proved to have important consequences for the future.

3. Developments from 1945 to 1971

The dissolution of the League and the emergence of the United Nations, in the founding of which South Africa actively participated, mark the beginning of a continuous dispute about South West Africa. During its first session, the → United Nations General Assembly already refused South Africa's application for a total incorporation of the territory in South Africa (UN GA Res. 65 (I)). In 1947 South Africa declared that it would further comply with the obligations of the Mandate and issue reports on the situation in the territory to be discussed in the Trusteeship Council (→ United Nations Trusteeship System), but strictly declined to transform the Mandate into a trusteeship as envisaged by Art. 77 of the → United Nations Charter (UN Doc. A/334). Growing criticism within the United Nations caused South Africa to stop issuing reports in 1949 on the grounds that such reports were only given on a voluntary basis. However, South Africa also announced a determination to administer the territory in the future in the spirit of the Mandate (UN Doc. A/929).

The following 17 years were characterized by the attempt of the United Nations to influence South Africa's attitude by means of judicial proceedings (→ South West Africa/Namibia (Advisory Opinions and Judgments)). In three → advisory opinions (1950, 1955, 1956) the → International Court of Justice (ICJ) upheld the view that the Mandate had not lapsed with the dissolution of the League and that the terms of the Mandate established an international status for the territory. The supervisory function of the United Nations General Assembly was recognized within such borders as applied under the Mandate system of the League, with supervisory procedures subject to adjustment in light of the characteristics of the General Assembly and South Africa's refusal of any cooperation in the field of supervision. Therefore, oral hearings of petitioners from the territory were also held admissible though such hearings had never taken place during the régime of the League.

Since advisory opinions have no binding force and South Africa showed no indication of changing her policy, another attempt was made to force South Africa to comply with her Mandate obligations. Based on Art. 7 of the Mandate instrument of 1920, two States, Ethiopia and Liberia, submitted claims in 1960 to the ICJ. The applicants contended that South Africa had seriously violated her duties as a Mandatory Power. While the Court, in 1962, rejected the preliminary objections of South Africa denying jurisdiction (ICJ Reports 1962, p. 319), the ICJ dismissed, in 1966, the claims of the applicants, finding that they could not be considered to have established a legal right or interest regarding the subject-matter of the claims (ICJ Reports 1966, p. 6). Thus, only the United Nations itself was held to be able to claim performance of the duties incumbent on the Mandatory; however, the organization was not in the position to call for a binding decision of the Court.

Frustration about the failure of the judicial proceedings combined with increasing indignation about the policy of South Africa which, by implementation of the so-called Odendaal Plan (1962/1963), introduced the homeland system (→ South African Bantustan Policy) into the territory under Mandate, moved the accent within the United Nations from legal to political action. The shift was facilitated by the emergence of many new States during the process of → decolonization.

On October 27, 1966 the General Assembly, reaffirming the right to self-determination for the people of South West Africa and reaffirming further the international status of the territory until independence, decided that South Africa, not having fulfilled her obligation in respect of the mandated territory, had disavowed the Mandate, that the Mandate was therefore terminated, and that the territory had come under the direct responsibility of the United Nations (see Res. 2145 (XXI), adopted by 119 affirmative to 2 negative votes (South Africa, Portugal), with 3 abstentions (United Kingdom, France, Malawi)). The → United Nations Security Council recognized this action and, considering that the continued presence of South Africa in Namibia was illegal, called upon the South African Government to withdraw immediately her administration from the territory (Res. 264 and 269 (1969)).

In Resolution 276 (1970), the Council added that "all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid". Resolution 283 (1970) called upon all States to assist the endeavours of the United Nations by refraining from any relations – diplomatic, consular, or economic – with South Africa implying recognition of her authority over Namibia. On request for an advisory opinion by the Security Council (Res. 284 (1970)), the ICJ affirmed completely the United Nations view that the General Assembly had rightly terminated the Mandate (ICJ Reports 1971, p. 16).

4. Legal Consequences of the Termination of the Mandate and Developments since 1971

(a) Status of the territory

Having lost the character of a mandated territory, Namibia did not lose her international status. This results from the direct responsibility which the United Nations has assumed for the territory and which is exercised by various United Nations organs according to their particular functions and competences. As South Africa, after the termination of the Mandate, did not hold any title to administer the country, South African administrative acts in Namibia lack any claim to

legal validity to date. This situation must not, however, result in disadvantages for the Namibian people. Thus, such acts as registrations of births, marriages and deaths have been deemed valid.

Because of her refusal to withdraw from Namibia, South Africa incurs international responsibility arising, on the one hand, from a continuing violation of an international obligation, and, on the other hand, from all acts which originate from the exercise of factual powers in relation to the territory and which violate the rights of other States. "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States" (ICJ Reports 1971, p. 16, at p. 54).

(b) UN Council for Namibia and other subsidiary institutions

In order to replace the South African administration, the General Assembly on May 19, 1967 established the United Nations Council for South-West Africa, later designated as the UN Council for Namibia, as the legal administering authority for Namibia until its independence (Res. 2248 (S-V)). The membership of the Council consists of 31 members (GAOR, 40th Session, Supp. No. 24 (A/40/24) p. 218). The Council cooperates with the → Organization for African Unity (OAU) and the Movement of Non-Aligned Countries and holds very close connections with the South West Africa People's Organization (see section (c) *infra*). The organs of the Council are the Presidency (President, five Vice-Presidents), the Steering Committee, three Standing Committees, other committees and working groups, and the Secretariat (GAOR, 40th Session, Supp. No. 24 (A/40/24)). The Council, as a policy-making body, has entrusted the UN Commissioner for Namibia with current executive and administrative tasks, e.g. the issuing of travel documents to Namibians in exile.

The Council is a subsidiary organ of the General Assembly (UN Charter, Art. 22) charged with defending the rights and interests of Namibia and its people. According to Resolution 2248 (S-V), the Council is entrusted not only with administrative functions, but also with the authority "to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established . . ." (for a compilation of the Council's functions, see UN GA Res. 40/97 C of December 13, 1985).

Since South Africa as the long-time *de facto* ruler of Namibia refused any → recognition of the Council, this organ completely failed to gain influence on the internal affairs of the territory. This is illustrated by the Council's enactment of Decree No. 1 of September 27, 1974 (GAOR, 35th Session, Supp. No. 24 (A/35/24), Vol. I, Annex II), later approved by the General Assembly in Resolution 3295 (XXIX) of December 19, 1974. The Decree forbids the exploitation of the territory's natural resources without the consent and permission of the Council and stipulates that any person, entity or corporation which contravenes the Decree may be liable for damages to the future government of an independent Namibia.

The legal value of the Decree is highly disputed. One should bear in mind, that the Decree is attributable to the General Assembly, which is the relevant organ of the United Nations with respect to the exercise of international competence for Namibia and from which the Council for Namibia derives its authority. Thus, the legal validity of the Decree cannot be denied, but such validity must not be equated with binding force.

If and how the Decree might be implemented in regard to UN member States depends totally on these States' municipal legal orders. There are good theoretical grounds for drawing a parallel between the Decree and a foreign public law, though the Council's lack of control over the territory might significantly affect such an analogy. After a report of the UN Commissioner for Namibia had favourably assessed the legal conditions, the Council, in 1987, instituted legal proceedings against two private companies and the Netherlands in the District Court in The Hague alleging that the defendants had violated the Decree and contributed towards the infringement of the right of self-determination of the people of Namibia. In view of the near-independence of Namibia it is doubtful if the proceedings will be continued.

The Council has proved to be more successful in the representation of Namibia with regard to international treaties or conferences convened under the auspices of the United Nations. The

participation of the Council in the UN Conference on the Law of the Sea (→ Conferences on the Law of the Sea) and in the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations and its ratification of the UN Convention on the Law of the Sea (December 10, 1982, UN Doc. A/CONF. 62/122 with Corr.) form recent examples of such representation. The General Assembly has permanently endorsed the competence of the Council in this respect (see e.g. Res. 40/97 C).

The General Assembly (Res. 31/149 and 32/9 E) has also paved the way for the membership of Namibia, as represented by the Council, in → United Nations Specialized Agencies. Notwithstanding evident constitutional obstacles concerning the formal requirements of Statehood, Namibia is, already before independence, a full member of the → International Labour Organisation, the → United Nations Educational, Scientific and Cultural Organization and the → Food and Agriculture Organization of the United Nations, and an associate member of the → World Health Organization.

Two other institutions have functions closely connected with the tasks of the Council. The UN Institute for Namibia was established at Lusaka, Zambia, on the basis of UN General Assembly Resolution 34/92 G of December 12, 1979, "to enable Namibians, under the aegis of the UN Council for Namibia, to develop and acquire the necessary skills required for manning the public service of the independent Namibia" and "to serve as an information and documentation centre of Namibia". In 1979 and 1982, the General Assembly approved the Charter of the Institute (text of the Charter, as amended, in GAOR, 37th Session, Supp. No. 24 (A/37/24), Annex IX).

The UN Fund for Namibia, established by UN General Assembly Resolution 2676 (XXV) of December 9, 1970, and Resolution 2872 (XXVI) of December 20, 1971, is based on the consideration that the United Nations incurred an obligation to assist the people of Namibia in their struggle to gain independence and, to that end, to provide them with comprehensive assistance. Today the Fund is composed of three separate accounts which provide for the following: (1) educational, social and relief activities; (2) the Institute for Namibia; (3) the Nationhood Programme for Namibia (GAOR, 40th Session, Supp. No. 24 (A/40/24) p. 176). Voluntary contributions are the major source of financing of the Fund, but the General Assembly has annually authorized an allocation from its regular budget as a temporary measure (e.g. 1986: US $ 1 million, Res. 40/97 E). The total income of the Fund in 1984 was nearly US $ 9.5 million.

(c) South West Africa People's Organization (SWAPO)

Founded in 1960, SWAPO initiated an armed struggle in 1966 when the Mandate was terminated after establishing a military wing, the People's Liberation Army of Namibia (PLAN). The majority of the organization's military recruits are Wambos from the north of the country. After recognition of SWAPO as a national liberation movement by the OAU, the UN General Assembly recognized SWAPO in 1973 as the sole and authentic representative of the Namibian people (Res. 3111 (XXVIII)). In 1976, SWAPO was granted observer status in the General Assembly (Res. 31/152; → International Organizations, Observer Status).

Subsequently, SWAPO gained influence on the actions of the United Nations concerning Namibia, although undergoing serious fragmentation; its military success remained rather modest. Both the General Assembly and the Security Council affirmed the legitimacy of the struggle of the Namibian people against the illegal occupation by South Africa, but while the Security Council avoided any mention of SWAPO in this connection (see e.g. Res. 269 (1969), 428 (1978), 566 (1985)), the General Assembly did not. Furthermore, the General Assembly expressly recognized armed struggle as a means for achieving liberation (see e.g. GA Res. 40/97 A). Correspondingly, the occupation of Namibia by South Africa was considered to constitute an act of aggression (ibid.).

The actions of SWAPO led to the increased military presence of South Africa in Namibia (estimated at 1987 to be 100 000 soldiers; UN Doc. A/AC.131/186, p. 11), particularly in the north at the border to Angola. This presence also extended to the southern parts of Angola. After independence in 1976, Angola seemed to offer a good

shelter for SWAPO fighters. However, SWAPO forces became involved in the internal struggle of Angola and repeatedly attracted South African military operations there. Consistent condemnation of these attacks by the United Nations (see e.g. SC Res. 428 (1978), Res. 571 (1985)) gave rise in 1977 to the imposition of mandatory → sanctions, i.e. an arms → embargo, on South Africa according to Chapter VII of the UN Charter (Res. 418 (1977)).

(d) Search for a political solution

Notwithstanding its assistance in the struggle against South Africa, the United Nations has not abandoned the search for a political solution to the Namibian question. In Resolution 385 (1976) the Security Council declared that "it is imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity". In order to achieve this aim, the five western members of the Security Council at that time (Canada, France, Federal Republic of Germany, United Kingdom, United States) – the "Contact Group" – proposed in April 1978 (UN Doc. S/12636) the suspension of all hostilities, the restriction of South African and SWAPO forces to their bases, a reduction in the number of South African troops, the release of all political prisoners, the return of all refugees, and the establishment of the United Nations Transition Assistance Group (UNTAG), consisting of civil and military sections to assist the United Nations in the supervision of the elections of a constituent assembly. The independence of Namibia was foreseen for the end of 1978. These proposals attained the principal assent of South Africa and SWAPO.

A report of the Secretary-General (S/12827) which contained some changes in relation to the western proposals was endorsed by the Security Council on September 29, 1978 (Res. 435 (1978)) with two abstentions (Soviet Union, Czechoslovakia), China not having taken part in the vote. After this date, further endeavours concentrated on the implementation of Resolution 435, which became a cornerstone in the Namibian policy of the United Nations. With active involvement of the Contact Group, the parties concerned succeeded during protracted discussions, which also included direct talks among the different political groups within Namibia, in resolving such difficult problems as the composition of UNTAG and the establishment of an electoral system.

After → consensus was reached on a system of proportional representation, the Secretary-General stated in 1985 that "all outstanding issues relevant to the United Nations plan for Namibia have now been resolved" (UN Doc. S/17658). South Africa, however, linked her readiness for implementation to the withdrawal of the Cuban forces in Angola. The Security Council (Res. 566 (1985)) and the General Assembly (Res. 40/97 A) rejected this linkage as incompatible with Resolution 435 (1978) and insisted strictly on implementation of the Resolution as the only basis for a peaceful solution.

After years of serious set-backs the political *détente* between the United States and the Soviet Union as well as the growing economic and military difficulties of South Africa and particularly Angola opened the door for new diplomatic activities (May 1988). Mediated by the United States, with the participation of Soviet and British representatives, negotiations between South Africa, Angola and Cuba resulted in the approval of Principles for a Peaceful Settlement in South Western Africa, by which the three States affirmed Res. 435 (1978) and the right to self-determination of the people as the bases for a solution of the problem and agreed upon the requirement of a withdrawal of the Cuban forces (July 1988). Finally, the signing of the Brazzaville Protocol on December 13, 1988 (UN Doc. S/20325) and the tripartite agreement on the independence of Namibia on December 22, 1988 in New York (UN Doc. S/20346), by which South Africa and Cuba promised to withdraw their troops from Namibia and Angola respectively, marked the decisive breakthrough. A Joint Commission consisting of representatives of the three States and, after independence, of Namibia and, as observers, of the Soviet Union and the United States supervises the implementation of the agreement. A bilateral Cuban-Angolan agreement of the same day provides for the details of the withdrawal of Cuban forces which must be implemented within 27 months (UN Doc. S/20345).

In order to control the movements of the Cuban forces from the south to the north of Angola and their final withdrawal to Cuba, the Security

Council established the UN Angola Verification Mission (UNAVEM) by Res. 626 (1988), consisting of 70 military observers and 20 civilians as assisting personnel.

Security Council Res. 629 (1989) set April 1, 1989 as the beginning date for implementation of Res. 435 (1978). By Res. 632 (1989) the Security Council approved the proposals of the Secretary-General for the establishment of UNTAG (UN Docs. S/20412 and 20457). For good reasons the military component of UNTAG, contrary to prior deliberations and to demands of the so-called front-line States, has been reduced from 7500 to 4650 soldiers; their task is to supervise the cessation of all hostilities between South African and SWAPO troops and to prevent infiltrations through the borders of Namibia. The civilian section of UNTAG consisting of about 2000 persons must assist the Secretary-General's Special Representative in the implementation of free elections and monitoring of local police forces. The estimated costs of UNTAG are US $416.2 million; its mandate was to run until March 31, 1990, when the independence of Namibia was expected to occur. On February 23, 1989, the Security Council agreed on the proposals of the Secretary-General concerning the participation of member States in the establishment of UNTAG (UN Docs. S/20479 and 20480). An agreement between the United Nations and South Africa on the status of UNTAG was concluded in New York on March 10, 1989 (UN Doc. S/20412 Add. 1).

Notwithstanding the agreed cease-fire between South Africa and SWAPO (UN Doc. S/20412 Add. 2) beginning on April 1, 1989, a serious crisis endangered the implementation of the one-year transition period when, on this date, some 100 SWAPO fighters crossed the border from Angola and were killed by South African troops. The Joint Commission, however, by its Mt. Etjo Declaration (UN Doc. S/20579), succeeded in restoring the situation in existence on March 31, 1989.

An impartiality package (UN Doc. S/20635) provided, on the one hand, for the abolition of all discriminatory provisions adverse to the free electoral process, the release of political detainees, and precautions for the repatriation of Namibian refugees including disarmed SWAPO fighters by the South African General-Administrator, and, on the other hand, for the obligations of the United Nations to maintain strict neutrality and of the Council of Namibia to abstain politically during the transition process. On November 1989 the last South African soldiers left the country.

5. Constitutional Developments in Namibia

South Africa's refusal to accept the United Nations plan for Namibia's independence coincided with attempts to achieve a solution on the basis of an internal settlement. In 1975, the so-called Turnhalle Conference, at which eleven ethnic groups were represented, convened at Windhoek, the country's capital, in order to draft a constitution for an independent Namibia. As a result of pressure by the Contact Group, however, the draft was not accepted by South Africa.

After the appointment of an Administrator-General by the President of South Africa, elections were held throughout Namibia. These elections, involving a large participation by voters (80 per cent), brought about a clear victory for the Democratic Turnhalle Alliance (DTA). The Security Council (Res. 439 (1978)) and the General Assembly (Res. 33/182) condemned this unilateral procedure and denied it any form of recognition. The experiment also failed internally, since in 1983 the DTA politicians resigned, protesting the restrictive policy of the Administrator-General.

Soon afterwards a new initiative was started. Six political groups (DTA, Labour Party of Namibia, National Party of South West Africa, Rehoboth Liberation Front, South West Africa National Union, SWAPO Democrats) founded the Multi-Party Conference (MPC), the common basis for which was a Declaration of Basic Principles and a Bill of Fundamental Rights and Objectives (UN Docs. A/40/56, S/16869, Appendix I and II). The proposals of the MPC (UN Doc. S/1752, Annex III) were approved by South Africa, and an Interim Government was established on June 17, 1985 (No. R. 101, 1985) by a Proclamation of the State President under the powers of the South West Africa Constitution Act, 1968 (Act 39).

The new institution was to exercise far-reaching internal autonomy, with South Africa retaining all competences regarding external security and relations. The Interim Government included a National Assembly, an Executive Cabinet, and a Constitutional Council charged with drafting a

constitution by the end of 1987. The arrangement was defined as a transitional mechanism for the internal administration of the territory pending an internationally acceptable agreement on independence for Namibia. The United Nations again strongly rejected these unilateral measures (UN Doc. S/Res. 566 (1985), UN GA Res. 40/97 A).

Only the above-mentioned breakthrough on the international plane overcame the deadlocked internal development. After the resignation of the Interim Government and the National Assembly, an Administrator-General, appointed by South Africa, took office again in March 1989 to steer, together with the Special Representative of the UN Secretary-General, the independence process. Since July 1989 about 700 000 persons, including 41 000 repatriated Namibian refugees, registered for the general elections of a constituent assembly; 97 per cent participated in the elections held in November 1989. SWAPO obtained an absolute majority (57.3 per cent), but failed to achieve the two-thirds majority necessary to adopt a constitution according to the catalogue of principles agreed upon by all political parties in cooperation with the Contact Group (UN Doc. S/15287); the DTA obtained 28.5 per cent, and five other political parties (12.2 per cent) are represented in the assembly. The electoral result inevitably furthers the search for cooperation and compromise and will mitigate the constitutional decisions concerning the political organization and economic system of the country which must be taken by the constituent assembly. This body started working on November 21, 1989 and adopted a constitution in March 1990; thus the independence of Namibia occured on March 21, 1990. It was hoped that on this date one of the grave international problems heavily burdening United Nations policy would have found its generally accepted solution.

6. Territorial Aspect

Namibia acquired her internationally recognized borders while still a German colony. The Orange River in the south and the Cunene and Okavango rivers in the north were recognized as boundaries by Great Britain and Portugal in 1884 and 1886 respectively. The border in the east was established in 1890 by a treaty with Great Britain which added the Caprivi strip to the new colony and, thereby, a territorial connection with the Zambezi River. There exists, however, a serious dispute concerning Walvis Bay, the Penguine Islands and some other small offshore islands which were annexed by Great Britain and never belonged to the mandated territory but are claimed to be integral parts of Namibia by the United Nations and SWAPO (see e.g. UN Doc. S/Res./432 (1978); UN GA Res./36/121 A). The constitution of an independent Namibia will probably uphold this claim.

Report of the Administrator of South West Africa for the Year 1923 (1924).

Reports Presented by the Government of the Union of South Africa to the Council of the League of Nations Concerning the Administration of South West Africa for the Year 1926–1934, 1936–1938.

Report by the Government of the Union of South Africa on the Administration of South West Africa for the Year 1946 (1947).

Report of the United Nations Council for Namibia, GAOR, 40th Session, Supp. No. 24; UN Doc. A/40/24).

Department of Foreign Affairs of the Republic of South Africa, South West Africa, Vol. 1: Basic Documents (1979), Vol. 2: Review of Proceedings at the United Nations in 1980 on Issues Affecting South West Africa/Namibia (1980).

J.C. SMUTS, The League of Nations. A Practical Suggestion (1918).

A. FREIHERR VON FREYTAGH-LORINGHOVEN (ed.), Das Mandatsrecht in den deutschen Kolonien, Quellen und Materialien (1938) 306–326.

L.H. WESSELS, Die Mandaat vir Suidwes-Afrika (1938).

H. BLUMHAGEN, Die Rechtsentwicklung in Deutsch-Südwestafrika unter dem Mandat der Südafrikanischen Union (1939).

J.A. YANKSON, South-West Africa in the International Scene (1953).

Mandate in Trust. The Problem of South West Africa (1960).

R. FIRST, South West Africa (1963).

R.W. IMISHUE, South West Africa. An International Problem (1965).

F. CARROLL, South West Africa and the United Nations (1967).

M. HIDAYATULLAH, The South West Africa Case (1967).

L. LUCCHINI, La Namibie. Une construction des Nations Unies, AFDI, Vol. 15 (1969) 355–374.

H. BLEY, South-West Africa under German Rule 1894–1914 (1971).

M. DUCAT, L'affaire de la Namibie, Penant, Revue de droit des Pays d'Afrique, Vol. 2 (1972) 301–331.

J.F. MURPHY, Whither Now Namibia?, Cornell International Law Journal, Vol. 6 (1972) 1–43.

M. DRAGHICI, Le processus de décolonisation et quelques considérations concernant le statut juridique de la

Namibie, Revue Roumaine d'études internationales, Vol. 7 (1973) 157–174.

J. DUGARD (ed.), The South West Africa/Namibia Dispute. Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations (1973).

A.U. OBOZUWA, The Namibian Question: Legal and Political Aspects (1973).

S. SLONIM, South West Africa and the United Nations: An International Mandate in Dispute (1973).

H. BOOYSEN and G.E.J. STEPHAN, Decree No. 1 of the United Nations Council for South West Africa, SAYIL, Vol. 1 (1975) 63–85.

A.C. CILLIERS, The South West African Mandate in United Nations Context (1975).

H. CUADRA, La polémica sobre el colonialismo en las Naciones Unidas. El caso de Namibia (1975).

L.L. HERMAN, The Legal Status of Namibia and of the United Nations Council for Namibia, CanYIL, Vol. 13 (1975) 306–322.

R.I. BRAUN, South West Africa Under Mandate. Documents on the Administration of the Former German Protectorate of South West Africa by the Union of South Africa under Mandate of the League of Nations, 1919–1929 (1976).

A.C. CILLIERS, United Nations Competence in Respect of South West Africa, SAYIL, Vol. 2 (1976) 128–142.

B. GÖTZ, The Right of Namibia and its People to Self-Determination and Independence, Vol. 115 (1976) 141–173 [in Czech].

A.C. KISS, La Namibie et les conventions internationales des droits de l'homme. Document préparé par un groupe de travail de Strasbourg, Revue des Droits de l'Homme, Vol. 9 (1976) 433–465.

E.S. LANDIS, Les droits de l'homme en Namibie, Revue des Droits de l'Homme, Vol. 9 (1976) 285–349.

G.J. DE LINT, The United Nations. The Abhorrent Misapplication of the Charter in Respect of South Africa (1976).

La Namibie et la primauté internationale du droit. Une étude de la "South West Africa Peoples Organization" (SWAPO) de la Namibie, Revue des Droits de l'Homme, Vol. 9 (1976) 391–423.

D.S. PRINSLOO, SWA/Namibia: Interim Rule to Freedom, SAYIL, Vol. 2 (1976) 155–175.

F. RIGAUX, Le décret sur les ressources naturelles de la Namibie adopté le 27 septembre 1974 par le Conseil des Nations Unies pour la Namibie, Revue des Droits de l'Homme, Vol. 9 (1976) 467–483.

J.H.P. SERFONTEIN, Namibia? (1976).

G.R. SHOCKY, Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources, Yale Studies in World Public Order, Vol. 2 (1976) 285–339.

C. CADOUX, L'Organisation des Nations Unies et le problème de l'Afrique australe. L'évolution de la stratégie des pressions internationales, AFDI, Vol. 23 (1977) 127–174.

J.A. FARIS, South Africa's Severance of Links With South West Africa, SAYIL, Vol. 3 (1977) 49–64.

H.-G. HUBRICH and H. MELBER, Namibia – Geschichte und Gegenwart. Zur Frage der Dekolonisation einer Siedlerkolonie (1977).

E.S. LANDIS, The Turnhalle Constitution: An Analysis, Africa Today, Vol. 24 (1977) 12–23.

H.G. SCHERMERS, The Namibia Decree in National Courts, ICLQ, Vol. 26 (1977) 81–96.

H. BLEY, Die Namibia-Initiative der westlichen Mitglieder des Sicherheitsrats, Vereinte Nationen, Vol. 26 (1978) 54–60.

J.A. FARIS, The Western Proposal and Elections in South West Africa/Namibia: A Summary of the Events for 1978, SAYIL, Vol. 4 (1978) 90–108.

S.C. SAXENA, Namibia: Challenge to the United Nations (1978).

S.C. SAXENA, Namibia and the Western Powers, Foreign Affairs Reports, Vol. 27 (1978) 58–79.

R.L. DILLINGHAM, Namibia and Its Neighbors, Africa Today, Vol. 26 (1979) 29–37.

H. VON LÖWIS OF MENAR, Die SWAPO – Befreiungsbewegung oder kommunistische Frontorganisation, Beiträge zur Konfliktforschung, Vol. 9 (1979) 97–138.

R. VON LUCIUS and G. TÖTEMEYER, Namibia – Regionalkonflikt und Weltproblem, Außenpolitik, Vol. 30 (1979) 68–81.

C.G. REDEKOP, The Limits of Diplomacy: The Case of Namibia, International Journal, Vol. 35 (1979–1980) 70–90.

G.W. SHEPHERD, No Free and Fair Settlement in Namibia: The Collapse of the Western Five Plan, Africa Today, Vol. 26 (1979) 7–22.

L. TAUBER, Legal Pitfalls on the Road to Namibian Independence, New York University Journal of International Law and Politics, Vol. 12 (1979–1980) 375–410.

O. VON WEBER, Geschichte des Schutzgebietes Deutsch-Südwest-Afrika (2nd ed. 1979).

R. BARSOTTI, In tema di amministrazione diretta di territori non autonomi da parte dell'ONU: il caso della Namibia, Communicazioni e Studi, Vol. 16 (1980) 53–135.

C. KIENLE, Der völkerrechtliche Status Südwestafrikas/Namibias, Friedens-Warte, Vol. 63 (1980) 68–92.

A.W. KÖRNER, Namibie: een testcase voor Zuid Afrika (1980).

E. OSIEKE, Admission to Membership in International Organizations: The Case of Namibia, BYIL, Vol. 51 (1980) 189–229.

F. ERMACORA, Namibia. Südwestafrika (1981).

M. KERINA, Namibia: The Making of a Nation (1981).

H. VEDDER, Das alte Südwestafrika. Südwestafrikas Geschichte bis zum Tode Mahareros 1890 (3rd ed. 1981).

R. ZACKLIN, The Problem of Namibia in International Law, RdC, Vol. 171 (1981 II) 225–339.

J.-R. BOOH, La décolonisation de la Namibie. Un mandat usurpé (1982).

D.C. JORDAN-WALKER, Settlement of the Namibian Dispute: The United States Role in Lieu of UN

Sanctions, Case Western Reserve Journal of International Law, Vol. 14 (1982) 543–570.
H. LESER, Namibia (1982).
E. SCHOEMAN, The Namibian Issue, 1920–1980. A Select and Annotated Bibliography (1982).
J. DEDIAL, Die Namibia-Frage vor der Entscheidung. Führt der Weg in die Unabhängigkeit über Angola?, Europa-Archiv, Vol. 38 (1983) 119–128.
T.N. IGBOELI, The International Politics of the United Nations. A Case Study of Namibia's Independence 1967–1972 (1983).
H. VON LÖWIS OF MENAR, Namibia im Ost-West-Konflikt (1983).
J.H. VAN DER MERWE, National Atlas of South West Africa (Namibia) (1983).
K. FREIHERR VON DER ROPP, Südafrika und Namibia: Das Scheitern der Friedensinitiative, in: Die Internationale Politik 1979/80 (1983) 338–357.
S.C. SAXENA, South West Africa People's Organization: A Perspective, Foreign Affairs Reports, Vol. 32 (1983) 123–140.
E.I. UDOGU, South West Africa People's Organization of Namibia as a Non-State Actor in the Namibian Issue (1983).
M. AICARDI DE SAINT PAUL, Namibie: un siècle d'histoire (1984).
F. ANSPRENGER, Die SWAPO, Profil einer afrikanischen Befreiungsbewegung (1984).
E.G. BELLO, Namibia: The Long March to Independence, Revue de Droit International de Sciences Diplomatiques et Politiques, Vol. 62 (1984) 99–114.
H. DRECHSLER, Südwestafrika unter deutscher Kolonialherrschaft. Der Kampf der Herero und Nama gegen den deutschen Imperialismus 1884–1915 (2nd ed. 1984).
T.D. GILL, South West Africa and the Sacred Trust 1919–1972 (1984).
H.J. RICHARDSON, Constitutive Questions in the Negotiations for Namibian Independence, AJIL, Vol. 78 (1984) 76–120.
I.I. DORE, The International Mandate System and Namibia (1985).
E.C. NDONDE, Die Namibia-Frage und die Entwicklung im südlichen Afrika, Blätter für deutsche und internationale Politik, Vol. 30 (1985) 60–74.
I.I. DORE, Self-determination of Namibia and the United Nations: Paradigm of a Paradox, Harvard ILJ, Vol. 27 (1986) 159–191.
G.J. McDOUGALL, International Law, Human Rights, and Namibian Independence, Human Rights Quarterly, Vol. 8 (1986) 443–470.
G. RESS (ed.), Verfassungsreform in Südafrika und Verfassungsgebung für Namibia/Südwestafrika (1986).
A.W. SINGHAM and S. HUNE, Namibian Independence. A Global Responsibility (1986).
D. SOGGOT, Namibia. The Violent Heritage (1986).
C. COSSLETT, The Economics of "Illegal" Development: International Law and Natural Resource Exploitation in Namibia 1966–1986, Yearbook of International Affairs, Vol. 41 (1987) 165–192.
G. ERASMUS and D. HAMMAN, Where is the Orange River Mouth?, The Demarcation of the South African/Namibian Maritime Boundary, SAYIL, Vol. 13 (1987/1988) 49–71.
E.S. LANDIS, Namibia: A Transatlantic View, South African Yearbook of Human Rights, Vol. 3 (1987) 347–364.
R. VON LUCIUS, Die Vereinten Nationen und die Beschlagnahme Urans aus Namibia, in: W. Fürst (ed.), Festschrift für Wolfgang Zeidler, Vol. 2 (1987) 1939–1962.
K. FREIHERR VON DER ROPP, Perspektiven einer Lösung des Namibia-Konflikts, in: Verfassung und Recht in Übersee, Vol. 20 (1987) 431–442.
A. DU PISANI and K. FREIHERR VON DER ROPP, The Western Namibia Initiatives: Past, Present and Future?, International Affairs Bulletin, Vol. 12 (1988) 4–22.
S.K.B. ASANTE and W.W. ASOMBANG, An Independent Namibia?, The Future Facing SWAPO, Third World Quarterly, Vol. 11 (1989) 1–19.
G.J. BENDER, Peacemaking in Southern Africa: The Luanda-Pretoria Tug-of-War, Third World Quarterly, Vol. 11 (1989) 15–30.
G. BRENKE, Die Bundesrepublik Deutschland und der Namibiakonflikt (1989).
W. KÜHNE, Frieden im südwestlichen Afrika?, Europa-Archiv, Vol. 44 (1989) 105–114.
A. DU PISANI, Beyond the Transgariep: South Africa in Namibia 1915–1989, Politikon, Vol. 16 (1989) 26–43.
K. FREIHERR VON DER ROPP, Friedensinitiativen im Südwesten Afrikas, Außenpolitik, Vol. 40 (1989) 193–205.
H. WEILAND, Namibia auf dem Weg zur Unabhängigkeit. Perspektiven des Entkolonialisierungsprozesses, Europa-Archiv, Vol. 44 (1989) 711–718.
H. MELBER, Die Dekolonialisierung Namibias, Jahrbuch Dritte Welt (1990) 203–223.
See also the bibliography of the article → South West Africa/Namibia (Advisory Opinions and Judgments).

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NEW HEBRIDES

1. General Background

New Hebrides (French: Nouvelles-Hébrides) was the name given by the English explorer Cook in 1774 to the roughly y-shaped → archipelago in the south-western Pacific known since its independence as Vanuatu ("Our Land"). The chain of about 80 islands and islets which comprises the country's territory is located over 1600 kilometres east of Australia between Fiji, New Caledonia and

the Solomon Islands. While its territorial boundaries are otherwise fixed Vanuatu disputes possession of the two small uninhabited islands Matthew and Hunter with France, which considers them a part of the New Caledonian archipelago (→ France: Overseas Territorial Entities).

Vanuatu is approximately 850 kilometres long and covers about 12 000 square kilometres of mainly forested and mountainous terrain containing several active volcanoes. The majority of the population, estimated at 140 000 in 1986, lives on Ambrym, Efate, Espiritu Santo, Tanna and eight other islands. Vanuatu's only two sizeable towns, Vila, the capital, and Santo, are situated respectively on Efate and Espiritu Santo.

Over 100 languages or dialects, primarily related to those found in Fiji and New Caledonia, are in use among the indigenous Melanesian inhabitants (ni-Vanuatu), who have, thus, adopted a form of pidgin English called Bislama or Bichelama as the lingua franca. Melanesians constitute some 95 per cent of the population, with Europeans, Polynesians, Micronesians, Vietnamese and Chinese comprising the remainder.

Land ownership plays a major role in the social system of Vanuatu and has apparently determined social status for the Melanesian inhabitants from time immemorial. Small communities and an absence of centralized political authority have traditionally characterized the now nearly extinguished indigenous culture. Interestingly, indigenous messianic movements, such as the "John Frum" cargo cult on Tanna Island, played a politically significant role as recently as 1980. Nevertheless, the population was already then and has remained predominantly Presbyterian, with the Anglican and Catholic denominations also represented.

Vanuatu ranks among the world's poorest countries and manifests a substantial imbalance of trade (→ Developing States). Following independence, most inhabitants continued to find employment on coconut plantations or to engage in subsistence and village agriculture. The export of agricultural products, particularly copra, constitutes a principal feature of the economy. Compounding the economic problems caused by a shortage of labor are a tropical climate with high humidity and frequent summer hurricanes, widespread malaria and transport difficulties. The country has attempted to reduce reliance on foreign aid by acceding to the → Lomé Conventions and the Treaty on Fisheries between certain Pacific Island States and the United States, April 2, 1987 (ILM, Vol. 26, p. 1053), promoting → tourism, and perpetuating regulations under which the New Hebrides became a tax haven.

2. Historical Overview

Before Cook named and charted the islands, the New Hebrides had already been discovered in 1606 by the Portuguese explorer de Quieros. In 1768, the French navigator Bougainville found additional islands in the archipelago. The Banks Islands were sighted in 1789 by Bligh during his passage to Timor after the mutiny on the *Bounty*.

European sandalwood traders arrived on the islands in the early part of the 19th century, and were followed in succession by Presbyterian → missionaries, French Marist missionaries and planters from Australia and New Caledonia. "Blackbirders" abducted and recruited large numbers of the indigenous population around the time of the American Civil War to work on cotton plantations in Queensland and Fiji. Later, New Hebrideans were similarly sent to the sugar-cane fields of Queensland and the mines of New Caledonia.

By 1868 Queensland had enacted legislation concerning the recruitment and treatment of indigenous labourers. However, rampant exploitation persisted in the New Hebrides until approximately the turn of the century and related practices were still reported there as late as the 1930s.

Towards the end of the 19th century, commercial interests in the islands by land speculators and settlers resulted in a competition between British and French nationals which aimed at or evolved into support for → annexation. The land-grabbing activities of a French company led the Presbyterian mission in the New Hebrides to protest to the Australian Government which, in turn, advocated British intervention.

An exchange of → notes between Great Britain and France in 1878 (BFSP, Vol. 69, p. 691) marked the first international attempt to regulate the New Hebrides' legal status. The notes confirmed the islands' "condition of independence" and British policy not to seek annexation. Moreover, they

gave expression to the principle of "mutual exclusiveness" (Lynch, p. 46) which governed subsequent British and French activities in what was considered *terra nullius*.

Ultimately, the notes proved ineffective in resolving the underlying disputes regarding land and labour. In 1887, Great Britain and France adopted a convention meant to terminate the French military presence which had meanwhile been established in the New Hebrides and to remove pressure for British annexation by Australia and New Zealand (Martens NRG2, Vol. 16, p. 820). In return for the withdrawal of French military posts and the creation of a Joint Naval Commission, Britain agreed under the convention to the abrogation of the Declaration of June 19, 1847 (Martens NRG, Vol. 10, p. 598). The 1887 Convention thereby withdrew the parties' previous → recognition of the independence of certain islands in the proximity of Tahiti which had precluded their annexation by France.

The Joint Naval Commission provided only for joint police surveillance to maintain the security of Europeans and their property in the New Hebrides. Significantly, the judicial competence of the British and French naval officers comprising the Commission did not extend to civil disputes, e.g. those concerning land. This limitation, in addition to the Commission's ambiguous jurisdiction with respect to criminal acts committed by Europeans against indigenous inhabitants, the extended absence of the Commission during the five-month hurricane season, and the attempt by settlers to establish autonomous administrative and judicial bodies, reveal the inability of the Commission to cope with the problems which had prompted its establishment.

Within the framework of the Entente Cordiale, Great Britain and France adopted a new convention in 1906 (Martens NRG3, Vol. 1, p. 523) establishing the régime subsequently referred to as the → condominium of the New Hebrides. The 1906 Convention provided for a "region of joint influence" in the New Hebrides (→ Spheres of Influence). For this region, the signatories agreed to limited joint administrative and judicial jurisdiction in order to resolve land and labour disputes which could not be regulated solely on the basis of each signatory's separate exercise of jurisdiction over its nationals. At the same time, it was accepted that the "subjects and citizens of the two Signatory Powers shall enjoy equal rights of residence, personal protection, and trade, each of the two Powers retaining jurisdiction over its subjects or citizens, and neither exercising a separate control over the Group". The most detailed of the 68 provisions comprising the 1906 Convention pertained to the Joint Court, land, and the recruitment and treatment of indigenous labourers.

The 1906 régime utilized institutions already established under each signatory's municipal law for extending administrative and judicial jurisdiction to those of its nationals who fell outside both the signatory's and other powers' territorial jurisdiction (see e.g. Pacific Islanders Protection Acts 1872, 35 & 36 Vict., c.19 and 1875, 38 & 39 Vict., c.51; Loi of July 30, 1900, Bulletin officiel du Ministère des Colonies (1900) p. 665). Thus, the British and French High Commissioners provided for in Art. II were at the same time the High Commissioner for the Western Pacific and Governor of Fiji, in the case of Britain, and the High Commissioner for the Pacific and Governor of New Caledonia, in the case of France. The Resident Commissioners designated to assist the High Commissioners were the British and French Resident Commissioners who had been stationed at Vila since 1902.

On August 6, 1914, Great Britain and France signed a Protocol (LNTS, Vol. 10, p. 334) revising and superseding the 1906 Convention. Ratification, delayed by World War I, finally occurred in 1922. The Protocol governed the legal status of the New Hebrides until independence, in conjunction with modifications effected by subsequent exchanges of notes between the two signatories. Although the 1914 Protocol made several major changes to the previous instrument, e.g. by greatly expanding joint judicial jurisdiction, these remained insignificant in practice. Stagnation characterized the New Hebrides' legal régime prior to the era of → decolonization following World War II.

An initial step towards implementing a right to → self-determination was taken in 1957 with the establishment by joint regulations of an Advisory Council with consultative functions. In 1975 the signatory Powers sanctioned the creation of a Representative Assembly (UNTS, Vol. 1001, p.

417). Through an exchange of notes on October 23, 1979, the United Kingdom and France accepted a draft constitution (British Command Papers, Cmnd. 7808, Treaty Series, No. 17 (1980)). In November 1979 the Vanuaaku Pati ("Our Land Party") won a majority in elections for the Representative Assembly as well as regional assemblies on Espiritu Santo and Tanna. Independence was declared as planned on July 30, 1980, despite a contemporaneous attempt to secede from the New Hebrides and to achieve separate independence by the Nagriamal "custom" movement on Espiritu Santo (→ Secession).

Since independence, the politically non-aligned → micro-State of Vanuatu has become an active member of the → United Nations (→ Non-Aligned States). Vanuatu also belongs to the South Pacific Forum (see → Regional Cooperation and Organization: Pacific Region) and the South Pacific Forum Fisheries Agency (see → Fisheries, International Regulation). Vanuatu's membership in both the → British Commonwealth and the Agence de Coopération Culturelle et Technique testifies to the country's condominial past.

3. Condominial Status and Régime

Although little agreement exists with regard to application of the term "condominium", all major modern treatises on international law refer to the New Hebrides under this rubric. The New Hebrides represented the only major example of "joint government on a basis of strict equality over territory which was not already a legally organized polity" (O'Connell, p. 78). Notwithstanding reference to the New Hebrides by reason of these characteristics as a "classical" or "genuine" condominium, however, the meaning of the expression has been questioned. In the absence of agreement on the essential features of a condominial régime, individual cases have been deemed *sui generis*. Dispute in connection with the New Hebrides is fueled by the fact that the 1906 and 1914 instruments nowhere mention the term "condominium".

Theoretical dispute focuses *inter alia* on whether a legal personality existed for the New Hebrides separate from that of the signatories to the 1914 Protocol and on the nature of the signatories' → sovereignty over the territory and inhabitants of the condominium. Seen as a bilateral agreement on the exercise of "joint influence", the Protocol did not necessarily create a separate legal identity. Since the signatories alone could establish treaty obligations for the New Hebrides, and assumed liability for breaches thereof, the condominium lacked an important attribute of international legal personality. On the other hand, treaties binding on the signatories were not *per se* applicable to the condominium in the absence of agreement between the signatories. Thus, the signatories apparently viewed the condominium as a foreign administration *vis-à-vis* themselves. To the extent the signatories exercised international competence on behalf of the New Hebrides, the condominial entity may not have qualified as a full → subject of international law and may more aptly be termed a passive legal personality.

No agreement exists whether the condominium involved a unitary sovereignty, the attributes of which were separately exercised by the signatories, or whether sovereignty was individually held by each signatory acting in conjunction with the other. The notion of joint sovereignty over a single territory contradicts the traditional concept of sovereignty as a State's exclusive and plenary power regarding a particular territory (→ Territorial Sovereignty). Nevertheless, it has been persuasively argued that the Protocol's provisions reflected both interpretations.

The essential principle underlying the condominial régime was the "equality of government by the two signatory Powers, and the coexistence of their respective jurisdictions" (O'Connell, p. 93). This principle resulted in the establishment of three parallel systems each with its own administrative, legislative and judicial jurisdictions, i.e. two national systems plus a condominial or joint system.

With regard to governmental powers, British and French nationals were generally subject to their respective national administrations. Nationals of third States had to opt for the legal system, and thus the administration, applicable to the nationals of either of the signatories. The indigenous population was subject to the joint administration of the High Commissioners or the Resident Commissioners. In practice, the British and French Resident Commissioners, representing the respective High Commissioners and acting jointly, comprised the condominium government.

As foreseen by the Protocol, overlapping administrative and legislative functions involved the issuance by the High Commissioners of joint "local regulations binding on all the inhabitants", the joint authorization by the High Commissioners and Resident Commissioners of "administrative and police regulations binding on the tribes", and the adoption, as well as the modification by "joint decisions", of a "code of native law" by the condominium government. Until independence, the New Hebrides had no legislative council.

The New Hebrides' judicial system consisted of separate British and French national judicial systems and a condominial system, for which the Joint Court served as the court of last resort. The Protocol envisaged that this tribunal would include a British judge, a French judge and a president with the nationality of a "neutral" third State and appointed by the King of Spain. Art. XXI (4) provided the condominial judicial system with Courts of First Instance and Art. VIII (4) envisaged the establishment of Native Courts in connection with the adoption of a "code of native law". While only a penal code entered into force, Native Courts were nevertheless created.

In particular, the Protocol's stipulations concerning judicial settlement of disputes demonstrate the unparalleled complexity of the condominium. A labyrinth of special rules determined the constituency and jurisdiction of the condominial courts and governed their application of substantive norms as well as rules of evidence and procedure. The Protocol regulated these matters according to subject-matter and the nationality of the parties or the judges. Thus, for example: the Joint Court had exclusive jurisdiction over claims to land prior to registration; in criminal cases involving offences against non-indigenous persons, the law applicable to such persons was followed; and the designation of the president and the assessor of the Courts of First Instance depended on the nationality or indigenous status of the defendant.

4. Evaluation

While joint rule has sometimes been considered a desirable method of resolving competing claims by States to a particular territory, the condominium of the New Hebrides hardly represents a successful example of the method's application. In particular, the condominium failed to deal adequately with the needs and aspirations of the indigenous population. Despite the many provisions of the Protocol which seem to offer this group some protection in transactions involving land and in employment relationships, the instrument reveals that the signatories' motives lay elsewhere. The main object of the condominium was to bar either signatory from achieving predominance in the territory.

To prevent disruptive competition, the Protocol prohibited the indigenous inhabitants from becoming nationals or dependents of either Power (Art. VIII (2)). Indigenous New Hebrideans were precluded from acquiring civil rights and from exercising legislative and administrative functions. Where no other provisions applied, the Protocol presumed that such persons were stateless and subject to the traditional authority of the "native chiefs".

Further discrimination under the condominial régime against the indigenous inhabitants took primarily the following forms (→ Discrimination against Individuals and Groups): The bulk of applications submitted to the Joint Court for a declaration of title to real property remained pending until 1968; according to the procedure provided by the Protocol, indigenous landowners were unable to register title acquired other than by way of contract; a "native code" was never compiled; the so-called Native Criminal Code, adopted in 1927 and re-enacted in 1962, reflected only British and French law, notwithstanding the provision of the Protocol which required consideration of native customs (Art. VIII (4)); and no substantive law existed in the condominium to resolve civil disputes between indigenous parties, thereby precluding adjudication of such cases. The provisions of the Protocol on offences relating to the supply of weapons, ammunition and alcohol to the indigenous population (Arts. LVII to LX) reflect most clearly the signatories' colonial approach.

Administrative practice under the condominium has euphemistically been called "benign neglect" (Jupp and Sawer, p. 15). In actuality, duplication, competition and a lack of central authority prevented effective government in the New Hebrides. Separate British and French public

services, police forces, educational systems, postage stamps, etc. produced a situation which drew ever-increasing criticism and consequently acquired the label "pandemonium" (see e.g. W. Lini, Beyond Pandemonium (1980)).

The underlying duality of the condominium and a lack of clearly defined powers impaired the exercise of administrative and legislative functions by the High Commissioners and Resident Commissioners. Important decisions required not only local consensus but also the agreement of the British and French Governments. Negotiations involved in this process were necessarily protracted and their results reveal linguistic misunderstandings. The Protocol itself was ambiguous with respect to the power of the High Commissioners and Resident Commissioners to make regulations affecting the indigenous population in part because of conflicting texts. Although the English text of Art. VIII (3) referred to regulations "binding on the tribes", the French version employed the expression "*en ce qui concerne ces tribus*". It was thus questionable whether the French text allowed for regulations, such as those providing for the establishment of local councils, which, rather than indirectly affecting the tribes, sought to replace tribal organization.

Art. VII, concerning the power of the High Commissioners to issue regulations for "all inhabitants of the Group", arguably applied to indigenous as well as non-indigenous persons. A discrepancy between the English and French texts compounded the ambiguity of this provision. According to the English wording, the legislative and administrative authority in question related to the "maintenance of order and the good government" of the archipelago. By employing the expression "*maintien de l'ordre et la bonne administration*", the French text, however, *prima facie* appears to have limited joint regulations to narrow administrative purposes.

Serious deficiencies also marred the joint judicial régime established under the Protocol. The "neutral" offices foreseen by the Protocol for the Joint Court, for example, were either only briefly or never filled. Thus, the presidency of the Joint Court remained vacant after the retirement of the first appointee in 1934. The functions of this office were partially assumed by the British and French judges acting jointly (Exchange of Notes, November 24, December 5 and 8, 1939 and January 18, 1940, British Command Papers, Cmd. 6184, Treaty Series No. 8 (1940)). In a further departure from the text of the Protocol, the Resident Commissioners together appointed public prosecutors and native advocates. This meant an acquisition of additional functions by the administrative authorities and raises questions concerning a separation of powers. No such separation existed with regard to the Courts of First Instance and the Native Courts, over which the District Agents presided.

During the final stages of the condominium, the divisiveness largely responsible for the problems already mentioned also delayed independence. The condominium's legacy in this respect is perhaps most readily identifiable in the form of an entrenched provision in Vanuatu's constitution making English and French the official languages, in addition to Bislama, as well as securing their use as languages of educational instruction.

Colonial Office, British Islands in the Southern Hemisphere 1945–1951, British Command Papers, Cmd. 8230 (1951).

Colonial Office (later, Foreign and Commonwealth Office), New Hebrides Anglo-French Condominium, Biennial Reports (separate vols.), 1951–1972 (1952–1974).

C.S. BELSHAW, Island Administration in the South West Pacific Government and Reconstruction in New Caledonia, the New Hebrides, and the British Solomon Islands (1950).

A. CORET, Le condominium (1960).

D.P. O'CONNELL, The Condominium of the New Hebrides, BYIL, Vol. 43 (1968–1969) 71–145.

H. BENOIST, Le condominium des Nouvelles-Hébrides et la Société Mélanésienne (1972).

R. CHIROUX, La fin d'une "curiosité juridique": le condominium franco-britannique des Nouvelles-Hébrides, Revue juridique et politique, indépendance et coopération, Vol. 30 (1976) 309–330.

J. JUPP and M. SAWER, The New Hebrides: From Condominium to Independence, Australian Outlook, Vol. 33 (1979) 15–26.

R.A.S. FORSTER, Vanuatu: The End of an Episode of Schizophrenic Colonialism, The Round Table, Vol. 280 (1980) 367–373.

S.C. HAKWA, Law, in: Government of Vanuatu (ed.), Vanuatu (1980) 200–209.

C.J. LYNCH, The Constitution of Vanuatu, The Parliamentarian, Vol. 62 (1981) 46–53.

J. JUPP, Elections in Vanuatu, Political Science, Vol. 35 (1983) 1–15.

H.-D. JOOSTEN, Die Stätte des Lasters. Kolonialgeschichte

des englisch-französischen Kondominiums der Neuen Hebriden (1987).
C. ROUSSEAU, France et Vanuatu, RGDIP, Vol. 87 (1988) 871–872.
L. PAGNI, Vanuatu: An Economy Caught between Culture and Modernism, The Courier, No. 113 (January-February 1989) 18–23.

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NIGER RIVER RÉGIME

The Niger river rises in the Futa Jallon highlands in Guinea and flows in a south-westerly direction inland into a basin almost rimmed by the extensive Futa Jallon and Bauchi plateaux through Mali and Niger, forming the frontier between the latter and Benin. It then curves north-easterly and south-easterly, breaks out of the rim between Niamey and Jebba, and flows through Nigeria through an extensive delta into the Atlantic Ocean. It is navigable in its upper course for some distance above Bamoko (Mali), and in its lower course between Kurusa and Niamey (Niger) and between Jebba and the delta (Nigeria). Important tributaries and sub-tributaries are found in Burkina Faso, Ivory Coast, Cameroon and Chad (→ International Rivers).

The earliest attempt to establish an international régime for the Niger river was made at the → Berlin West Africa Conference (1884/1885) of 13 European States and the United States, when the participants sought to extend the principles of Arts. 108 to 116 of the Final Act of the → Vienna Congress (1815) on free navigation of navigable waterways to the different circumstances of the Niger basin (→ Navigation on Rivers and Canals). None of the participants were riparian States and although the basin was occupied by unrepresented indigenous African political units, it was the subject of territorial competition between France, Great Britain and Germany. Chapter V, entitled "Act of Navigation of the Niger", Arts. 26 to 33 of the General Act of Berlin of February 26, 1885 (Martens NRG2, Vol. 10, p. 414) stipulated the free navigation of the Niger and its tributaries as well as any road, railway or → canal constructed to obviate the non-navigability of any part or correcting the imperfection of the river route, for the → merchant ships of all nations equally, whether with cargo or ballast, or for the transportation of goods or passengers, in times of war and peace. However, goods destined for a belligerent considered to be → contraband by the rules of the law of nations were prohibited. Except the United States, all the signatory States ratified the General Act.

These provisions were affirmed by the General Act and Declaration of Brussels of July 2, 1890 (Martens NRG2, Vol. 17, p. 345) but were formally abrogated by Art. 13 of the Convention of Saint-Germain-en-Laye of September 10, 1919 between Belgium, Britain, France, Italy, Japan, Portugal and the United States (→ Saint-Germain Peace Treaty (1919)). While maintaining the provisions of the General Act relating to the freedom of navigation and commerce of merchant vessels and equality of treatment in peacetime, the Convention restricted their enjoyment to vessels of contracting States and to States which, being members of the → League of Nations, had been parties to the General Act or the Brussels Act and Declaration. In the → Chinn Case in 1934, the → Permanent Court of International Justice upheld the validity of the Convention as the successor of the Acts of Berlin and of Brussels as regards the relations between the parties in the case, Great Britain and Belgium.

Upon their attainment of independence from France and Britain in 1960, the riparian and basin States of the Niger river – Benin, Burkina Faso, Cameroon, Chad, Guinea, Ivory Coast, Mali, Niger and Nigeria – considered themselves freed from the dispositions of the Convention and in a series of meetings in Niamey established a new régime for the river by the adoption of the Act of Niamey regarding navigation and economic cooperation between the States of the Niger Basin of October 26, 1963 (UNTS, Vol. 587, p. 10, entry into force February 1, 1966) and an Agreement concerning the Niger River Commission and the navigation and transport on the river Niger of November 25, 1964 (UNTS, Vol. 587, p. 19, entry into force April 12, 1966). The new régime gives equal emphasis to the development of close cooperation for the judicious exploitation of the resources of the river basin as well as to the guarantee of the freedom of navigation and equality of treatment of those using it.

The Act of Niamey declared as abrogated the

General Act of Berlin, the General Act and Declaration of Brussels and the Convention of Saint-Germain-en-Laye. It stipulated that navigation on the river and its tributaries shall be entirely free for merchant vessels and pleasure craft of all nations and for the transportation of goods and passengers on the basis of complete equality. It reserved the utilization of the river, defined as navigation, agricultural and industrial uses, and collection of the products of its fauna and flora, to each riparian State. The stretch of the river within the territory of each State was made subject to the principles defined in the Act and in subsequent agreements. In this regard, riparian States undertook to establish close cooperation concerning the study and execution of any project likely to have an appreciable effect on the river and its tributaries, particularly on their conditions of navigability, agricultural and industrial exploitation, the sanitary conditions of their waters and their ecosystems. To this end, it envisaged the establishment of the Niger River Commission to be entrusted with the task of coordination. Disputes between the riparian States regarding the interpretation or application of the Act are to be settled by direct agreement or through the Commission, and failing such settlement by → arbitration by the Commission of Mediation, Conciliation and Arbitration of the → Organization of African Unity or by judicial settlement by the → International Court of Justice.

As regards navigation, the Agreement setting up the Niger River Commission entrusted the Commission with the drawing up of General Regulations regarding all forms of navigation, to ensure the safety and control of navigation, and to facilitate movement. Taxes and duties payable by vessels and goods using the river shall be non-discriminatory and shall be in proportion to the services rendered to navigation. However, on roads, railways and lateral canals constructed for the purpose of avoiding non-navigable portions or to improve sections of the waterways, riparian States are permitted to collect non-discriminatory tolls, on the basis of the cost of construction, maintenance and management. The Commission adopted a General Regulation on Navigation of the River Niger on February 22, 1974 and this remains in force. States appear to have accommodated themselves to this régime without any objection.

As regards the utilization of the waters and resources of the basin, the riparian States, by the terms of the Agreement, undertook to inform the Commission, at the earliest stage, of all studies and works, and to abstain from carrying out, on portions of the river and its tributaries, any works likely to pollute the waters or to have an adverse environmental impact, without adequate notice to and prior consultation with the Commission. These obligations are maintained by the Convention establishing the Niger Basin Authority of November 21, 1980 between the riparian States, by virtue of which the Authority replaced the Commission in an effort to strengthen and revitalize its functions. The Authority is entrusted with the promotion of cooperation among member States in order to ensure the integrated development of the basin as a whole. In order to achieve these objectives, the Authority has competence over the following matters: water control and utilization; infrastructure development; environmental monitoring and preservation; and coordination of planning and statistical compilation. The Convention established a Conference of Heads of States and Government as the governing body, a Council of Ministers as a controlling organ and an Executive Secretary as the administrative organ. Unlike the Act of Niamey, disputes between member States on interpretation and implementation of the Convention, if not settled by mutual agreement, shall be settled by the Conference, whose decisions are taken by unanimity and are conclusive and binding (→ Regional Cooperation and Organization: African States).

General Act of the Conference of Berlin of February 26, 1885, Martens NRG2, Vol. 10 (1885–1886) 414–427.

General Act of the Brussels Conference relative to the African Slave Trade, July 2, 1890, Martens NRG2, Vol. 17 (1892) 345–396.

Convention of Saint-Germain-en-Laye, September 10, 1919, Martens NRG3, Vol. 11 (1922) 691–839.

Act Regarding Navigation and Economic Co-operation between States of the Niger Basin of 26 October 1963, UNTS, Vol. 587 (1967) 10–17.

Agreement concerning the Niger River Commission and the Navigation and Transport on the River Niger of 25 November 1964, UNTS, Vol. 587 (1967) 19–33.

T.O. ELIAS, The Berlin Treaty and the River Niger Commission, AJIL, Vol. 57 (1963) 873–882.
M. SCHREIBER, Vers un nouveau régime international du fleuve Niger, AFDI, Vol. 9 (1963) 866–889.
M. SCHREIBER, Accord relatif à la Commission du Fleuve Niger et à la navigation et aux transports sur le fleuve Niger, AFDI, Vol. 10 (1964) 813–817.
T. MALUWA, The Origins and Development of International Fluvial Law in Africa: A Study of the International Legal Régimes of the Congo and Niger Rivers from 1885 to 1960, NedTIR, Vol. 29 (1982) 368–400.
B.A. GODANA, Africa's Shared Water Resources, Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems (1985).
A.T. GROVE (ed.), The Niger and its Neighbours (1985).

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NORTHERN IRELAND

A. Introduction

Northern Ireland is the portion of the island of Ireland that forms part of the United Kingdom of Great Britain and Northern Ireland.

The creation of Northern Ireland was both the cause and the consequence of the partition of Ireland under the Government of Ireland Act, 1920, and subsequent related instruments, as a result of which the former United Kingdom of Great Britain and Ireland was reduced to the present United Kingdom of Great Britain and Northern Ireland. The territory which then became Northern Ireland had together with the remainder of Ireland already become a part of the United Kingdom of Great Britain and Ireland in 1801, under the Acts of Union passed by the parliaments of Ireland and Great Britain, when the United Kingdom as such came into being (see → United Kingdom of Great Britain and Northern Ireland: Dependent Territories).

Although sometimes referred to as "Ulster" or "the Province", Northern Ireland includes only six of the nine counties which made up the historical province of Ulster before the partition of Ireland. The political division of the island as a result of the partition was completed upon the full emergence of the Irish Free State, which later became the Republic of Ireland. Today the border between the United Kingdom and the Republic of Ireland stretches for some 300 miles across the north-east of the island. The two parts of Ireland are often described as the "North" and the "South", but in fact the latter extends further north than the former: The most northerly point in the island, Malin Head, is situated in the Republic of Ireland.

The area of Northern Ireland is 5462 square miles (14 153 square kilometres), representing about 17 per cent of the whole of Ireland or 6 per cent of the United Kingdom. At its closest to Great Britain, Northern Ireland is less than 14 miles from Scotland, across the narrow North Channel, and it is about 70 miles from England. Northern Ireland has slightly over 1.5 million inhabitants, representing over 30 per cent of the population of the whole of Ireland and less than 3 per cent of the population of the United Kingdom. The principal industrial centre and port is Belfast. The economy, despite improvements in certain sectors, remains in an overall state of decline. In general, Northern Ireland is heavily subsidized at British expense.

The main political divisions in Northern Ireland follow closely along religious lines, and the religious divisions in turn correspond with what are felt to be different ethnic origins and allegiances. Nearly two thirds of the inhabitants are Protestant descendants of colonial settlers from England and Scotland; most of these are unionists, or loyalists, who form the dominant group and favour the maintenance of the union with Great Britain. Slightly over a third of the population are Roman Catholics, of indigenous origin, and largely

nationalist or republican in outlook; in essence, they favour unification with the Republic of Ireland. While the minority group is more homogeneous, each of the two communities is split into various political factions. Only very few people in Northern Ireland belong neither to one community nor to the other.

The regional distribution of Protestants and Roman Catholics in Northern Ireland is uneven, with local concentrations but without a clear pattern. The long history of conflict, rivalry and mistrust between the two communities is perpetuated by a high degree of segregation, especially in housing, employment and education. The mutual antagonisms, fanned by commemorative processions and other public rituals, often involving the provocative display of flags and emblems, erupt at times into the street violence, civil disorder and → terrorism which together are known as the "troubles".

The underlying problems of Northern Ireland appear to have become virtually insoluble with the passage of time, and there is little indication that they will diminish appreciably in intensity in the near future.

B. Historical Background

Ireland is the second largest island situated off the north-west coast of the European continent, and it was always regarded by the English as a vulnerable point of entry where enemies might seek to establish a foothold. King Henry II of England invaded Ireland in 1171 and stationed garrisons there. Some historians mention that the → conquest of Ireland was given legitimacy by Pope Adrian IV, an Englishman, but others dispute the authenticity and the legal effects of his act.

While English authority in Ireland was for many years confined to the fortified area known as the Pale, consisting of Dublin and the surrounding country, English influence spread further. The old Brehon law was supplanted by the common law of England and Wales, and English statute law was introduced into Ireland by force. In 1495 a specially packed Irish parliament enacted the so-called Poynings' Law (10 Hen.7 c.22), which severely restricted the powers of that assembly and rendered its legislation subject to the approval of the English Crown. In 1541 King Henry VIII took the title King of Ireland.

England became Protestant and military campaigns were undertaken to subjugate the Roman Catholics and colonize Ireland, with only partial success. Ulster retained considerable independence, largely escaping the control of the English Government until the early 17th century. Then, during the reign of James I, widespread confiscations of land in the north and east of Ireland took place, followed by its systematic and lasting plantation with English and Scottish settlers. Many Irish uprisings were ruthlessly suppressed. Massacres both of Protestants and Roman Catholics are still recalled with bitterness today. Notwithstanding international → alliances with Spain and later with France, the Roman Catholics were displaced and finally suffered a military defeat at the Battle of the Boyne in 1690.

After the emergence of a united Great Britain in 1707, the British parliament declared its right to legislate for Ireland in the Dependency of Ireland Act, 1719 (6 Geo.1 c.5). The Acts of Union of 1800 brought about the full constitutional unification of Ireland with Great Britain with effect from January 1, 1801, and, in the words of common Art. 1, "for ever" (Act for the Union of Great Britain and Ireland: in Ireland, 40 Geo.3 c.38; in Britain, 40 Geo.3 c.67). The passage of the Irish act of union, while usually regarded as procedurally valid, was secured by the British through a combination of bribery, intimidation and other corrupt practices. The Irish parliament, which in fact represented the Protestant ruling minority, was extinguished. Thenceforth, the whole of Ireland was governed from Britain with Irish representation in both houses of the United Kingdom parliament at Westminster. Alien landowners continued to possess most of Ireland.

Despite the centuries of foreign rule, the Irish retained their separate identity and acceptance of the union with Britain was never widespread. The great Irish famine of 1846 to 1848 was accompanied and followed by massive → emigration. Both nationalist and loyalist organizations flourished. The growing Home Rule movement, which included not only Roman Catholic but also some Protestant members, led to the proposal of various schemes of constitutional devolution during the 19th century. However, the movement

was rejected and opposed by the Protestants in Ulster. By the outbreak of World War I, Ireland was itself on the verge of → civil war.

C. The Partition of Ireland

1. The Government of Ireland Act, 1920

The proclamation of the Irish Republic was made in Dublin on Easter Monday, 1916, by a self-appointed provisional → government composed of insurrectionary nationalist leaders who sought a republic comprising all 32 counties of Ireland. The British put down this rising but its spirit survived despite the execution of most of its leaders. In December 1918 the general election in Ireland revealed wide support for the Sinn Féin party, the political counterpart of the volunteer Irish Republican Army (IRA), and in Dublin in 1919 the elected members of this party constituted the Dáil Éireann (Assembly of Ireland; now House of Representatives). This assembly, regarded as illegal by the British, issued a declaration of independence reaffirming the Easter proclamation. At the same time, a campaign of → guerrilla warfare was waged by the IRA against the British, not only for home rule but to obtain an independent Irish → State.

The United Kingdom Government was soon forced to attempt a settlement. This took the form of the Government of Ireland Act, 1920 (10 & 11 Geo.5 c.67), enacted in the United Kingdom on December 23, 1920. The 1920 Act envisaged the separation of Ireland into Southern Ireland and Northern Ireland, each part to have its own subordinate parliament. The statute was intended to establish a scheme of devolution of constitutional authority for Ireland as a whole, but it never came into effective operation in the South; as amended and supplemented, however, it served for over 50 years as the basic law of Northern Ireland.

The relevant part of section 1(2) of the 1920 Act provided:

> "... Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry ...."

The choice of the six counties, omitting Monaghan, Cavan and Donegal, was a compromise arrangement made between the United Kingdom Government and the unionists, reflecting the anticipated difficulty on the part of the latter in retaining control of the whole of Ulster. The arrangement aimed at securing for Northern Ireland the greatest possible land area over which control could safely be maintained by a unionist majority. As a consequence, however, Northern Ireland from its inception included relatively large areas in which the majority of the population identified strongly with the nationalist cause. A basis was supplied to those who would consider Northern Ireland to be an artificial creation founded upon a contrived majority.

2. The Anglo-Irish Treaty of 1921

The parliament of Northern Ireland was formally inaugurated on June 22, 1921. A truce was called in July, and foreign opinion turned against the British. In a new settlement, a treaty was concluded on December 6, 1921, between the Republican Government in the South and the United Kingdom Government, under Art. 1 of which the whole of Ireland was to become a self-governing dominion in the British Empire with the name Irish Free State. However, there was no prospect of this aim being realized for the whole of Ireland. By Art. 12 of the Treaty, Northern Ireland, without being a party to the agreement, was given the option of retaining its existence and status under the Government of Ireland Act, 1920. This option was exercised by the Northern Ireland parliament on December 7 and 8, 1922. By then the Northern Ireland Government had established control throughout most of its territory.

The 1921 Treaty was enacted as law in the United Kingdom with effect from March 31, 1922 by the Irish Free State (Agreement) Act, 1922 (12 Geo.5 c.4). Necessary modifications of existing legislation relating to Ireland as a whole were provided for by the Irish Free State (Consequential Provisions) Act, 1922 (12 Geo.5 c.4), and by subsequent legislation. In the Irish Free State the Treaty's legal status was seen as deriving from its incorporation in the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No.1 of 1922). In Britain the Treaty was referred to only as "Articles of Agreement for a Treaty", but the Irish Free State registered the instrument as a treaty

with the → League of Nations (→ Treaties, Registration and Publication).

3. The Boundaries of Northern Ireland

Art. 12 of the 1921 Treaty provided for the establishment of a tripartite international boundary commission, the task of which was to:

> "determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland".

Even a restrictive interpretation of this provision could have resulted in substantial areas of Northern Ireland being given to the Irish Free State. Despite the refusal of the Northern Ireland Government to appoint a member, the international commission was eventually constituted. It met for the first time in December 1924, but its work broke down shortly before a report could be issued.

In the absence of agreement on a new boundary, the existing border was retained under a tripartite agreement concluded on December 3, 1925, between the Governments of the Irish Free State, Northern Ireland, and Great Britain. By Art. 1 of the 1925 Agreement the extent of Northern Ireland was confirmed to be that fixed in section 1(2) of the 1920 Act. The border between Northern Ireland and the rest of Ireland has since remained unchanged.

The 1925 Agreement was ratified by the Irish Free State in the Treaty (Confirmation of Amending Agreement) Act of December 17, 1925 (No.40), and by the United Kingdom with effect from the same date (Ireland (Confirmation of Agreement) Act, 1925; 15 & 16 Geo.5 c.77). It was also deposited with the League of Nations by the Irish Free State. Upon the registration of the Treaty of 1921 and the Agreement of 1925 with the League of Nations, the British Government issued statements invoking the → *inter se* doctrine and denying the applicability of Art. 18 of the Covenant of the League to the two instruments; this attempt by the British to devalue the quality of the Treaty and the Agreement as instruments of international law was rejected by the Government of the Irish Free State (see LNTS, Vol. 27, pp. 449–450; and Vol. 44, pp. 266–268).

Several unofficial proposals were made for a more appropriate partition line, and even for population transfers, but such proposals were unrealistic at the time and it may be doubted whether they could ever have provided any form of lasting solution.

The 1920 Act had not foreseen the line of partition as an international frontier, but the relevant → boundaries of the counties involved did assume an international character. However, the border itself has remained open for most of its length. Apart from increasingly intensive surveillance for security purposes, the frontier is without controls on the movement of persons (→ Border Controls); it is primarily a → customs frontier, since the whole of Ireland and Great Britain together form a common travel area within which → passports are not required.

The question of → sovereignty over the waters off the coast of Northern Ireland, especially the → territorial sea, has given rise to some legal controversy which is partly of a rather speculative nature but is nonetheless based on the fact that section 1(2) of the 1920 Act made no reference to these waters. The Republic of Ireland still maintains what has been described as a "political" claim to the waters surrounding Northern Ireland (see Dáil, Debates, Vol. 328 (1981) col. 475). This claim is supported by the 1937 Constitution which in Art.2 designates the territorial seas of the whole island of Ireland as national territory. In the United Kingdom, as a consequence of the Territorial Sea Act, 1987 (c. 49), which applies to Northern Ireland and extended the breadth of the territorial sea to twelve nautical miles, the entire North Channel is now regarded as British territorial waters.

The United Kingdom and the Republic of Ireland have never agreed on a delimitation of the → boundary waters in Lough Foyle and Carlingford Lough, where the line of partition meets these inlets at the coast. Some incidents there, mostly of a minor nature, have occasionally been reported. Motivated by economic interests, a formula was reached on the delimitation of areas of the → continental shelf between the United Kingdom and the Republic of Ireland in an agreement signed in Dublin on November 7, 1988, which entered into force on January 11, 1990 (see British Command Paper Cm 535).

4. Emergence of the Republic of Ireland

The Constitution of the Irish Free State, enacted by Dáil Éireann sitting as a Constituent Assembly, came into force on December 6, 1922. It was recognized by the United Kingdom in the Irish Free State Constitution Act, passed on December 5, 1922 (13 Geo.5 c.1). The Irish Free State was admitted to membership in the League of Nations on September 10, 1923. An Irish parliamentary oath to the British Crown continued, however, until abolished in 1933, and the United Kingdom retained certain naval and aviation facilities in the Irish Free State until these were abandoned in 1938. In a special arrangement under the Executive Authority (External Relations) Act, 1936 (No.58), the Crown's function of accrediting Irish diplomatic and consular representatives and concluding international agreements survived until that act was repealed in 1948.

In 1937 the present Constitution (Bunreacht na hÉireann) was enacted, under which the name of the State became Éire or Ireland. The Parliament (Oireachtas) consists of the President, Dáil Éireann, and Seanad Éireann. The Taoiseach is the Prime Minister. The last formal links with the British Crown were only severed completely upon the enactment by the Oireachtas of the Republic of Ireland Act, 1948 (No.22), under which the description of the State became the Republic of Ireland. In 1949 the Republic withdrew from the → British Commonwealth. The United Kingdom parliament then passed the Ireland Act, 1949 (12 & 13 Geo.6 c.41) which recognized that Éire had ceased to be a part of the dominions as from April 18, 1949. This act also declared that the Republic of Ireland is for legal purposes, from the perspective of the United Kingdom, not a foreign country.

During World War II, Éire had remained neutral and thereafter the Republic of Ireland did not join the → North Atlantic Treaty Organization. The Republic of Ireland was a founding member of the → Council of Europe in 1949, was admitted to membership in the → United Nations in 1955, joined the → European Communities at the same time as the United Kingdom in 1973, and maintains a position of → neutrality in international affairs. In contemporary official practice, the term Ireland is employed alone as the formal description of the State.

Under the 1937 Constitution the Irish language is the national language, but both Irish and English are "official" languages. A reference to the special position of the Roman Catholic Church was deleted from the Constitution following a referendum held in 1972. Under the Irish Nationality and Citizenship Act, 1956 (No.26), every person born in Ireland is an Irish citizen from birth (→ Nationality). This act seems to confer citizenship on virtually all Northern Ireland people automatically; even persons born in Northern Ireland after December 6, 1922 and excluded by the act were enabled to take Irish citizenship by declaration. The law of the Republic of Ireland enfranchises persons of other nationality on the basis of → reciprocity, and so far only the British qualify. Irish citizens resident in Britain are entitled to vote in elections there, but stricter qualifications apply in Northern Ireland.

D. Government and Administration of Northern Ireland

1. Until 1972

Under the Government of Ireland Act, 1920, and subsequent legislation, Northern Ireland continued to be represented in the United Kingdom parliament. Until 1972, Northern Ireland also had its own regional legislature and government modelled on the British system. The legislature consisted of the Crown, the House of Commons and the Senate. The chief executive representative of the Crown in Northern Ireland from its inception until 1922 was the Lord Lieutenant, and thereafter a Governor of Northern Ireland was appointed. The Northern Ireland parliament, known as Stormont from its eventual location in the district of that name outside Belfast, had restricted competences and lacked financial independence. Moreover, section 75 of the 1920 Act reserved ultimate authority over all matters in Northern Ireland to the United Kingdom parliament. The United Kingdom Government represented Northern Ireland in relations with the Republic of Ireland.

In response to the state of civil war and virtual invasion that had prevailed at the time of its creation, the Northern Ireland parliament adopted a variety of emergency measures which were periodically renewed. By the late 1960s the

situation in Northern Ireland had again entered a more violent phase. The civil rights campaign launched in 1968 was accompanied by growing civil strife, and the process of government within Northern Ireland as well as the relations between the Northern Ireland Government and the United Kingdom Government finally broke down in 1972. Until that time, a unionist majority had always controlled the Northern Ireland parliament, government and administration.

2. From 1972

In March 1972 the United Kingdom Government prorogued the Northern Ireland parliament and imposed direct rule on Northern Ireland under the Northern Ireland (Temporary Provisions) Act, 1972 (c.22). The functions of the Northern Ireland Government were taken over by a newly-appointed Secretary of State for Northern Ireland, a Northern Ireland Office was created and the legislative process was continued by Orders in Council, which are a form of delegated legislation subject to only rudimentary control by parliament.

Attempts were made to reintroduce a Northern Ireland Assembly and a new power-sharing executive under the Northern Ireland Assembly Act, 1973 (c.17) and the Northern Ireland Constitution Act, 1973 (c.36), but this scheme collapsed after operating from January to May 1974. Direct rule was then resumed and two months later a new phase of direct rule was introduced under the Northern Ireland Act, 1974 (c.28), which again vested legislative powers for Northern Ireland in the Queen in Council and executive powers in the Secretary of State for Northern Ireland. Although a new form of elected Assembly came into being in November 1982, it immediately met with political deadlock and was eventually dissolved on June 23, 1986. Direct rule has continued up to the present.

There are 17 parliamentary constituencies in Northern Ireland, each of which elects one member to the United Kingdom House of Commons. Northern Ireland is treated as a single constituency for the purpose of elections to the European Parliament, where three United Kingdom representatives elected in Northern Ireland sit. Local government follows the English pattern.

3. Sources of Law

At its creation Northern Ireland inherited the law of Ireland, which was amended and supplemented by new enactments. Today the statutory law in force in Northern Ireland includes enactments of the following legislatures: (i) the Parliament of Ireland up to 1800; (ii) the Parliaments of England, Great Britain, and the United Kingdom up to the present; (iii) the Parliament of Northern Ireland, from 1921 to 1972; and (iv) the Northern Ireland Assembly of 1974. Not all laws made for the rest of the United Kingdom apply in Northern Ireland. The death penalty for murder, for example, was abolished for Northern Ireland only in 1973. Northern Ireland remains a separate jurisdiction with its own legal system and courts; the House of Lords is the final court of appeal.

4. The Security Forces

The regular police force of Northern Ireland is the Royal Ulster Constabulary, established in 1922. In the early period of Northern Ireland's existence several forms of special constabulary were recruited, among which were the so-called "B" Specials, a notorious and controversial force composed in practice exclusively of Protestants. This force was disbanded and replaced in 1969 by the locally-recruited Ulster Defence Regiment established by the United Kingdom parliament under military command, but the Regiment also attracts virtually only Protestants. In August 1969 the British Army was ordered into Northern Ireland to patrol the streets in the areas most severely affected by civil disturbance. Further large commitments of British troops were made in the following years and the army is still in service in Northern Ireland as an active part of the security forces.

E. Aspects of the Political Violence and Terrorism

1. The IRA and the Provisional IRA

The most severe disturbances occurred upon the creation of Northern Ireland, but serious political violence and terrorism again intensified in the late 1960s, despite governmental efforts towards reform. An opportunity provided by the repres-

sion of the civil rights movement in 1968 and 1969 was seized by the Provisional IRA. The latter, after breaking with the "official" IRA, emerged with the avowed aim of reuniting Ireland. The claims of the Provisional IRA, regarding itself as an army of national liberation and the lineal successor to the historic Provisional Government, thus set it also against the contemporary Government of the Republic of Ireland. The most violent operations of the IRA were at first confined to Northern Ireland where, together with various splinter groups, it found support among the Roman Catholic population. On the loyalist side, several armed groups also emerged, including the para-military Ulster Defence Association. The IRA and most of the other armed groups were proscribed by United Kingdom legislation.

After the official IRA had called a cease-fire in 1972, the Provisional IRA continued the campaign of violence and publicly reiterated its view that Northern Ireland is a colony of Britain (→ Colonies and Colonial Régime) and subject to alien →occupation. Principally on this basis it claims legitimacy for its actions. The nationalist viewpoint as such has been sympathetically received in many places abroad. However, the atrocities committed by the IRA, and by other groups, have usually met with widespread condemnation. The IRA has neither received the necessary popular support in Ireland nor attained any recognition by States, international organizations or conferences which might enable it to gain the status under international law that has been obtained by some → liberation movements in other parts of the world. Among foreign States, only Libya has accorded some recognition to the "Irish revolutionaries" (Keesing's Contemporary Archives, Vol. 18 (1971–1972) p. 25444). This gesture does not appear to have been backed by any substantial long-term support for the IRA, although arms shipments have taken place.

The attitude of the United Kingdom Government to the IRA has generally been to regard the organization and its activities as criminal in the ordinary sense. A special-category status introduced in June 1972 for convicted prisoners who claimed political motivation was phased out from 1976 and it has not been reintroduced. The hunger-strike protests by some prisoners in Northern Ireland attracted worldwide publicity to this issue in the early 1980s.

2. Emergency Powers and Internment

Emergency legislation in Northern Ireland has a long history going back over several centuries in Ireland as a whole. The infamous Civil Authorities (Special Powers) Act (Northern Ireland), 1922 (12 & 13 Geo.5 c.5), conferred upon the authorities unusually wide powers for maintaining the peace. The 1922 Act was periodically renewed and supplemented, remaining in force for over 50 years until it was repealed and replaced by the United Kingdom parliament under a new statute which, *inter alia*, also provided for internment without trial, viz. the Northern Ireland (Emergency Provisions) Act, 1973 (c.53). In 1971 the Northern Ireland parliament used powers under the 1922 Act to order internment of suspects without charge or trial. Under the new legislation in the period of direct rule, similar detention was based on orders made under the authority of the Secretary of State for Northern Ireland. Internment was at first applied only to the republican side, making it a political target in a way which it had not been during earlier episodes; by 1976 internment had to be abandoned. Among other extraordinary measures introduced in Northern Ireland, emergency powers relating to arrest, search and seizure were given to the security forces, and a system of non-jury trials for certain offences was created.

In the Republic of Ireland a state of national emergency was proclaimed on September 2, 1939, on account of the war in Europe, and it was renewed on September 1, 1976 in view of the armed conflict taking place in Northern Ireland. The Emergency Powers Act, 1976 (No.33), adopted on the basis of the state of emergency, lapsed after one year but the state of emergency itself still continues. Internment powers exist under the Offences Against the State (Amendment) Act, 1940 (No.2), but they have not been used for several decades.

3. Civil Liberties and Human Rights

The emergency legislation for Northern Ireland was as such virtually immune from challenge in the United Kingdom courts, on account of the absence of any national constitutional authority higher than

parliament, and the fact that the judiciary cannot invalidate statutes. Although some of the procedures by which special powers were implemented did gradually come under review in the United Kingdom, resort was also increasingly had to the international organs established under the → European Convention on Human Rights. This Convention had been ratified by the United Kingdom in 1951 and by the Republic of Ireland in 1953.

The right of individual petition under Art. 25 of the European Convention was accepted by the United Kingdom with specified duration, which has since always been extended, and by the Republic with unspecified duration. However, in 1957 the United Kingdom issued a notice of derogation with respect to Northern Ireland under Art. 15 of the Convention, claiming that the condition set out therein, namely a " . . . public emergency threatening the life of the nation . . . ", was fulfilled by the situation in Northern Ireland. This notice was renewed periodically until 1984. The Republic of Ireland also derogated from the Convention.

The United Kingdom signed the International Covenant on Civil and Political Rights in 1968 and ratified it on May 20, 1976, accepting the competence of the Human Rights Committee under Art. 41, but did not become a party to the Optional Protocol, under which the competence of the Human Rights Committee to consider individual communications is recognized (→ Human Rights Covenants). The adherence of the United Kingdom to the Covenant was made subject to reservations upon signature and ratification and to a far-reaching notice of derogation under Art. 4, dated May 17, 1976, with respect to the situation in Northern Ireland. The Republic of Ireland has not ratified either of the Covenants.

The → European Court of Human Rights delivered judgments in 1960 and 1961 in its first case, originating from the Republic of Ireland. The Court held that internment in the Republic of a suspected member of the IRA in 1957 was not in breach of the European Convention because a justifiable derogation had been made in a time of national emergency (Lawless v. Ireland, Eur. Court H.R., Series A, Nos. 1, 2 and 3).

The first individual applications under the European Convention from the United Kingdom arising out of the conflict in Northern Ireland were submitted to the → European Commission of Human Rights in 1968, but they did not pass through the initial procedural stages necessary for admittance. The case of Devlin v. United Kingdom was declared inadmissible in 1971 (Application No. 4607/70).

On December 16, 1971 the Government of the Republic of Ireland submitted to the European Commission an application against the United Kingdom alleging violations of the Convention in relation to the treatment inflicted on detainees by the British Army during interrogations in Northern Ireland between August and October 1971 (Application No. 5310/71). The Commission found that the interrogation methods constituted a practice of inhuman treatment and in combination amounted to → torture. In its related judgment, delivered on January 18, 1978, the European Court considered that the requisite emergency existed to justify extra-judicial detention and held that the interrogation techniques amounted to inhuman and degrading treatment in breach of Art. 3 of the Convention, from which no derogation is permitted (Ireland v. United Kingdom, Eur. Court H.R., Series A, No. 25). This was the first inter-State case of which the Court had been seised.

In May 1972 seven individual applications were filed with the European Commission alleging torture and brutality by the security forces in Northern Ireland following the imposition of direct rule (Donnelly and Others v. United Kingdom, Application Nos. 5577/72 – 5583/72). The decision reached on December 15, 1975 held all these applications inadmissible. In a further case, the Commission rejected a claim by IRA prisoners that they were entitled to special status (McFeeley and Others v. United Kingdom, Application No. 8317/78). Other unsuccessful applications have also been made to the Commission from Northern Ireland (e.g. Stewart v. United Kingdom, Application No. 1004/82; for further references see Hogan and Walker, 1989).

In a judgment delivered on November 29, 1988, the European Court held that the detention of terrorist suspects in 1984, under the Prevention of Terrorism (Temporary Provisions) Act, 1984 (c.8), was in breach of Art. 5(3) and (5) of the European

Convention (Brogan and Others v. United Kingdom, Eur. Court H.R., Series A, No. 145 B).

On May 4, 1989, the European Commission held that the United Kingdom was in breach of Art. 5 (1), (2) and (5) of the Convention in respect of detention of suspects in 1986 under the Northern Ireland (Emergency Provisions) Act, 1978 (Fox, Campbell and Hartley v. United Kingdom, Application Nos. 12244/86, 12245/86 and 12383/86). In mid-1990 the case was still pending before the European Court of Human Rights.

Several commissions of enquiry established by the United Kingdom Government have investigated the problems relating to civil liberties in Northern Ireland, including allegations of misconduct on the part of the security forces. Various reforms of a procedural, administrative and legislative nature have been introduced. A Standing Advisory Commission on Human Rights was appointed (see British Command Paper Cmnd. 7009).

The notices of derogation by the United Kingdom from the European Convention on Human Rights as well as from the International Covenant on Civil and Political Rights were withdrawn in 1984. However, following the judgment of the European Court in 1988, new notices of derogation, described as temporary, were given by the United Kingdom Government under both the European Convention and the International Covenant with particular regard to the seven-day detention powers contained in the Prevention of Terrorism (Temporary Provisions) Act, 1989 (c.4).

Despite several proposals, the European Convention has not been incorporated into United Kingdom law or into the law of Northern Ireland and, consequently, the protections which the Convention offers are not available there directly through the national courts.

4. Extradition

Considerable difficulties over → extradition still beset Anglo-Irish relations, despite increasing bilateral cooperation in other areas relating to security and the combating of terrorism. In the Republic of Ireland, for many years, persons wanted for trial in Northern Ireland for activities related to republican violence were generally successful in resisting extradition on the basis of favourable interpretations of the political offence exception. The exception is defined in the Republic in section 50 of the Extradition Act, 1965 (No.17) as covering "a political offence or an offence connected with a political offence". In this regard, the Government of the Republic of Ireland has always taken the position that its extradition practice conforms with the principles of international law on the subject. On the British side, however, the main concern is that wanted terrorists should not escape justice; on the Irish side there is concern primarily that those charged with terrorist offences may not obtain a fair trial in the United Kingdom courts, and also that those under arrest or serving sentences may suffer maltreatment while in detention.

Extradition from third countries to the United Kingdom or to the Republic in cases involving alleged terrorists has also proved controversial, for example where France and the United States have been concerned.

The United Kingdom is not a party to the European Convention on Extradition of 1957 (→ Extradition Treaties), but the Republic of Ireland ratified it on May 2, 1966. In the Republic of Ireland, under the Criminal Law Jurisdiction Act, 1976 (No.14), extra-territorial jurisdiction was introduced so that suspected criminals could be tried in the Republic for offences committed in Northern Ireland. However, the implementation of this statute gave rise to further problems of a legal and political nature. Although it has not been very widely used, commentators have noted that the act at least proved somewhat more successful than extradition as a means of bringing political fugitives alleged to have committed crimes of violence to trial.

A joint Anglo-Irish Law Enforcement Commission, appointed in December 1973 to consider how to bring terrorist suspects to trial in any part of Ireland, had been unable to reach agreement about new extradition measures (in the United Kingdom, British Command Paper Cmnd. 5627; in the Republic of Ireland, Prl. 3832). In the Republic of Ireland, greater flexibility on the part of the courts and the authorities towards the political exception to extradition only emerged during the 1980s. Both the Republic and the

United Kingdom then completed the reform of their extradition law.

The European Convention on the Suppression of Terrorism of 1977 was signed by the Government of the Republic of Ireland in 1986, and ratified in December 1987. Under the Convention, extradition for many serious offences connected with terrorist activity becomes automatic.

In the Republic, the scope of the political offence exception was restricted by the Extradition (European Convention on the Suppression of Terrorism) Act, 1987 (No.1), while safeguards for extradition under the 1965 Act were applied by the Extradition (Amendment) Act, 1987 (No.25). However, the arrangements governing extradition remained highly controversial. In the United Kingdom, the Extradition Act, 1989 (c.33) revised much of the earlier legislation on the subject.

Despite some slight improvements during the 1980s, there continue to be reversals in Anglo-Irish relations where extradition practice is concerned. In 1988 and 1989 a few extraditions of fugitive terrorists were carried out from the Republic of Ireland to Northern Ireland. In general, however, the extradition processes are still surrounded by political and legal obstacles.

5. The Law of Armed Conflict

The fact that the disturbances in Northern Ireland have escalated beyond ordinary acts of criminal violence has raised the question of the applicability of the humanitarian law of → armed conflict, in particular the provisions of common Art. 3 of the → Geneva Red Cross Conventions of 1949, to which the United Kingdom has been party since 1957. The applicability of the Conventions has not been admitted by the British authorities, but delegates of the International Committee of the Red Cross (→ Red Cross) were permitted to visit detainees in Northern Ireland. The United Kingdom Government has signed but not ratified the Additional Protocols of 1977 to the Geneva Conventions. The British authorities have also refused to admit that the nature or intensity of the military operations in Northern Ireland have been sufficient to involve the application of Protocol II governing non-international conflicts, or that the conditions could be fulfilled for application of Protocol I governing international conflicts.

F. The Anglo-Irish Agreement of 1985

1. British and Irish Policy on the Status of Northern Ireland

The Constitution of the Republic of Ireland contains two articles which read as follows:

"Article 2. The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3. Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect."

These articles, at the time of their adoption, had an important symbolic value in Ireland that has since declined, but not disappeared. While Art. 2 appears to make a virtual claim to territory that is part of the United Kingdom, Art. 3 is a more complex provision which appears to take some account of the division of Ireland; whereas the former adopts a national perspective, the latter refers to the laws of the State. Even today, Arts. 2 and 3 of the Constitution still have legal and political repercussions in the Republic of Ireland, as well as in Anglo-Irish relations, and the true significance of these articles as well as their very existence remain controversial (cf. Kelly (1984) pp. 12–13, and Suppl. (1987), pp. 3–5; McGimpsey v. Ireland, Irish Law Reports Monthly, Vol. 10 (1990), pp. 441–454).

Arts. 2 and 3 of the Constitution notwithstanding, in international relations the Republic of Ireland pursues no territorial claim to Northern Ireland in the sense of a legal assertion of the Republic against the United Kingdom. Although the Republic did make unsuccessful attempts to bring the question of Northern Ireland before the → United Nations Security Council and the → United Nations General Assembly in August and September 1969, such efforts have not been repeated. However, the reunification of Ireland is enshrined in the Constitution of the Republic and it remains a national political aspiration, albeit not one that is supported by all the electorate.

Even in purely bilateral relations with the

United Kingdom, no overtly irredentist claims have been pursued by the Republic (→ Irredentism); but Arts. 2 and 3 still rise up from time to time as an irritant in Anglo-Irish diplomacy.

British official policy on the status of Northern Ireland is to respect the wishes of the majority of the people of Northern Ireland, and the majority has so far always wished to remain a part of the United Kingdom. This policy was expressed in the form of a statutory declaration, enacted by the United Kingdom parliament when the Republic of Ireland severed all residual connections with the British Crown, in section 1(2) of the Ireland Act, 1949 (c.41):

> "It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland."

After the suspension of the Northern Ireland parliament the declaration was repeated, with modifications, in section 1 of the Northern Ireland Constitution Act, 1973 (c.36):

> "It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll . . . ."

The → plebiscite referred to was held on March 8, 1973, resulting in a majority vote to remain in the United Kingdom.

Following the Conference held at Sunningdale in England from December 6 to 9, 1973, between the Governments of the Republic of Ireland and the United Kingdom together with a designated Northern Ireland Executive, a joint communiqué was issued in which the Government of the Republic of Ireland accepted that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired such a change; the United Kingdom Government agreed that if a majority should indicate a wish to become part of a united Ireland it would support their wish. The communiqué thus underlined British acceptance of the potential legitimacy of a united Ireland and gave some official recognition to nationalist aspirations (text of the agreement in Keesing's Contemporary Archives, Vol. 20 (1974) pp. 26301-2).

The constitutionality of the Sunningdale agreement was challenged in the Republic of Ireland. The Supreme Court, declining to grant an injunction to restrain the Government from implementing the terms of the supposed settlement, stated that the agreement owed its existence to an executive act and had no standing in law; consequently no conflict with the Constitution could arise (Boland v. An Taoiseach, The Irish Reports, 1974, p. 338). In practice, the elaborate arrangements set out in the Sunningdale communiqué proved to be ineffective; they never received the full support of all the parties concerned, and they were never incorporated into a formal agreement as had been envisaged.

2. The Anglo-Irish Agreement of November 15, 1985, signed at Hillsborough

(a) Background: the Anglo-Irish Intergovernmental Council

A series of Anglo-Irish joint studies was commissioned at prime ministerial level in 1980, with special attention being given to the possible establishment of a new bilateral intergovernmental institution. A joint report published in November 1981 identified several areas for closer governmental cooperation, especially in the economic and technical spheres (in the Republic of Ireland, Pl. 299; in the United Kingdom, Cmnd. 8414).

After a meeting held between the Prime Minister and the Taoiseach on November 6, 1981, a joint communiqué was issued announcing the setting up of an Anglo-Irish Intergovernmental Council (see text in Keesing's Contemporary Archives, Vol. 28 (1982) pp. 31578–80).

The Council's purpose is to enable close bilateral consultations to take place between the two governments at summit, ministerial or official level. The Council is not based on a formal bilateral agreement, and it was apparently not endowed with a constitution. Ministerial agreement to its creation was reported to Parliament and Oireachtas on November 11, 1981, and the Council's first meetings at ministerial and official

level took place in January 1982. This development was welcomed abroad by European governments and the European Community (see European Parliament, Doc. 1526/83, March 19, 1984). The Anglo-Irish joint studies were continued (see Cmnd. 9094; Pl. 1953).

(b) The Anglo-Irish Agreement

Further summit level and ministerial meetings paved the way for the Anglo-Irish Agreement signed at Hillsborough Castle in Northern Ireland on November 15, 1985. The Agreement entered into force on November 29, 1985, upon the exchange of → notes of acceptance by the two governments, and it was registered with the United Nations.

The two original copies of the text of the Hillsborough Agreement are almost identical in substance, but the Irish version describes the Agreement as being between "the Government of Ireland and the Government of the United Kingdom", whereas the British version refers to "the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland". These differences in the nomenclature employed for the two States are in line with a long established but not always exactly uniform bilateral practice on the part of the two governments; the differences clearly reflect the underlying conflicting claims over Northern Ireland.

Art. 1 of the Hillsborough Agreement contained a joint policy statement on the status of Northern Ireland, expressed as follows:

"The two Governments

(a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;

(b) recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;

(c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish."

The operative part of the Hillsborough Agreement thus opened with a reference to a change in the status of Northern Ireland. The Agreement appeared to confirm the present status of Northern Ireland as part of the United Kingdom, although viewed more closely the term "status" employed in Art. 1(a) and (b) was not defined in any way. The United Kingdom Government accepted that Northern Ireland may be united with the Republic of Ireland if a majority of the people of Northern Ireland so wish; and on its part the Government of the Republic accepted that the people of Northern Ireland may decide their own future on the basis of majority consent.

(c) The Intergovernmental Conference

Art. 2 of the Hillsborough Agreement created a new Anglo-Irish institution called the Intergovernmental Conference, established within the framework of the Anglo-Irish Intergovernmental Council, to be concerned with Northern Ireland and with relations between the two parts of Ireland. The Conference meets at ministerial and official levels.

Under Art. 2, the Government of the Republic of Ireland was given an active consultative role with regard to specified matters in Northern Ireland within the field of the Intergovernmental Conference, insofar as such matters are not the responsibility of a devolved administration in Northern Ireland. In Art. 4 of the Agreement, both governments also declared their support for a policy of devolution; this, if successful, would leave only a residual role for the Republic under the Agreement. The subjects referred to as open for consultation are political matters, security and related matters, legal matters, and the promotion of cross-border cooperation. Art. 8 of the Agreement, concerning legal matters, concentrated on criminal law aspects of concern to both countries, including the possibility of establishing mixed courts; the latter, however, have not been brought into being.

3. Developments since 1985

The Hillsborough Agreement obtained endorsement by Oireachtas and Parliament, and it was well received throughout Western Europe and in the United States. However, strong criticisms were also voiced. On the republican side, the objections to the Agreement again centred on the constitutional implications, which were perceived as purporting to accord sovereignty over a part of Ireland to Britain, and on the tendency in the

Agreement to seek a devolved form of government within Northern Ireland. Unionists vehemently opposed the Agreement because of the involvement which it granted to the Republic in the affairs of Northern Ireland, and also because they had not been included in the negotiations which preceded it. Both sides, but most especially the unionists, criticized the provisions for their lack of reciprocity.

Meetings of the Intergovernmental Conference have continued to take place, and a standing secretariat was established with its seat at Maryfield in Belfast. The European Parliament welcomed the Hillsborough Agreement and recommended the Commission of the European Communities to draw up a development programme for less-favoured areas in Northern Ireland (Official Journal, Vol. 28 (1985) C 352/83–84; Vol. 29 (1986) C 322/454–461). On September 18, 1986 the Governments of the Republic of Ireland and the United Kingdom concluded an agreement setting up an International Fund for Ireland to receive contributions for purposes of economic and social development in both parts of Ireland, as foreseen in Art. 10(a) of the Hillsborough Agreement. The United States has provided the largest contributions to the Fund.

A legal challenge to the Hillsborough Agreement was mounted in the Republic of Ireland by two unionists from Belfast holding Irish citizenship, who claimed that the Agreement conflicted with Arts. 2 and 3 of the Constitution. This was rejected in a judgment delivered by the High Court on July 29, 1988; the court stated, *inter alia*, that the Agreement was interim in nature and of a type which could be entered into pending the reintegration of the national territory (McGimpsey v. Ireland, Irish Law Reports Monthly (1989) p. 209). It was emphasized by the court that the Agreement created obligations and was regarded as having its effect primarily in international law.

On appeal against this judgment, the Supreme Court, in its unanimous decision of March 1, 1990, also upheld the constitutionality of the Anglo-Irish Agreement, (Irish Law Reports Monthly, Vol. 10 (1990), pp. 441–454). The decision referred in the context of the Anglo-Irish Agreement to "a clear attempt to resolve the position with regard to the reintegration of the national territory and the position of Northern Ireland" (ibid., p. 452), further stating that there was a high improbability that such an attempt "could ever be inconsistent with a Constitution devoted to the ideals of ordered, peaceful international relations" (ibid). Commentators have suggested an effect of this decision may be to deny the Government of the Republic of Ireland capacity to renounce the standing *de jure* claim to Northern Ireland which is found in Arts. 2 and 3 of the Constitution. The decision could also make it even easier than before for those accused of terrorist offences to successfully maintain a political motivation for their acts.

It now appears that the Hillsborough Agreement has been counter-productive in terms of political relations inside Northern Ireland, and the same may apply in terms of Anglo-Irish relations generally. However, some would say the Agreement has at least induced a greater sense of realism. The official review of the workings of the Intergovernmental Conference, carried out after three years of operations and published in May 1989, reaffirmed the commitment of both governments to all of the provisions of the Agreement, but without excluding the possibility of future changes in the scope and nature of the Conference. An important question for the future is whether or not the policies of the two governments will turn out to be based ultimately on compatible standpoints.

G. Conclusion

The partition of Ireland was deeply resented by many and today it provides a constant reminder of the cultural and ideological divisions which still prevail, especially in Northern Ireland where ancient antagonisms between the religious communities are reflected in extreme political positions and a bitter fanaticism thrives. All efforts so far to extend a devolved system of government to Northern Ireland have failed. The circumstances prevailing there have also made it difficult to maintain public confidence in the law and in the security forces. Instead, the concept of emergency has assumed a virtually permanent character. By degrees, however, the urgency of seeking joint policies on vital matters of common concern has been recognized by the authorities on both sides. Despite periodic setbacks, this has resulted in closer relations being established between the United Kingdom and the Republic of Ireland with regard to Northern Ireland, and the policies of the

two governments with respect to Northern Ireland have acquired some common features.

A basis for the continuing interest of the Government of the Republic of Ireland in the problems of Northern Ireland was provided by the Anglo-Irish Treaty of 1921 together with Arts. 2 and 3 of the 1937 Constitution. This interest has not receded with time. On the contrary, it assumed new bilateral legal dimensions and was given institutional expression in the Anglo-Irish Agreement of 1985. More broadly, there have been hopes that the economic integration promoted by the European Community will eventually enable a higher degree of transborder cooperation to take place within a European setting. Both parts of Ireland have benefited from Community aid. So far, however, only a rather limited European role in achieving a settlement of the political problems has emerged, and no significant multilateral initiatives of a wider international nature have been undertaken.

It has been argued that both Britain and the Republic increasingly regard Northern Ireland as a place apart, and there is considerable truth in this observation. But however much both sides might wish to be rid of the problems of Northern Ireland, they are also aware that any moves to negotiate autonomy or independence for Northern Ireland would only raise new dangers. In particular, changes which could affect sovereignty or citizenship in Northern Ireland seem bound to be forcefully opposed by members of the majority community there.

The attempts which have been made to clarify the future of Northern Ireland have thus not simplified the task of achieving greater long-term stability in Ireland as a whole. Further bilateral governmental consultations would appear to be necessary and inevitable, albeit with the qualification that such consultations are likely to be set within the general framework of the present → *status quo*. No new joint policy of a lasting nature has become apparent since 1985. Anglo-Irish relations at official level are of a continuous nature, and consultations at ministerial level between the two countries also take place regularly. In contrast, however, the question of direct North-South contacts still presents the greatest difficulties. There is some hope, nevertheless, that an internal political settlement within Northern Ireland could be accompanied by the emergence of new constitutional solutions and structures, with the involvement of the Republic of Ireland.

In conclusion, the experience of recent years confirms that the status of Northern Ireland as a part of the United Kingdom is open-ended. The continued existence of Northern Ireland has been brought into greater doubt precisely because the United Kingdom Government has repeatedly declared that the wishes of the majority must be respected, a position to which the Government of the Republic of Ireland has also subscribed. The status of Northern Ireland as a part of the United Kingdom is thus both conditional and provisional. However, even those who admit the possibility of a fundamental change for the better in Northern Ireland recognize that such a transformation may not come about for some considerable time.

Articles of Agreement for a Treaty between Great Britain and Ireland, London, December 6, 1921: in the United Kingdom, schedule to the Irish Free State (Agreement) Act, 1922 (12 Geo.5 c.4), and second schedule to the Irish Free State Constitution Act, 1922 (13 Geo.5 c.1); in the Irish Free State, second schedule to the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 (No. 1 of 1922). Treaty between Great Britain and Ireland, LNTS, Vol. 26 (1924) 9–18.

Agreement between Great Britain and the Irish Free State, amending and supplementing the Treaty of December 6, 1921 between Great Britain and the Irish Free State, London, December 3, 1925, LNTS, Vol. 44 (1926) 263–266.

Anglo-Irish Agreement, Hillsborough, November 15, 1985: in the Republic of Ireland, Prl. 3684, Treaty Series (1985) No. 2; in the United Kingdom, British Command Paper Cmnd. 9657, and Cmnd. 9690, Treaty Series No. 62 (1985). Also ILM, Vol. 24 (1985) 1579–1588.

Northern Ireland, Public General Acts (1921–1971); Statutes and Orders in Council having effect as such (1972); Orders in Council (1973); Measures and Orders in Council (1974); Orders in Council (1975 – present).

Northern Ireland, Statutory Rules and Orders (1922–1973); Statutory Rules (1974 – present).

Belfast Gazette (weekly, 1921 – present).

Ulster Year Book (triennial, 1926–1968; annual, 1969–1985).

A.S. QUEKETT, The Constitution of Northern Ireland, Part 1: The Origin and Development of the Constitution (1928); Part 2: The Government of Ireland Act, 1920 and Subsequent Enactments (1933); Part 3: A Review

of Operations under the Government of Ireland Act, 1920 (1946).
N. MANSERGH, The Government of Northern Ireland, A Study in Devolution (1936).
J.W. BLAKE, Northern Ireland in the Second World War (1956).
H. CALVERT, Constitutional Law in Northern Ireland, A Study in Regional Government (1968).
Report of the Irish Boundary Commission 1925, with an Introduction by G.J. Hand (1969).
J.B. BELL, The Secret Army, The IRA 1916–1970 (1970).
M. HASTINGS, Ulster 1969, The Fight for Civil Rights in Northern Ireland (1970).
E. SCHWELB, Northern Ireland and the United Nations, ICLQ, Vol. 19 (1970) 483–492.
R. ROSE, Governing Without Consensus, An Irish Perspective (1971).
I. BROWNLIE, Interrogation in Depth: the Compton and Parker Reports, The Modern Law Review, Vol. 35 (1972) 501–507.
H. HANNUM and K. BOYLE, Ireland in Strasbourg: An Analysis of the Northern Irish Proceedings before the European Commission of Human Rights, The Irish Jurist, Vol. 7 (1972) 329–348.
D.H.N. JOHNSON, Certain Legal Aspects of Anglo-Irish Relations, Netherlands Yearbook of International Law, Vol. 3 (1972) 1–17.
C.C. O'BRIEN, States of Ireland (1972).
C. PALLEY, The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution, The Anglo-American Law Review, Vol. 1 (1972) 368–476.
M. DILLON and D. LEHANE, Political Murder in Northern Ireland (1973).
F.S.L. LYONS, Ireland Since the Famine (1973).
K. BOYLE, T. HADDEN and P. HILLYARD, Law and State, The Case of Northern Ireland (1975).
K. BOYLE and H. HANNUM, Ireland in Strasbourg: Final Decisions in the Northern Irish Proceedings before the European Commission of Human Rights, The Irish Jurist, Vol. 11 (1976) 243–267.
R.H. HULL, The Irish Triangle, Conflict in Northern Ireland (1976).
D. LOWRY, Internment in Northern Ireland, The University of Toledo Law Review, Vol. 8 (1976/1977) 169–208.
C.R. SYMMONS, Who Owns the Territorial Waters of Northern Ireland?, A Note on D.P.P. for Northern Ireland v. McNeill, Northern Ireland Legal Quarterly, Vol. 27 (1976) 48–66.
R. FALIGOT, La résistance irlandaise (1977).
P. MERTENS, L'affaire Irlande contre Royaume-Uni devant la Commission européenne des Droits de l'Homme, RevBelge, Vol. 13 (1977) 10–29.
M. O'BOYLE, Torture and Emergency Powers under the European Convention on Human Rights, Ireland v. the United Kingdom, AJIL, Vol. 71 (1977) 674–706.
R.J. SPJUT, The Northern Ireland Constitutional Settlement of 1973 and the Loyalist Opposition, The Irish Jurist, Vol. 12 (1977) 243–260.
D. BONNER, Ireland v. United Kingdom, ICLQ, Vol. 27 (1978) 897–907.
D.R. LOWRY and R.J. SPJUT, The European Convention and Human Rights in Northern Ireland, Case Western Reserve Journal of International Law, Vol. 10 (1978) 251–297.
E.P. MOXON-BROWNE, Northern Ireland, in: M. Kolinsky (ed.), Divided Loyalties, British Regional Assertion and European Integration (1978) 23–43.
D.E. DONAHUE, Human Rights in Northern Ireland: Ireland v. the United Kingdom, Boston College International and Comparative Law Review, Vol. 3 (1979/1980) 377–432.
R. HERMLE, Der Konflikt in Nordirland (1979).
P. ARTHUR, Government and Politics of Northern Ireland (1980; 2nd ed. 1984).
T.P. COOGAN, The I.R.A. (1980).
J.M. KELLY, The Irish Constitution (1980; 2nd ed. 1984; Suppl. 1987).
P. BUCKLAND, A History of Northern Ireland (1981).
T.P. FOLEY, Public Security and Individual Freedom: The Dilemma of Northern Ireland, Yale Journal of World Public Order, Vol. 8 (1981–1982) 284–324.
P. HAINSWORTH, Northern Ireland: A European Role?, Journal of Common Market Studies, Vol. 20 (1981/1982) 1–15.
P.R. MAGUIRE, The Standing Advisory Commission on Human Rights 1973–1980, Northern Ireland Legal Quarterly, Vol. 32 (1981) 31–61.
D. WATT (ed.), The Constitution of Northern Ireland, Problems and Prospects (1981).
K. BOYLE, Human Rights and Political Resolution in Northern Ireland, Yale Journal of World Public Order, Vol. 9 (1982–1983) 156–177.
B. HADFIELD, The Northern Ireland Act 1982 – Do-It-Yourself Devolution?, Northern Ireland Legal Quarterly, Vol. 33 (1982) 301–325.
D.P.J. WALSH, Arrest and Interrogation: Northern Ireland 1981, Journal of Law and Society, Vol. 9 (1982) 37–62.
F.W. O'BRIEN, Irish Terrorists and Extradition: The Tuite Case, Texas ILJ, Vol. 18 (1983) 249–272.
T. TOWEY, Who Owns the Territorial Waters of Northern Ireland? The McNeill Case: Another View, ICLQ, Vol. 32 (1983) 1013–1025.
D.P.J. WALSH, The Use and Abuse of Emergency Legislation in Northern Ireland (1983).
B. DICKSON, The Legal System of Northern Ireland (1984).
C.R. SYMMONS, Who Owns the Territorial Waters of Northern Ireland? A Rejoinder, ICLQ, Vol. 33 (1984) 1064–1068.
K. BOYLE and T. HADDEN, Ireland: A Positive Proposal (1985).
A. GUELKE, International Legitimacy, Self-Determination, and Northern Ireland, Review of International Studies, Vol. 11 (1985) 37–52.
J.M. KELLY, Die Auslieferung bei politischen Delikten in der neueren irischen Rechtsprechung, ZaöRV, Vol. 45 (1985) 44–61.

J.F. O'CONNOR, L'accord Anglo-Irlandais de 1985, AFDI, Vol. 31 (1985) 191–203.
W.V. SHANNON, The Anglo-Irish Agreement, Foreign Affairs, Vol. 64 (1985–1986) 849–870.
A. COUGHLAN, Fooled Again? The Anglo-Irish Agreement and After (1986).
D.J. GREENSPAN, Bridging the Irish Sea: The Anglo-Irish Treaty of 1985, Syracuse Journal of International Law and Commerce, Vol. 12 (1986) 585–599.
B. HADFIELD, The Anglo-Irish Agreement 1985 – Blue Print or Green Print?, Northern Ireland Legal Quarterly, Vol. 37 (1986) 1–28
D. HAMILL, Pig in the Middle: The Army in Northern Ireland 1969–1985 (1986).
J. HORGAN, Die Zukunft Nordirlands im Lichte des Abkommens zwischen Großbritannien und der Republik Irland, Europa-Archiv, Vol. 41 (1986) 275–284.
K.G. KENNEALLY, Northern Ireland: The Anglo-Irish Treaty of 1985, Suffolk Transnational Law Journal, Vol. 10 (1986) 425–440.
A. KENNY, The Road to Hillsborough, The Shaping of the Anglo-Irish Agreement (1986).
J.M. SPILLANE, Terrorists and Special Status: The British Experience in Northern Ireland, Hastings International and Comparative Law Review, Vol. 9 (1986) 481–515.
G.S. SWAN, Irish Unification as Northern Ireland Self-Determination: A Speculative Reappraisal of the Evidence, Florida International Law Journal, Vol. 2 (1986) 129–157.
P. BISHOP and E. MALLIE, The Provisional I.R.A. (1987).
A.M. CONNELLY, Political Violence and International Law: The Case of Northern Ireland, Denver Journal of International Law and Policy, Vol. 16 (1987–1988) 79–94.
P.D.H. SMYTH, The Northern Ireland Assembly 1982–86: The Failure of an Experiment, Parliamentary Affairs, Vol. 40 (1987) 482–500.
A. GUELKE, Northern Ireland: The International Perspective (1988).
A. JENNINGS (ed.), Justice Under Fire, The Abuse of Civil Liberties in Northern Ireland (1988).
A.G. MAURER, Die staatsangehörigkeitsrechtlichen Beziehungen geteilter Staaten, dargestellt am Beispiel von Irland, Nordirland und Großbritannien (1988).
C. O'LEARY, S. ELLIOTT and R.A. WILFORD, The Northern Ireland Assembly 1982–1986, A Constitutional Experiment (1988).
C. WARBRICK, Anglo-Irish Extradition, Journal of Criminal Law, Vol. 52 (1988) 414–424.
C. CAMPBELL, Extradition to Northern Ireland: Prospects and Problems, Modern Law Review, Vol. 52 (1989) 585–621.
P. CHARLETON, Extradition from Ireland to the United Kingdom, Journal of Criminal Law, Vol. 53 (1989) 235–253.
B. DICKSON, The Prevention of Terrorism (Temporary Provisions) Act 1989, Northern Ireland Legal Quarterly, Vol. 40 (1989) 250–267.
W.D. FLACKES and S. ELLIOTT, Northern Ireland, A Political Directory 1968–88 (1989).
T. HADDEN and K. BOYLE, The Anglo-Irish Agreement, Commentary, Text and Official Review (1989).
B. HADFIELD, The Constitution of Northern Ireland (1989).
G. HOGAN and C. WALKER, Political Violence and the Law in Ireland (1989).
S. LIVINGSTONE, A Week is a Long Time in Detention: Brogan and Others v. United Kingdom, Northern Ireland Legal Quarterly, Vol. 40 (1989) 288–303.
T. WILSON, Ulster: Conflict and Consent (1989).

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NORTHWEST PASSAGE (CANADIAN-AMERICAN CONTROVERSY)

1. Background

In 1969, the passage of the *S.S. Manhattan*, an American ice-strengthened tanker, through Canada's Arctic → archipelago raised the issue of the international legal status of the so-called Northwest Passage, i.e. the waters bounded by Baffin Island in the east and the Beaufort Sea in the west. The voyage which was intended to test the feasibility of transporting oil from Alaska to the northeastern United States and perhaps Europe, was widely perceived as a challenge to the Canadian assertion that the Northwest Passage was part of the Canadian "national terrain".

Following the Manhattan's transit, Canada, in 1970, adopted twin legislation which extended her → territorial sea to twelve miles and established a far-reaching offshore pollution control régime covering Arctic waters up to 100 miles from Canadian coastal territory. Although Canada emphasized the limited jurisdictional nature of the latter, the new legislative measures ensured Canadian → sovereignty over two of the gateways to the Northwest Passage and put the Canadian Government in a position to control vessel traffic through the Passage under the guise of enforcing Canada's anti-pollution laws. The United States strongly objected to the Canadian pollution legislation as a unilateral extension of national jurisdiction on the → high seas unfounded in international law. A United States proposal to submit the dispute to adjudication by the

→ International Court of Justice (ICJ) was ignored by Canada which had acted to exclude from the Court's jurisdiction any dispute concerning the Arctic waters pollution legislation.

While eventually her limited jurisdictional claim was to be vindicated at the Third United Nations Law of the Sea Conference (see Art. 234 of the 1982 Law of the Sea Convention), Canada soon broadened her claim to one of full sovereignty over the waters of the Arctic archipelago. In 1975, the government unequivocally characterized the Northwest Passage as → internal waters and denied that it was subject to an international → straits régime. In 1985, when yet another United States vessel, the *Polar Sea*, was scheduled to sail through the Northwest Passage, Canada insisted that prior authorization be obtained while the United States refused to make such a request on the grounds that the Passage constituted an international strait. In the end, the transit took place after the United States had provided formal assurances that the voyage would not prejudice Canada's legal position.

Following this event, Canada announced a number of steps to reinforce her claim of sovereignty. Chief among them was the demarcation of "Canada's historic internal waters" in the Arctic by a system of straight → baselines drawn around the outer parameters of the Arctic archipelago. At the same time Canada sought immediate talks with the United States on cooperation in Arctic waters, "on the basis of full respect for Canadian sovereignty". In 1988, the two parties signed an Arctic Cooperation Agreement which commits the United States not to permit navigation by United States icebreakers in the disputed waters without the consent of the Canadian Government. However, the parties also stipulated that the Agreement "and any practice thereunder" would be without prejudice to their respective legal positions.

2. *Evaluation*

Although Canada's claim to sovereignty in the Arctic North is a matter of potentially wide international concern, the international dispute to which it has given rise has essentially retained a bilateral character. Within this bilateral setting, other concerns underlying the Canada-United States dispute, such as environmental or economic ones, have been subsumed into the single issue of navigational rights in the Northwest Passage. Initially, the question thus arises whether and on what basis Canada might be said to enjoy sovereignty over the waters concerned.

Canadian sovereignty over the Passage might either be grounded in a historic title (→ Historic Rights) or be the consequence of an internationally permissible application of straight baselines; the so-called sector theory has never been officially invoked by Canada and, in any event, would prove inherently unacceptable internationally. As between these two conceivable bases, the historic title is clearly the weaker one. Firstly, it is questionable whether Canada could meet the "continued exercise of State authority" test, given her own ambiguous posture in treating the Passage as historic internal waters prior to 1975. Secondly, consistent opposition by the United States, the country most directly affected by the Canadian claim, makes it impossible to argue → acquiescence by foreign countries, the other crucial element in a historic title.

Criteria for assessing the international legality of a deviation from normal baselines – drawn along the low water mark – were first authoritatively laid down by the ICJ in the Anglo-Norwegian Fisheries case (→ Fisheries Case (U.K. v. Norway)). After having been incorporated in Art. 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, they were reconfirmed, as well as refined, in Art. 7 of the 1982 Law of the Sea Convention. Although neither convention *per se* would apply to the dispute between Canada and the United States, the geographical criteria they incorporate nowadays must be deemed part of general → customary international law (→ Law of the Sea).

In this light, and considering the physical characteristics of the western part of the Northwest Passage, Canada's use of straight baselines in the Arctic archipelago appears problematical. Thus, the islands north of the Parry Channel are unlikely to be considered "in the immediate vicinity" of the mainland coast as required, nor might the seas in between "be sufficiently closely linked to the land domain" to constitute internal waters. Indeed, the straight baselines demarcating the western boundary, across the Amundsen Gulf and the M'Clure Strait, are 92.2 miles and 99.5 miles

respectively. They are drawn across open seas, not a fringe of islands or deeply indented coast lines. Although there exist few reliable indicia as to the maximum permissible length of straight baselines, the Passage's western boundary lines are extremely long compared to those used by other States. For example, Norway's longest line (enclosing Lopphavet basin) is 44 miles, while only five of Chile's more recent 74 straight baselines exceed 50 miles, the longest one measuring almost 65 miles.

On the other hand, any analogy between Canada's straight baseline system and "archipelagic baselines" under the 1982 Law of the Sea Convention is a strained one: Canada does not qualify as an "archipelagic State" within the meaning of Art. 46 of the Convention. Art. 47, which exceptionally permits archipelagic baselines of up to 125 miles, consequently cannot *eo ipse* provide support for Canada's stance in the Arctic dispute. Therefore, if Canada's Arctic baseline system must be deemed a novel, because unusually expansive, application of straight baselines whose international validity is premissed on foreign acquiescence, United States opposition raises serious doubts as to Canadian sovereignty over the Passage.

Even if Canada's system were in conformity with established international criteria and State practice, and the enclosed maritime space thus internal Canadian waters, foreign vessels would not automatically be precluded from using the Passage. Both Art. 5 of the 1958 Convention on the Territorial Sea and Contiguous Zone and Art. 8 of the 1982 Law of the Sea Convention preserve a right of → innocent passage through newly enclosed internal waters previously not considered as such. Today, the essence of this navigational "grandfather" clause might well be invocable *vis-à-vis* Canada as a customary legal principle. In any event, foreign rights to navigate the Northwest Passage would survive if the Passage were to be found to constitute an international strait.

The Passage easily satisfies the "geographic" criterion. A question arises, however, whether it meets the "functional" criterion, i.e. "use for international navigation". Open international use has amounted to little more than periodic transits of foreign vessels. Whether this fact would be sufficient grounds for denying the international strait character of the Northwest Passage is unclear. On the one hand, the remoteness of the Arctic waters surely implies a comensurately lower standard regarding requisite "use". On the other hand, Canada herself has acknowledged that transits by submerged foreign → submarines may have occurred frequently. Moreover, "use" is an ambiguous criterion. In the → Corfu Channel Case, the ICJ – without defining "use" – implied that potential use could be a factor in determining the status of a strait. By contrast, the 1958 Territorial Sea and the 1982 Law of the Sea Conventions appear to define a legal strait in terms of past use for navigation.

Conclusions as to the present status of the Northwest Passage as an international strait may thus be difficult, but they are not impossible. Once a *prima facie* case for legal strait status has been made out, based on evidence of geography and minimum international traffic, the burden of proof shifts to the coastal State. For the assertion of coastal State sovereignty presents itself as a derogation from the principle of freedom of navigation, a fundamental tenet that pervades the whole law of the sea (→ Navigation, Freedom of). When seen in this light, Canada's denial of foreign transit rights through the Northwest Passage, or conversely, her assertion of unfettered jurisdiction over it, looks unpersuasive.

3. Outlook

For the time being, the two disputants may have found a → *modus vivendi* that facilitates economic, scientific and environmental cooperation in the Arctic. However, if economic, technological or global environmental changes were to render the Passage more important for international navigation, the presently dormant bilateral conflict will erupt with full force. For Canada, sovereignty in the Arctic North is a potent symbol of both national identity and independence *vis-à-vis* her powerful southern neighbour. A Canadian concession on the issue of foreign rights of transit through the Passage is likely to make Canadian Arctic sovereignty acceptable to the United States while leaving the symbol intact. Such a compromise need not undermine protection of the Arctic → marine environment, another major Canadian concern. Canada possesses wide, internationally recognized jurisdictional powers that already reach

or could be negotiated to reach foreign vessels exercising a right of transit through the Northwest Passage.

In the end, it should be recognized, however, that access to and protection of the waters of the Northwest Passage present issues that will have to be resolved in consultation with neighbouring third States such as → Greenland and Denmark as well as the indigenous populations directly affected. In that sense, the eventual settlement of the Northwest Passage dispute is likely to be a pivotal element in the proposed multilateral management régime for the Arctic North that would involve all Arctic States and people.

Arctic Waters Pollution Act, c. 47, 18–19 Eliz. II, 1969–1970.

Territorial Sea Geographical Coordinates (Area 7) Order, S.O.R./85–872, Canada Gazette, Vol. 119, Pt.II, 3996, September 10, 1985.

Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, ILM, Vol. 28 (1989) 141–145.

R. McCONCHIE and R. REID, Canadian Foreign Policy and International Straits, in: B. Johnson and M. Zacher (eds.), Canadian Foreign Policy and the Law of the Sea (1977) 158–201.

M. REISMAN, The Régime of Straits and International Security: An Appraisal of International Lawmaking, AJIL, Vol. 74 (1980) 48–76.

D. McRAE and D. GOUNDREY, Environmental Jurisdiction in Arctic Waters: The Extent of Article 234, University of British Columbia Law Review, Vol. 16 (1982) 197–228.

A. SHUSTERICH, International Jurisdictional Issues in the Arctic Ocean, Ocean Development and International Law, Vol. 14 (1984–1985) 235–272.

M. KILLAS, The Legality of Canada's Claims to the Waters of its Arctic Archipelago, Ottawa Law Review, Vol. 19 (1987) 95–136.

C. LAMSON and D. VANDERZWAAG, Arctic Waters: Needs and Options for Canadian-American Cooperation, Ocean Development and International Law, Vol. 18 (1987) 45–99.

B. McKINNON, Arctic Baselines: A Litore Usque ad Litus, The Canadian Bar Review, Vol. 66 (1987) 790–817.

F. GRIFFITH (ed.), Politics of the Northwest Passage (1988).

D. PHARAND, Canada's Arctic Waters in International Law (1988).

D. PHARAND, Canada's Sovereignty over the Northwest Passage, Michigan Law Journal of International Law, Vol. 10 (1989) 653–675.

GÜNTHER HANDL
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ODER-NEISSE LINE

1. Location

The Oder-Neisse line derives its name from two rivers in central Europe: the Oder and the Neisse. The latter is a tributary of the former. Since there are two rivers named Neisse (in Polish: *Nysa*), both originating in the Sudety Mountains and traversing Silesia, it is important to distinguish between them. The first has its origin in the southern part of the mountain range in the vicinity of the city of Glatz and is, hence, known as the Glatzer Neisse or eastern Neisse; it flows eastward and reaches the Oder River (in Polish: *Odra*) south of the city of Breslau (in Polish: *Wroclaw*). The second river originates in the northern part of the Sudety Mountains near the city of Görlitz and is, hence, called the Görlitzer Neisse, as well as western Neisse or Lusatian Neisse; it flows north and reaches the Oder River north of the city of Guben (*Gubin*). It is the second Neisse River which has attained historical importance in connection with the Oder-Neisse line.

The first international document describing the Oder-Neisse line, the Report on the Tripartite Conference of Berlin of August 2, 1945 (→ Potsdam Agreements on Germany) defines the line in Sec. IX(B) as "running from the Baltic Sea immediately west of Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier".

2. Historical Evolution

The Oder-Neisse line emerged in the course of the Allies' discussions about the frontiers of Poland during World War II. Although plans to shift these frontiers westward from their pre-war location can be traced back to the very beginning of the war, these discussed aims did not become feasible before the Tehran Conference of November 28 to December 1, 1943. By then, it was apparent that the Soviet Union was not willing to relinquish the Polish territory she had acquired in 1939, extending roughly as far west as the → Curzon line. The Protocol of Proceedings of the Crimea or → Yalta Conference of February 11, 1945 declared: "The three Heads of Government consider that the Eastern frontier of Poland should follow the Curzon Line . . . . They recognise that

Poland must receive substantial accessions of territory in the North and West. They feel . . . that the final delimitation of the Western frontier of Poland should thereafter await the Peace Conference" (Foreign Relations of the United States. Diplomatic Papers. The Conferences of Malta and Yalta 1945 (1955) p. 975, at p. 980).

Previously, on September 12, 1944 the same three governments had signed the London Protocol (UNTS, Vol. 227, p. 279; → Germany, Occupation after World War II), declaring: "Germany, within her frontiers as they were on the 31st of December 1937, will, for the purposes of occupation, be divided into three zones, one of which will be allotted to each of the three Powers, and a special Berlin area, which will be under joint occupation by the three Powers." According to Point 2 of the Protocol the eastern zone, to be occupied by Soviet troops, was to include the territory of Germany east of a line drawn from the Baltic Sea east of Lübeck to the point where the northern frontier of Bavaria reaches the 1937 frontier of Czechoslovakia. No provision was made for any other line affecting the eastern zone. The Oder and Neisse rivers were mentioned neither in the Protocol nor in its amendment of November 14, 1944 (UNTS, Vol. 227, p. 286); the French zone of occupation, added after the accession of France to the Protocol, was carved out of the United States and British zones by agreement of the Four Powers. Nevertheless, Polish armed forces and civil administration were allowed by Soviet authorities to occupy and administer the German territories east of the Oder-Neisse line, excluding the northern part of East Prussia, immediately after the Soviet army had conquered them.

At the Potsdam Conference of July 17 to August 2, 1945, the Western Powers, reaffirming the London Protocol, reproached the Soviet Union for having violated the London Protocol, as well as the Berlin Declaration of June 5, 1945 (UNTS, Vol. 68, p. 189), by virtually establishing a fifth zone of occupation not provided for in the Protocol. The result of the ensuing discussion is reflected in Sec. XI(B) of the Report on the Tripartite Conference. In it, "the three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement". However, "pending the final determination of Poland's western frontier", they placed "the former German territories" east of the Oder-Neisse line, with the exception of northern East Prussia, "under the administration of the Polish State" and stressed that these territories "for such purposes should not be considered as part of the Soviet Zone of occupation in Germany".

3. Interpretation of the Potsdam Agreement

The wording of Sec. IX(B) of the Potsdam Agreement has given rise to different interpretations. On the one hand, the assertion, twice formulated in the Agreement, that the peace settlement would finally "delimitate" or "determine" the western frontier of Poland underscores the fact that the Potsdam Agreement is not a peace treaty and does not take the place of a peace settlement. On the other hand, the Powers represented at the Potsdam Conference issued additional statements contained in the Report on the Tripartite Conference and Protocol of Proceedings which must also be of legal relevance.

The view clearly distinguishing between the acquisition of → territorial sovereignty and of mere competence of administration may point to the precedent of Bosnia and Herzegovina. In this case the Austro-Hungarian Empire acquired the competence of administration while the Ottoman Empire retained sovereignty over these territories by virtue of the treaty of April 21, 1879 (Martens NRG2, Vol. 4, p. 422). The opposing view, asserting that the express reservation of the delimitation or determination of Poland's western frontier to a → peace treaty only refers to the technical process of marking the frontier, may point to the words "former German territories" used in Sec. IX(B) of the Potsdam Agreement for support.

If the second view is taken, it is necessary, however, to identify the legal title which enabled the Three Powers represented at the Potsdam Conference to transfer territorial sovereignty from Germany to Poland without the participation of either of these two States. The authors adhering to this view tend to base it on the traditional right of → annexation pertaining to the victor after complete subjugation of the enemy. This pre-

supposes that the right of annexation is in accordance with 20th century international law as it evolved following the partial ban on → war in the Covenant of the → League of Nations and the total ban on war in the → Kellogg-Briand Pact of 1928. Even assuming this to be the case, the situation in 1945 poses another difficulty for the proponents of this view: The four occupying Powers, among them the Three Powers represented at the Potsdam Conference, stated in their Berlin Declaration of June 5, 1945 that the assumption of supreme authority with respect to Germany "does not effect the annexation of Germany". However, another passage in the same Declaration supports them: The Four Powers declare that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory". Pointing to these words, K. Skubiszewski (Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement, AVR, Vol. 23 (1985) p. 3, at pp. 32–33) concludes as follows: "Having the right to annex and partition the whole of Germany the Great Powers *ipso jure* possessed the competence to decide the fate of merely some portions of German territory. This is what they did when they concluded the Potsdam Agreement on the Western Frontier of Poland."

The above-mentioned interpretations of Sec. IX(B) of the Potsdam Agreement reveal distinctly differing opinions on fundamental questions of international law, such as the admissibility of annexation, the competence of occupying powers (→ Occupation, Belligerent), the functions of a peace treaty, and the strength of the right of → self-determination of peoples. Whichever view is accepted, it must not be forgotten that the shifting of sovereignty over territories involves the populations living on them.

4. *Subsequent Legal Developments*

Poland considered the "former German territories" east of the Oder-Neisse line mentioned in Sec. IX(B) of the Potsdam Agreement to be integral parts of the Polish State and, accordingly, enacted laws for and extended full jurisdiction over these territories. These unilateral acts have been interpreted as constituting the annexation of the territories in themselves. A relevant bilateral act was the agreement concluded on August 16, 1945 between Poland and the Soviet Union on the delimitation of the frontier between the two States (UNTS, Vol. 10 (1947) p. 194). This agreement covers the frontier in respect of East Prussia, "until such time as territorial questions have been finally decided by peaceful settlement" (Art. 3).

On July 6, 1950, following their joint Warsaw Declaration of June 6, 1950, Poland and the German Democratic Republic concluded the treaty of Görlitz-Zgorzelec, reaffirming the Oder-Neisse line as the "State frontier between Poland and Germany" (UNTS, Vol. 319 (1959) p. 95). The United States Department of State protested in a statement to the press of June 8, 1950, declaring that the United States did not recognize the agreement and that "Germany's eastern boundary could be finally determined only when a peace treaty was drawn up" (Department of State Policy Statement of November 27, 1950, Foreign Relations of the United States 1950, Vol. 4 (1980) p. 1040, at p. 1043). The British Foreign Office refused to make any official response, since it had not been notified of the Görlitz treaty through diplomatic channels, but it issued a statement that the Oder-Neisse line had never been fixed as a definite frontier. The Potsdam Agreement, the statement said, had established the Oder-Neisse line merely as a temporary frontier (Keesings Archiv der Gegenwart, Vol. 20 (1950) p. 2426).

5. *The Warsaw Treaty and Moscow Treaty*

In order to end the dispute about the legal nature of the Oder-Neisse line and to clear the way for normal diplomatic relations, Poland and the Federal Republic of Germany concluded the Treaty on the Basis of Normalization of Mutual Relations, signed at Warsaw on December 7, 1970 and, hence, called the "Warsaw Treaty" (UNTS, Vol. 830 (1972) p. 327; → Germany, Federal Republic of, Treaties with Socialist States (1970–1974)). This treaty is part of a comprehensive effort to contribute to peace, cooperation and *détente* on the part of the Federal Republic and her partners, which had found previous expression in the treaty between the Federal Republic and the Soviet Union signed on August 12, 1970 in

Moscow, known as the "Moscow Treaty" (ILM, Vol. 9 (1970) p. 1026). In Art. 3 of the Moscow Treaty the signatories declared that they regard the frontiers of all States in Europe "including the Oder-Neisse Line which forms the western frontier of the People's Republic of Poland" to be inviolable for all time. Before signing the treaty, the Federal Republic sent diplomatic notes to the Moscow embassies of France, the United Kingdom and the United States, declaring that the treaty to be concluded would not affect the rights and responsibilities of the Four Powers with respect to Germany as a whole and Berlin (Bulletin der Bundesregierung Nr. 109, August 17, 1970, p. 1095). In identical notes of August 11, 1970 the three Western Powers accepted these notes and expressly reaffirmed support for their contents (ibid., p. 1096). They also accepted the Soviet response to the statement of the foreign minister of the Federal Republic addressed to the Soviet foreign minister on August 6, 1970, which reaffirmed that "the question of the rights of the Four Powers" had not been the object of negotiations.

The exchange of diplomatic notes made it clear that the eventual conclusion of a formal peace treaty between Germany and her World War II adversaries was not to be prejudiced by the Moscow Treaty. A similar exchange of notes took place prior to the signing of the Warsaw Treaty. The Federal Republic sent identical notes to the embassies of the three Western Powers in Bonn on November 19, 1970 (ILM, Vol. 10 (1971) p. 128). These Powers replied on the same day in likewise identical notes, reaffirming that "the Treaty does not and cannot affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America as reflected in the known treaties and agreements" (ibid., p. 129).

In Art. I, clause 1 of the Warsaw Treaty the parties agreed that the Oder-Neisse line, as described in Sec. IX(B) of the Potsdam Agreement, "constitutes the western State frontier of the Polish People's Republic". This is reinforced by clause 2 of Art. I in which the parties "confirm the inviolability of their existing frontiers, now and hereafter, and pledge absolute respect for each other's territorial integrity" and by clause 3 of Art. I in which the parties "declare that they have no territorial claims against each other and will advance none in the future" (UNTS, Vol. 830 (1972) p. 832, at p. 834).

The Warsaw Treaty, thus, establishes clear international obligations to which the Federal Republic is bound in her relations with Poland regardless of any difficulties that may arise from constitutional provisions on the national level. There is no doubt that as long as the Federal Republic exists the territorial questions connected with the Oder-Neisse line are settled by the Warsaw Treaty.

Report on the Tripartite Conference of Berlin, August 2, 1945, DeptStateBull, Vol. 13 (1945) 153–161.

Agreement concerning the Basis for Normalization of their Mutual Relations, December 7, 1970, UNTS, Vol. 830 (1972) 327–335.

H. KRAUS, Die Oder-Neisse-Linie (2nd ed. 1954).

K. SKUBISZEWSKI, La frontière polono-allemande en droit international, RGDIP, Vol. 61 (1957) 242–258.

Deutsches Institut für Zeitgeschichte (ed.), Polen, Deutschland und die Oder-Neisse-Grenze (1959).

G. RHODE and W. WAGNER (eds.), Quellen zur Entstehung der Oder-Neisse-Linie in den diplomatischen Verhandlungen während des Zweiten Weltkrieges (1959).

M. LACHS, The Polish-German Frontier (1964).

W. WAGNER, Die Entstehung der Oder-Neisse-Linie (3rd ed. 1964).

H.G. MARZIAN, The German Frontier Problem (1969).

S. KRÜLLE, Die völkerrechtlichen Aspekte des Oder-Neisse-Problems (1970).

D. COLARD, Considérations sur les "Traités de Normalisation" signés par la R.F.A. avec l'U.R.S.S. et la Pologne, RGDIP, Vol. 75 (1971) 333–355.

J.A. FROWEIN, Die Grenzbestimmungen der Ostverträge und ihre völkerrechtliche Bedeutung, in: Institut für Internationales Recht der Universität Kiel (ed.), Ostverträge, Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR, Vorträge und Diskussionen eines Symposiums, March 27–29, 1971 (1971) 27–32.

H. MEYROWITZ, Le Traité de Varsovie du 7 décembre 1970, RGDIP, Vol. 75 (1971) 944–1013.

K. SKUBISZEWSKI, Poland's Western Frontier and the 1970 Treaties, AJIL, Vol. 67 (1973) 23–43.

A.M. DE ZAYAS, Nemesis at Potsdam (1977).

B. ZÜRNDORF, Die Ostverträge (1979).

C. ARNDT, Legal Problems of the German Eastern Treaties, AJIL, Vol. 74 (1980) 122–133.

A. VERDROSS, B. SIMMA and R. GEIGER, Territoriale Souveränität und Gebietshoheit. Zur völkerrechtlichen Lage der Oder-Neiße-Gebiete (1980).

C. ARNDT, Die Verträge von Moskau und Warschau (2nd ed. 1982).

L. GELBERG, The Warsaw Treaty of 1970 and the Western Boundary of Poland, AJIL, Vol. 76 (1982) 119–129.
M. SCHMITZ, Die Rechtslage der deutschen Ostgebiete. Die Oder-Neiße-Grenze im Blickpunkt des Völkerrechts (1986).

OTTO KIMMINICH

ORINOCO RIVER

The Orinoco river flows in a giant arc for 2151 kilometres from its source in Venezuela's Guiana Highland to its mouth in the Atlantic Ocean. The river basin covers an area of about 950 000 square kilometres, encompassing approximately four-fifths of Venezuela and one-fourth of Colombia. Throughout most of its course, the river flows through Venezuela, except for a section approximately 280 kilometres long which forms the frontier between Venezuela and Colombia (→ International Rivers). The Orinoco and its tributaries have long served as important waterways. Large river steamers travel up-river on the Orinoco for over 1000 kilometres from the delta to the Raudal de Atures. Dredging has allowed large ocean-going vessels to navigate the Orinoco from its mouth to its confluence with the Caroní river, a distance of approximately 350 kilometres.

The fact of forming the → boundary between two States gives the Orinoco river a readily apparent international legal dimension. This fact also explains why, in their bilateral treaties and agreements which explicitly or implicitly concern the Orinoco river, Colombia and Venezuela have been so far mostly preoccupied with frontier demarcation and related issues.

Downstream from the frontier stretch of the river, where the Orinoco is navigable and flows wholly in Venezuelan territory, all nations enjoy freedom of access to the river and freedom of navigation on it by virtue of a unilateral grant stipulated in the Decree of the Venezuelan Congress of May 14, 1869. This decree, and the implementing Presidential Decree of July 1, 1869 (P. Fauchille, Traité de droit international public, Vol. 1, part 2 (1925) p. 478), restricts the scope of the grant to steamships engaged in inland trading, to the express exclusion of those engaged also in maritime trading; the law also lays down certain procedural requirements for the actual enjoyment of the grant. This act of the Venezuelan legislature is consistent with established practice of South American States whereby freedom of navigation on rivers where two or more States are involved accrues to ships flying a foreign flag from a grant of the riparian States concerned (→ Navigation on Rivers and Canals). The grant can be either unilateral and have its source in the domestic legislation of the riparian States, or it can be bilateral or multilateral and have its source in international treaties and agreements among the States concerned.

A pertinent example of the latter category of grant with respect to the Orinoco river is the reciprocal grant of freedom of navigation on all rivers which traverse or separate the two countries, effected by Venezuela and Colombia by virtue of the Treaty on the Demarcation of Frontiers and Navigation of the Common Rivers of April 5, 1943 (BFSP, Vol. 144, p. 748). As a result of this Treaty, the stretch of the Orinoco river which forms the boundary between Venezuela and Colombia is, in principle, open to free and unimpeded navigation by the vessels flying the flag of either country, subject to uniform police, customs and health regulations. Navigation between → ports of one country alone, and → cabotage, are expressly excepted from the scope of the grant, and remain subject to the → domestic jurisdiction of Colombia or Venezuela, as the case may be.

Certain uses of the water resources in the boundary stretch of the Orinoco river come by implication within the purview of the legal régime mutually agreed upon by Colombia and Venezuela with regard to all of their frontiers, both on land and water. Such a régime is recorded in the Statute between Colombia and Venezuela Regulating the Frontier Régime of August 5, 1942 (Colección de Tratados Públicos y Acuerdos Internacionales de Venezuela, Vol. 7 (1945) p. 422). With specific regard to frontier watercourses, fishing on all non-navigable frontier rivers and streams can be carried out by the nationals of each country up to the median line (*linea media*) of the river or stream on their respective side of the border (Art. 22). The use of fixed fishing nets or other devices which impede the free movement of fish from one bank to the other, and the use of explosives and poisonous substances are all expressly forbidden

(Art. 23). The treaty also grants the frontier population freedom to use boats for fishing or for any other lawful purpose (Art. 24).

In more recent years, specific bilateral concern for the development of the Orinoco river has been voiced in a number of solemn joint → declarations emanating from the Presidents of Colombia and Venezuela. The joint declaration issued in Bogotá on August 9, 1969 called for the full development of the navigation potential of the Orinoco, and for a → mixed commission to give the matter further consideration. The integrated development and management of, among others, the Upper Orinoco river basin through a mixed commission was called for in the joint presidential declaration of July 23, 1976 issued on board the dredger *Carabobo*. This specific understanding was solemnly confirmed in the joint presidential declaration of June 14, 1985, issued on the J.A. Páez international bridge on the Arauca river, and the foreign relations authorities of the two countries were instructed to set the dates for the first convening of the mixed commission called for in the 1976 declaration.

These pronouncements are significant in that they indicate a readiness on the part of both Colombia and Venezuela to shift the focus of bilateral concern from the boundary stretch of the Orinoco river, in an upstream and downstream direction from it, and from navigation to other uses of the water resources of the river, within the broader context of the vast river basin regarded as a whole. Until such time as this readiness is translated into specific international obligations, and with due regard for the standing international obligations of Colombia and Venezuela concerning both reciprocal freedom to navigate all along the course of the Orinoco river, and restrictions on fishing in the frontier stretch of the river, the non-navigational uses of the Orinoco river water resources by Colombia and Venezuela in their respective territories must be deemed to be governed by rules of → customary international law. Such rules as have come to be largely accepted by the international community in this matter are the following: (a) a general duty of all co-riparian or co-basin States not to cause substantial injury to each other's territory; (b) a right of all co-riparian or co-basin States concerned to a reasonable and equitable share in the use of the waters of an international watercourse or basin; and (c) a duty to consult and then engage in → good faith in → negotiations with a view to reconciling the interests of the co-riparian or co-basin States concerned.

In the specific context of relations among South American countries, evidence of substantial regional support for these principles is to be found in the Declaration concerning the Industrial and Agricultural Use of International Rivers, adopted at the Seventh International Conference of American States held in Montevideo, in 1933 (text in Organización de los Estados Americanos (OEA), Rios y Lagos Internacionales, Utilización para Fines Agrícolas e Industriales (1967) p. 131), and in the Draft Convention on the Industrial and Agricultural Use of International Rivers and Lakes adopted by the Inter-American Juridical Committee of the → Organization of American States in Río de Janeiro, September 1, 1965 (Text in OEA, ibid., p. 152).

United Nations, Register of International River Basins. Report of the Secretary-General, UN Doc. E/C.7/71 of March 11, 1977.

J.A. BARBERIS, Los recursos naturales compartidos entre Estados y el derecho internacional (1979) 26–54.

B. VITÁNYI, The International Regime of River Navigation (1979) 93–98.

STEFANO BURCHI

PACIFIC ISLANDS

1. Geography and History

The pacific islands comprise the Micronesian Islands administered since 1946 by the United States of America under the → United Nations Trusteeship System as a → strategic area. They are situated between latitudes 1° and 22° North and between longitudes 142° and 172° East. The Archipelagos of the Marshalls, the Carolines and the Marianas (excluding Guam) comprise more than 2100 islands scattered over an area of more than 7.8 million square kilometres. These islands, of which about one hundred are inhabited, have a combined land area of about 18 050 square kilometres. The total population is about 165 000 inhabitants. Nine distinct languages with variations of dialects are spoken in the territory.

In the second half of the 19th century Spain was the colonizing power in this region, operating from the Philippines (→ Colonies and Colonial Régime). In 1885 Germany established a colonial → protectorate in the Marshall Islands. After the American-Spanish war, Spain ceded the Carolines and Marianas (except Guam) to Germany in 1899. In 1914 Japanese troops occupied the islands. In 1920 the → League of Nations placed the islands under Japanese authority as a C-mandate (→ Mandates). The islands were occupied by American forces in 1944, and in 1946 were placed under the UN trusteeship system with the United States as administering authority. They were designated as a strategic area.

Gradually, the population took part in the local administration and in the lawmaking process. In 1965 the Congress of Micronesia was formed to prepare a new political status of the islands. The development led to the forming of four different States: the Federated States of Micronesia, the Republic of the Marshall Islands, the Republic of Palau and the Commonwealth of the Northern Mariana Islands.

2. The States in Free Association to the United States of America

(a) The Federated States of Micronesia

In 1967 the Congress of Micronesia established the Future Political Status Commission to negotiate with the United States. Between October 1969 and May 1976 eight rounds of → negotiations took place. During the third round in 1971 the negotiators agreed on a framework for free association which envisaged that the United States would retain foreign affairs and defence authority and that Micronesia would be internally self-governing. During the fourth round, held at Koror (Palau) in April 1972, the representatives of the Northern Mariana Islands requested separate negotiations with the United States, which finally led to a closer relationship of the Marianas to the United States in the form of a Commonwealth.

In the mid-1970s the representatives of the Marshalls and of Palau decided to set up political entities of their own and requested separate negotiations with the United States. After the second round-table conference in Guam in July 1977 the negotiations took place on two levels: multilateral negotiations focused on those aspects of the relationship with the United States common to all districts and the second level of bilateral negotiations addressed matters of a specific nature important to each district. An agreement was reached during the meeting in Hilo, Hawaii, in early 1978. On July 12, 1978, a referendum was held on the proposed constitution of the Federated States of Micronesia. The constitution was ratified in the four central Caroline Districts of Yap, Ponape, Truk and Kosrae, but the constitution was rejected in Palau and the Marshall Islands.

The negotiations on the general level led to the Compact of Free Association which was signed by the United States and the Federated States of Micronesia on October 1, 1982, and by the Marshall Islands on June 25, 1983. The Compact of Free Association was approved by the majority of the people of the Federated States of Micronesia and the Marshall Islands in → plebiscites under the observance of the → United Nations conducted on June 21, 1983, and September 7, 1983, respectively. The Compact of Free Association with Palau was signed on January 10, 1986, after some further negotiations.

The compacts establish a special relationship between the associated States and the United States. They state that the associated States are self-governing. Capacity to conduct foreign affairs on their own rests with the associated States (→ Foreign Relations Power). The United States has full authority and responsibility for security and defence matters in or relating to the associated States. Defence treaties or other international security agreements fall into the exclusive → jurisdiction of the United States; in recognition of the competence of the United States in relation to defence the associated States shall consult, in the conduct of their foreign affairs, the Government of the United States. The United States provides for each associated State financial grants and programme assistance. The Compact of Free Association Act of 1985 of the United States provides for the application of the compacts. It comprises special provisions for programmes related to the effects of the → nuclear tests on some of the atolls of the Marshall Islands.

The constitution of the Federated States of Micronesia was approved in a referendum on March 1, 1979. The federal State comprises the

states of Kosrae, Pohnpei (the former Ponape), Truk and Yap. The Congress of Micronesia is the parliament with legislative powers; it elects the president. The four member states have their own legislatures and governments.

(b) The Republic of the Marshall Islands

The Marshall Islands are also a State in free association to the United States. The Compact of Free Association in force in respect of the Marshall Islands is the same instrument as the Compact for Micronesia. The constitution was approved in the referendum of March 1, 1979. It provides for basic rights and the organs of the State. The legislative powers are vested in the elected Nitijela, consisting of 33 members. The council of Iroij, consisting of 12 members from the different districts, has advisory functions and the right to request the reconsideration of any bill affecting local customary law or any traditional practice. The cabinet is elected by the Nitijela from among its members.

(c) The Republic of Palau

The constitution of the Republic of Palau was approved by a referendum on July 9, 1979. It provides for member states with constitutions, governments and legislatures; Palau is formed of sixteen member states with a total population of not more than 14 000 people in 1987. The legislature consists of two houses; the president is to be elected in a nationwide election. The constitution provides that the use, storage or disposal of nuclear weapons need the express approval of 75 per cent of the votes in a referendum. The same majority is needed for a treaty or compact allowing for such a disposal or for an amendment to the constitution proposed to avoid inconsistency with the Compact of Free Association. Even a fifth plebiscite on a revised compact with the United States, held in June 1987, failed to secure that majority: 5500 votes were in favour, 2600 votes against.

In a new referendum an amendment to the constitution was approved, assuring that a simple majority would be needed to approve the compact. This amendment, however, was declared unconstitutional by the Supreme Court of Palau. Since the compact has not been approved with the required majority of 75 per cent, the Compact of Free Association between Palau and the United States is not yet in force. Accordingly, the trusteeship system is still applicable to Palau. The United States declared in a proclamation dated November 3, 1986, that the trusteeship agreement had come to an end with respect to the Northern Marianas, the Marshalls and the Federated States of Micronesia, but that she would continue to discharge her responsibilities in Palau as administering authority.

(d) The Northern Mariana Islands

The separate negotiations between the Northern Mariana Islands and the United States led to the Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, signed on February 5, 1975, and approved by a referendum under the supervision of the UN Trusteeship Council on July 8, 1975. The covenant states that the Northern Marianas will become a self-governing commonwealth in political union with and under sovereignty of the United States of America. The covenant provides for constitutional principles: a bicameral parliament, an elected governor and an independent judiciary. The constitution was approved in October 1977. The new system entered entirely into force in November 1986 in accordance with the proclamation ending trusteeship over the Marianas.

A. BLAUSTEIN and P. BLAUSTEIN (eds.). Constitutions of Dependencies and Special Sovereignties, United States – United States Territories: Federated States of Micronesia (1987); Republic of the Marshall Islands (1987); The Republic of Palau (1988); The Commonwealth of the Northern Mariana Islands (1988).

Department of State, United States of America, 1986 – Trust Territory of the Pacific Islands (39th Annual Report to the United Nations on the Administration of the Trust Territory of the Pacific Islands).

N. MELLER, The Congress of Micronesia (1969).

A.J. ARMSTRONG, The Emergence of the Micronesians into the International Community: A Study of the Creation of a New International Entity, Brooklyn Journal of International Law, Vol. 5 (1979) 207–261.

A.J. ARMSTRONG, Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia, Brooklyn Journal of International Law, Vol. 7 (1981) 179–233.

D. ISENBURG, Reconciling Independence and Security:

The Long Term Status of the Trust Territory of the Pacific Islands, Pacific Basin Law Journal, Vol. 4 (1985) 210–243.

N. HIRAYASU, The Process of Self-Determination and Micronesia's Future Political Status under International Law, University of Hawaii Law Review, Vol. 9 (1987) 487–532.

DIETRICH RAUSCHNING

PALESTINE

1. Origins of the Palestine Issue

Palestine, a land with an ancient history, sacred to the three great monotheistic religions, constituted part of the provinces of the Ottoman Empire after 1517, when an area approximating that belonging to the independent *sanjak* of Jerusalem and the *sanjaks* of Acre and Balqa was captured by Sultan Selim I. The Ottoman Empire entered the First World War on the side of the Central Powers and suffered defeat at the hands of the Allied Powers. Palestine itself was occupied by the allied forces in December 1917 and placed under British military administration.

The subsequent → dismemberment of the Ottoman Empire marks, as far as Palestine is concerned, the beginning of a long conflict, which has involved the struggle for → self-determination and independence by the Palestinian people. This conflict, if left unresolved, will continue to threaten not only peace in the Middle East, but peace world-wide.

2. Establishment, Delineation and sui generis Character of the Palestine Mandate

The Supreme Council of the Principal Allied Powers decided on April 25, 1920 at the San Remo Conference to place Palestine under an international → mandate pursuant to Art. 22 of the Covenant of the → League of Nations. The United Kingdom, already acting as administrator of the territory, was selected as the Mandatory Power. The draft text of the mandate, drawn up by the British Government and approved by the House of Commons, was confirmed by the Council of the League of Nations in July 1922.

At that time the new Turkish Republic, successor to the Ottoman Empire, was still the official sovereign over the territory, as it had refused to sign the Peace Treaty of Sèvres of August 10, 1920 (LNTS, Vol. 8, p. 39; → Peace Treaties after World War I; → Sovereignty; → Territorial Sovereignty). The United Kingdom was consequently no more than a belligerent occupant (→ Occupation, Belligerent). The legal existence of the mandate could only be secured by the conclusion of a peace treaty with Turkey in which the latter relinquished any rights of sovereignty over the area. This result was finally effected in the → Lausanne Peace Treaty of July 24, 1923 (LNTS, Vol. 701, p. 11). With the ratification of this treaty on September 29, 1923, the Palestine class A Mandate officially came into force, establishing a provisionally recognized "independent" Palestine subject to the rendering of administrative advice and assistance by the Mandatory until such time as it would be able to stand alone.

The Palestine Mandate contained an important *sui generis* characteristic. It gave international legal sanction to the Balfour Declaration, which was a policy declaration by the British Government containing a promise to use its best efforts to facilitate the establishment of a "Jewish National Home" in Palestine. This promise was explicitly worked out in the Mandate text (see especially Arts. 2, 4, 6, 7, 11 and 22). The policy of the "National Home" subsequently led to a considerable immigration of Jews to Palestine. This policy, together with the legal tools available in the Mandate Charter and, more particularly the role and the powers of the Zionist Organisation – Jewish Agency (an official public body), enabled the Jewish community in Palestine to seek independent "Jewish" Statehood.

Originally the Palestine Mandate also comprised 70 000 square kilometres east of the Jordan River. Under Art. 25 of the Mandate Charter, the Council of the League of Nations approved on September 16, 1922 Britain's proposals to designate this portion of the Mandate territory as Transjordan. *De facto*, however, after the agreement of February 1928 between the British Government and the Emir of Transjordan, Transjordan was separated from Palestine and the Mandatory's obligations were considered satisfied

in virtue of its agreement with the autonomous Transjordan Government.

3. *Legal Status of the Palestine Mandate*

Basically four arguments have been put forward to attack the legality of the Palestine Mandate: firstly, it was a violation of the sovereignty and the right of self-determination of the original inhabitants; secondly the Jewish National Home policy was a violation of the well-being and the development of the Palestinian people; thirdly, the rights and wishes of the Palestinians were not taken into consideration; and lastly, the Mandatory was granted full administrative and legislative control over the Mandate in contravention of the purpose of Class A Mandates under the Covenant.

These objections must be rejected. Firstly, the principles of sovereignty and self-determination could not be applied, at least not as legal rights, to the mandated territories. Secondly, since the supreme competent organs of the League of Nations reached the conclusion that it was in the interest of humanity that a solution be found for the national problem of the Jewish people, there was nothing to prevent the Mandate from being drafted as it was. Thirdly, the views and opinions of the Palestine population (see the consultation held by the King-Crane Commission in 1919 (Foreign Relations of the United States, Paris Peace Conference, Vol. 12 (1919) p. 745)) were not as such legally binding upon the League and the Mandatory, as was the case for other mandated territories. Finally, it was provided in Art. 22 of the League's Covenant that the degree of authority to be exercised by the Mandatory shall be determined by the Council of the League and that "other circumstances", *in casu* the *sui generis* characteristic of the Palestine Mandate, may well justify a special grant of powers. Consequently there existed a valid and dual obligation: one resulting from the Mandate *in se*, and one resulting from the incorporation of the policy of the Jewish National Home in the Mandate Charter.

4. *Status of "Palestine" after the Dissolution of the League of Nations*

It has been generally accepted in international law that there is no succession between the League of Nations and the → United Nations. The judgments of the → International Court of Justice do not leave any doubt, however, about the continuance of the institution of mandates after the disappearance of the original supervisory machinery. In the case of the Palestine Mandate, under which no direct provision was made for the granting of independence, there was no obligation to place the mandated territory under trusteeship, since the trusteeship system did not automatically replace the mandate system. Consequently, the Mandatory Power kept the obligation of administering Palestine as a mandated territory, but that obligation did not rest solely on its shoulders.

5. *Co-Responsibility of the United Nations and of the Mandatory Power for the Granting of Independence to Palestine*

It has been repeatedly upheld by the International Court of Justice that the continuance of Mandate status not only implies further administration of the territory in question by the Mandatory, but equally includes further supervision of this administration by the → United Nations General Assembly. Acting together, the United Kingdom and the General Assembly were empowered to change the status of the Palestine Mandate and to grant the country independence.

Although responsibility remained in the hands of both the United Kingdom and the General Assembly, the United Kingdom Government in April 1947 reversed the original decision-making process by delegating its powers to the General Assembly. However, the United Kingdom remained free to accept or reject the ultimate decision of the world organization. The attitude of the United Kingdom concerning that ultimate decision, as formulated in the UN General Assembly's partition Resolution 181 (II) of November 29, 1947, notwithstanding her abstention, was acquiescence, since she doubted whether partition was really the right and just solution, but saw no valid alternative.

Co-responsibility, which continued despite the delegation of powers by the Mandatory, formed the basis of the General Assembly's competence to reach a decision "binding in international law". Consequently the General Assembly acted here not so much according to its explicit powers under the → United Nations Charter as within the scope of the mandate system.

6. *Independence and the Right to Self-Determination*

As principal architect and adjudicator in the elaboration of a solution for the Palestine problem, the UN General Assembly was bound by the Charter provisions on self-determination. From April until November 1947, the period leading up to the adoption of the Palestine partition plan under UN auspices, the wishes of the inhabitants were insufficiently taken into account. The General Assembly did not finally decide on the basis of the "majority rule" principle. Nevertheless, the partition Resolution was adopted after a thorough analysis of the situation, as shown by the detailed findings of the United Nations Special Committee on Palestine (UNSCOP) (UN GA, Official Records of the 2nd session (1947) Supp. 11, Vol. 1) and the subsequent report of the General Assembly's *ad hoc* committee on Palestine (UN GA, Official Records of the 2nd session (1947), *Ad Hoc* Committee on the Palestine Question, Summary Records of Meeting, September 15 to November 25, 1947). However, the General Assembly could not dismiss the existence of a strong and distinct Jewish national identity in Palestine. Consequently, the right to self-determination, in the early years of the United Nations still very much a *lex imperfecta*, and the right to Statehood must be assessed here with regard to Palestine within the context of a *sui generis* mandate.

The United Kingdom, not convinced of the successful chances for implementation of the envisaged partition of the Palestine Mandate into a Jewish State and an Arab State with an economic union and international status for → Jerusalem, and hardened in her opinion by the increasing tensions and hostilities between the Arab and Jewish communities in Palestine, unilaterally renounced her mandatory powers to take effect May 14, 1948. This automatically meant that the sole organ charged with administering the territory after that date was the UN General Assembly.

At a second special session of the General Assembly in April/May 1948 it was clear from the beginning that the whole problem was in a complete imbroglio. The United Nations was not able to handle the situation. Faced with an imminent British withdrawal, nothing more than a minimum solution could be accepted, namely the appointment of a mediator for Palestine. At the same time, however, the central organ charged with the implementation of the partition Resolution, the Palestine Commission, was dissolved.

As a result, the UN General Assembly found it impossible to maintain any longer an international mandate status or any other supervisory status for Palestine. On May 14, 1948 it implicitly renounced its supervisory responsibilities for mandated Palestine. Consequently, Palestine became a *terra derelicta* and a "sovereignty vacuum" ensued. It was now up to the Jewish and Arab populations to fill this vacuum by proclaiming the independence of their respective States. It must be added that in 1946 the Transjordanian part of the Mandate had already become a fully independent and sovereign State known as the Hashimite Kingdom of Transjordan.

7. *The Present Status of "Palestine"*

A sovereignty vacuum existed in the whole of Palestine only for a symbolic second, i.e. between the termination of the Mandate and the proclamation of the independence of the State of Israel. Nevertheless, after Israel came into being, a sovereignty vacuum remained for the rest of Palestine, since no Arab Palestinian State was established.

This means that there was not only no State sovereignty vested in the remaining area, but that there was not even an administering authority entitled and willing at that time to exercise its powers. However, the right of the inhabitants of such an area to sovereignty and independence does not become extinct, but remains in suspension. There does not exist a *terra nullius*.

Accordingly, the Arab rejection of the UN partition plan and refusal to proclaim an independent State did not represent a renunciation of the Arab right to sovereignty. This right still exists, since no further opportunity to exercise it has occurred to date. The Arab Palestinians have not ceased to exist as a people. They have never accepted or acquiesced in foreign rule over their territory. Consequently, no loss or extinction of their right to sovereignty and independence can be said to have occurred. This is evidenced not only by the short-lived all-Palestine Government (1948 to 1952) and the representation of Palestine in the → League of Arab States since 1948 (→ Arab States, League of), but, first and foremost, by the

creation of the → Palestine Liberation Organization (PLO) in 1964 and its increasingly strengthened international status ever since.

However, since May 1948 the State of Israel has seized, partly annexed and partly occupied the State territory of "Palestine" as it was conceived in the terms of the UN partition plan (→ Israel: Status, Territory and Occupied Territories). The sovereignty vacuum in 1948 to 1949 and the 1949 armistice agreements between Israel and Egypt (February 24, 1949, UNTS, Vol. 42, p. 251) and Israel and Jordan (April 3, 1949, UNTS, Vol. 42, p. 303) led to a carving up of Palestine among these three States (→ Armistice). They could be considered as trustees over the seized territories but definitely not as sovereigns. The Six Day War and Israeli invasion of June 1967 put an end to Egypt's and Jordan's administration of the Gaza Strip and of the West Bank respectively, but the present status of Israel in these territories is nothing more than that of a belligerent occupant.

Notwithstanding Israel's trustee and belligerent occupancy, the sovereignty vacuum continues to exist. It is an exaggeration to see in this vacuum an Arab State in *statu nascendi*. The basic elements of Statehood, e.g. a defined people and an established, though in recent years increasingly questioned authority, can be said to be present. However, there is as yet no possibility to vest sovereign title in the Arab Palestinians over Palestinian territory, since this would mean a second partition of Palestine which cannot this time be effected within the framework of a mandate system. Such a partition would require that Israel give up control over illegally seized Palestine territories. On the other hand, the Palestinians would have to agree to such a second partition, which must include some type of Statehood, with or without a union or a federation.

An important new step towards the realization of the second part of this "partition" requirement was taken on November 15, 1988, when the Palestine National Council, the governing body of the PLO, officially proclaimed the "independence" of a Palestinian State with Jerusalem as its capital. In this proclamation explicit reference was made to the 1947 UN partition Resolution 181, but, apart from a reiterated call for Israeli withdrawal from the occupied territories, no clear indications were given as to the precise scope of the territory of such a State. Moreover, no provisional government was established; only a declaration of intent in that sense was issued. Consequently, neither the proclamation nor the premature recognition of this "State" by a rather impressive number of Arab or Muslim countries, as well as by many so-called non-aligned countries, by socialist States and even by a few western States, would suffice to comply with the core of the Statehood criteria, e.g. the control by an established governmental authority over a well-defined territory.

While "Palestine" may as yet not be a State in *statu nascendi*, the Palestinian people's right to sovereignty and independence is no longer in suspension. As a result, it is still very much up to the international community to achieve a durable settlement for this most serious problem.

The Origins and Evolution of the Palestine Problem, Parts I, II, III, UN Doc. ST/SG/SER.F/1 (1978–1984).

J. KHOURY, La Palestine devant le monde (1953).

J. MARLOWE, The Seat of Pilate. An Account of the Palestine Mandate (1959).

N. FEINBERG, The Arab-Israeli Conflict, in: J.N. Moore (ed.), The Arab-Israeli Conflict I, Readings (1974) 386–488.

H. CATTAN, Palestine and International Law (1976).

F. VAN DE CRAEN, The Territorial Title of the State of Israel to "Palestine", an Appraisal in International Law, RevBelg, Vol. 14 (1978–1979) 500–538.

H.Z. NUSEIBEH, Palestine and the United Nations (1981).

J. STONE, Israel and Palestine: Assault on the Law of Nations (1981).

J.H. WEILER, Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible, Texas ILJ, Vol. 17 (1982) 287–385.

B. KIMMERLING, Zionism and Territory (1983).

E.A. MUVDI, Palestine y el derecho de gentes (1983).

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PALESTINE LIBERATION ORGANIZATION

1. History and Structure

The Palestine Liberation Organization (PLO) is a self-proclaimed → liberation movement that was constituted at the first Palestine National Council held in → Jerusalem on May 20, 1964. The PLO replaced the Government of All Palestine at the Arab League (→ Arab States,

League of) and claimed for itself the right to represent the Palestinian people. It was first led by Ahmad Shukairy, but Shukairy's PLO was not destined to provide the kind of revolutionary appeal and leadership demanded by the Palestinians. The drastic defeat of the Arabs in the June 1967 war between → Israel and the Arab States brought about a significant increase in the PLO's power and culminated in the emergence of Yasir Arafat's Fatah as the major group within the PLO organization. Other components of the PLO include *inter alia* the following: the Popular Front for the Liberation of Palestine (PFLP), led by G. Habash; the Democratic Front for the Liberation of Palestine (DFLP), led by N. Hawatmeh; the PFLP-General Command, led by A. Jabril; the Syrian controlled Saiqua, led by I. al-Quadi; and the Iraqi controlled ALF, led by A. Abd-al-Rahim.

In consonance with the Palestinian National Covenant as amended in 1968, the PLO is governed by an Executive Committee which elects a Chairman, a post which since 1969 has been held by Yasir Arafat. The Executive Committee is in term elected by the Palestine National Council (PNC). The PLO consists of the combined membership of its constituent organizations. Its leadership is collective and only the PNC may make or change basic policy positions. Internally, the PLO has structured itself as "a government-in-process".

2. *Goals and Objectives*

Since 1968, the radical Palestinian National Covenant has not been altered or revised. Predicated upon the central provisions of this covenant, the PLO's liberation strategy aims, first, at the removal of Israel as an occupant of the West Bank and Gaza (→ Israel: Status, Territory and Occupied Territories): second, at the establishment of a Palestinian State in these liberated territories, and finally, third, at the dismantling of the State of Israel, the absorption of its territory into a secular and democratic Palestinian State, and the expulsion of that part of the Jewish population not entitled to remain in the new State of → Palestine, i.e. Jews who did not inhabit the region prior to the formation of the State of Israel (→ Population, Expulsion and Transfer).

Between the black letter of the Palestinian Covenant and the day-to-day policies of the PLO, however, an increasing gap has arisen. As early as 1974 the PNC declared its support for a two-State solution, and in 1983 the PNC accepted the Brezhnew Plan and the Venice Declaration of the → European Economic Community which explicitly support the security and → sovereignty of all States in the region, including Israel (cf. UN SC Res. 242 of 1967). The Hussein-Arafat accord of February 1985, which speaks *inter alia* of a Palestinian-Jordanian Confederation, the resolutions of the 19th session of the PNC held in November 1988 and Arafat's last major speech before the → United Nations General Assembly on the Palestine question in Geneva on December 13, 1988 reaffirm this more pragmatic and flexible line.

Nevertheless, the PLO's Covenant has up to now not been adapted to such a course and deliberately avoids formulating a clear-cut scheme of action leading to the establishment of a Palestinian State. An explicit statement of → recognition of the State of Israel has as yet not been issued. On the other hand, no Israeli government is at present prepared to accept or even condone Palestinian sovereignty over "Palestine" territory. Consequently, the lack of a mutual recognition of Israeli Statehood and Palestinian nationhood by the two principal antagonists is still an intractable impasse (→ State).

That does not mean that the PLO, being a genuine liberation movement and not a mere insurgency or → resistance movement, although not yet having formed a → government-in-exile, a quasi-State or a State in *statu nascendi*, does not possess an international legal status, to some extent different from that of the more classical liberation movements (→ Subjects of International Law).

3. *Legal Status*

(a) *Introduction*

In contradistinction to the traditional liberation movements which fight against colonial or racist régimes (e.g. SWAPO in → Namibia and ANC/PAC in South Africa), the PLO faces a somewhat different type of situation in its struggle for → self-determination and Statehood. Indeed, the State of Israel cannot be considered as an example of a colonial or racist régime. First, Israel is a

lawfully created State and, second, notwithstanding Israel's partly discriminatory treatment of her Palestinian minority and "illegal" expansion after the Six Day War of 1967, resulting in the → annexation of East Jerusalem and occupation of Gaza and the West Bank, Israel is rather a combination of a belligerent and a trustee-occupant régime, legally and illegally controlling "Palestine" territory (→ Occupation, Belligerent). Both, the inalienable rights of the Palestinian people and the legal existence of the State of Israel must be respected.

This dual conflicting title to Statehood does not simplify the situation and it is in this light also that the legal status of the PLO must be assessed. A distinction must, thereby, be made between diplomatic status and belligerent status. Both, however, are uniquely based upon and justified by the aims of "liberation". The international legal personality enjoyed by the PLO is, consequently, not derived from some "quasi" Statehood, nor is it based on some type of governmental status. The PLO is nothing more than a political movement and not yet a "territorial" public body, representing a people which is entitled to its inalienable right to return to its home, to self-determination and to the establishment of its own independent State in Palestine. Since the adoption of UNGA Res. 3236 (XXIX) of November 22, 1974 and 3375 (XXX) of November 10, 1975 this definition is firmly embedded in UN law.

(b) Diplomatic status

The diplomatic status of the PLO is based on the recognition of the representativeness and → effectiveness of its organization and the lawfulness of its aims by the → international legal community (→ Diplomatic Relations, Establishment and Severance).

(i) Recognition by States

The PLO has been recognized by over 100 States. About 60 States accord the PLO full diplomatic status. However, the prevailing pattern of recognition is that of recognizing the PLO as representing the Palestinian people. For most of the recognizing States, this relationship with the PLO is more symbolic than of practical importance. There is little occasion for the PLO to enjoy rights and duties under international law, except those relating to diplomatic status. By way of exception, it appears to have exercised some functions of a → government in its dealings with Arab governments.

Central to recognition of the PLO is the position of the recognizing State *vis-à-vis* the PLO's goals for Palestinian self-determination. Apart from general support for such an aim, there is unfortunately no uniform and clear policy-pattern discernable among the recognizing States.

(ii) Recognition by international organizations and international conferences

In 1975 the United Nations General Assembly invited the PLO as the representative of the Palestinian people to participate in all efforts, deliberations and conferences on the Middle East, held under UN auspices, on an equal footing with other parties (UNGA Res. 3237 (XXIX)). The General Assembly therewith granted the PLO official observer status (→ International Organizations, Observer Status). Moreover, since 1975, the PLO has on more than one occasion been invited to participate in → United Nations Security Council debates, normally only accessible to States without a seat in the Council. On the basis of an observer status, the PLO is further represented in the ECOSOC, in most of the → United Nations Specialized Agencies and at a great variety of international conferences held under United Nations auspices. It has even been granted full member status in the Economic Commission of the United Nations for West Asia (→ Regional Commissions of the United Nations). This very broadly framed observer status can be compared with that of non-member States or of international or regional organizations (→ International Organizations, Membership; → International Organizations, General Aspects). As a result of the proclamation of the so-called "State of Palestine", the UN General Assembly, by Res. 43/177 of December 15, 1988, has decided that the designation "Palestine" should be used in place of the designation "Palestine Liberation Organization" in the United Nations system, without prejudice to the observer status and functions of the PLO within the United Nations. The PLO is, furthermore, a full member of the Arab League and it generally also enjoys full member status within the League's agencies.

(c) Belligerent status

Given the fact that Israel still firmly controls the entire territory of "Palestine", the PLO can only conduct its struggle for self-determination from outside the seized or occupied territories. After having been thrown out of Jordan in 1970, the PLO established its operational headquarters in Lebanon.

During the highpoint of the Lebanese → civil war (1978–1982), the PLO consolidated control over large areas in Lebanon. By doing so, the PLO exercised some of the legal rights and duties of a belligerent occupant, although the Palestinians had no claim with regard to the sovereign State of Lebanon. This became especially clear in the 1981–1982 hostilities, the ultimate phase of which took on the character and magnitude of an outright war directly involving comparatively large PLO units and the Israeli army. The hostilities ended with the transfer of the PLO headquarters to Tunis and the reduction of the PLO to its former status as a liberation movement.

This status has become more than that of an organized resistance movement (see 1949 Geneva Convention III, Art. 4; → Geneva Red Cross Conventions and Protocols). The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977), which produced the two 1977 Protocols Additional to the 1949 Geneva Conventions, accorded to the PLO, for example, an extraordinary exemption from the normal standards for belligerency. Art. 1(4) of Protocol I, indeed, upgrades its status. According to this provision the PLO is considered a belligerent equal to a belligerent State, irrespective of its ability to meet the four specific requirements of "organized resistance movements". Moreover, the very broadly drafted qualifications placed on the four conditions for belligerent status leading to entitlement to the rights and duties of the prisoners of war régime (Arts. 43 and 44 of the 1977 Additional Protocol I) also favour the PLO.

This implies that in particular the classical requirements for belligerent status of "high intensity (conventional) warfare" and "territorial control" do not apply in the case of the PLO's war of liberation. Necessary and sufficient for the PLO's claim to belligerent status is the recognition of this status by the regional intergovernmental organization concerned (i.e. the League of Arab States), the reality of PLO representativeness of the Palestinian people and, finally, a minimum of effectiveness as a belligerent.

Under Art. 96(3) of the 1977 Additional Protocol I, the PLO can address a Declaration of Intent to the depositary, agreeing to be bound by the Geneva Conventions and by Protocol I. Such a declaration, however, has not yet been made.

Israel, which has as yet not adhered to the Additional Protocols either, denies the PLO's claim to belligerent status. Only PLO members captured in fighting outside Israel or Israeli occupied territories have been treated by Israel as → prisoners of war; all other PLO fighters have been considered unrecognized insurgents or terrorists. They have been tried under Israeli law or Israeli occupation law. There have, however, been exceptions, as for example in the case of the PLO-Israeli prisoner exchange agreement of November 1983, directly negotiated between the parties.

The major dilemma for the PLO has been to keep its international status by combining a diplomatic and a military struggle in order to achieve its aims. Especially this second tool has not ceased to be controversial because of the often thin line between a → war of national liberation and → terrorism. In addition, this line is further blurred by the internal division of the PLO which does not facilitate normal command over and international responsibility for its actions. This was also one of the major reasons behind the adoption of the Anti-PLO Terrorism Act by the United States Congress (22 United States Code §§ 5201–5203), effective since March 21, 1988. However, Congress failed to speak with one clear voice on the precedence of this piece of legislation over the international legal commitments of the United States, e.g. as to the status of the PLO observer mission to the United Nations in New York. Consequently, the international status of the PLO was not affected.

There is, nonetheless, a consistent pattern in United Nations law since UN GA Resolution 2787 (XXIV) stressing the special and privileged position of groups engaged in a war of national liberation, thereby explicitly referring to the PLO and its liberation struggle.

Nevertheless, in as far as the territorial integrity and sovereignty of the State of Israel are directly threatened, the PLO struggle for self-determination loses its lawful character and Israel may successfully invoke the protection of Art. 51 of the → United Nations Charter. A struggle for self-determination is equally unlawful if civilian targets are attacked, particularly if they are located outside the disputed area.

4. Conclusion

At present, unfortunately, no single UNGA resolution has clearly drawn the line between the Israeli rights and the Palestinian title. Moreover, it is first and foremost up to the Security Council under Arts. 12(1), 39 and 42 of the UN Charter to consider, determine and decide such a pre-eminent issue as the international → use of force in connection with the Palestinian right to self-determination.

Since the mid-1970s the PLO has undoubtedly become a subject of international law, albeit with an international personality limited to its lawful but not yet sufficiently well-defined goals. Given the utter failure of terrorism and the poor prospects for a successful conventional war by the PLO against Israel, little of substance would be relinquished if the belligerent struggle were suspended and the energies of the PLO concentrated on peaceful methods of advancing and clearly defining the Palestinian cause. The same effort, however, is demanded from the international community, especially from the United Nations, and the State of Israel.

N.J. PRILL, Die Anerkennung der PLO durch die Vereinten Nationen, Die Friedens-Warte, Vol. 59 (1976) 208–225.

S.R. SILVERBURG, The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations, Israel Law Review, Vol. 12 (1977) 365–392.

G. ABI-SAAB, Wars of National Liberation in the Geneva Conventions and Protocols, RdC, Vol. 165 (1979 IV) 353–445.

J.R. TYNER, Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories?, Yale Studies in World Public Order, Vol. 5 (1979) 234–291.

A.F. KASSIM, The Palestine Liberation Organization's Claim to Status: A Juridical Analysis under International Law, Denver Journal of International Law and Policy, Vol. 9 (1980) 1–34.

R.A. FRIEDLANDER, The PLO and the Rule of Law: A Reply to Dr. Anis Kassim, Denver Journal of International Law and Policy, Vol. 10 (1981) 221–235.

A.F. KASSIM, A Response to Professor Robert A. Friedlander, Denver Journal of International Law and Policy, Vol. 10 (1981) 237–241.

A.F. KASSIM, A Response to Dr. Evyatar Levine, Denver Journal of International Law and Policy, Vol. 10 (1981) 259–262.

E. LEVINE, A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order, Denver Journal of International Law and Policy, Vol. 10 (1981) 243–258.

H. COBBAN, The Palestinian Liberation Organisation: People, Power and Politics (1984).

O. KRÖNERT, Die Stellung nationaler Befreiungsbewegungen im Völkerrecht (1984) 293–324.

W.V. O'BRIEN, The PLO in International Law, Boston University International Law Journal, Vol. 2 (1984) 349–413.

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PANAMA CANAL

1. Early History

The idea of building a → canal across the Isthmus of Central America was conceived soon after the discovery of the American continent. This goal, recalled from time to time during the following centuries, became a concrete plan at the beginning of the 19th century. At the Panama Conference of 1826 the construction of a waterway was taken into consideration as a common American project for the benefit of all States.

In 1846 the United States and New Granada – later known as Colombia, which at that time also included Panama – concluded the so-called Bidlack-Mallarino Treaty (Martens NRG, Vol. 13, p. 666). Art. 35 of the Treaty provided "the right of way or transit across the Isthmus of Panama, upon any modes of communication that now exist, or that may be, hereafter, constructed shall be open and free to the government and the citizens of the United States". The latter guaranteed to New Granada the "perfect neutrality of the before mentioned Isthmus" and "the right of sovereignty and property which New Granada has and possesses over the said territory".

The increasing activity of Great Britain in

Central America, manifested by the foundation of the Mosquito Protectorate, provoked the fear on the part of the United States that a European power could acquire control over a future waterway across the Isthmus. To prevent such a development the United States concluded the Clayton-Bulwer Treaty with Great Britain in 1850 (Martens NRG, Vol.15, p. 187), in which the parties stipulated "that neither the one nor the other will ever obtain or maintain for itself any exclusive control" over a canal constructed in Central America. The Treaty interdicted the erection of fortifications at such a waterway. It was provided that the contracting parties should invite other States to make similar agreements with them so that all States might contribute to the enterprise of constructing and maintaining a canal. The Bulwer-Clayton Treaty was considered a violation of the → Monroe Doctrine since it involved extra-American States in affairs which concerned territory on the American continents.

In the second half of the 19th century, the United States sought to modify the Bidlack-Mallarino Treaty and the Clayton-Bulwer Treaty in order to acquire an explicit right to construct a canal through the Isthmus over which it would exercise exclusive control. However, all → negotiations in this direction failed. The only important exception was the conclusion of an agreement with Nicaragua in 1867 (CTS, Vol. 135, p. 59) which granted to the United States rights similar to those foreseen by Art. 35 of the Bidlack-Mallarino Treaty.

In 1878 Colombia conferred the concession for constructing a canal on a French company which was subsequently bought by the Compagnie Universelle du Canal Interocéanique de Panama under the direction of F. de Lesseps. In the concession contract a right-of-use for 99 years and the neutrality of the canal were agreed upon. Merchant ships were to enjoy free access to the waterway (→ Merchant Ships), whereas for vessels transporting troops the special permission of Colombia was required. The rights granted to other nations by Colombia in international treaties were not to be impaired by the concession. The United States invoked Art. 35 of the Bidlack-Mallarino Treaty against the new stipulations, and the United Kingdom considered the Clayton-Bulwer Treaty violated, but both allegations were manifestly unfounded.

2. The Régime Established by the Treaties of 1901/1903 and Subsequent Related Agreements

(a) History

After the bankruptcy of the Compagnie Universelle the United States intensified her efforts to realize plans to construct a canal under her control. In 1900 a treaty between the United States and Great Britain was drafted which permitted the construction of a canal by the United States. This draft was rejected by the United States Senate mainly because the proposed treaty did not abrogate the Clayton-Bulwer Treaty, under which the erection of fortifications had been interdicted, and was open to accession by third States.

The Hay-Pauncefote Treaty of November 18, 1901 (Martens NRG2, Vol. 30, p. 631) satisfied these objections. The 1901 agreement granted the United States the right to build a waterway and to provide exclusively for its regulation and management. With regard to the status of neutrality, reference was made to the Convention of Constantinople concerning the → Suez Canal without, however, incorporating the provisions of this agreement in full. The canal was to be open to all ships; it was never to be the object of a → blockade and was to be free of all military acts; → warships of belligerent States were to be subject to the rules of → neutrality in → sea warfare.

In 1902 the President of the United States was authorized by the Spooner Act (32 Stat. 481) to buy the concession of the French Company and to acquire a strip of land as necessary for the construction of the canal. With this act the plans to build an interoceanic canal in Nicaragua were definitely dropped.

A year later the so-called Hay-Herran Treaty (CTS, Vol. 192, p. 324) was drafted between Colombia and the United States. This agreement granted the exclusive right to the United States to buy the concession of the canal company and to construct, maintain, control, and protect a maritime canal for the term of 100 years, renewable at the sole and absolute option of the United States. For these purposes the United States was permitted to use and control a zone

extending five kilometres on both sides of the canal, the → sovereignty of Colombia being otherwise explicitly upheld. Colombia was to receive a compensation of $ 250 000. The treaty was rejected by the Colombian parliament mainly on financial grounds.

At the same time Panama, attempting to acquire more autonomy, declared its independence from Colombia. The military forces of Colombia were prevented from intervening in Colon by the presence of the United States navy, with the United States grounding her conduct on Art. 35 of the Bidlack-Mallarino Treaty which granted her the right to protect the right of way across the Isthmus. A few days after the State of Panama was founded the new → State concluded on November 18, 1903 the Hay-Bunau-Varilla Treaty (Martens NRG2, Vol. 31, p. 599) with the United States. In this agreement the United States guaranteed the independence of Panama.

> Under the Treaty, the United States acquired "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed".

Panama conferred on the United States

> "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 waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority".

The United States enjoyed the monopoly for the construction of the canal and a railroad. She was entitled to use the waters, rivers and lakes necessary for operating the canal. The United States was also empowered to issue sanitary ordinances for the cities of Colon and Panama, and to maintain public order there. The cities of Panama and Colon and the → ports at each end of the canal were declared duty-free zones. At all times and in her discretion, the United States had the right to use her police, land and naval forces to assure that the canal remained open.

As compensation for the rights, powers and privileges obtained, the United States was obliged to pay Panama a lump sum of $ 10 000 000 and subsequent annual amounts of $ 250 000. Panamanian vessels of war and troop-ships had the right to use the canal without paying charges. The canal was to be "neutral in perpetuity". For the character of this neutrality, reference was made to the Hay-Pauncefote Treaty.

In the Taft Agreement of December 3, 1904 (Foreign Relations of the United States, Diplomatic Papers 1904, p. 640), in force until 1924, Panama and the United States regulated questions of tolls, customs and postal service in the canal zone. The intention of the United States under the Panama Canal Act of August 28, 1912 (37 Stat. 560) to exempt her own ships from transit tolls was successfully rejected by Great Britain with reference to the Hay-Pauncefote Treaty, which provided for equal treatment of ships of all nations. Apart from Panama, only Colombia enjoyed an exemption from tolls for her warships, as granted by the Thomson-Urrutia Treaty of April 6, 1914 (CTS, Vol. 219, p. 351) and tolerated by Great Britain.

The construction of the canal was accomplished in 1914. At the beginning of World War I, the United States and Panama affirmed the neutrality of the Panama Canal in a protocol (Foreign Relations of the United States, Diplomatic Papers 1914, p. 984). A proclamation of the United States, dated November 13, 1914 (38 Stat. 2039), specified the rules to be applied while the canal was open. These rules reflected the provisions of the XIIIth Hague Convention on rights and duties of neutral powers in a maritime war (CTS, Vol. 205, p. 305). After entering World War I the United States declared on May 23, 1917 that, while generally upholding the neutrality of the Panama Canal, she would exclude her enemies and ships of neutral States transporting arms for enemy States from the use of the canal without special permission (40 Stat. 1667). On September 5, 1939 (Foreign Relations of the United States, Diplomatic Papers 1939, Vol. I, p. 685), at the outset of World War II, the United States proclaimed the applicability of the same rules as in 1914, whereas on December 7, 1941 (ibid., Diplomatic Papers 1941, Vol. VI, p. 106), she declared applicable an order similar to that of 1917.

The Hay-Bunau-Varilla Treaty was subject to two major changes. Under the Arias-Roosevelt

Treaty of March 2, 1936 (LNTS, Vol. 200, p. 17), it was agreed that the United States would no longer guarantee the independence of Panama. Furthermore, the sale of duty-free imports in the canal zone was restricted, the United States lost the right to maintain order in the cities of Panama and Colon and the annual payment was augmented to $ 430 000. In the treaty of January 25, 1955 (UNTS, Vol. 243, p. 258), the annual amount increased to $ 1 930 000 and the United States renounced her authority to operate the trans-isthmian railroad and the right to issue sanitary ordinances for the cities of Colon and Panama.

(b) Legal Status

(i) Sovereignty

The Hay-Bunau-Varilla Treaty of 1903 established a somewhat ambiguous situation regarding sovereignty in the canal zone. Under this instrument, the United States had the right in perpetuity to exercise full jurisdiction there, allowing her to issue the applicable statutes and administer the canal. For many years the United States Government claimed to have complete sovereignty in the canal zone and the Supreme Court decided at the beginning of the century that the territory belonged to the United States (Wilson v. Shaw, 204 U.S. 24 (1906)).

Nevertheless, the following limitations on United States sovereignty should be kept in mind: First, the rights conferred on the United States by the Hay-Bunau-Varilla Treaty were granted with a view to the construction and operation of the canal and, therefore, could be exercised only in respect of that purpose. Second, it is beyond doubt that the United States had no right to transfer the canal zone to a third power without the consent of Panama. Third, the Hay-Bunau-Varilla Treaty does not use the language found, for example, in the treaties by which Louisiana or Hawaii were ceded to the United States. Finally, aliens born in the canal zone never became United States citizens; moreover, tax-exemptions there concerned only property and persons related to the canal and, since the treaty of 1955, Panama levied taxes on her citizens who worked in the canal zone.

In light of these arguments the proposition that the United States had full sovereignty in the canal zone and that this territory was ceded to the United States cannot be upheld. Rather, Panama retained general sovereignty over this zone and only conferred the right to exercise jurisdiction for the purpose of operating the canal.

(ii) Neutrality and defence

The neutrality of the Panama Canal established by the Hay-Pauncefote Treaty and the Hay-Bunau-Varilla Treaty did not reflect the usual concept of neutrality in international law, as the treaties referred only to a territory and not to a State. The question is whether the canal zone may be considered neutral under these treaties even if Panama, to which it belongs, or the United States, being a contracting party to the treaties providing for the canal's neutrality and having the right to defend the canal by the → use of force, were at → war. Neutrality in this case would mean that Panama would have to keep the canal open even to her enemies, making defence impossible and contradicting Panama's right to → self-preservation and, indirectly, her obligation to defend the canal. As the main user of the canal, the United States could consider any attack upon herself as a threat to this waterway.

Notwithstanding Art. III, para. 1 of the Hay-Pauncefote Treaty which also grants the right of transit to all merchant ships and vessels of war of belligerents, the United States as the guarantor of the neutrality and the security of the canal has the right to use force whenever she deems the canal to be in danger. Consequently, the neutrality of the Panama Canal is closely linked to the neutrality of both Panama and the United States, as was indicated by the practice of these States during the two World Wars.

(iii) The rights of third States

A main concern in the interpretation of the treaty system on the Panama Canal was the question of the rights of third States. Art. III, para. 1 of the Hay-Pauncefote Treaty provided for free access to the canal by vessels of commerce and by warships of all nations. The Hay-Bunau-Varilla Treaty, establishing the neutrality of this waterway, also referred to this article.

It was argued that the treaties created a → servitude in the canal zone, but this concept does not itself imply who will be beneficiary of the related rights. It was also contended that on the

basis of the treaties an objective régime containing the right of all nations to transit was imposed on the Panama Canal. This approach found support in the → *Wimbledon* Case where the → Permanent Court of International Justice declared that an artificial waterway permanently dedicated to the use of the whole world is similar to a natural → strait. However, this interpretation presupposed that free passage through a canal, comparable to such passage through a strait, was only guaranteed under the condition that the canal was dedicated to all nations.

According to the → Vienna Convention on the Law of Treaties, which in so far expresses customary law, a right of a third State is conferred by a bilateral treaty if this corresponds to the clear will of the contracting parties. Neither the Hay-Pauncefote Treaty nor the Hay-Bunau-Varilla Treaty provided the possibility for accession by third States. Moreover, the United States rejected the first Hay-Pauncefote project of 1900 on the ground that the treaty should be open to such States. If third States were to have received special rights, participation in the treaty system would have been the natural means for achieving this goal. The exclusion of this possibility implies that the contracting parties did not intend to concede third States such a right on the basis of the treaty. For the same reason, several authors have contended that third States could also not acquire such a right under customary law.

Although free access to the canal was a long-standing practice, no *communis opinio* existed, at least on the part of the United States and Panama, indicating that there was a right to passage. However, this has not prevented each of the contracting parties from being entitled to require the other to give free access to the canal to non-signatory States. For Great Britain, such a right *vis-à-vis* the United States derives from the Hay-Pauncefote Treaty.

3. Status after 1977

(a) History

Since the 1960s tension grew between the United States and Panama over the canal. Panama demanded a complete revision of the treaty system. A resolution of the → United Nations Security Council in 1973 (UN Doc. S 10931 and Rev.1) asking for the withdrawal of the United States from Panama was hindered by the American → veto. In 1974 the foreign ministers of the United States and Panama formulated a joint statement which outlined the contents of a new agreement (ILM, Vol. 13, p. 90).

In 1977 the Panama Canal Treaty (ILM, Vol. 16, p. 1022) and a treaty concerning the neutrality and the operation of the Panama Canal (Neutrality Treaty, ILM, Vol. 16, p. 1040) were concluded between the United States and Panama. The two treaties were accepted by a referendum in Panama. A previously published joint understanding of the United States President and the Panamanian head of the Government, the so-called leadership amendment (DeptStateBull (November 1977) p. 631), which was intended to construe but, in fact, amended the Neutrality Treaty, was not expressly subject to the → plebiscite. The United States ratified the treaties adding two amendments, two conditions, four reservations and five declarations to the Panama Canal Treaty (ILM, Vol. 17, p. 820), and six reservations and six declarations to the Neutrality Treaty (ibid., p. 827). Although these modifications by the United States Senate constituted changes to the treaties, no referendum was held on them as required by Art. 274 of the Panamanian constitution for all agreements concerning the canal. However, as the modifications were expressly accepted by the Panamanian Government on the exchange of ratifications, their invalidity because of a manifest violation of internal law cannot be claimed.

The treaties entered into force on October 1, 1979. Because Great Britain was not a contracting party, the Hay-Pauncefote Treaty could not be abrogated by these new agreements. The earlier instrument, therefore, remained in force. However, the United Kingdom subsequently approved the new Panama Canal treaties.

(b) The Panama Canal Treaty

The Panama Canal Treaty terminated the Hay-Bunau-Varilla Treaty and the subsequent related agreements concerning the Panama Canal. The 1977 treaty refers to the Republic of Panama "as territorial sovereign" and grants to the United States the rights necessary for operating, improving, protecting and defending the canal. The United States may use the installations and areas described in detail for these purposes, regulate

passage through the canal and levy tolls. After a transition period of 30 months, Panama also obtained full jurisdiction in the area where the canal is located.

A special canal zone is not established under the 1977 treaty; Panamanian law also applies in the area where the canal is operated. The contracting parties, however, agreed that vessels transiting the canal are exempt from any Panamanian charges. Furthermore, it is provided that agencies and instrumentalities of the Government of the United States in Panama pursuant to this treaty enjoy immunity. In an agreement implementing the Panama Canal Treaty, it was agreed that United States employees should not be subject to Panamanian criminal courts in matters which arise from their official duties.

The canal is operated by the Panama Canal Commission as a United States governmental agency. Until the end of 1989 a national of the United States was administrator of the Commission, a post held thereafter by a Panamanian. The Panama Canal Commission is supervised by a board of nine members; five are nationals of the United States; four are Panamanian nationals appointed by the United States on the recommendation of Panama. A Panama Canal Consultative Committee, composed of an equal number of United States and Panamanian representatives, is to advise both States on matters of policy affecting the Canal's operation. The United States regulates relations with the employees of the canal. Panama is to participate increasingly in the management and protection of the canal.

The Panama Canal Commission is to pay $ 10 000 000 out of its revenues as a fixed annual amount to the Republic of Panama and up to another $ 10 000 000, if revenues exceed expenditures to that extent. Finally, the Commission is to pay a certain amount for each net ton transported through the canal. If the treaty expires, the United States will not owe Panama anything even if she could not fulfil the aforementioned obligations.

The protection and defence of the canal are obligations of the United States and Panama under the treaty, the United States having the primary responsibility in this regard. Pursuing this aim, the United States and Panama may act in common or independently as required. The United States has the right to station and train troops and to move vessels, aircraft, and vehicles freely within Panamanian territory when performing official duties. A combined board of senior officers of both parties is foreseen by the treaty to facilitate participation and cooperation of both States' armed forces in the defence of the canal. This body has only consulting functions. As the danger which allows for the use of force is not specified, the United States may act against an external as well as an internal attack on the canal.

In December 1989, the United States invaded Panama to overthrow the acting Government and arrest the head of State, Noriega, for drug trafficking. The United States invoked, *inter alia*, in general terms her rights to defend the canal; but as she could not offer any proof that the functioning of the waterway was actually in danger, the military action could not be based on specific treaty provisions. In one of the reservations to the treaty, the United States had expressly declared that the treaty system "shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity". The principle of → non-intervention is also mentioned in Art. V of the treaty, which provides that the United States nationals employed in operating the canal shall refrain from interfering in the internal affairs of Panama.

For the protection of the environment, the treaty foresees a joint commission which may give recommendations without binding force.

The treaty also deals with a new sea-level canal. The provision that a new waterway within the territory of Panama shall be constructed in accordance with the provisions of this treaty, and that the United States shall negotiate with a third State on a new canal only if Panama agrees, was abrogated by one of the reservations of the United States mentioned above. In 1985, Panama and the United States concluded the Arrangement Concerning the Commission for the study of alternatives to the Panama Canal (AVR, Vol. 25 (1987) p. 232). Japan was invited to participate. The Commission, an → international organization with headquarters in Panama, consists of a Board of Commissioners named by the member States. It shall identify potential transportation alternatives in Panama, study them, select the best and develop conceptual plans for such alternatives.

Disputes are to be settled through the estab-

lished committees or diplomatic channels or through the classical means of → peaceful settlement. A special procedure was not agreed upon.

The treaty will terminate on December 31, 1999.

(c) The Treaty concerning the Permanent Neutrality and Operation of the Panama Canal

In the treaty concerning the permanent neutrality and operation of the canal, Panama unilaterally declared the neutrality of this waterway and any other which might be built on Panamanian territory. The canal is to remain secure and open to peaceful transit by vessels of all nations; it is not to be "the target of reprisals in any armed conflict between other nations of the world". Vessels of war and auxiliary vessels of all nations are not subjected to inspection and they may refuse to disclose their internal operation, origin, armament, cargo or destination; they may, however, be requested to certify that they comply with all relevant health regulations. The warships of the United States and of Panama are entitled to transit the canal expeditiously, i.e. to go to the head of the line. Panama may levy tolls and other charges, but only up to an amount which is "just, reasonable, equitable and consistent with the principles of international law".

It is the obligation of both the United States and Panama to maintain the régime of neutrality concerning the canal, the United States no longer having the right to maintain military forces and installations within Panamanian territory. The leadership amendment specifies that each country independently has the right to defend the canal. However, the United States may not interfere with the internal affairs of Panama. Under the so-called De Concini condition, accepted by Panama on the exchange of ratifications, the United States declared that the prohibition on stationing troops within Panama does not prevent the United States from using military force there to comply with her obligations arising out of the treaty.

The new treaty system is not open to accession by third States. Other States may only accede to the protocol to the treaty concerning neutrality wherein the contracting parties agreed to observe and respect the régime of permanent neutrality of the Panama Canal.

(d) Problems of the New Treaty System

(i) Neutrality

Whereas the new treaty system removes any doubts about sovereignty in the canal zone, difficulties may arise in the interpretation of the neutrality status and the right to defend the canal. The fact that neutrality was unilaterally declared by Panama, in contrast to the situation which existed under the Hay-Bunau-Varilla Treaty, does not mean that this status may be preserved or changed at the option of this country. The unilateral declaration is only an expression of Panama's sovereignty. The declaration is part of a bilateral treaty which binds Panama as well as the United States.

Art. IV of the treaty concerning neutrality provides that both the United States and Panama will maintain this status. The situation in case of war has not changed in comparison with that which existed before the creation of the new treaty system. As long as the United States and Panama remain neutral, ships of all belligerents may pass through the canal. If the United States or Panama are parties to a war, either may declare that circumstances require the closure of the canal to ships of the enemy as a defence measure. After the year 2000, the defence and protection of the canal will be the primary obligation of Panama. However, as the leadership amendment accepted by Panama provides that each of the parties shall defend the canal, and as the De Concini condition explicitly allows the use of force by the United States, the defence system will not change drastically in the future.

(ii) Tolls and charges

It may be questioned up to which amount tolls are just, reasonable, equitable and consistent with international law. The United States has operated the canal without making any profit. Panama has called the canal, as her main source of income, a "natural resource", hinting at a concept which permits countries with commodities to fix the prices of such items. Tolls and charges may at least amount to a sum covering the expenditure of operation. The provisions of the applicable treaty system do not exclude profits. Aside from the costs of operation, the prices of other means of transport, the interest in maintaining the domestic

fleets, general commercial interests, the impact on the various geographical areas of the contracting parties and the interest of both in maximizing their international commerce have been enumerated as criteria for the fixing of a toll.

(iii) The rights of third States

The situation concerning third States changed after 1979 when the possibility arose for them to sign the protocol to the Neutrality Treaty. States acceding to this protocol do not become parties to the treaty. Instead, they recognize the status of neutrality of the canal in times of war and peace, participating neither in the obligations nor in the rights arising out of the Neutrality Treaty. The wording of the protocol does not allow the conclusion that it confers any rights. The "permanent access to the canal" mentioned in the preamble can be construed as a condition for the recognition of neutrality. Therefore, if Panama or the United States cease to hold the canal open, the States which have signed the protocol are no longer bound.

4. Conclusions

The Panama Canal may be qualified as an international artificial waterway, a description which also applies to the Suez Canal and applied to the → Kiel Canal at least between 1919 and 1936. The legal régime established for these waterways is similar, requiring that they be neutral and open to all nations. The passage of a belligerent through such waterways does not contradict the concept of neutrality as stated in the *Wimbledon* Case. However, a special concept of neutrality for the strip of land bordering a canal has not been developed and, therefore, no rights derive in this regard from the mere classification of a canal as an international waterway. The legal order governing such waterways, including the Panama Canal, does not result from their general character, but rather is constituted by the relevant treaty system.

Panama Canal, Chronology of Events and Background Documents, Committee on Foreign Relations -- United States Senate, Ninety-Fifth Congress, First Session, November and December, Vols. 1 and 2 (1977).

L.H. WOOLSEY, The Sovereignty of the Panama Canal Zone, AJIL, Vol. 20 (1926) 117–124.

R.R. BAXTER, The Law of International Waterways (1964).

D.G. HANRAHAN, Legal Aspects of the Panama Canal Zone – in Perspective, Boston University Law Review, Vol. 45 (1965) 64–87.

M.D. SIMPSON, Panama: The Proposed Transfer of the Canal and the Canal Zone by Treaty, Georgia Journal of International and Comparative Law, Vol. 5 (1975) 195–215.

M.J. SHAY, The Panama Canal Zone: In Search of a Juridical Identity, New York University Journal of International Law and Politics, Vol. 9 (1976/1977) 15–60.

G. FISCHER, Le canal de Panama: passé, présent, avenir, AFDI, Vol. 23 (1977) 745–790.

D.M. HIMMELREICH, Panama Canal Treaties, Vanderbilt Journal of Transnational Law, Vol. 10 (1977) 615–626.

T. MERON, Article 46 of the Vienna Convention on the Law of Treaties (Ultra Vires Treaties): Some Recent Cases, BYIL, Vol. 49 (1978) 175–199.

H. M. RUBIN, The Panama Canal Treaties: Keys to the Locks, Brooklyn Journal of International Law, Vol. 4 (1978) 159–220.

G. FISCHER, Le canal de Panama: nouveaux problèmes, AFDI, Vol. 25 (1979) 245–254.

H. GRUBMAYR, Die immerwährende Neutralität und der Panamakanal – Geschichtliche Entwicklung und völkerrechtliche Stellung, Österreichische Zeitschrift für Aussenpolitik, Vol. 21 (1981) 198–221.

R. PERRUCHOUD, Le régime de neutralité du Canal de Panama (1983).

H.G. MAIER, United States Defense Rights in the Panama Canal Treaties: The Need for Clarification of a Studied Ambiguity, Virginia Journal of International Law, Vol. 24 (1984) 287–332.

O. ORTEGA DURAN, Die Neutralität und Verteidigung des Panamakanals, Internationale Politik, Vol. 38, No. 898 (1987) 21–23.

R.S. SAGEL, The USA and the Panama Canal, Review of International Affairs, Vol. 38, No. 889 (1987) 11–12, 25–26.

B. WOLF, Die Panamakanal-Frage in ihrer globalen Verflechtung – Analyse, Wertung, Perspektiven, AVR, Vol. 25 (1987) 129–173.

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PARACEL ARCHIPELAGO

1. Introduction

The Paracel Archipelago, which is called Hsi-sha ch'ün-tao (Wade-Giles) or Xisha qundao (Pinyin) in Chinese and Quan Dao Hoang Sa in Vietnamese, is a group of small islets off the Chinese and Vietnamese Coast located roughly

between 110°11' and 112°54' East longitude, and 15°46' and 17°8' North latitude, in the South China Sea. The → archipelago comprises 14 islets, covering a total land area of less than 5 square kilometres, and more than a dozen partly or temporarily submerged reefs and banks, scattered over a sea area forming a large oval with a diameter of about 200 kilometres. From Woody Island, which covers 1.85 square kilometres and is the largest → island in the Paracels, it is about 300 kilometres to the port of Yulin on Hainan Island, People's Republic of China, and about 420 kilometres to the port of Da Nang, Vietnam.

The Western names of 14 major islets are listed below.

(1) Amphitrite Group: Tree Island, North Island, Middle Island, South Island, Woody Island, Rocky Island, Lincoln Island;

(2) Crescent Group: Robert Island, Pattle Island, Money Island, Duncan Island (in Chinese geography books, considered as an archipelago as it includes Ch'en-hang tao and Kuang-chin tao, the latter having no equivalent Western or Vietnamese name), Drummond Island, Triton Island, Passu Keah.

Until recently, the Paracels primarily served as bases for → fishing boats or as sites of guano deposits, which can be used in manufacturing fertilizers. With the emergence of a 12 mile → territorial sea, a → continental shelf and a 200 mile → exclusive economic zone, the islands may serve as bases enabling the owning State to claim extensive maritime zones and sea-bed resources in the South China Sea. Moreover, if the presumed existence of large petroleum deposits under the sea-bed area of the Paracels is confirmed, these islands will become economically important (→ Sea-Bed and Subsoil).

2. Claims of Vietnam and China

Historically, ownership of the Paracels has been assumed by different dynasties and governments of both China and Vietnam, but often without the awareness of the other claimant. In the more distant past there were no reports of → armed conflict over the Paracels. Only in recent years have both Vietnam and China became more assertive of their claims, resulting in conflict or armed intrusions.

Aside from China and Vietnam, during the 1920s and 1930s France claimed jurisdiction over the Paracels on behalf of Vietnam, then her → protectorate. In 1939, Japan occupied the → Spratly Archipelago, together with the Pratas (Tung-sha ch'un-tao in Wade-Giles and Dongsha Qundao in Pinyin) and the Paracels, renamed them as Shinnan Gunto (New South Archipelago) and placed them under the administration of Kao-hsiung District of → Taiwan, then occupied by Japan. Japan's occupation ended in 1945 with defeat in World War II. In the San Francisco Peace Treaty of September 8, 1951 (UNTS, Vol. 136, p. 5) and the bilateral Peace Treaty with the Republic of China, April 28, 1952 (UNTS, Vol. 138, p. 3), Japan renounced all claims to these islands (→ Peace Treaty with Japan (1951)).

(a) Basis of Vietnamese claim

According to Vietnam, in 1776 a Vietnamese scholar Le Qui Don described in his book Phu Bien Tap Luc (Miscellaneous Records on the Pacification of the Frontiers) the organization by the Nguyo Princes of the Hoang Sa and Bac Hai detachments for the exploitation of Huang Sa and other islands in the South China Sea. In 1816, on King Gia Long's orders, Vietnamese naval units and the Hoang Sa detachment carried out the measurement of sea routes from the mainland to these islands. In 1835, the Vietnamese Navy Commander Phame Van Nguyen led naval units with building materials to Hoang Sa to install a stele and build a temple. Then, in 1849, an Englishman, Dr. Gutlatz, stated in his article entitled "Geography of the Cochinchinese Empire" that the King of Cochinchina had taken possession of the Hoang Sa archipelago. Similarly, in 1910 the National Institute of History under the Nguyen dynasty referred to Hoang Sa as a part of Vietnamese territory in its official geographical book National Geography.

In 1925, Than Trong Hue, Minister for Military Affairs of the Hue Imperial Court, in response to a Chinese claim to Hoang Sa, reaffirmed that the archipelago had always been part of Vietnam. Finally, by Decree of March 30, 1938, King Bao Dai severed the Hoang Sa archipelago from Nam Ngai province and attached it to Thua Thien province. By Ordinance of June 15, 1938, the Governor General of Indochina, J. Brévié made the archipelago an administrative unit, and the French colonial administration installed sovereignty markers, and built a → lighthouse, a

meteorological station and a radio-transmission station on Pattle Island. In 1946, after the defeat of Japan, France re-occupied the Hoang Sa archipelago and in 1950 France handed over to the Bao Dai Government the administration of this archipelago.

(b) Basis of Chinese claim

As early as the Northern Sung Dynasty from 960 to 1127 A.D., China had placed the Hsi-sha (in Pinyin, Xisha) Islands under its jurisdiction and dispatched naval warships to patrol them.

During the Ming (1368 to 1644) and Ch'ing (1644 to 1911) Dynasties, the officially compiled local chronicles Kuangtung T'ung-chi (Pinyin, Guangdong Tongzhi), Ch'iung-Chou Fu-chi (Qiongzhou Fuzhi) and Wang-chou Chi (Wangzhou Zhi) all record, in the sections entitled "territory" or "geography, mountains and waters", that "Wang-chou covers Ch'ien-li Ch'ang-sha (Qianli Changsha, or thousand-li sand cay) and Wan-li Shih-t'ang (Wangli Shitang, ten thousand-li rocky reefs)". This shows that the Hsi-sha Islands were administered by the Wang-chou County (now Wanning) and Ling-shui (Lingshui) counties of the Kuangtung (Guangdong) Province.

In several official → maps, the Hsi-sha Islands were recorded as Chinese territory. Such maps include the Huang Ch'ing Ke Chi Sheng Fen-t'u (Huang Qing Ge Zhi Sheng Fen Tu, or Map of the Provinces Directly Under the Imperial Ch'ing (Qing) Authority, 1755) and Ta Ch'ing Yi-t'ung T'ien-hsia Ch'üan-t'u (Da Qing Yi Tong Tian Xia Quan Tu, Map of the Unified Territory of the Great Ch'ing (Qing) Empire, 1817).

In 1883, Germany had to stop certain surveys on the Hsi-sha Islands because of the Ch'ing Government's → protest. In 1909, Admiral Li Chun (Li Zhun) led three → warships on an inspection tour of the Hsi-sha Islands and set up stone tablets engraved with the names of the islands.

In 1911 the Kuangtung provincial government officially placed the Hsi-sha Islands under the administration of Ya-hsien (Yaxian) County of Hainan Island.

In a → note addressed to the Chinese Legation in France on December 4, 1931, France asserted a claim on behalf of Vietnam that the Hsi-sha Islands were part of Vietnam (Wai-chiao pu kung-pao (Gazette of the Ministry of Foreign Affairs), Vol. 6, No. 3 (July-September 1933) p. 208). The Chinese Government made a categorical rejection of that claim. After the defeat of Japan in 1945, the Chinese Government in November and December 1946 designated senior officials to proceed to the Hsi-sha Islands by warships to take over these islands, erect stone tablets and station garrison troops there.

3. Development of the Dispute

With the defeat of the Republican forces in the Chinese civil war (1946 to 1950), the Republican garrison troops on Woody Island were evacuated to Taiwan. Communist Chinese troops were then sent to occupy the island. Between 1956 and 1964, a naval convoy of the then Republic of Vietnam made regular visits to the Paracels to supply the logistic needs of the detachments stationed on some of the islands. According to the Foreign Ministry of the People's Republic of China, on June 15, 1956, two high officials of the Foreign Ministry of the Democratic (now Socialist) Republic of Vietnam told the chargé d'affaires *ad interim* of the Chinese embassy in Vietnam that the Xisha and Nansha Islands "are historically part of Chinese territory" (Chinese Foreign Ministry's Memorandum on Question of Xisha and Nansha Islands, May 12, 1988). During the 1960s, two pertinent domestic measures were taken by the Republic of Vietnam Government: the Paracels were reassigned from Thua Thien Province to Quang Nam Province by Presidential Decree No. 174-NK of July 13, 1961; and a similar decree (Decree No. 709-B.N.V./HC) was issued on October 21, 1969. According to the People's Republic of China, the Republic of Vietnam on a number of occasions invaded some islands of the Paracels and arrested and harassed Chinese fishermen there. China protested strongly against such "illegal" behaviour. Between 1960 and 1971, when the United States and the Republic of Vietnam were engaged in military actions in Vietnam, the People's Republic of China issued many "serious warnings" to the United States for violating her territorial sea or territorial airspace in the Paracels area.

In January 1974, the forces of the People's Republic of China drove out all Vietnamese forces from the Paracels and have occupied the islands since then.

Republic of Vietnam, Ministry of Foreign Affairs, White paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands (1975).
Information and Press Department, Ministry of Foreign Affairs, Socialist Republic of Vietnam, Vietnam's Sovereignty Over the Hoang Sa and Truong Sa Archipelagoes (1979).
Ministry of Foreign Affairs of China, China's Indisputable Sovereignty Over the Xisha and Nansha Islands, Beijing Review, Vol. 23, No. 7 (February 18, 1980) 15–24.
Ministry of Foreign Affairs of China, Memorandum on Question of Xisha and Nansha Islands (May 12, 1988), Foreign Broadcast Information Service, China (May 13, 1988) 12–14.

J.A. COHEN and H. CHIU, People's China and International Law: A Documentary Study, Vol. 1 (1974) 341–346.
H. CHIU, Collection of Articles Concerning Questions of International Law Relating to the Territory of China [in Chinese] (1975) 215–240.
H. CHIU and CHOON-HO PARK, Legal Studies of the Paracel and Spratly Islands, Ocean Development and International Law, Vol. 3 (1975) 1–28.
D. HEINZIG, Disputed Islands in the South China Sea, Paracels-Spratlys-Pratas-Macclesfield Bank (1976).
H. CHIU, Chinese Attitude Toward Continental Shelf and Its Implication on Delimiting Seabed in Southeast Asia, Occasional Papers/Reprints Series in Contemporary Asian Studies, No. 1 (1977).
CHOON-HO PARK, The South China Sea Disputes: Who owns the Islands and the Natural Resources?, Ocean Development and International Law Journal, Vol. 5 (1978) 27–59.
The Paracels, Fighting over Flyspecks, Far Eastern Economic Review (August 7, 1981) 28–29.
M.S. SAMUELS, Contest for the South China Sea (1982).

HUNGDAH CHIU

PARIA, GULF OF

1. Geographical Description

The Gulf of Paria is a substantial indentation of relatively shallow water situated on the north-east coast of Venezuela. Seawards, it faces the island of Trinidad which forms most of its eastern side. It communicates with the open sea through two channels running north and south of Trinidad, the Dragon's Mouth to the north and the Serpent's Mouth to the south. The Gulf extends about 80 miles from west to east and about 40 miles from north to south. Each of the above two channels is less than 6 miles wide at its narrowest point.

2. Historical Evolution

In the 1930s, oil companies operating in Trinidad, at that period a British colony (→ Colonies and Colonial Régime), raised with the British authorities the possibility of drilling in the Gulf outside the → territorial sea of Trinidad, then three miles wide. In considering possible legal mechanisms for obtaining control of such a marine resource, the legal advisers to the United Kingdom Foreign Office expressed the view that the Gulf did not fall within the régime of → bays and gulfs, being bordered by more than one → sovereignty, and therefore fell within the régime of → high seas beyond the three-mile belts of the British and Venezuelan territorial seas; thus, the United Kingdom and Venezuela could not lawfully agree to close the Gulf to foreign ships (→ Ships, Nationality and Status), nor could they exercise customs control over foreign ships exporting oil through the overlapping territorial seas in the two channels since these were international → straits and subjects to the right of → innocent passage (→ Customs Law, International). The legal advisers considered, however, that State practice in the areas of sedentary fisheries (→ Fisheries, Sedentary), and undersea coal and tin mines, together with academic opinions, supported another possibility. Accordingly, in July 1936 the British Minister in Caracas was instructed to open negotiations with the Venezuelan Government on the basis that

> "in international law the bed of the sea beneath territorial waters and in the subsoil beneath that bed are already considered as being in the possession of the territorial State. The bed of the sea and accompanying subsoil beneath the high seas on the other hand is *res nullius*, but is capable of acquisition by effective occupation in the same manner as any unoccupied territory above the level of the sea."

Negotiations, once started, were complicated and protracted by the Venezuelan Government's raising the question of sovereignty over Patos Island, administered as part of Trinidad and situated near the northerly channel, and Soldado Rock, situated near the southerly channel. An agreement, however, was considered essential by the United Kingdom since otherwise, in its view of the applicable international law, either State was entitled to make a pre-emptive claim to the whole

submarine area up to the seaward limit of the territorial sea of the other State. The United Kingdom regarded as ineffective against third States an agreement with Venezuela simply to divide the → sea-bed and subsoil of the Gulf between the two States (→ Treaties, Effect on Third States); the best that could be done was for each State to agree mutually not to claim the other's share of the submarine area and then for each State to take unilateral steps to occupy its share.

Negotiations came to fruition in February 1942 when the United Kingdom and Venezuela signed two → treaties. In the first treaty the United Kingdom ceded Patos Island to Venezuela and at the same time the President of Venezuela made an oral statement abandoning Venezuela's claim to Soldado Rock. In the second treaty the two States, having defined a line of delimitation in the Gulf, each agreed not to assert any claim to sovereignty or control over that part of the submarine area of the Gulf, outside territorial waters, which fell on the other State's side of the line. Likewise, each agreed to recognize any rights of sovereignty or control which had been or might later be "lawfully acquired" by the other in the latter's part of the submarine area. The treaty went on to declare that it would not affect in any way the status of the waters of the Gulf and any right of passage or navigation on the surface, thus reflecting the concern of both States, and that of third States such as the United States, during the negotiations (→ Navigation, Freedom of). By separate and unilateral action, each State later annexed its part of the submarine area to its territory (→ Annexation).

A → mixed commission failed to bring about an agreement on the demarcation of the maritime boundary (→ Boundary Waters). Since the creation of the independent State of Trinidad and Tobago in 1962, attempts have been made to resolve by → negotiation this question and others arising from extended fishery jurisdiction (→ Maritime Jurisdiction; → Fishery Zones and Limits; → Boundary Disputes in Latin America).

3. *Legal Significance*

The above events have a positive significance in that they brought about one of the first treaties to acknowledge that the bed and subsoil of the high seas were capable of being exclusively appropriated, while high seas freedoms were retained for the superjacent waters. They have a negative significance in that the legal theory on which the contracting parties, or at least the United Kingdom, acted, namely that the sea-bed and subsoil beyond the territorial sea was a *res nullius*, capable of acquisition as territory, was quite different from the theory which underlay the Truman Proclamation in 1945 and which has come to prevail both in treaty law (see the Convention on the Continental Shelf, 1958, UNTS, Vol. 499, p. 311) and → customary international law (→ North Sea Continental Shelf Case): This is the doctrine that the coastal State has *ipso jure* sovereign rights for the exploration and exploitation of the natural resources of the → continental shelf.

Treaty between His Majesty in Respect of the United Kingdom and the President of the United States of Venezuela concerning the Status of the Island of Patos, February 26, 1942, LNTS, Vol. 205 (1942) 131–136.

Treaty between His Majesty in Respect of the United Kingdom and the President of the United States of Venezuela relating to the Submarine Areas of the Gulf of Paria, LNTS, Vol. 205 (1942) 121–130.

Order in Council annexing the submarine areas of the Gulf of Paria and attaching them to Trinidad and Tobago for Administration Purposes, BFSP, Vol. 144 (1942) 970–971.

United Kingdom State Archives, Public Record Office, London: Class F.O. 371, pieces 19847, 20675, 21554, 22850, 24270, 24271, 26308, 26309, 30745.

F.A. VALLAT, The Continental Shelf, BYIL, Vol. 23 (1946) 333–338.

United States Department of State, Bureau of Intelligence and Research: International Boundary Study, Series A, Limits in the Sea, No. 11.

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PERSIAN GULF

1. *General Background*

The Persian or Arabian Gulf is a shallow trough of the Indian Ocean stretching over 500 statute miles from the mouth of the Shatt Al-Arab river south-eastward to the Strait of Hormuz and the adjacent Gulf of Oman. Covering approximately 97 000 square miles, it is surrounded by eight States: Bahrain, Iran, Iraq, Kuwait, Oman

(Musandam peninsula exclave), Qatar, Saudi Arabia, and the → United Arab Emirates (UAE). The Gulf region, forming part of the "fertile crescent" from which human civilization sprang 5000 years ago, now belongs to the Middle Eastern "crescent of crisis".

Since the Arab conquest in the 7th century, life in the Gulf region has been determined by Islam, a religion split early into a Sunnite and a Shiite branch. The Arab States from Oman to Iraq are politically dominated by Sunnites, although all of them have a partly or even mostly Shiite population (Bahrain circa 65 per cent, Iraq circa 60 per cent), while Iran has been ruled by a Shiite clergy since 1979. The ethnic and cultural division between the Semitic Arabs and the Indo-European Persians who dominate Iran has thus been supplemented by religious differences. There are serious political and religious tensions between Iran and the Arab Gulf States which became obvious in the July 1987 riots by Iranian pilgrims in Mecca.

There are also ethnic → minority problems in the Gulf region that have primarily affected the relationship between Iran and Iraq. The population in Iran's oil-rich Chuzestan province bordering the Shatt Al-Arab is mostly Arab, and Iraq has never renounced its irredentist territorial claims to what it calls Arabistan (→ Irredentism). More serious problems are involved in the Kurdish question. The Kurds are an Indo-European people living in sizeable areas extending from south-eastern Turkey through north-eastern Syria to north-eastern Iraq (Arbil, Sulaymaniah) and north-western Iran (Rezaiyeh, Sanandaj) where they form the majority of the population. In Iraq, the Kurds account for 15 per cent or more of the total population, in Iran for around 8 per cent. They have long fought for autonomy or even national independence by means including armed struggle. Since 1961, the Iraqi government has faced Iranian-supported Kurdish guerillas in a part of the country that is crucial because of its oil deposits. During the Iraq-Iran war, Kurdish guerrillas fought on the Iranian side.

Most of the States surrounding the Gulf have known a British or Turkish colonial or quasi-colonial past, following earlier Portuguese and Dutch influences. From the 16th through the 19th centuries, the Gulf region harboured important bases on the European trade route to India. When the area's oil wealth was discovered, at the turn of the 20th century, the foundation of its present-day strategic importance was laid. At that time, the main players for power over the Gulf were the Ottoman and Persian Empires, Britain and Czarist Russia.

World War I brought some changes in the region's political landscape: Former Turkish Mesopotamia was placed under British tutelage as a → League of Nations "A" → mandate until 1932, when it gained independence as the Kingdom of Iraq. The Persian Empire which had long been dominated by Russia in the north and Britain in the south (Anglo-Russian Agreement on spheres of influence, August 31(18), 1907, Martens NRG3, Vol. 1, p. 8; → Spheres of Influence) became an original member of the League but remained subject to outside interference.

Saudi Arabia, whose Hejaz province had been Turkish until 1916, was consolidated in its present form in the 1930s under the rule of Ibn Saud.

Kuwait remained a sheikhdom under British protection until, in 1961, it was granted independence, which Iraq recognized only in 1963 after Britain had averted an impending Iraqi invasion. Kuwaitis fear that Iraq may resurrect territorial claims to all of Kuwait which had once belonged to the Ottoman province of Basrah.

Qatar, having been under Turkish domination earlier, was a British protectorate between 1914 and 1971 when it became independent (→ Protectorates).

Bahrain also gained independence from Britain in 1971. Britain's domination had begun in the early 19th century, not long after Bahrain had broken away from Persia. Iran upheld territorial claims to Bahrain until 1970.

In the Sultanate of Oman, British influence, though present since the late 18th century, had never been strong enough to jeopardize independence.

The United Arab Emirates were formed in 1971/1972 as a federation of seven sheikhdoms that since the late 18th century had been under British influence and later protection as the Trucial States.

The most momentous recent event in the Gulf region proved to be the 1979 Islamic revolution in Iran under the Ayatullah Khomeini's leadership.

In 1981, six Gulf monarchies formed the Co-operation Council of the Arab Gulf States to achieve greater unity in view of a perceived threat from the Islamic Republic of Iran. Following steps toward economic integration, a common defence policy was devised.

Today, the Gulf region's status in international politics is primarily determined by its oil wealth on which the world economy depends in large measure, due mainly to the fact that the western industrialized nations, including Japan, buy an important part of their crude oil supply in the area. Approximately 25 per cent of all oil moving in world trade comes from the Gulf countries. The land area around the Gulf and its continental shelf hold circa 70 per cent of the world's known oil reserves.

2. *Law of the Sea Issues*

(a) Semi-enclosed sea

The Gulf is a semi-enclosed sea in the sense of Art. 122 et seq. of the United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF.62/122 with Corr.; not yet in force). The concept of semi-enclosed seas, requiring a special legal régime for balancing the rights of coastal States among each other and with the interests of third States with regard to, for example, resources management, scientific research, preservation of the marine environment and internal navigation, was devised with the active participation of Iran and Iraq. While the geographically disadvantaged Iraq, which has only a narrow access to the Gulf, had advocated general international law rules concerning semi-enclosed seas, Iran had favoured a case-by-case approach through regional agreements. Iraq's attempt to secure by definition a high seas status to all semi-enclosed seas failed.

(b) Delimitation of continental shelves

The → continental shelf of the Gulf covers all of its sea-bed beyond the → territorial seas. The Convention on the Continental Shelf, April 29, 1958 (UNTS, Vol. 499 (1964) p. 311) is inapplicable as none of the Gulf States has ratified it. A number of agreements on the delimitation of the oil-rich shelf areas have been concluded between adjacent and opposite States on the Gulf since 1958, mostly under the influence of Great Britain and the United States, which were both interested in oil concessions. The treaties have usually been based on a median line approach, modified by considerations of equitable distribution of shelf areas. Several shelf boundaries still await delimitation. Conflicting claims to shelf areas often coincide with disputes over land territory or → islands. Apart from this, the equidistance principle would offer the most appropriate delimitation method in the Gulf. It would produce an equitable solution, if adequate account were taken of some special circumstances, primarily the presence of islands, which could be accorded less than full effect, and of oil fields extending across the equidistance line, which could be equally divided. The existing delimitation agreements provide examples for such an approach.

(c) Protection of the marine environment

Pollution control is crucial in the semi-enclosed Gulf whose physical features make it particularly vulnerable. Heavy tanker traffic and extensive offshore oil production pose increased pollution risks. This was recognized by the International Convention for the Prevention of Pollution from Ships, under which the Gulf was designated a "special area" where any discharge of oil should be prohibited (November 2, 1973, ILM, Vol. 12, p. 1319).

Bahrain, Kuwait, Qatar, Saudi Arabia and the UAE are parties to the International Convention for the Prevention of Pollution of the Sea by Oil (May 12, 1954, UNTS, Vol. 3, p. 327). Oman acceded to the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships of November 2, 1973 (February 17, 1978, British Command Papers, Cmnd. 7347, Misc. 27 (1978)).

On April 24, 1978, under the auspices of the → United Nations Environment Programme (UNEP), all Gulf States except Oman, which later acceded, signed the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (ILM, Vol. 17, p. 511), and a Protocol concerning Regional Co-operation in Combating Pollution by Oil and other Harmful Substances in Cases of Emergency (ILM, Vol. 17, p. 526) (in force since 1980). An Action Plan for the Protection and Development of the

Marine Environment and the Coastal Areas was also agreed (→ Marine Environment, Protection and Preservation).

During the Iraq-Iran war, attacks on oil installations led to large-scale pollution, prompting the → United Nations Security Council to call upon the belligerents to refrain from all actions jeopardizing the Gulf's marine fauna and flora (Res. 540 of October 31, 1983).

(d) Freedom of Navigation

The shipping lanes to and from the Gulf through the Strait of Hormuz still play an important role in supplying the world economy with crude oil even though oil transport via overland → pipelines has increased. Some 17 per cent of the oil consumed in the West comes through the Strait. Maintaining the freedom of navigation in the Gulf has therefore been a particular concern of the Western industrialized nations including Japan (→ Navigation, Freedom of). When the "tanker war" began during the Iraq-Iran armed conflict, several States sent warships to the area for the protection of neutral shipping (→ Neutral Trading). The United Nations Security Council in this context repeatedly emphasized that the international legal right to free navigation in international waters was to be respected by all States (e.g. Res. 540 of October 31, 1983; Res. 552 of June 1, 1984).

The Strait of Hormuz, with a minimum width of 20 3/4 nautical miles, is controlled by Iran in the north and Oman in the south (they both claim a 12 nautical miles territorial sea). The → strait is used for international navigation in the sense of Art. 16(4) of the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (UNTS, Vol. 516, p. 205) (guaranteeing non-suspendable innocent passage) and Arts. 34 to 45 of the United Nations Convention on the Law of the Sea (guaranteeing transit passage) Neither Iran nor Oman have ratified the 1958 Convention. Both States dispute the applicability of the rule in Art. 16(4) on the ground that the Strait does not connect one part of the → high seas to another. All other Gulf States demand free passage for military and non-military vessels in times of peace (→ Innocent Passage, Transit Passage).

In the → Corfu Channel Case, the → International Court of Justice (ICJ) held that the right of innocent passage through straits in times of peace extended to → warships. The major maritime powers have accordingly for decades maintained a naval presence in the Gulf. In 1980, Iran closed its territorial sea, including the portion in the Strait, to all foreign ships, for security reasons. Since then, the maritime traffic has used the Omani territorial sea for passing the Strait. Iran later threatened to block the waterway entirely but no such attempt was ever made. The United States pledged to use force if necessary to keep the Strait open.

3. Territorial Issues

The territorial issues in the Gulf region include disputes about → boundaries and the → territorial sovereignty over certain islands. Some remaining border uncertainties on the Arabian peninsula have been eclipsed by the old Shatt Al-Arab boundary dispute between Iran and Iraq that was the major cause of the Iraq-Iran war.

(a) Shatt Al-Arab boundary

The Shatt Al-Arab, the circa 120-mile-long confluence of the Euphrates and Tigris rivers, opening out into the Gulf, in its southern half forms the boundary between Iran and Iraq. It provides Iraq's only access to the Gulf, a waterway connecting its most important → port, Basrah, with the open sea. Although Iran has a long Gulf coast line, its major port of Khorramshahr and its Abadan oil refinery lie on the Shatt Al-Arab.

The dispute over the Shatt Al-Arab boundary reaches back to the 16th century when the Ottoman Empire established control over Mesopotamia. In the 19th century, serious efforts were undertaken with British and Russian mediation to obtain a settlement, leading to the conclusion of the Treaty of Erzeroum between the Persian and Ottoman Empires (May 31, 1847, Martens NRG, Vol. 20, p. 4). Art. II of the treaty recognized Persian sovereignty over the territories on the left bank of the Shatt Al-Arab, including the city and port of Mohammara (now Khorramshahr) as well as the island of Khizr (Abadan) and its anchorage, and granted Persian boats freedom of navigation on the river, all of which implied that the river as such remained completely under Ottoman sovereignty. Demarcation attempts on the basis of this treaty failed. The validity of the

treaty was confirmed by the Tehran Protocol, (December 21, 1911, CTS, Vol. 215, p. 138).

In 1913, a Protocol was signed at Constantinople between Britain and the Ottoman, Persian and Russian Empires with regard to the Turco-Persian boundary (November 4(17), 1913; League of Nations, Official Journal, Vol. 16 (1935 I) p. 201). The Shatt Al-Arab and all the islands therein were to remain under Ottoman sovereignty, the eastern normal low watermark constituting the boundary, subject, however, to a number of conditions and exceptions. Some islands were given to Persia; and Persian sovereignty over Mohammara, including its port and anchorage, was confirmed. The Delimitation Commission set up under the Protocol completed its work in 1914.

Persia began seeking border rectifications shortly after World War I from the British mandatory power. It asserted that the Protocol of 1913 was invalid for lack of consent and that changing times justified Persian claims to an equal partition of the Shatt Al-Arab along a middle line. A serious dispute later erupted with the newly independent Iraq which was brought before the Council of the → League of Nations in 1934 but adjourned a year later.

On July 4, 1937, Iraq and Iran concluded a new boundary treaty (LNTS, Vol. 190, p. 241). In Art. 1, they agreed that the 1913 Protocol and the 1914 Minutes of the Delimitation Commission (League of Nations, Official Journal, Vol. 16 (1935 I) p. 207) should be valid and binding, subject to a modification provided in Art. 2. This modification concerned a sector of the river at Abadan, less than five miles long, where the boundary line was moved to the thalweg, this line being vertically connected with the eastern low watermark that continued to form the border elsewhere, except at the Mohammara anchorage. The separate convention concerning the management of the waterway mentioned in Art. 5 was never concluded because the two States could not agree whether they both had equal management rights, as Iran asserted, or whether Iraq's right was exclusive.

In 1959, the boundary dispute erupted again when the new Iraqi revolutionary government demanded the return of the river area ceded in 1937, alleging that the cession had occurred under pressure. Iran, unwilling to accept the left bank of the river as the boundary, in response advocated either the thalweg line, which in the Shatt Al-Arab does not follow the median line and is also constantly shifting, or alternatively the median line. In 1969, Iran formally abrogated the treaty of 1937, primarily on four grounds: inequality; failure by Iraq to fulfil its treaty obligations; fundamental change of circumstances; and non-application of the thalweg principle. The validity of the Iranian abrogation is open to question because boundary treaties enjoy special legal stability; it was rejected by Iraq.

Mounting tensions between the two States led to several border clashes from 1971 to 1974. On March 6, 1975, the two States signed a Joint Iranian-Iraqi Communiqué (the Algiers Protocol, UNTS, Vol. 1017, p. 118), agreeing to proceed with the definitive demarcation of their land frontiers on the basis of the Constantinople Protocol of 1913 and the Minutes of the Frontier Delimitation Commission of 1914. The river frontiers were to be delimited along the thalweg. They further agreed to end all subversive infiltration across the common frontier (meaning primarily Iranian support for the Kurdish insurgency in Iraq).

The Protocol was followed by the Baghdad Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq of June 13, 1975 (UNTS, Vol. 1017, p. 54) with several appended protocols (in force since 1976). One of the latter concerned the delimitation of the common river frontier pursuant to Art. 2 of the Treaty, and another the transboundary infiltration of subversive elements which had to be terminated under Art. 3 of the Treaty. Art. 2 of the delimitation protocol provides that the Shatt Al-Arab boundary shall in its entirety follow the thalweg, defined as the median line of the main navigable channel at the lowest navigable level. Art. 4 of the Baghdad Treaty repeated the clause of the Algiers Protocol that the agreements on the boundary and the infiltration of subversive elements constituted the indivisible elements of an overall settlement. Art. 6 contained a dispute settlement mechanism.

The implementation of these agreements went smoothly until the bilateral relationship deteriorated after the 1979 Islamic revolution in Iran. On September 16 or 17, 1980, Iraq unilaterally

abrogated the Baghdad Treaty and reclaimed sovereignty over the entire Shatt Al-Arab. Iraq put forward mainly two legal reasons, asserting that she had accepted the Treaty under military coercion only and that Iran was guilty of a material breach by continuing to support the Kurdish insurgency. The coercion argument, if factually correct, would render the Treaty void under the customary rule embodied in Art. 52 of the → Vienna Convention on the Law of Treaties. The second ground, even if supported by facts, seems to be inconclusive because it is incompatible both with Art. 5 of the Baghdad Treaty, providing that the course of the land and river frontier shall be permanent and final, and with the dispute settlement mechanism in Art. 6 which Iraq had not even tried to set in motion. At any rate, the ensuing Iraq-Iran war or any unilateral moves of the belligerents could not affect the Baghdad Treaty and its protocols (→ War, Effect on Treaties). All things considered, the present boundary régime is uncertain.

(b) Disputes concerning territorial sovereignty over islands

The two most serious of several such disputes involve Iraq and Kuwait, and Iran and the UAE. Iraq has upheld claims of territorial sovereignty over the strategically important Kuwaiti islands of Warbah and Bubiyan close to her coast (and an adjacent part of the Kuwaiti coast), even though in a 1963 bilateral agreement Iraq had recognized those islands as Kuwaiti territory (Agreed Minutes regarding the restoration of friendly relations, recognition and related matters, October 4, 1963, UNTS, Vol. 485, p. 321). Iraq denies the legally binding nature of this agreement.

Both Iran and the UAE claim sovereignty over three islands strategically located at the entrance of the Gulf into the Strait of Hormuz: Abu Musa, and the Greater and the Lesser Tunb from which the international shipping lanes can be controlled. On November 24, 1971, Iran and Sharjah, which now belongs to the UAE, had reached a memorandum of understanding that gave Iran the right to land troops in Abu Musa and occupy parts of the island, although expressly reserving each State's territorial claims. Iran occupied all three islands by military force on November 30, 1971, when Britain was withdrawing from the area, and has held them ever since. A complaint to the UN Security Council by several Arab States in this matter was unsuccessful. Iran bases her claims primarily on → historic rights preceding the British occupation (which Iran had constantly protested), recognition on geographical → maps, geographical connection, consideration for the abandonment of Iran's claim to Bahrain, and strategic and national security interests. The Iranian claims have not met with international recognition. Sovereignty over the islands became an issue in the Iraq-Iran war.

4. The Iraq-Iran War

War broke out between Iraq and Iran on September 22, 1980 when Iraqi forces crossed more than 350 miles of the common boundary in the southern and central sectors and occupied an approximately 6-mile wide strip of Iranian territory. The fighting continued for almost eight years. The reasons prolonging the war were of a political, ideological, territorial and religious nature, invigorated by personal enmity between the two national leaders. The war was fought with crusade-like ferocity. Iran even used children in combat, despite the provisions of Art. 77(2) of the 1977 Protocol I Additional to the → Geneva Red Cross Conventions of 1949 which, though not ratified by either belligerent and arguably not reflecting a rule of → customary international law, appears nevertheless to result from the laws of humanity and the dictates of the public conscience (→ Martens' Clause). While according to traditional rules the outbreak of war *ipso jure* terminates diplomatic relations, Iran and Iraq maintained low-level diplomatic representations in each other's capitals until October 1987 (→ Diplomatic Relations, Establishment and Severance).

(a) Problem of aggression

The massive Iraqi strike was preceded by several border clashes initiated alternately by both States. There had also been assassination attempts on Iraqi political figures by Shiite extremists allegedly supported by Iran. While para. 6 of UN Security Council Res. 598 of July 20, 1987 proposes to entrust an impartial body with inquiring into responsibility for the conflict, a preliminary assessment can already be given. According to

Art. 2 of the UN General Assembly's Definition of Aggression, Iraq having first used armed force on a massive scale is *prima facie* guilty of an → aggression. Iran, as a victim of an armed attack, could exercise her right of → self-defence. When Iraq had completely withdrawn her armed forces from Iranian territory in 1982 and made several cease-fire offers, the Iraqi armed attack had come to an end. But Iran fought on for the purpose of overthrowing the Iraqi Government. This continued → use of force was not supported by the right of self-defence. The Iranian prolongation of the war constituted an act of aggression against Iraq. The UN Security Council did not take effective measures for the restoration of international peace and security pursuant to Art. 51 of the United Nations Charter prior to Res. 598.

(b) Law of war issues

The Iraq-Iran war brought up several law of war issues (→ War, Laws of). Events indicate that the traditional legal rules, especially those concerning → sea warfare, may no longer be sufficient to deal with modern practices. The ferocity of the war led to violations of the *jus in bello* by both sides.

(i) War zones

The Iraq-Iran war demonstrated the most extensive use of → war zones since World War II. Shortly after the outbreak of hostilities, both adversaries proclaimed war zones with no serious consequences for neutral shipping, Iraqi air attacks remaining sporadic. In 1984, Iraq declared a 50 nautical mile "exclusion zone" around the main Iranian oil terminal at Kharg Island and threatened to attack any ship entering the area. With systematic air raids on commercial vessels of various nationalities in and also outside the zone, Iraq initiated the so-called "tanker war". Iraq claimed a customary international legal right of belligerents to declare war zones and also justified her actions as → reprisals against Iran. Both legal arguments are questionable. The right of → blockade cannot justify indiscriminate attacks on neutral → merchant ships without warning and without regard for crew safety. The Iraqi practice resembled the unrestricted naval warfare conducted by Germany in World War II and condemned as illegal by the Nuremberg Tribunal (→ Nuremberg Trials). Moreover, reprisals may not be primarily directed against third States. As the Iraqi declaration of an exclusion zone finds no basis in international law, Iraq's subsequent attacks on neutral merchant vessels were in violation of the laws of war.

Iran declared her own exclusion zone in 1987, placing an approximately 40 mile wide stretch along the entire length of her Gulf coast off limits to any ship not bound for Iranian ports. Neutral ships thenceforth used → sea lanes outside the Iranian zone so that only few Iranian attacks occurred there. The Iranian practice was essentially defensive in character and arguably remained within the limits of the international law of war as it has developed.

(ii) Law of neutrality

The traditional rules of neutrality (→ Neutrality, Concept and General Rules) were partly disregarded during the Gulf war. Some States, primarily Kuwait and Saudi Arabia, openly gave financial and other support to belligerent Iraq which led to sporadic Iranian bomb and missile attacks on Kuwait. Both belligerents violated the rights of neutral States. Their "tanker war" affected neutral shipping more than any other conflict since 1945. In response to Iraq's illegal actions concerning Kharg Island, Iran began taking measures against neutral vessels, mostly those bound for Kuwaiti and Saudi ports. Iran not only stopped and searched them (→ Ships, Visit and Search) but also launched naval and air attacks which could not be justified as reprisals. Even assuming that Iran could take reprisals against Iraq for the latter's illegal attacks on non-Iranian tankers, Iran was not free to target neutral vessels. Some attacks even occurred in third States' territorial waters.

(iii) War of mines

In 1987, Iran covertly began extensively using → mines against neutral ships, especially in the approaches to Kuwaiti ports, but outside any territorial waters. This mine war was illegal for the same reasons as Iran's overt attacks on neutral vessels. Furthermore, although Iran is not bound by the Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (Martens NRG3, Vol. 3, p. 580), elementary considerations of humanity prohibit secret

minelaying in international shipping lanes on the high seas. This seems to follow from the ICJ's judgments in the Corfu Channel Case and the Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits).

The minesweeping operations on the high seas by third States in the Gulf, undertaken to guarantee safe passage for neutral merchant vessels, were justified under international law.

(iv) Chemical warfare

The Gulf war was also characterized by the large-scale use of chemical weapons, for the most part by Iraqi against Iranian troops, but also against Iranian-held Kurdish towns in Iraqi territory, resulting in extensive loss of human lives, military as well as civilian (→ Chemical Warfare). This practice has rightly been universally condemned as a → war crime. It violated the ban on the use of chemical weapons by the Geneva Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925 (LNTS, Vol. 94, p. 65) binding both States (see UN Security Council Res. 612 of May 9, 1988) and now generally recognized as customary international law (→ Biological Warfare). The resulting worldwide concern led to the Paris Conference on Chemical Weapons in January 1989 which advocated their total abolition.

(v) Prisoners of war

Grave violations of the Third Geneva Convention relative to the treatment of → prisoners of war (August 12, 1949, UNTS, Vol. 75, p. 135) were committed by Iraq, but even more by Iran. This caused the International Committee of the Red Cross to take an extraordinary step: On May 7, 1983, it issued an appeal to all States parties to the Geneva Conventions demanding that they ensure respect for those Conventions according to common Art. 1 (→ Red Cross).

(vi) "War of cities"

Both adversaries repeatedly attacked each other's population centres with bombs and missiles in violation of the customary humanitarian laws of war prohibiting military operations against civilian targets (→ Civilian Objects). The protection of the civilian population against attacks takes precedence even over the right of belligerent reprisals (→ Civilian Population, Protection). The UN Security Council Res. 540 of October 31, 1983 condemned such acts.

(c) Internationalization of the conflict

The Gulf war attained wider international dimensions when Belgium, France, Great Britain, Italy, the Netherlands, the Soviet Union and primarily the United States sent warships to the Gulf for minesweeping purposes and to protect neutral shipping against Iranian attacks. Iran perceived the presence of those warships as an illegal threat of force and an indirect support of Iraq. However, the preceding Iranian threats and uses of force, in violation of neutral States' rights, justified the international intervention, even if in fact it may have benefitted Iraq. Iran further maintained that the foreign naval presence was likely to further escalate and widen the conflict and thus violated para. 5 of UN Security Council Res. 598. Although this resolution was generally binding under Art. 25 of the UN Charter, para. 5 itself contained a non-binding appeal only.

(i) Reflagging of ships

Britain and the United States reflagged a number of Kuwaiti tankers though there probably was no genuine link between them and those ships (→ Flags of Vessels). It is controversial whether the genuine link requirement in Art. 5 of the Convention on the High Seas, April 29, 1958 (UNTS, Vol. 450, p. 82) and Art. 91(1) of the United Nations Convention on the Law of the Sea has become a rule of general international law (→ IMCO Maritime Safety Committee, Constitution of (Advisory Opinion)). Even if it has, a violation of that rule would not justify any interference with a ship.

(ii) Protection of neutral shipping against belligerents

The United States and other States claimed the right to use force in protecting neutral merchant vessels in the Gulf against illegal attacks by a belligerent. There is evidence of an international law rule supporting such a practice either as self-defence or as a limited use of force below the threshold of Art. 2(4) of the UN Charter.

(iii) United States measures against an Iranian oil platform and a civilian aircraft

United States navy ships destroyed at least one Iranian oil platform after an Iranian missile had damaged a United States merchant vessel in Kuwaiti territorial waters. The legality of this measure is debatable. As a non-belligerent, the United States could not resort to belligerent reprisals, and the general law of reprisals is subject to the prohibition on the use of force. The United States invoked her right of self-defence because the oil platform had been used for military action against neutral ships, an allegation denied by Iran.

While engaged in a battle with Iranian gunboats, a United States warship accidentally shot down an Iranian civilian → aircraft approaching the area. The United States Government voluntarily promised to pay compensation to the families of those killed. The incident was deplored in UN Security Council Res. 616 of July 20, 1988. A Council decision of the → International Civil Aviation Organization of March 17, 1989 under Art. 84 of the → Chicago Convention on International Civil Aviation exonerated the United States. Iran appealed to the ICJ on May 17, 1989, seeking not only a determination that the United States action violated the Chicago Convention and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, September 23, 1971 (UNTS, Vol. 974, p. 177; → Civil Aviation, Unlawful Interference with), but also an award of → damages.

(iv) Role of the United Nations

The UN Security Council passed a number of resolutions during the course of the war, unsuccessfully trying to bring about a cease-fire. On July 20, 1987, it adopted the indisputably binding Res. 598 under Chapter VII of the UN Charter. The Security Council determined that there existed a breach of the peace and demanded that Iran and Iraq observe an immediate cease-fire, discontinue all military actions and withdraw all forces to the internationally recognized boundaries without delay, threatening to consider further steps in case of non-compliance (thereby alluding to Art. 41 of the UN Charter). Iraq accepted the resolution immediately and Iran's acceptance followed nearly one year later, leading to a cease-fire effective since August 20, 1988. The cease-fire is monitored by a small peacekeeping force (UN Iran-Iraq Military Observer Group) which had established several hundred violations by February 1989 (→ Observers; → United Nations Forces). Iranian and Iraqi representatives have repeatedly met under the auspices of the → United Nations Secretary-General to reach a comprehensive settlement of all differences but there has been no progress so far.

Dokumente zum irakisch-iranischen Krieg (1980–1988), EA 43 (1988) D 541–568.

Iran-Iraq War and Navigation in the Gulf, ILM, Vol. 26 (1987) 1422–1487.

U. GEHRKE and G. KUHN, Die Grenzen des Irak. Historische und rechtliche Aspekte des irakischen Anspruchs auf Kuwait und des irakisch-persischen Streites um den Schatt al-Arab, 2 vols. (1963).

R.K. RAMAZANI, The Persian Gulf and the Strait of Hormuz (1979).

S.H. AMIN, International and Legal Problems of the Gulf (1981).

R. LITWAK, Security in the Gulf 2: Sources of Inter-State Conflict (1981).

S.H. AMIN, The Iran-Iraq Conflict: Legal Implications, ICLQ, Vol. 31 (1982) 167–188.

S.H. AMIN, Marine Pollution Regulation in the Persian Gulf, Marine Policy Reports, Vol. 5, No. 1 (1982).

P. HÜNSELER, Der Irak und sein Konflikt mit Iran (1982).

S.H. AMIN, The Law of Fisheries in the Persian/Arabian Gulf, Journal of Maritime Law and Commerce, Vol. 14 (1983) 581–593.

Y. SANDOZ, Appel du C.I.C.R. dans le cadre du conflit entre l'Irak et l'Iran, AFDI, Vol. 29 (1983) 161–173.

M.S. EL-AZHARY (ed.), The Iran-Iraq War (1984).

M.A. FERDOWSI, Der iranisch-irakische Krieg, Aus Politik und Zeitgeschichte, Vol. 42 (1984) 3–15.

P. TAVERNIER, La guerre du Golfe: Quelques aspects de l'application du droit des conflits armés et du droit humanitaire, AFDI, Vol. 30 (1984) 43–64.

M. JENKINS, Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals, Boston College International and Comparative Law Review, Vol. 8 (1985) 517–549.

W.J. FENRICK, The Exclusion Zone Device in the Law of Naval Warfare, CanYIL, Vol. 24 (1986) 91–126.

P. BALTA, Iran-Irak. Une guerre de 5000 ans (1987).

E. DAVID, La guerre du Golfe et le droit international, RevBelge, Vol. 20 (1987) 153–183.

R. LAGONI, Gewaltverbot, Seekriegsrecht und Schiffahrtsfreiheit im Golfkrieg, in: W. Fürst, R. Herzog and D.C. Umbach (eds.), Festschrift für Wolfgang Zeidler, Vol. 2 (1987) 1833–1867.

S.S. MILAN, The Legal Status of the Persian Gulf as a Semi-enclosed Sea, AVR, Vol. 25 (1987) 92–105.

N. RONZITTI, La guerre du Golfe, le déminage et la circulation des navires, AFDI, Vol. 33 (1987) 647–662.

S. CHUBIN and C. TRIPP, Iran and Iraq at War (1988).
J.A. GARDNER, The Iraq-Iran War. A Bibliography (1988).
K.H. KAIKOBAD, The Shatt-al-Arab Boundary Question (1988).
R. LECKOW, The Iran-Iraq Conflict in the Gulf: The Law of War Zones, ICLQ, Vol. 37 (1988) 629–644.
W.G. LERCH, Der Golfkrieg (1988).
The Persian/Arabian Gulf Tanker War: International Law or International Chaos, Ocean Development and International Law, Vol. 19 (1988) 299–321.
T.A. PHILLIPS, Exchanging Excuses for Uses of Force – The Tug of War in the Persian Gulf, Houston Journal of International Law, Vol. 10 (1988) 275–293.
T. GIEGERICH, The German Contribution to the Protection of Shipping in the Persian Gulf: Staying out for Political or Constitutional Reasons?, ZaöRV, Vol. 49 (1989) 1–40.
R. WOLFRUM, Reflagging and Escort Operation in the Persian Gulf: An International Law Perspective, Virginia Journal of International Law, Vol. 29 (1989) 387–399.

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RED SEA

1. Background

The Red Sea is a long, narrow and very deep body of water which fills a rift in the earth's crust between Africa and Asia. In the north, the Sinai Peninsula separates the two arms of the Red Sea known as the Gulf of → Aqaba and the Gulf of Suez. If the gulfs are considered part of the Red Sea, the following may be counted as its coastal States: Djibouti, Egypt, Ethiopia, Israel, Jordan, North Yemen (Yemen Arab Republic), Saudi Arabia, South Yemen (People's Democratic Republic of Yemen) and Sudan. Between its south-eastern access from the Gulf of Aden and the Indian Ocean, through the Strait of Bab al-Mandeb, and the port of Suez in the north-west, the Red Sea reaches a length of approximately 2000 kilometres. The main portion of the Red Sea ranges from 210 to 400 kilometres in width and has revealed depths of over 2000 metres.

Four waterways utilized by international shipping and enumerated as follows are closely connected with or constitute part of the Red Sea: (i) the → Suez Canal, connecting the eastern Mediterranean Sea to the Gulf of Suez; (ii) the Strait of Bab al-Mandeb, linking the Gulf of Aden to the southern portion of the Red Sea; (iii) the Strait of Gubal, joining the main body of the Red Sea to the Gulf of Suez; and (iv) the Strait of Tiran, giving access to the Gulf of Aqaba from the main part of the Red Sea. The Red Sea has major significance for international shipping largely because of the Suez Canal. In connection with the canal, the Red Sea provides the shortest route between Europe and the coastal States of the Indian Ocean and the western Pacific Ocean.

Until the construction of the Suez Canal and the development of the steam-engine in the 19th century, the Red Sea played a relatively unimposing role in international maritime communication. Nevertheless, despite the hot humid climate and unfavourable winds in the region, as well as the dangers to navigation posed by the many reefs and islands located near the straits giving access to the Red Sea and its gulfs, this waterway was already known as a trade-route in ancient times and has also been used by vessels carrying pilgrims to Islamic holy sites. With the opening of the canal, the Red Sea became a strategically vital thoroughfare for the British Empire.

When oil replaced coal as a primary source of fuel in the 20th century, the transport of this commodity from the → Persian Gulf through the Suez Canal invested the Red Sea with an entirely new status. Such transport was only briefly interrupted by the closure of the canal during the 1956 Suez War. However, the subsequent Six-Day War between → Israel and the Arab States, which resulted in the suspension of transit through the canal from 1967 to 1975, reduced dramatically the Red Sea's function in facilitating the inter-continental distribution of oil.

Nevertheless, the Red Sea retained commercial and strategic importance for the littoral States, as demonstrated by the → blockade against Israel instituted at Bab al-Mandeb during the 1973 Yom Kippur War, against which Israel retaliated by interrupting shipping through the Strait of Gubal. The Red Sea also continued to interest the superpowers in their attempts to influence regional political developments.

Notwithstanding efforts to enlarge the Suez Canal since its re-opening and the construction of oil → pipelines with terminals on the Red Sea in

Israel (Eilat) and Egypt (Sumed) to by-pass the canal, as well as the work begun on such a device in Saudi Arabia (Yanbu) to avoid shipping through the Persian Gulf, the Red Sea has not recovered its former significance for the transport of oil. The supertankers developed after the 1967 war remain too large for the canal and continue to make alternative routes more economical.

In the future, the natural marine resources of the Red Sea may provide it with an importance unrelated to international shipping. Abundant oil reserves exist in the Gulf of Suez and high concentrations of metalliferous hot brines have been discovered on the sea-bed between Saudi Arabia and Sudan (→ Sea-Bed and Subsoil).

2. *National Jurisdiction*

While the provisions of the various international conventions on the → law of the sea comprise a relevant source of international law for determination of the extent of coastal States' → maritime jurisdiction, few of the Red Sea littoral States have ratified these treaties or accepted their contents in full. Among these States, Israel alone ratified the Convention on the High Seas (April 29, 1958, UNTS, Vol. 450, p. 82) and the Convention on the Territorial Sea and the Contiguous Zone (April 29, 1958, UNTS, Vol. 516, p. 205). Israel and Sudan were the only Red Sea littoral States to ratify the Convention on the Continental Shelf (April 29, 1958, UNTS, Vol. 499, p. 311). The United Nations Convention on the Law of the Sea (December 10, 1982, UN Doc. A/CONF.62/122 with Corr.), which is not in force, has been signed by all the littoral States except Israel, Jordan and Saudi Arabia, and ratified by only Egypt and South Yemen. Thus, maritime jurisdiction in the Red Sea can only be determined by establishing the extent to which the pertinent provisions of these multilateral treaties represent → codifications of → customary international law and what State practice has been, especially with respect to the littoral States affected.

Several Red Sea littoral States lay claim to extensive maritime areas as → internal waters. This applies to Egypt, North Yemen, Saudi Arabia and Sudan, each of which has expressly provided for the drawing of straight → baselines from the mainland to → islands not more than 12 miles from the coast and around islands not more than 12 miles apart. Moreover, according to the traditional approach to territorial bays based on the number of littoral States and certain geographic conditions (→ Bays and Gulfs), the criteria for qualifying the Gulf of Suez as Egyptian internal waters have arguably been met (but see United States Department of State, Memorandum of Law, October 1, 1976, reprinted in: ILM, Vol. 16, p. 733, at p. 749 and note 20).

Following a general trend, most littoral States located on the Red Sea have claimed 12-mile-wide → territorial seas. The exceptions are Israel and Jordan, which claim only 6 and 3 miles respectively, and Ethiopia, which sees such waters as extending to the limits of its → pearl fisheries and other sedentary fisheries (→ Fisheries, Sedentary). Egypt, North Yemen, Saudi Arabia and Sudan, moreover, consider pockets of → high seas assimilated to territorial seas where they are entirely surrounded by the latter and do not extend more than 12 miles in any direction.

Most of the Red Sea coastal States have also claimed a 6 to 12-mile-wide → contiguous zone beyond the territorial sea. In a departure from the traditional approach, the majority of these States assert the right to issue legislation protecting their security interests in this area.

Rights to the → continental shelf have also been claimed by most of the Red Sea littoral States, although no agreement exists with regard to the outer limit of such claims (→ Continental Shelf, Outer Limits). The various national approaches to defining the shelf make reference to the sea-bed and subsoil beneath waters adjacent to the territorial sea and up to a depth of 200 metres, exploitability, the continental margin, a 200-mile-wide zone, or they ignore the problem of outer limits altogether.

Until now only Egypt, Djibuti and South Yemen have claimed → exclusive economic zones, which explicitly extend up to 200 miles from the baselines in the case of the latter two States. Should an increasing number of such claims be asserted and become legally effective, the Red Sea will no longer contain any areas of high seas and both of the alternative definitions of a semi-enclosed sea formulated in Art. 122 of the 1982 Law of the Sea Convention will be satisfied.

3. *Navigation and Overflight*

Traditionally, the central strip of the Red Sea situated between the territorial seas of the littoral States with opposite coasts has been recognized as high seas, allowing vessels to navigate freely through these waters and aircraft to fly over them (→ Navigation, Freedom of). The claims of littoral States to territorial seas wider than those existing previously has put the status of such waters in question. Determination of the régime presently applicable to communication through or over the Red Sea's → straits presents a particularly sensitive issue in this regard, owing to the noticeable absence of special provisions for straits, such as those formulated by both the 1958 Convention on the Territorial Sea and the 1982 Law of the Sea Convention, in the legislation on territorial seas of the Red Sea littoral States.

The régime of navigation and → overflight applicable to the Strait of Bab al-Mandeb, in contrast to that prevailing for the Danish Straits (→ Baltic Sea) or the → Dardanelles, is not regulated by special agreement. Dispute concerning this régime has been generated by the claims of the littoral States, Djibouti, Ethiopia, North Yemen and South Yemen, to territorial seas wide enough to eliminate all high seas in this waterway, by the insistence of Djibouti, North Yemen and South Yemen on prior authorization or notification for the passage of foreign → warships and nuclear-powered ships through their territorial seas (→ Nuclear Ships), and by the imposition of a blockade in the Strait against Israeli shipping in 1973.

According to the → International Court of Justice (ICJ) in the → Corfu Channel Case, customary international law provides for non-suspendable innocent passage even by warships through a strait used for international navigation between one part of the high seas and another part of the high seas. The codification of this rule in Art. 16(4) of the 1958 Convention on the Territorial Sea extended the notion of non-suspendability to innocent passage between one part of the high seas and the territorial sea of a foreign State.

Under the traditional view, the Strait of Bab al-Mandeb thus satisfies the conditions for non-suspendable innocent passage pronounced by the ICJ, since it is used for international passage and connects the high seas of the Red Sea with those of the Gulf of Aden. Furthermore, customary international law, as expressed by Art. 16(4) of the 1958 Convention on the Territorial Sea, secures such a régime for vessels engaged in passage between the high seas in the Gulf of Aden and the territorial seas of the Red Sea littoral States located north of the Strait of Bab al-Mandeb. The régime of non-suspendable innocent passage also seems applicable even if portions of the Red Sea formerly deemed to be high seas are hereafter considered primarily comprised of overlapping exclusive economic zones, or if the entire body of water is defined as a semi-enclosed sea (cf. Art. 45(1)(b) and (2) of the 1982 Law of the Sea Convention).

The Strait of Bab al-Mandeb may also satisfy the prerequisites for application of the régime of transit passage foreseen by the 1982 Convention (→ Innocent Passage, Transit Passage), as a waterway used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. If the Convention enters into force or is considered declaratory of customary international law, States without coasts on the Strait would obtain broader rights under this régime than those codified in Art. 16(4) of the 1958 Convention. The notion of transit passage would namely guarantee such States the right of overflight and the right of → submarines to engage in transit without surfacing or showing their flag (→ Flags of Vessels).

Evidence that a more liberal régime than that provided by national legislation or Art. 16(4) of the Convention on the Territorial Sea presently prevails for the Strait of Bab al-Mandeb may be derived from several instruments related to the conflict in the Middle East. Presumably motivated by the knowledge that the blockade imposed against Israel in the Strait of Tiran represented a *casus belli* for the 1956 and 1967 wars between Israel and Arab States, the → United Nations Security Council affirmed in Res. 242 (1967) the necessity of guaranteeing freedom of navigation through "international waterways in the area". Such waterways implicitly included the Strait of Bab al-Mandeb, given the object of Res. 242 to promote the establishment of peace and security in the Middle East.

In a 1975 Memorandum of Agreement (ILM, Vol. 14, p. 1468, para. 14), the United States promised to support diplomatically Israel's right to "free and unimpeded passage through and over straits connecting international waters" and specifically recognized the Strait of Bab al-Mandeb as an "international waterway". The régime intended by the reference in the Memorandum to "freedom of flights" for Israel over the Red Sea and such straits as that at Bab al-Mandeb is conceivably even broader than that of unimpeded transit passage.

Significantly, the 1979 Treaty of Peace between Egypt and Israel (ILM, Vol. 18, p. 362) did not abrogate the 1975 Memorandum. Moreover, in a collateral agreement, Israel received assurances of practical support by the United States where violations of the Treaty could be seen as threatening Israel's security (ILM, Vol. 18, p. 537). This agreement referred specifically to "a blockade of Israel's use of international waterways" (ibid., at p. 538, para. 3) as an example of a "demonstrated violation". The context in which the collateral agreement was reached indicates that such waterways implicitly included the strait previously mentioned in the 1975 Memorandum.

The legal régime governing passage through or over the main portion of the Red Sea presents no particular interpretative difficulties under the traditional view, since foreign vessels enjoy full high seas' freedoms within the strip of high seas, or the superjacent airspace in the case of aircraft, situated between the territorial seas of littoral States with opposite coasts. Should the notions of the exclusive economic zone and of semi-enclosed seas gain acceptance, the rights of non-littoral States will inevitably diminish. The freedoms of navigation and overflight for this area of the Red Sea would arguably remain unaffected even under these circumstances; nevertheless, questions concerning conflicting uses may arise.

A potential controversy persists, furthermore, with respect to the Gulf of Suez including its entrance, the Strait of Gubal. Even if the Gulf of Suez is juridically regarded as a bay consisting entirely of Egyptian internal waters, a right of innocent passage may, nevertheless, still be held to prevail there by way of exception. According to Art. 5 of the 1958 Convention on the Territorial Sea, such a right continues when the effect of establishing straight baselines to delimit maritime jurisdiction is to close off waters previously considered part of the territorial seas or high seas.

However, a far more liberal régime than that of innocent passage has been argued to apply to the Gulf of Suez because of the Suez Canal. The canal manifestly transformed the Gulf into an international waterway. Moreover, free passage through the canal would be meaningless if the Gulf were subject to the full sovereign control of Egypt. At least for vessels which have passed through the canal or intend to do so, the régime relevant to the canal should also govern navigation in the Gulf. This was already suggested by Art. IV of the 1888 Constantinople Convention on the Suez Canal which expressly precluded interference with free navigation within three miles of the ports of entry.

In addition, Art. V of the 1979 Egyptian-Israeli Peace Treaty assures Israeli ships and cargoes headed to or from Israel

> "the right of free passage through the Suez Canal and its approaches through the Gulf of Suez and the Mediterranean Sea on the basis of the Constantinople Convention of 1888, applying to all nations".

Finally, the various instruments which relate to the conflict in the Middle East previously cited in support of the contention that a liberal régime of passage generally prevails for the Strait of Bab al-Mandeb may also be considered relevant to the Gulf of Suez and the Strait of Gubal. The designation "international waterways" found in these instruments implicitly subsumes the Gulf and the latter Strait.

4. Maritime Safety

An effort has been undertaken to promote the security of navigation in the Red Sea by means of maritime traffic routing measures (→ Maritime Safety Regulations). In particular, the → International Maritime Organization (IMO) has specifically recommended traffic separation schemes for the Strait of Bab al-Mandeb and the Gulf of Suez. Traffic lanes as well as a mile-wide separation zone have been suggested by the IMO for the so-called Large Strait west of Perim Island, which divides the Strait of Bab al-Mandeb into two passage ways; coastal traffic, on the other hand, has been urged to use Small Strait, located between Perim Island and the Arabian Peninsula

(see IMO, Ships' Routeing Systems (5th ed. 1984) Part B, Sec. IV/2). Similarly, traffic lanes have been adopted for northbound and southbound shipping in the Gulf of Suez and are located in its western half (ibid., Sec. IV/1 → Sea Lanes).

The Red Sea is also the subject of a 1962 international agreement to share the costs of maintenance and improvement of two → lighthouses on small islands in the southern part of the waterway (UNTS, Vol. 595, p. 159). These navigational aids were originally built and maintained by the Ottoman Empire. During World War I, Great Britain occupied the islands on which lighthouses are located and assumed operation of the lights. Following the war, Turkey renounced its interests in the islands in Art. 16 of the → Lausanne Peace Treaty (1923) and Great Britain continued to maintain the lights, eventually with financial contributions from other States which ceased with or were interrupted by World War II.

The 1962 Red Sea Lights Agreement sets charges for each participating State based on the tonnage of its flag vessels using the lights in proportion to the total tonnage of vessels of all participating parties using the lights. Transit through the Suez Canal is considered synonymous with such use. This permits the employment of statistics on the tonnage of shipping which transits the canal, as indicated by the Suez Canal Authority, in calculating assessments under the Agreement. The participants to the Agreement have avoided creating an international organization, relying instead on the United Kingdom, to implement its provisions, including the collection of annual payments.

5. Resources

Despite the presence of oil reserves in the Gulf of Suez, over which Egypt has asserted → sovereignty, and claims to extensive fisheries in the main body of the Red Sea by Ethiopia and Saudi Arabia (→ Fishery Zones and Limits), legal attention concerning resources in the Red Sea has primarily focused on sovereignty over its metalliferous deposits (→ Natural Resources, Sovereignty over). The underlying issues in this regard concern rights of exploration and exploitation. Until now, it has proved economically unfeasible to exploit the iron, manganese, silver, zinc and other metals contained by hot and extraordinarily saline waters first discovered at great depths in the Red Sea in 1963. Although the economic significance of these hot brines, concentrated in the northern and central parts of the Red Sea, has therefore been disputed, commercial enterprises have sought exploration rights in the area.

The expression of commercial interest induced Saudi Arabia in 1968 to declare its ownership of all hydrocarbon materials and minerals in the sea-bed of the Red Sea contiguous to the Saudi continental shelf. Resting on a concept of contiguity without restriction as to outer limits, this claim clearly conflicted with the 1958 Convention on the Continental Shelf, to which Sudan is a party.

The 1958 Convention sought to promote the delimitation of claims to national jurisdiction over the continental shelf by allowing for demarcation based on geomorphological factors and exploitability. In contrast, the 1982 Law of the Sea Convention allows for claims to the continental shelf resting on the criteria of distance and exploitability. Uncertainty as to whether the outer boundaries of the exclusive economic zone coincide with those of the continental shelf further heightens the potential for dispute over rights to resources in the sea-bed and subsoil of the Red Sea.

In 1974 Sudan and Saudi Arabia concluded an agreement which appears to have resolved uncertainties between the parties regarding the application of the equidistance method and equitable principles, as developed by the ICJ in the → North Sea Continental Shelf Case (1969), in delimiting their claims to the sea-bed in the Red Sea. A median line, fixed pursuant to the equidistance method, would have entirely subjected the known metalliferous deposits there to Sudanese sovereignty. The 1974 Khartoum Agreement avoided this result by establishing three separate régimes for the waters lying between the parties' opposite coasts. Each coastal State was recognized as having unchallenged exclusive sovereign rights in the sea-bed adjacent to its coast and extending to a line where the depth of the superjacent waters measures 1000 metres. Between the Sudanese and Saudi zones, the Agreement created a so-called Common Zone, "common to both Governments", and provided

that in this area "[t]he two Governments have equal sovereign rights in all the natural resources . . . which rights are exclusive to them" (Art. V).

In keeping with the condominial character of the legal régime intended for the Common Zone (→ Condominium), the Agreement called for establishment of a Joint Commission consisting of an equal number of representatives and a competent minister from each signatory and enjoying legal capacity in both States. The Joint Commission was invested with wide-ranging authority over the exploration and exploitation of the Common Zone's natural resources. Although specifically enumerated, the powers of the Joint Commission appear to be open-ended.

Saudi Arabia bears financial responsibility for the work of the Joint Commission, the secretariat of which has its seat at Jeddah, and the Saudi investment may be recovered from the returns on the natural resources produced in the Common Zone. The Agreement stipulates that its implementation will leave the status of the high seas unaffected and navigation unobstructed "within the limits provided for by the established rules of public international law" (Art. XV). Under Art. XVI, the parties accepted the compulsory jurisdiction of the ICJ with respect to disputes which cannot be settled amicably (→ Peaceful Settlement of Disputes).

While regarded by some observers as having settled an important boundary in the Red Sea, the meaning of the Khartoum Agreement may still raise questions for the international community. Under the concept of a → common heritage of mankind, developed in connection with the 1982 Law of the Sea Convention, activities in maritime areas beyond national jurisdiction may fall within an → international sea-bed area subject to international control. Arguably, the hot-brine resources of the Red Sea, located at depths exceeding 2000 metres and economically not yet exploitable, lie beyond the Saudi and Sudanese continental shelves according to customary international law, as defined by the 1958 Convention on the Continental Shelf. Neither State, moreover, has expressly declared jurisdiction over an exclusive economic zone, thereby failing to satisfy an apparent condition for recognition of the rights related to this new concept expressed in the 1982 Law of the Sea Convention and presumably not yet reflective of customary international law. Nevertheless, the international community may have acquiesced in the delimitation of the Saudi-Sudanese sea-bed boundary by failing to protest, and Sudan has rejected any suggestion that she should renounce rights already asserted and acted upon (see UN Doc. A/AC.138/SC.I/SR.17 (1971); → Acquiescence; → Prescription).

6. Environmental Protection

Obligations for protecting the environment of the Red Sea may be derived from multilateral treaties covering a general field of international relations, such as the 1982 Law of the Sea Convention (see → Marine Environment, Protection and Preservation). Further duties of protection have been secured in treaties dealing with a specific type of environmental hazard (see → Oil Pollution Conventions) and in regional agreements aimed at a broad spectrum of dangers specifically with regard to the Red Sea region.

Extensive evaporation owing to high air temperature, minimal rainfall, and dependence for replenishment on one river (in Sudan) and inflowing currents from the Gulf of Aden make the renewal of water in the Red Sea a very slow process. In ratifying the International Convention for the Prevention of Pollution from Ships, 1973 (ILM, Vol. 12, p. 1319), and the 1978 Protocol (ILM, Vol. 17, p. 546) which amended it, over 50 States have recognized the particular threat to the Red Sea posed by its exposure to pollution by oil and other harmful substances. Two of the optional annexes to the 1973 Convention reveal as much by classifying the Red Sea as a "special area".

Annex I, concerning pollution by oil, lists methods in Regulation 10 for preventing such pollution from ships operating within waters denoted by this term. This Regulation provides stricter standards in the Red Sea than those generally applicable for oil tankers and other ships with regard to discharges; moreover, reception facilities are required at ports, including oil loading terminals and repair ports, for dirty ballast, tank washing water and other oily mixtures, and the parties to the Convention have an obligation to promptly investigate alleged violations of the Regulation.

Regulation 5 of Annex V also categorizes the Red Sea as a "special area" in respect of pollution

by garbage from ships. The related provisions prohibit the disposal into the sea of all garbage, with explicit reference to plastic materials, but except food wastes. Here, again, the parties agreed to maintain appropriate reception facilities at all of their ports on the Red Sea.

While modifying various provisions of the 1973 Convention, including those contained in Annex I, the 1978 Protocol has left the two above-mentioned Regulations unchanged. The Protocol, acceptance of which constitutes acceptance of the 1973 Convention, first entered into force in 1983; as of 1989, the Protocol formally bound only two Red Sea littoral States, i.e. Egypt and Israel. The latter has not accepted Annex V. Although Jordan and North Yemen accepted the 1973 Convention, this instrument has not separately entered into force.

The Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, February 14, 1982 (Burhenne, p. 982: 13/11–14), entered into force in 1985 for the Red Sea States Saudi Arabia, Sudan and North Yemen. It pursues the broad objectives of ensuring rational use and development of marine and coastal resources while at the same time protecting the existing ecosystems, averting hazards to health and preserving the potential of the marine environment of the Red Sea and the Gulf of Aden. The parties have agreed to cooperate in establishing the legal norms necessary for implementation of the Convention, thereby envisioning national and regional standards directed towards a harmonization of national policies (→ Unification and Harmonization of Laws).

The Convention refers individually to the major sources of pollution, for which preventive, abating, combating and emergency measures, as well as research, monitoring and assessment activities are foreseen. The Convention also calls for adoption of rules on liability and compensation. Warships and → State ships are exempted from the scope of the Convention's application. To help achieve the goals set, Art. XVI establishes a Regional Organization for the Conservation of the Red Sea and Gulf of Aden based in Jeddah and comprising a Council, a General Secretariat and a Committee for the Settlement of Disputes. A provision for the accession to the Convention by additional States refers only to members of the Arab League (→ Arab States, League of).

In the Protocol to the Regional Convention which also entered into force in 1985 for the States parties to the latter and included a similar provision in respect of membership, the parties sought to create a cooperative framework for dealing with pollution by oil and other harmful substances in emergency situations. Under the terms of this instrument, the parties pledged to draw up contingency plans, establish an appropriate national authority to fulfil their obligations and to cooperate and coordinate their responses to pollution emergencies by, *inter alia*, providing direct assistance and exchanging information. To facilitate implementation of the Protocol, the parties agreed in Art. III to establish a Marine Emergency Mutual Aid Centre subject to supervision by the Council of the Regional Organization for the Conservation of the Red Sea and Gulf of Aden Environment (cf. Art. XIII).

As in the case of the above-mentioned general multilateral treaties and those concerned with specific forms of pollution, the Regional Convention and the related Protocol have attracted only limited support from Red Sea coastal States. Clearly, the restrictive approach towards accession by third States evident in the latter instruments does not appear conducive to changing this situation. The participation of Israel, for example, which is active in the area but has until now been excluded from regional conservation efforts, seems indispensable for achieving effective cooperation and coordination of action to protect the Red Sea environment.

7. Demilitarization

Although lacking specific legal content, the expression "peace zone" has been applied to the Red Sea in connection with the ostensible objective of establishing a regional security arrangement (see e.g. the communiqué issued by Somalia, Sudan, North Yemen and South Yemen at the Taiz conference, March 22, 1977, UN Doc. A/32/154, Annex, p. 2). The designation thereby finds a parallel in occasional references to the Red Sea as an "Arab lake". This latter catchword has been employed to suggest a right to close the waters at issue to Israeli shipping or to naval vessels of the Soviet Union and other socialist States. Neither term implies a desire to reduce generally military capabilities or the presence of armed forces in the Red Sea region.

In contrast, a fundamental step towards → demilitarization of the Red Sea occurred through the conclusion of the 1979 Egyptian-Israeli Treaty of Peace. To end the state of → war between each other and promote the establishment of a comprehensive peace in the Middle East (Preamble), the parties to the Treaty mutually accepted "limited force zones" in Egyptian and Israeli territory (Art. IV). As an integral part of this arrangement, the parties agreed to restrict the presence of their land, aerial and naval forces in the Sinai Peninsula and the two northern arms of the Red Sea.

Annex I of the Peace Treaty, also entitled "Protocol concerning Israeli Withdrawal and Security Arrangements", details the new security régime. Art. II of this Annex created four zones subject to various degrees of restriction with regard to the stationing of land forces as well as their character, strength, equipment and fortifications. In addition, Annex I limits the presence and operating capabilities of aerial military forces and naval forces of the parties, referring to the same zones. Art. III of Annex I restricts flights of combat aircraft and reconnaissance flights to zones "A" (on the western Sinai coast) and "D" (on the Israeli side of the international boundary between the parties in the Negev Desert), including the airspace above the adjacent territorial waters; moreover, only unarmed, non-combat aircraft may be stationed in these areas (Art. III, para. 2). An analogous provision applies to naval vessels. Thus, Art. IV of Annex I permits the operation of such vessels along the coasts of zones A and D, including the adjacent territorial waters, but precludes the construction of non-civilian maritime ports and installations there (Art. IV, para. 5). Other restrictions notwithstanding, Art. IV, para. 4 explicitly upholds the general right of innocent passage of the parties' naval vessels.

Agreement between Sudan and Saudi Arabia relating to the Joint Exploitation of the Natural Resources of the Sea-Bed and Sub-Soil of the Red Sea in the Common Zone (Khartoum Agreement), May 16, 1974, reprinted in: UN Doc. ST/LEG/Ser.B/18 (1976) 452–455.

Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment, February 14, 1982, reprinted in: W.E. Burhenne (ed.), International Environmental Law. Multilateral Treaties (1974, with loose-leaf supplements) 982:13/11–14.

Protocol concerning Regional Co-operation in Combating Pollution by Oil and other Harmful Substances in Cases of Emergency, February 14, 1982, reprinted in: ibid., 982:14/11–12.

Djibouti, Law 52/AN/78, concerning maritime jurisdiction, summarized in: Lapidoth (1982) *infra*.

Egyptian Declaration upon Ratification of the 1982 Law of the Sea Convention; Ethiopian, Israeli, Sudanese and North Yemeni Notes regarding Declarations, in Office of the Special Representative of the Secretary-General for the Law of the Sea (ed.), The Law of the Sea. Status of the United Nations Convention on the Law of the Sea (1985) 26, 29, 34–36, 46.

Ethiopia, Maritime Proclamation No. 137 of 1953, reprinted in: UN Doc. ST/LEG/SER.B/6 (1956) 128–134.

Israel, Submarine Areas Law of 1953, reprinted in: UN Doc. ST/LEG/SER.B/6 (1956) 28–29.

Israel, Territorial Waters Law, 1956, reprinted in: UN Doc. ST/LEG/SER.B/18 (1976) 26.

Jordan, Fisheries Act No. 25, December 2, 1947, reprinted in: UN Doc. ST/LEG/SER.B/6 (1956) 522–523.

Saudi Arabia, Royal Decree No. 33, February 16, 1958 concerning territorial waters, reprinted in: UN Doc. ST/LEG/SER.B/8 (1959) 114–116.

Saudi Arabia, Royal Decree No. M-27, September 7, 1968, relating to ownership of Red Sea resources, reprinted in: ILM, Vol. 8 (1969) 606.

Saudi Arabia, Declaration concerning the Limits of the Exclusive Fishing Zones of Saudi Arabia in the Red Sea and the Arabian Gulf, 1974, translation in: El-Hakim, *infra*.

Sudan, Territorial Waters and Continental Shelf Act, 1970, reprinted in: UN Doc. ST/LEG/SER.B/16 (1974) 30–33.

North Yemen, Decree No. 15, April 30, 1967, concerning the territorial waters of the Yemen Arab Republic, translation in: El-Hakim, *infra*.

North Yemen, Decree No. 16, April 30, 1967, concerning the continental shelf, translation in: ibid.

North Yemen, Presidential Resolution No. 17, April 30, 1967, reprinted in: UN Doc. ST/LEG/SER.B/15 (1970) 133.

South Yemen, Territorial Waters and the Continental Shelf of the People's Republic of Southern Yemen Law, 1970, reprinted in: UN Doc. ST/LEG/SER.B/16 (1974) 25–27.

South Yemen, Act No. 45, 1977, concerning the territorial sea, exclusive economic zone, continental shelf and other marine areas, reprinted in: UN Doc. ST/LEG/SER.B/19 (1980) 21–26.

J.M. GARNER, The Red Sea Lights Agreement: Another Instance of International Cost-Sharing, AJIL, Vol. 69 (1975) 129–134.

R. GLAGOW, Das Rote Meer – eine neue Konfliktregion?, Politik und Sicherheit im afro-arabischen Grenzbereich, Orient, Vol. 18 (1977) No. 2, 16–50; No. 3, 25–68.

P. RONDOT, La Mer Rouge peut-elle devenir un "lac de

paix" arabe?, Défense Nationale, Vol. 33 (1977) 71–84.
R. LAPIDOTH, Passage through the Strait of Bab al-Mandeb, Israel Law Review, Vol. 13 (1978) 180–193.
A.A. EL-HAKIM, The Middle Eastern States and the Law of the Sea (1979).
R. LAPIDOTH-ESCHELBACHER, The Red Sea and the Gulf of Aden (1982).
A.M. FARID (ed.), The Red Sea: Prospects for Stability (1984).
R. ALIBONI, The Red Sea Region. Local Actors and the Superpowers (1985).
O.A. BAKHASHAB, The Legal Regime of Saudi Arabian Territorial Sea, RevEgypt, Vol. 41 (1985) 57–71.

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RHINE RIVER

1. Historical Development

The Rhine is the world's most frequently navigated waterway, apart from the → Great Lakes in North America, and the backbone of Western Europe's waterway system. The international fleet operating on the Rhine comprises 12 000 ships with a load-carrying capacity of more than 10 million tons. More than half of all European transfrontier shipment of goods, in tonnage, is by way of → European Communities (EC) inland shipping on the Rhine.

The → Vienna Congress (1815) has considerably influenced the legal system governing the Rhine up until the present. The Final Act of the Vienna Congress (Final Act of June 9, 1815 (Martens NR, Vol. 2, p. 361)) includes in Arts. 108 et seq. the basic principles for European river navigation law and may be characterized as a constitutional charter in respect of such law (→ International Rivers). Annex 16 B to the Final Act (Rheinurkunden, Vol. I, p. 43) defines the general principles relating to the Rhine River more precisely. It places special emphasis on the basic postulates for freedom of navigation and for the creation of a uniform legal system for the entire Rhine.

As early as 1815 the Vienna Congress called for the creation of an International River Navigation Commission for the Rhine. On March 31, 1831, the riparian States agreed upon the first Rhine Navigation Convention of Mainz (Rheinurkunden, Vol. I, p. 212). The demands in Annex 16 B of the Final Act were, for the major part, translated into a regulation binding on the riparian States under international law and created an international law basis for the first true → supranational organization. This organization, namely the Central Commission for the Navigation of the Rhine (Central Rhine Commission), was to have independent jurisdictional powers.

The Rhine Navigation Convention of Mainz, however, soon required revision as the international legal situation with reference to the Rhine had developed not only as a result of numerous decisions of the Central Rhine Commission but also through a network of bilateral treaties on commerce and navigation between the riparian States. This led to the conclusion of the Rhine Navigation Convention of Mannheim (Mannheim Convention) of October 17, 1868 (Rheinurkunden, Vol. II, p. 80) which, together with later revisions and amendments, continues to be the fundamental international treaty governing Rhine navigation under international law.

Except for Switzerland, all of the then-existing riparian States, i.e. Baden, Bavaria, France, Hesse, the Netherlands and Prussia, were contracting parties to the Mannheim Convention. Under international law, this treaty cannot be renounced and may be revised only by unanimous consent. As early as 1868, the Mannheim Convention took account of the German riparian States' accession to the German Customs Union (→ Zollverein (German Customs Union)). Art. 13 of the Mannheim Convention provided that where several riparian States had established a joint customs and tax system, the border enclosing the area of the → customs union was to be considered the national border (→ Customs Frontier). Until World War I, however, the German contracting States represented on the Central Rhine Commission continued to act as autonomous parties with separate voting rights. The provision of Art. 13 of the Mannheim Convention might again be of importance today in view of the EC membership of all riparian States with the exception of Switzerland.

The provisions of the → Versailles Peace Treaty (1919), particularly in Arts. 354 et seq., caused substantial amendments to be made to the Rhine régime. These articles provided for the opening of

the Rhine to the ships of all third States and thus for the → internationalization of the river. Art. 356 specifically provided that ships of all nations should have the same rights and privileges as vessels of riparian States. To guarantee this, Great Britain and Italy, as non-riparian States, were each given a seat and a vote on the Central Rhine Commission (Art. 355) and thus became the international community's co-guarantors of the internationalization of the Rhine. The additional admission of Switzerland and Belgium to membership on the Central Rhine Commission, on the other hand, was due to the direct or indirect riparian status of these States.

After World War II a departure was made from the Versailles Peace Treaty's provisions on internationalization. Italy, as one of the international community's guarantors, withdrew from the Central Rhine Commission whereas the riparian State of Switzerland acceded to the Mannheim Convention. As of 1987, the following States were contracting parties to the Mannheim Convention: Belgium, the Federal Republic of Germany, the United Kingdom, France, the Netherlands and Switzerland. The aforementioned departure from the Peace Treaty's provisions was further evidenced by the fact that, contrary to the more extensive provisions of Art. 356 of the Peace Treaty, the riparian States observed the prohibition of national discrimination as contained in Art. 4 of the Mannheim Convention only where ships of these States were concerned. Moreover, limited → cabotage was temporarily reserved only for riparian States' vessels. On the occasion of the partial revision of the Mannheim Convention on November 20, 1963 (German Bundesgesetzblatt 1966 II, p. 561), the contracting parties also stated that not all of the amendments made to the Mannheim Convention after 1868 were to be part of the Rhine Shipping Convention but rather only those which were in force as of 1963 (Art. V of the 1963 revision).

With the drafting of the Second Protocol Additional to the Revised Rhine Shipping Convention of October 17, 1868 (October 17, 1979, German Bundesgesetzblatt 1980 II, p. 871), the prohibition of discrimination as contained in Art. 4 of the Mannheim Convention was further restricted by the fact that, as a matter of principle, participation in the Rhine shipping market was to be reserved exclusively for ships of the contracting States. Considering this long-standing practice and its fixation in international law as described above, it must be concluded that the provisions in Art. 356 of the Versailles Peace Treaty are applicable to Rhine navigation law to a limited extent only. The possibility of new controversies arising with regard to the aforementioned regulations on the internationalization of the Rhine cannot be excluded in the event that the Main-Danube Waterway is completed (→ Rhine-Main-Danube Waterway).

The establishment of the European Communities caused a smouldering conflict between Rhine navigation law and EC law which has lasted 25 years and for which a solution should be found. The underlying reasons for this conflict are that Switzerland is not an EC member State and that the Rhine Navigation Convention (Mannheim Convention) has established an independent economic system different from that of the European Communities. In 1868, the intent of the riparians had been to boost Rhine shipping trade by reducing all obstacles originating from State-imposed trade barriers. Today the concern is to preserve, by means of State intervention, the freedom of Rhine shipping trade from any private concentration of power and concomitant ruinous competition as well as to offset distortions in competition with other modes of transport such as by rail and road. Moreover, the provisions of Art. 3 of the Mannheim Convention, which do not allow any toll-levying arrangement, would seem to require revision given the steady increase in the maintenance costs incurred by the riparian States with respect to the Rhine. However, since Switzerland is opposed to extending the scope of EC law to the Rhine, EC transport legislation has until now scarcely been applied to the Rhine; indirectly this factor has also resulted in restricting and, in instances, even obstructing EC transport policies.

2. Freedom of Navigation: Movement and Trade

Under Art. 1 of the Mannheim Convention the vessels of all nations are guaranteed a technical freedom of movement in the Rhine basin and, thus, are allowed free international transit. Art. 3 of the Mannheim Convention exempts the vessels of all nations from charges which are based solely on the fact of navigation on the waterway. In

territorial terms, freedom of navigation as accorded under the Mannheim Convention covers the course of the Rhine River from Basle to the open sea, thereby including such branches of the Rhine as the Lek and the Waal and any other outlets of the Rhine to the open sea in the Rhine's delta region. Therefore, the route to the open sea via Antwerp must presently also be included in this category (Mannheim Convention, Art. 1, para. 1 and Art. 2 paras. 1 and 2). In contrast to the outlets of the Rhine, its affluents, such as the Neckar, Main or Kahr, do not fall within the freedom of navigation accorded under the Mannheim Convention.

The Rhine Navigation Convention does not recognize absolute freedom of trade, i.e. complete freedom in concluding freight contracts and entering into commercial transactions of other types. This follows from the wording of Art. 1 of the Mannheim Convention. In addition, a configuration of interests similar to that prevailing among the colonial powers in the context of the Open Door Policy with respect to the Congo and Niger rivers in 1885 did not exist with reference to the Rhine either in 1831 or in 1868 (→ Niger River Régime; → Chinn Case). Nor did the Versailles Peace Treaty bring about absolute freedom of trade with regard to Rhine navigation. Even if account is taken of the phrase "*sous le rapport du commerce*", as contained in the Preamble to the Mannheim Convention, freedom of navigation pursuant to Art. 1 allows only for the right to engage in such commercial transactions as are entailed by the transport of goods or passengers, e.g. affreightment, employment of staff, storage and removal of cargoes, supplying of fuel and other activities directly related to ship operation.

Even if the provisions of Arts. 4 and 14 of the Mannheim Convention prohibiting discrimination are taken into consideration, it is not possible to arrive at an extension on the scope of freedom of trade as regards third nations, which are primarily concerned in this context. Quite to the contrary, since the 1979 revision of Art. 4 in the Second Protocol Additional to the Revised Rhine Shipping Convention of October 17, 1868, which entered into force on February 1, 1985, ships of third States, with the exception of those of EC member nations, may no longer carry out transports between Rhine ports unless consent is given by the Central Rhine Commission (Art. 4, para. 1). Thus, in light of EC law, the original provisions of the Mannheim Convention (Art. 4, para. 3, and Art. 14) banning discrimination are of practical importance only as regards Rhine traffic by Rhine riparians' ships.

International shipping between a riparian State of the Rhine and a third State, i.e. between a Rhine port and a third nation port, is subject to bilateral memoranda of understanding and agreements. Thus, for instance, a ship flying the Romanian flag may engage in transport on the Rhine from Bucharest to Duisburg only if a bilateral agreement permits such bilateral traffic (→ Flags of Vessels). In order to ensure a legal régime of the greatest uniformity possible for the entire Rhine, Art. 4, para. 2 provides that the Central Rhine Commission must be consulted prior to the conclusion of any such agreements.

Ships flying the flag of an EC member State are not subject to the above restrictions applying to international Rhine traffic. Under EC law, the Rhine riparian States shall treat the ships of other EC member nations in the same way as the shipping vessels of Rhine riparians. Thus, a ship flying the Spanish flag will enjoy the same degree of freedom of trade on the Rhine as the vessels of riparian States, at least as far as the Swiss border.

However, all of the above forms of freedom of navigation apply with the proviso that compliance with national regulations under police law for the maintenance of public safety must be ensured (Mannheim Convention, Art. 1, para. 1). These national regulations include not only traffic law regulations, such as the Rhine Navigation Police Regulation, but other legal provisions as well, e.g. those referring to personnel qualifications for navigation on the Rhine. In the case of the Ordinance on the Granting of Rhine Skippers' Licences, or the Ordinance on the Transportation of Dangerous Substances on the Rhine, the regulations are designed to provide against the risks emanating from the ship itself or from its operation.

3. Central Rhine Commission

The Central Rhine Commission is a standing conference of the governments of the States parties to the Mannheim Convention. This original

international organization owes its continuing existence after the entry into force of the EEC Treaty to the fact that, at the time of the commencement of that Treaty, Switzerland was a contracting party to the Mannheim Convention, at least by virtue of consuetudinary law.

The Central Rhine Commission may be termed the first international court (→ International Courts and Tribunals). It is an optional court of appeal from decisions of the national Rhine Navigation Courts and has original jurisdiction in criminal and civil cases concerning Rhine shipping matters under Art. 45 I c in conjunction with Arts. 37 et seq. of the Mannheim Convention. Following the decision by a court of first instance, the appellant can decide on whether to opt for having recourse to national courts, with possible further stages of appeal, or for lodging an appeal with the Central Rhine Commission. However, the right of appeal exists only if the value of the matter in dispute exceeds the amount of 20 IMF Special Drawing Rights (→ International Monetary Fund). Decisions by the national Rhine Navigation Courts or by the Central Rhine Commission are enforceable in all other riparian States (Mannheim Convention, Art. 40). The Central Rhine Commission Appellate Division consists of one regular and one alternate judge from each contracting State.

Ever since the Central Rhine Commission was established in 1816, it has, in addition, acted as the preparatory legislative commission of the contracting States with regard to preserving and enhancing the unity of the Rhine régime (Mannheim Convention, Arts. 45, para. 1(b) and 46). Striking a balance between the opposing arguments for → sovereignty and for the creation of a uniform legal system for the Rhine, the Central Rhine Commission already in the first half of the 18th century developed a special form of international law-making based on Agreed Regulations. Accordingly, delegates to the Central Rhine Commission may agree either on new rules for the Rhine to be enacted as identical national regulations, or on regulations within the Central Rhine Commission which harmonize the various national regulations in such a way as to achieve a uniform legal order governing the Rhine.

In this context, it is of particular significance that resolutions unanimously adopted by the Central Rhine Commission are in principle binding on all member nations except where a member State within one month of such adoption withholds approval or gives notice of a requirement for ratification by its legislative bodies (Mannheim Convention, Art. 46, para. 3). In the case of unanimous decisions, member nations are thus obligated to translate the given regulation into national legislation (→ International Legislation; → International Law in Municipal Law: Law and Decisions of International Organizations and Courts). On the other hand, majority decisions of the Central Rhine Commission are to be taken only as recommendations unless such decisions refer to Central Rhine Commission internal matters (→ International Organizations, Resolutions; → International Organizations, Internal Law and Rules).

In legal terms, the Central Rhine Commission regulations which have been issued or agreed unanimously are similar in their legislative nature to EC directives. Generally, Agreed Regulations may be considered as reflecting a preliminary form of the legislative powers of a supranational organization. This assessment applies at any rate to regulations agreed within the Central Rhine Commission which do not require the consent of the national legislative bodies in order to become effective under national law.

The Central Rhine Commission has made frequent use of the aforementioned rule-making possibilities. Almost all safety regulations as well as a large number of regulations on social, tax and technical matters concerning the Rhine have been issued in the form of Agreed Regulations with the result that a uniform legal order presently exists for the Rhine in these areas.

The Central Rhine Commission is also called upon and authorized to watch over compliance by the contracting States with both primary and derived Rhine shipping law (→ International Controls). Any complaint by a riparian State must be referred to the Central Rhine Commission (Art. 45(1)(a)). The pertinent Central Rhine Commission decisions can be classified as → arbitration agreements under international law, which may legally be regarded as providing for or representing the following: an authentic interpretation of the Mannheim Convention and of the implementing regulations issued in respect

thereto; a binding application agreement; or an agreement on amendment, revision or implementation with reference to primary Rhine shipping law itself.

Finally, Art. 45(1)(b) contains a general clause providing for Central Rhine Commission authority to deliberate on all matters relevant to the advancement of Rhine shipping. Since the establishment of the Central Rhine Commission, this clause has always been given a broad interpretation. Consequently, it has formed the basis for extensive deliberations on economic policy issues. In this sector, however, the Central Rhine Commission has shown great reserve whenever the settling of economic legal problems by means of Agreed Regulations has been at issue.

While the Central Rhine Commission found it difficult to agree on economic regulations concerning Rhine shipping trade, the EC has attempted since the early 1960s to extend application of European Community inland shipping and transport law to the Rhine. However, the EC is in principle precluded from adopting, against the will of Switzerland, Community legislation applicable to the Rhine which is not compatible with the provisions of the Rhine Navigation Convention. In this respect the EC must observe the older treaty and international law obligations of its Rhine riparian member States under the Mannheim Convention (Art. 234, para. 1 of the EEC Treaty; → Pacta sunt servanda). Furthermore, the EC cannot, by invoking the provisions of Art. 234, para. 2 of the EEC Treaty, encourage its member States to free themselves from their obligations pursuant to the Mannheim Rhine Navigation Convention.

The Mannheim Convention cannot be renounced and may be revised only by common agreement. Moreover, changed economic concepts do not warrant the unilateral termination or renunciation of a treaty by invoking the → *clausula rebus sic stantibus* (Art. 62, para. 1 of the → Vienna Convention on the Law of Treaties).

As a result of this legal situation, Community law, up to the present, largely does not apply to the Rhine. In addition to the aforementioned substantive law conflicts between Rhine navigation law and EC law, the institutional conflicts between these two international legal systems have also clearly come to light. The latter conflicts result from the fact that the EC Rhine riparian member States have, under Community law, relinquished to the EC part of their powers concerning foreign trade while at the same time continuing to be obligated to Switzerland as contracting parties to an international treaty, i.e. the Mannheim Convention.

In this context, the international law problem arises in determining the effects which intra-Community shifts in competence have on a continuing international treaty entered into by EC member States (→ European Communities: External Relations; → Vienna Convention on Succession of States in Respect of Treaties). In a number of decisions and opinions the → Court of Justice of the European Communities has decided that either the EC is required to observe the Rhine Navigation Convention or EC riparian member States represented on the Central Rhine Commission may not agree to any new regulations which will obstruct or interfere with the further development and enforcement of a common EC transport policy.

Over the past ten years, a pragmatic solution to the institutional problem has been developed whereby the EC has been admitted as an observer to the Central Rhine Commission. Following the Signature Protocol to the Second Additional Protocol, an approach may be developed similar to that which applies to the International Commission for the Protection of the Rhine against Pollution. In the case of the International Commission the EC was admitted as a delegation authorized to exercise voting rights on behalf of its member States, provided that the matter at issue was truly within EC competence. Thus, the EC has been enabled to negotiate the required revisions of the Mannheim Convention in direct contact with Switzerland, making it possible for Community law also to be applied to the Rhine.

4. Rhine Protection Commission

Since the Rhine is a major source of drinking-water within the territories of the Federal Republic of Germany and the Netherlands, considerable importance attaches to measures designed to control pollution of Rhine water (→ International Watercourses Pollution). In particular, significant Rhine pollution is caused by waste water discharged by the large Swiss and German chemical

plants located respectively in the Basle region and in the area from Ludwigshafen to Düsseldorf, as well as by the French Alsatian potash mines. An exacerbating factor is the large number of nuclear power plants constructed along the Rhine in order to provide both access to a supply of cooling water and the possibility for discharge of heated water into the Rhine.

With the Agreement of April 29, 1963 (UNTS, Vol. 994, p. 3), the riparian States established a basis, binding under international law, for the work of the International Commission for the Protection of the Rhine against Pollution (Rhine Protection Commission). The latter constitutes a standing conference of delegates from the contracting parties. By virtue of a Supplementary Agreement of December 3, 1976, the EC became a separate contracting party. Within its field of competence, the EC exercises exclusively the right to vote by casting the aggregate number of votes held by its member States (Art. 6, para. 2).

The Rhine Protection Commission is responsible for making studies to establish the nature, degree and source of Rhine pollution, and for submitting proposals for appropriate remedial action to the member States. Monitoring the degree of Rhine water pollution, however, is the responsibility of the competent authorities of the contracting States. The pertinent technical and scientific evaluations are prepared by the Secretariat of the Rhine Protection Commission established at Coblenz.

The responsibilities and powers of the Rhine Protection Commission were put in concrete terms and extended by the Convention for the Protection of the Rhine against Chemical Pollution (Chemical Protection Convention) of December 3, 1976 (German Bundesgesetzblatt 1978 II, p. 1054) and the Convention for the Protection of the Rhine against Pollution by Chlorides (Chloride Protection Convention) of December 3, 1976 (ibid., p. 1065). The EC has not acceded to the Chloride Protection Convention.

The aim of the Chemical Protection Convention is, on the one hand, to achieve total elimination of Rhine pollution caused by particularly hazardous substances and their compounds, such as organohalogenic, organophosphoric, mercury and cadmium compounds or persistent mineral oils, and, on the other hand, to reduce Rhine pollution due to substances within a second level risk category, which essentially comprises metalloids, metals and metal compounds such as zinc, copper, lead, etc., or certain biocides. The parties undertook to subject any discharge of substances considered hazardous to national administrative authorization. Substances classified as particularly hazardous and listed in Annex I to the Convention may be discharged into the Rhine by the plant operator only if and where the emission standards established by the Rhine Protection Commission are observed.

With regard to substances in the second risk category, the contracting States undertook to prepare national programmes for reducing pollution of watercourses. The Rhine Protection Commission is responsible for the scientific and technical evaluation and subsequent harmonization of such programmes. In this respect, however, the pertinent proposals submitted by the Rhine Protection Commission are also to be approved unanimously by the contracting States.

Reducing Rhine pollution caused by chlorides is the subject of a separate convention, since this type of pollution is essentially due to potassium salts from French potash mines in Alsace. Following approval, in 1986, of the Chloride Protection Convention by the French legislature, France must, after a certain transitional period, reduce her discharges of chloride ions by 60 kilograms per second on an annual average. Correspondingly, the Federal Republic of Germany will have to ensure that a content of 200 milligrams per litre of chloride ions will not be exceeded at the German-Netherlands border.

Since France, with her potassium mines, faces the main burden of conforming to the obligations relating to this convention, the Federal Republic, the Netherlands and Switzerland have agreed to defray 70 per cent of the relevant costs totalling 132 million French francs. The tasks incumbent on the Rhine Protection Commission under this convention are to make quantitative evaluations of the pollution load, to submit proposals for gradual reduction of the chloride ion charge, and to control observance of the quality limits determined for discharge of waste salts into the Rhine.

Both the Chemical Protection Convention and the Chloride Protection Convention provide for an arbitral procedure in the event of non-compliance

(→ Arbitration Clause in Treaties). If the parties to a dispute cannot agree on a chairperson for the arbitral tribunal, the latter shall be designated by the President of the → European Court of Human Rights. Obviously, this provision takes account of the fact that all of the contracting States are also parties to the → European Convention on Human Rights. In addition, the Chemical Protection Convention provides that the EC will always be a joint party to a dispute in which an EC member State is involved or that, *vice versa*, the affected EC member State will also be a party to a dispute in which the EC is a party.

On the sole basis of the Convention of April 29, 1963, the International Commission for the Protection of the Rhine has already succeeded in achieving a number of interim results such as the agreements, obtained at the ministerial level, on the limitation of the thermal load, on the reduction of mercury effluents and on the reduction of the discharge of other hazardous substances.

The International Commission for the Protection of the Rhine is entitled to take up relations and engage in consultations with the Central Commission for Rhine Navigation. For the reasons stated in section 3 *supra*, and presumably also because the competence of the Central Rhine Commission is confined to shipping matters, placing negotiation and conclusion of the above conventions for the protection of the Rhine against pollution in the framework of the Central Rhine Commission has deliberately been avoided.

Rheinurkunden: Sammlung zwischenstaatlicher Vereinbarungen, landesrechtlicher Ausführungsverordnungen und sonstiger wichtiger Urkunden über die Rheinschiffahrt seit 1803, veranstaltet von der Zentral-Kommission für die Rheinschiffahrt, 2 vols. (1918).

Vereinbarung über die Internationale Kommission zum Schutze des Rheins gegen Verunreinigung mit Zusatzprotokoll vom 29. April 1963, German Bundesgesetzblatt (1965 II) 1432–1435; German Bundesgesetzblatt (1979 II) 87.

Les Actes du Rhin et de la Moselle, Traités, Lois et Règlements principaux concernant la navigation sur le Rhin et les voies navigables d'Europe occidentale (1966).

Revidierte Rheinschiffahrtsakte vom 17. Oktober 1868 (Mannheimer Akte), German Bundesgesetzblatt (1969 II) 598–604.

Zusatzprotokoll zu der am 17. Oktober 1868 in Mannheim unterzeichneten Revidierten Rheinschiffahrtsakte vom 25. Oktober 1972, German Bundesgesetzblatt (1974 II) 1386–1389.

Übereinkommen zum Schutz des Rheins gegen chemische Verunreinigung vom 3. Dezember 1976, German Bundesgesetzblatt (1978 II) 1054–1060.

Übereinkommen zum Schutz des Rheins gegen Verunreinigung durch Chloride vom 3. Dezember 1976, German Bundesgesetzblatt (1978 II) 1065–1072.

Zusatzprotokoll Nr. 2 zu der Revidierten Rheinschiffahrtsakte vom 17. Oktober 1979, German Bundesgesetzblatt (1980 II) 871–872.

Zusatzprotokoll Nr. 3 zu der Revidierten Rheinschiffahrtsakte vom 17. Oktober 1979, German Bundesgesetzblatt (1980 II) 876–878.

W. CHAMBERLAIN, The Regime of the International Rivers Danube and Rhine (1923).

J.-F. HOSTIE, Le statut international du Rhin, RdC (1929 III) 109–225.

W.J.M. VAN EYSINGA, La Commission Centrale pour la Navigation du Rhin (1936).

U. SCHEUNER, Das internationale Recht der Rheinschiffahrt und der nationale Binnenverkehr (Cabotage) (1954).

U. SCHEUNER, Rechtsfragen der Rheinschiffahrt (1956).

W. RIPHAGEN, The Transport Legislation of the European Communities, its Relationship to International Treaties and its Effect in Member States, CMLR, Vol. 3 (1965–1966) 291–325.

W. STABENOW, Die internationalen Konventionen über die Binnenschiffahrt im Lichte der wirtschaftlichen Integration Europas, in: Raccolta delle lezioni (1968) 528 et seq.

F. MEIßNER, Das Recht der Europäischen Wirtschaftsgemeinschaft im Verhältnis zur Rheinschiffahrtsakte von Mannheim (1973).

R. HOEDERATH, Stillegungsabkommen und EWG-Vertrag – Das Gutachten des Europäischen Gerichtshofes Nr. 1/76 vom 26. April 1977, Zeitschrift für Binnenschiffahrt und Wasserstraßen (1977) 248 et seq.

K.W. KIPPELS, Der völkerrechtliche Status des zukünftigen Europakanals und seine Auswirkungen auf das Rhein- und Donauregime (1978).

W. MÜLLER, Ist die Mannheimer Rhein-Schiffahrts-Akte noch zeitgemäß?, Zeitschrift für Binnenschiffahrt und Wasserstraßen (1979) Annex 1.

W. MÜLLER, Die Ausführungsvorschriften zum Zusatzprotokoll Nr. 2 zu der Revidierten Rheinschiffahrtsakte vom 17. Oktober 1979, Zeitschrift für Binnenschiffahrt und Wasserstraßen (1983) 310 et seq.

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RHINE-MAIN-DANUBE WATERWAY

Charlemagne is said to have planned to link the → Rhine River to the → Danube River by means of a canal. In 1846 such a link was established by

the Ludwigskanal, albeit only for very small barges. Projects to build a deep-draught Rhine-Danube waterway for ships having up to 1500 tons capacity date back to before World War I. Work on this waterway is nearing completion. The waterway will consist of new enlarged sluices on 385 kilometres of the Main River and on 208 kilometres of the Danube as well as 171 kilometres of canal, properly speaking. Work on the waterway has been interrupted again and again by doubts whether the enormous costs involved are justifiable by the direct or indirect advantages to be obtained by its construction, by the protests of environmentalists, and by international law problems.

Arts. 331 and 353 of the → Versailles Peace Treaty of 1919 provide that Germany undertakes to apply to the deep-draught Rhine-Danube navigable waterway, should it be constructed, the régime of → internationalization prescribed in Arts. 332 to 338. The Federal Republic of Germany, however, is unwilling to submit the waterway, as far as it is constructed on German soil with German funds, to any such régime. The relevant provisions of the Versailles Peace Treaty are said to be obsolete. By a unilateral declaration of November 14, 1936 (German Reichsgesetzblatt, 1936 II, p. 361), Germany had denounced the provisions of this Treaty which restricted Germany's sovereignty over her waterways. The British occupation authorities did not respect the provisions of the Versailles Treaty on internationalization of the → Kiel Canal. This attitude is interpreted as acquiescence in the 1936 declaration.

Navigation on the part of the Rhine-Main-Danube waterway using the Main up to Bamberg will be governed by Arts. 3 and 4 of the Mannheim Convention (Revidierte Rheinschiffahrtsakte, October 17, 1868, German Bundesgesetzblatt, 1968 II, p. 598). The Federal Republic is not bound to admit foreign ships on the Main, but if it does, they shall be treated like German ships. No charges shall be levied based on the sole fact of navigating on the river. This rule does not exclude the collection of charges for the use of sluices.

The Mannheim Convention concerning navigation on the Rhine applies, however, only to the river's natural affluents. The Convention does not apply to the canal from Bamberg on the Main to Kehlheim on the Danube. Any claim to extend the validity of the Belgrade Convention of August 18, 1948 (UNTS, Vol. 33, p. 181), which applies to the Danube, to this part of the canal is moot already in view of the fact that this Convention does not extend to the tributaries of the Danube.

The Federal Republic has not adhered to the Belgrade Convention. Although this Convention provides freedom of navigation (excluding → cabotage) for ships of all nations up to Ulm, a town upriver from Kehlheim, this rule cannot deprive the Federal Republic of her sovereign rights concerning navigation on the Danube inside her territory, including the part of the Rhine-Main-Danube waterway from Kehlheim to Passau, using the Danube. However, a right of navigation for foreign ships on the Danube might possibly have become part of customary law, as such right has been exercised for more than a hundred years.

Nevertheless, under general international law there exists no obligation for a State building an inter-oceanic waterway to submit it to any sort of international control. Apart from its obligations under the EEC Treaty (→ European Economic Community) not to discriminate in matters of inland water transport between the nationals of the several member States, the Federal Republic is free to establish the régime of the waterway, in any case for the canal between Bamberg and Kehlheim. In doing so, the Federal Republic must take account of the apprehensions that an unrestricted access of ships from socialist States to the Rhine would seriously hurt the interests of the private companies assuming most of the navigation on the river. These companies are afraid of being unable to withstand the competition of heavily subsidized State shipping companies.

As far as navigation on the Rhine and Main are concerned, the Additional Protocol No. 2 of October 17, 1979 to the Mannheim Convention grants to ships of non-EEC States merely a right of transit on the Rhine (German Bundesgesetzblatt, 1980 II, p. 871). Under the Protocol, the Central Commission may authorize ships of third States to carry out transport between different parts of the Rhine basin on conditions to be laid down individually by each State. Moreover, member States of the Mannheim Convention may conclude with third States bilateral agreements on navigation after having consulted the Central Commission.

It has been argued that these rules impose on the

Federal Republic an obligation not to impede the access of ships of non-EEC States to the Rhine via the Rhine-Main-Danube waterway, as otherwise the authorizations envisaged in the 1979 Protocol would be meaningless. Notwithstanding this interpretation, however, these authorizations would govern the rights of navigation of non-member States having entered the Rhine via Rotterdam.

The Federal Republic intends to establish the régime of the waterway by bilateral treaties. It has laid down its conditions for the use of "German inland waterways" in the Treaty of Inland Navigation concluded with Austria on November 20, 1985 (German Bundesgesetzblatt, 1987 II, p. 79). These conditions will apply to the Rhine-Main-Danube waterway upon its completion and after a future decision of the joint commission established by the Treaty. This Treaty is conceived as a pilot treaty which the Federal Republic intends to offer to all States. The Treaty envisages a maximum of restrictions which aim to protect the interests of German shipowners against competition from State-trading countries.

In view of the fact that the socio-economic régimes of Austria and the Federal Republic are based on the same principles, both States, in an Additional Protocol to the Treaty (German Bundesgesetzblatt, 1987 II, p. 81), grant to the ships flying their flags exemptions from most of these restrictions. The reasons given for granting these exemptions render inapplicable the → most-favoured-nation clause figuring in the Austria-Soviet Union Treaty on Navigation of June 14, 1957 (UNTS, Vol. 285, p. 169) and in the navigation treaties concluded by Austria with other Danube riparian States.

The pilot treaty itself does not distinguish between national and international waterways. It merely provides that the obligations resulting from the adherence of the Federal Republic to the Mannheim Convention and of Austria to the Belgrade Convention remain unaffected by the conclusion of the treaty. The bilateral agreements modelled on the pilot treaty are considered to be special agreements within the meaning of the Additional Protocol No. 2 of the Mannheim Convention, i.e. they also lay down the condition for admission of the ships of the partner State to navigation on the German part of the Rhine.

Although the Mannheim Convention and Belgrade Convention grant freedom of transit to ships of all nations on the Rhine and Danube respectively, the Federal Republic, after having consulted the joint commission, may establish a maximum number of voyages on her waterways, i.e. *in casu* on the canal, for the ships of other States. In exchange traffic (i.e. traffic involving the transport of goods from one contracting country to the other), ships of each State, moreover, will have to share equally the total amount of cargo to be transported. Traffic with third countries (i.e. traffic related to transport between a port situated on the territory of the other contracting State and a port situated on the territory of a third country) will be subjected to the special agreements to be concluded by the contracting States. Cabotage will require a special licence by the competent authorities.

Convention concerning the Régime of Navigation on the Danube, August 18, 1948, UNTS, Vol. 33 (1948) 181–225.

Agreement concerning the Settlement of Technical and Commercial Questions relating to Navigation on the Danube, June 14, 1957, UNTS, Vol. 285 (1958) 169–191.

Zusatzprotokoll Nr. 2 zu der Revidierten Rheinschiffahrtsakte vom 17. Oktober 1868 in der Fassung vom 20. November 1963, October 17, 1979, German Bundesgesetzblatt, 1980 II, 871–874.

Vertrag über den Binnenschiffsverkehr, November 20, 1985, German Bundesgesetzblatt, 1987 II, 79–82.

A. BORCHERT, Der Einfluß der Verkehrsfreiheit auf die völkerrechtlichen Regeln über die Höhe der Schifffahrtsabgaben auf international bedeutsamen Schifffahrtswegen (1964).

P. KRZIZANOWSKI, Die Rechtslage des Rhein-Main-Donau-Verbindungsweges, AVR, Vol. 14 (1969/1970) 343–374.

G. JAENICKE, Die neue Großschiffahrtsstraße Rhein-Main-Donau (1973).

W. BÖTTGER, Die Rhein-Main-Donau Wasserstraße als gesamteuropäisches Problem (1975).

K.W. KIPPELS, Der völkerrechtliche Status des zukünftigen Europakanals und seine Auswirkungen auf das Rhein- und Donauregime (1976).

K. ZEMANEK, Die Schiffahrtsfreiheit auf der Donau und das künftige Regime der Rhein-Main-Donau-Großschiffahrtsstraße (1976).

Y.Y. BASKIN and I.N. TARASOVA, Rhine-Main-Danube Canal, Sovetskoe Gosudarstvo i Pravo (1977) 118–122 [in Russian].

B. VITÁNYI, The International Regime of River Navigation (1979).

A. KISS, Problèmes de droit international posés par la voie d'eau Rhin-Danube, AFDI, Vol. 27 (1981) 768–780.

B. VITÁNYI, Legal Problems in Connection with the Deep-Draught Rhine-Main-Danube Navigable Waterway after the Additional Protocol to the Act of Mannheim, ZaöRV, Vol. 41 (1981) 731–807.

B. VITÁNYI, Le statut juridique de la nouvelle voie navigable Rhin-Main-Danube, in: Société française pour le droit international (ed.), Colloque du Mans, aspects actuels du droit international des transports (1981) 183–221.

V. FASTENROTH and B. SIMMA, Die Rhein-Main-Donau Verträge, Deutsches Verwaltungsblatt, Vol. 98 (1983) 8–20.

H.-J. SCHLOCHAUER, Rechtsfragen grenzüberschreitender Wasserstraßen am Beispiel des Rhein-Main-Donau Schiffahrtsweges, in: R. Bernhardt, W.K. Geck, G. Jaenicke and H. Steinberger (eds.), Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit und Menschenrechte, Festschrift für H. Mosler (1983) 839–867.

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RHODESIA/ZIMBABWE

A. The "Rhodesian Problem" and Its Historical Background: 1. General. 2. The 1923 Constitution. 3. The 1961 Constitution. 4. The Question of Independence. – B. The Unilateral Declaration of Independence. – C. Responses to U.D.I. – D. The Legal Status of Rhodesia after U.D.I.: 1. Questions Raised by U.D.I. 2. Judicial Decisions. – E. From U.D.I. to Its Revocation: 1. The Period of the 1965 Constitution. 2. The Period of the 1969 Constitution. 3. The Period of the 1979 Constitution. – F. From the Revocation of U.D.I. to the Attainment of Independence: 1. The Return to Legality. 2. The Termination of Sanctions. 3. The Interim Government. – G. The Attainment of Independence and the Emergence of Zimbabwe.

A. The "Rhodesian Problem" and Its Historical Background

1. General

When Southern Rhodesia attained independence under the name of Zimbabwe on April 18, 1980, she had among British territories played a particular role for nearly a century (→ United Kingdom of Great Britain and Northern Ireland: Dependent Territories; → Colonies and Colonial Régime). This role culminated in the "Unilateral Declaration of Independence" (U.D.I.) proclaimed on November 11, 1965. Though U.D.I. was revoked after 14 years on December 12, 1979 and Rhodesia attained independence four months thereafter, like other British territories through a British statute, U.D.I. made Rhodesia a unique case and a *cause célèbre* of British decolonization (→ Decolonization: British Territories). It was known as the "Rhodesian problem", since Southern Rhodesia employed the shorter name of Rhodesia after the attainment of independence by Northern Rhodesia on October 24, 1964, as Zambia.

Southern Rhodesia came under British control by 1890 through Cecil Rhodes and the British South Africa Company which administered the territory for more than 30 years. The population comprised a majority of African natives and a minority of European settlers as well as some Asians and Coloured. The European settlers, whose presence distinguished Southern Rhodesia from nearly all other British territories in Africa, were before World War I granted representation in the Legislative Council through the election of members to the Council; the African natives were withheld such representation through a restrictive franchise which did not directly distinguish between Europeans and Africans as such but distinguished indirectly through the requirements as to educational and economic qualifications which only few Africans could satisfy.

The status of the territory, which was considered by the Judicial Committee of the Privy Council in re Southern Rhodesia ((1919) A.C. 211), basically changed after World War I, when administration by the Company came to an end. Southern Rhodesia had the choice between becoming a province of the Union of South Africa or a separate colony with responsible government. A referendum held among the voters decided in favour of the latter alternative.

2. The 1923 Constitution

Under the Southern Rhodesia Letters Patent 1923 Southern Rhodesia was in internal affairs, subject to some British control, a virtually self-governing colony. Unlike the Union of South Africa, Southern Rhodesia was not one of the "Dominions", which as members of the → British Commonwealth became independent between World Wars I and II, but she was in some respects

treated as such; the measure of self-government which she enjoyed was higher than that enjoyed by any other British colony. The franchise remained restrictive and thus placed self-government in the hands of the Europeans whose minority rule over the majority of the Africans was then not regarded as violating international law, though it had, for example, produced the racially discriminatory Land Apportionment Act 1930 (→ Racial and Religious Discrimination).

After World War II Southern Rhodesia further advanced her status as a virtually self-governing colony. With British authorization a citizenship of Southern Rhodesia was created which was distinct from the citizenship of the United Kingdom and Colonies, though her citizens continued to be British subjects (→ British Commonwealth, Subjects and Nationality Rules). Southern Rhodesia also conducted some external affairs, though external affairs as such remained under British control. From 1953 to 1963, together with Northern Rhodesia and Nyasaland, she formed part of the Federation of Rhodesia and Nyasaland, commonly known as the Central African Federation, and transferred some powers to the Federation which, however, returned to Southern Rhodesia on the dissolution of the Federation on December 31, 1963.

3. The 1961 Constitution

During the Federation the 1923 Constitution was replaced by the Constitution of Southern Rhodesia 1961, an annex to the Southern Rhodesia (Constitution) Order in Council 1961 which was made under the Southern Rhodesia (Constitution) Act 1961, a statute passed by the British Parliament. The 1961 Constitution had been agreed at a Constitutional Conference held in London and Salisbury and had also been approved through a referendum held among registered voters in Southern Rhodesia.

The new Constitution differed from the former in several respects. Some changes reduced British control over internal affairs to a minimum. The Governor continued to be appointed by the Queen on the advice of the British Government, but the advice had to be tendered after consultation of the Prime Minister of Southern Rhodesia. The British Parliament retained legislative power over Southern Rhodesia under constitutional law; but the British Government had declared that there was also a constitutional convention that the British Parliament would not legislate on matters within the competence of the Legislative Assembly of Southern Rhodesia except with the agreement of the Government of Southern Rhodesia. Some other changes concerned the status of the Rhodesian population as a whole and, directly or indirectly, also touched on the four racial communities, of which by 1960 the Africans comprised 95 per cent, the Europeans 4 per cent, and the Asians and Coloured 1 per cent of the total population.

Above all, the new Constitution introduced an extension of the franchise which secured some African representation in the Legislative Assembly. The complicated electoral system made provision for an "A" Roll and a "B" Roll of voters, voting qualifications for the latter being lower than for the former but as before of an economic and educational rather than of a racial nature. "A" Roll voters dominated the election of 50 members of the Legislative Assembly in constituencies, while "B" Roll voters dominated the election of the 15 other members in electoral districts. With an increasing number of Africans on the "A" Roll, the new franchise and electoral law could after some years or decades even have resulted in majority rule of the Africans. But the result of the election held under the new franchise and electoral law in 1962 enabled the minority rule of the Europeans over the Africans to continue, since 50 Europeans but only 14 Africans and one Coloured were returned to the Legislative Assembly; another election held in 1965 had a similar result. Both elections were boycotted by the African nationalists.

The new Constitution also set out a judicially enforceable Declaration of Rights, which included some protection from racial or other discrimination, and established a Constitutional Council to consider legislation with a view to inconsistencies with the Declaration; its members were elected from the four racial communities. The four racial communities were also given some voice through the changed rules on constitutional amendment: As under the former Constitution, the Legislative Assembly could amend the constitutional provisions except for some provisions securing British control over Rhodesia, amendment of which

remained in the hands of the British Government. As under the former Constitution, constitutional bills had to be passed with a majority of two-thirds of the votes. But under the new Constitution, constitutional bills concerning certain "specially entrenched" provisions, including the Declaration of Rights, the chapter on the Constitutional Council, and some provisions relating to the franchise and electoral law, further required approval by the four racial communities in separate referenda or the agreement of the British Government.

4. The Question of Independence

The 1961 Constitution survived the dissolution of the Central African Federation. While Nyasaland and Northern Rhodesia attained independence a few months thereafter, as several other British territories had already done before, Rhodesia, as Southern Rhodesia began to call herself, did not. The British and the Rhodesian Governments appeared to concur on the point that the constitutional terms of independence required agreement between them and that imposition of the terms by British legislation without such agreement was incompatible with Rhodesian self-government and the constitutional convention relating to British legislation for Rhodesia. The Governments, however, could not agree on the substance of the constitutional terms under which independence would be granted; the virtual self-government of the territory thus made an advance to full self-government not easier but more difficult than in the case of other territories. In particular, both Governments could not agree on the question when minority rule of the Europeans would be replaced by majority rule of the Africans.

The Rhodesian Government, relying on a referendum and the support by African chiefs and headmen, demanded independence on the basis of the 1961 Constitution, i.e. before majority rule would replace minority rule. The African nationalists, on the other hand, demanded independence on the basis of a new Constitution which would give effect to the principle "one man one vote". Pointing out that decolonization must not conflict with the right to → self-determination and with the prohibition of racial discrimination, they also secured support by the → United Nations General Assembly which regarded Rhodesia as a case falling under the notion of → non-self-governing territories in the sense of Chapter XI, Arts. 73 and 74, of the → United Nations Charter. The General Assembly adopted a number of resolutions on the Rhodesian problem (Res. 1747 (XVI) of June 28, 1962; Res. 1760 (XVII) of October 31, 1962; Res. 1883 (XVIII) of October 14, 1963; and Res. 1889 (XVIII) of November 6, 1963). The British Government, however, objected that Rhodesia as a self-governing colony was not a non-self-governing territory and that the Rhodesian problem was a matter essentially within British → domestic jurisdiction in the sense of Art. 2 (7) of the UN Charter.

With regard to the constitutional terms for independence, successive Conservative and Labour United Kingdom Governments throughout took a middle line which in 1965 was laid down by the Labour Government under Harold Wilson in the following "five principles" (to which after U.D.I. a sixth principle was added): (1) The principle and intention of unimpeded progress to majority rule already enshrined in the 1961 Constitution would have to be maintained and guaranteed; (2) there would have to be guarantees against retrogressive amendment of the Constitution; (3) there would have to be an immediate improvement in the political status of the African population; (4) there would have to be progress towards ending racial discrimination; and (5) the British Government would have to be satisfied that any basis for independence was acceptable to the people of Rhodesia as a whole.

The rejection of the five principles by the Rhodesian Government, formed by the Rhodesian Front under Ian Smith, produced a deadlock which → negotiations could not overcome. The Rhodesian Government then went on to announce that independence would be declared unilaterally, while the British Government warned against such a step and stated beyond doubt that it would be regarded as illegal and invalid. The → United Nations Security Council (Res. 202 of May 6, 1965) and the General Assembly (Res. 2012 (XX) of October 12, 1965 and Res. 2022 (XX) of November 5, 1965) requested the British Government not to accept the envisaged step and to prevent it.

All British efforts to dissuade the Rhodesian Government from proclaiming U.D.I. failed. On

November 5, 1965 the Governor, acting on the advice of the Rhodesian Government, made a Proclamation declaring a state of emergency which after some days proved to have been the direct prelude to U.D.I.

B. The Unilateral Declaration of Independence

The Rhodesian Government realized its plan through a Proclamation dated November 11, 1965 in which the Governor had no part. The Proclamation contained the envisaged Unilateral Declaration of Independence in a wording resembling the Declaration of Independence proclaimed in 1776 by the 13 North American colonies which were subsequently recognized as the United States of America. An annex to U.D.I. set out the Constitution of Rhodesia 1965 which replaced, or purported to replace, the 1961 Constitution. The main difference between the 1961 Constitution and the 1965 Constitution was the termination of all British control. The fundamental changes made in this context also included the abolition of all appeals from decisions of Rhodesian courts to the Judicial Committee of the Privy Council, while the new Constitution in nearly all other respects was very similar to the old.

Rhodesia retained allegiance to the Queen. The Queen was, however, declared "Queen of Rhodesia" and in relation to Rhodesia given a similar position as she had in relation to such members of the British Commonwealth as Canada, Australia and New Zealand. She was declared to be represented by an "Officer Administering the Government" who replaced the Governor and could be either a Governor-General, appointed by the Queen on the advice of the Rhodesian Government, or a Regent, appointed by the Rhodesian Executive Council. The Legislative Assembly was replaced by a Parliament, but by virtue of the transitional provisions the last Legislative Assembly elected under the old Constitution continued as the first Parliament under the new. The new Constitution retained the Declaration of Rights, the Constitutional Council and the provisions relating to the franchise and electoral law virtually as they had been under the old.

A fundamental change going beyond the termination of British control over Rhodesia was the substitution of new rules regarding constitutional amendment. Though the new rules continued to distinguish between ordinary and specially entrenched constitutional provisions, amendment of the latter no longer essentially differed from amendment of the former: Constitutional bills had to be passed by Parliament with two-thirds of the votes; the passage of constitutional bills concerning specially entrenched provisions had only to be followed by the adoption, again with two-thirds of the votes, of a resolution at a subsequent sitting. All constitutional provisions thus were in the hands of the European members of Parliament, who were the masters of the whole 1965 Constitution, under which Rhodesia – factually, if not legally – was governed for more than four years.

Like U.D.I., the 1965 Constitution was, of course, invalid in the British view. The Queen throughout rejected the role given to her without her consent and did not appoint a Governor-General. The Executive Council therefore appointed a Regent, the Queen having thus had no part in the appointment of her representative. Though the Rhodesian Parliament declared the 1965 Constitution to be "ratified and confirmed" through the Constitution (Ratification) Act 1966 some months after U.D.I., it could in the British view thereby not validate the new Constitution, since the ratification statute, having been made under the new Constitution, was in the British view itself invalid.

C. Responses to U.D.I.

Responses to the Rhodesian rebellion commenced on the very date of U.D.I. While no Government recognized Rhodesia as an independent State (→ Recognition), the British Government and several other governments expressly declared a policy of →non-recognition. On instructions from the British Government, the Governor – who continued to stay in his official residence – dismissed Prime Minister Ian Smith and the other Ministers forming the Rhodesian Government. He also issued a statement calling on Rhodesian citizens to refrain from all acts which would further the objectives of the illegal authorities. He added that, subject to this, it was the duty of all to maintain law and order and to carry on with their normal tasks. This was to apply equally to the judiciary, the armed services, the

police and the public service. The Ministers regarded the Governor as merely a private person and ignored their dismissal, but they were thereafter regarded as an illegal régime by the British Government.

The British policy of non-recognition was also laid down by statute. The British Parliament, no longer feeling itself bound by the constitutional convention requiring the agreement of the Rhodesian Government to British legislation for Rhodesia, passed the Southern Rhodesia Act 1965 a few days after U.D.I., declaring that Southern Rhodesia continued to form part of the Queen's dominions and that the British Government and the British Parliament had responsibility for and jurisdiction in it as before. The Southern Rhodesia Constitution Order 1965 which was made thereunder confirmed the invalidity of the 1965 Constitution and let the 1961 Constitution continue in force as such, but made it subject to certain amendments and suspensions which did away with some of its basic features inclusive of Rhodesian self-government: The Legislative Assembly lost its legislative power to the Queen in Council; executive power was made exercisable through the Governor without any Rhodesian Ministers or through the British Government. Thus amended, the 1961 Constitution legally rivalized with the 1965 Constitution, while the latter throughout prevailed over the former factually inside Rhodesia.

The British Government also resorted to other non-military measures through the expulsion of the Rhodesian High Commissioner and immigration restrictions for citizens of Rhodesia. Above all, British measures aiming at making an end to the Rhodesian rebellion included an increasing number of economic → sanctions which after some months were extended to an almost complete prohibition of imports from and exports to Rhodesia. Responses to U.D.I. also came from the Commonwealth. The Heads of Government of its members made the matter a permanent item on the agenda of their meetings and had to overcome a serious crisis of the association, since some members, especially African States, pointed out that mere non-recognition and economic sanctions would not quell the rebellion and in vain urged for the → use of force, which was rejected by other members.

The question of responses to U.D.I. also arose in the United Nations. The British Government, which before U.D.I. had throughout denied any competence of the United Nations for the Rhodesian problem, changed its position and invoked the Security Council which from 1965 to 1979 adopted numerous resolutions, some expressly determining that the situation created by U.D.I. constituted a threat to the peace. By Resolution 216 of November 12, 1965 the Security Council decided to condemn U.D.I. and to call upon all States not to recognize the illegal racist minority régime. After Resolution 217 of November 20, 1965 had then called for voluntary non-military measures, i.e. mainly economic sanctions, the measures were made mandatory by Resolution 232 of December 16, 1966, and further extended by Resolution 253 of May 29, 1968. States not members of the United Nations were also urged to act in accordance with the resolutions which, *inter alia*, made provision for an almost total ban on trade relations with Rhodesia inclusive of an → embargo on oil and were capable of giving rise to special problems in cases of → permanent neutrality of States.

Unlike the resolutions against recognition, the resolutions calling for sanctions were disregarded by several States, and thus failed to have the desired success for several years. Among the States not taking part in sanctions, South Africa and Portugal, though continuing not to declare recognition of Rhodesia, played outstanding roles. Portuguese policy gave rise to Security Council Res. 221 of April 9, 1966 which called upon the British Government "to prevent, by the use of force if necessary the arrival at Beira of vessels . . . carrying oil" destined for Rhodesia, and empowered the British Government "to arrest and to detain the tanker known as the Joanna V upon her departure from Beira" in the event that her oil cargo had been discharged there. The *Joanna V* then left Beira without having discharged the oil. Another tanker known as the *Manuela* which was steering towards Beira was boarded by a British ship and changed her course. The resolution succeeded in preventing the supply of oil via Beira but could not prevent it being done via South Africa. This resolution was unique among the resolutions of the Security Council in calling, with confinement to a special case, for the

use of force; like the four Resolutions of the Security Council mentioned above, it was adopted with the British vote, while the numerous resolutions of the General Assembly which in vain called for the use of force without confinement to a special case were throughout adopted without British participation in the vote (e.g. Res. 2024 (XX) of November 11, 1965; Res. 2151 (XXI) of November 17, 1966; Res. 2262 (XXII) of November 3, 1967; and Res. 2383 (XXIII) of November 7, 1968).

D. The Legal Status of Rhodesia after U.D.I.

1. Questions Raised by U.D.I.

After U.D.I. the legal status of Rhodesia was the subject of two contrary positions, until U.D.I. was revoked 14 years later. The Rhodesian position, based on the validity of U.D.I., was that Rhodesia had become an independent State, and that the 1961 Constitution had been replaced by the 1965 Constitution (until the 1965 Constitution was itself replaced by other Constitutions). The British position, based on the invalidity of U.D.I., was that Rhodesia had remained a British colony, and that the 1961 Constitution had remained in force subject to the amendments and suspensions contained in the British legislation made in response to U.D.I. According to the British position, the Rhodesian Government with all its Ministers had through its dismissal by the Governor ceased to hold office and had become an illegal régime, to which also the Officer Administering the Government, the Rhodesian Executive Council and the Rhodesian Parliament belonged; moreover, all acts done and measures taken by the illegal régime after U.D.I., inclusive of the enactment of statutes and the appointment of civil servants or judges, were invalid. U.D.I. thus had created a complex and uncertain legal situation: Lawfulness or unlawfulness of behaviour and rights and duties of persons often could depend on the position taken with regard to the legal status of Rhodesia.

U.D.I. gave rise to several judicial decisions and to a vast literature with arguments drawn from constitutional and international law and also from jurisprudence. One argument for the British position, drawn from British constitutional law, was that Rhodesia could as a British colony not become an independent State without a British statute. Another argument, drawn from a modern but unsettled view in international law, was that an independent State could not emerge in violation of the right to self-determination. The prevailing view was that the question of Rhodesian statehood (→ State) and independence (→ Sovereignty) under international law was one of the factual situation and of its → effectiveness but not one of recognition, recognition merely being of a declaratory and not of a constitutive nature. The factual situation of Rhodesia was, however, ambiguous: Rhodesia had satisfied such criteria of statehood as territory, people and government already before U.D.I.; British forces had never been stationed in Rhodesia and also were not stationed there on the date of U.D.I. So Rhodesia could with regard to her internal situation be said to have fully and effectively done away with British control through U.D.I. and to have had full and effective control over herself thereafter for several years. But her external factual situation was different. Responses to U.D.I. continued until its revocation and showed the enduring determination of nearly all governments as well as of the United Nations to make an end to the rebellion.

Although the responses to U.D.I. virtually failed over several years, their failure could throughout these years be regarded as merely temporary, since it was mainly due to the lacking participation in economic sanctions by South Africa and Portugal, whose racial and colonial policies faced similar condemnation as U.D.I. itself. Rhodesian statehood and independence could therefore be said to have never reached the necessary consolidation, though the contrary view could also be taken. Rhodesia could also be regarded as an example of a → *de facto* régime.

2. Judicial Decisions

Judicial decisions, like views taken in the literature, thus naturally diverged. Rhodesian decisions, which began by almost fully backing the British position and ended with fully backing the Rhodesian position, commenced with a decision delivered by the General Division of the Rhodesian High Court on September 9, 1966 in the case Madzimbamuto v. Lardner-Burke, N.O. and Anor (1966 Rhodesian Law Reports 756; 1966 (4) South African Law Reports 462). The case,

regarded as a test case and commonly known as the "Constitutional Case", concerned the lawfulness of the detention of the applicant's husband which continued under the state of emergency extended after U.D.I., and under emergency power regulations likewise made after U.D.I., the validity of the extension of the state of emergency and the emergency regulations therefore being questionable.

Though both judges concurred in holding that they were not bound by a certificate from the British Government declaring non-recognition of Rhodesia and her Government, both judges also concurred in holding that the 1965 Constitution was not the lawful constitution and that the Government set up under it was not the lawful government, unless and until the ties of sovereignty were severed either by express consent or by → acquiescence of the British Government in abandoning the attempt to end the revolution. They added, however, that the Government was the only effective government, and that the Court should on the basis of necessity give effect to such measures, both administrative and legislative, as could have been taken by the lawful Government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order, as long as such measures were not taken in order to further the revolution. The Court therefore let the detention continue.

The Appellate Division delivered its decision more than 16 months later on January 29, 1968 (1968 R.L.R. (1) 203; 1968 (2) S.A. 284). In the main issue of the case, the five judges, again regarding themselves as not being bound by the certificate from the British Government, divided: While two judges agreed with the General Division, two other judges held that the Government was the "internal *de jure* government", and that the 1965 Constitution was the "internal *de jure* constitution". The Chief Justice took a middle line: He held that the Government was the "*de facto* government", and could lawfully do what the lawful Government could have lawfully done under the 1961 Constitution; at the same time he held that the Government would become the "*de jure* Government" and the 1965 Constitution would become the "*de jure* constitution", once they would be "firmly established". In the event, the detention could again continue.

While the Court had thus not declared the Government and the 1965 Constitution to be lawful, both the Government and the 1965 Constitution appeared to be on the way to being declared lawful. Such appearance was endorsed after one month by the decision of the Appellate Division in the case of Dhlamini v. Carter of February 29, 1968 (1968 (1) R.L.R. 136; 1968 (2) S.A. 445), where the Court widely referred to the reasons given in Madzimbamuto's case; the General Division had done likewise in its decision of September 22, 1967 (1967 (4) S.A. 378).

Dhlamini's case was a second test case and found attention similar to Madzimbamuto's case. It concerned death sentences which had been imposed on three men before, but were confirmed by the Executive Council after U.D.I. After applications had been dismissed, the applicants in both cases sought declarations from the Appellate Division that under the 1961 Constitution they had a right to appeal to the Privy Council. While the Court avoided pronouncing on the question whether such appeals had been validly abolished by the 1965 Constitution, it refused the declaration and, *inter alia*, stated in decisions of March 1, 1968 both in Madzimbamuto's case (1968 (1) R.L.R. 192; 1968 (2) S.A. 457) and in Dhlamini's case (1968 (1) R.L.R. 157; 1968 (2) S.A. 464) that a decision of the Privy Council would be merely a "brutum fulmen" or an "academic exercise", since the Government had stated that it would not give effect to such a decision.

Thus the Court began to yield to the rebellion. In Dhlamini's case it was to proceed even further, after only three days. On March 2, 1968 a statement was issued that the Queen had on the advice of the British Government extended the royal prerogative of mercy to the three men. Two of them then sought the prohibition of the execution, which the Appellate Division refused in its last decision in the case of March 4, 1968 (1968 (1) R.L.R. 160; 1968 (2) S.A. 467). The Court stated that the exercise of the royal prerogative of mercy had been unlawful and could not be based on the British legislation made in response to U.D.I., since the said legislation was no longer valid in Rhodesia, if it ever had had any validity there. The subsequent execution of the three men was condemned as murder by the British Government. Madzimbamuto's case went on, since the

Privy Council granted special leave to appeal and also declared that the applicant had a right to appeal under the 1961 Constitution.

The Privy Council delivered its decision on July 23, 1968 ((1969) 1 A.C. 645). Without mentioning the certificate from the British Government produced in both Divisions of the Rhodesian High Court, the Privy Council fully backed the British position on the legal status of Rhodesia. The Board held that the question relating to British sovereignty over a British colony had to be determined by British constitutional law, and that the British legislation responding to U.D.I. had full effect in Rhodesia, the constitutional convention requiring Rhodesian agreement with British legislation for Rhodesia not having had the effect of limiting the legal power of the British Parliament.

The Board also held that the conceptions of international law as to *de facto* or *de jure* status were inappropriate where a court sitting in a particular territory had to decide on the lawfulness of a new régime which had gained control of the territory, and that the usurping government in control of Rhodesia could not be regarded as the lawful government, since the British Government was still taking steps to regain control, it being impossible to predict with certainty whether or not the British Government would succeed. The Board thus again gave weight to the question of the "efficacy of the change". It also held that no principle of necessity or implied mandate, as deduced from the message of the Governor after U.D.I., could validate a purported law made after U.D.I., however necessary such a law might be for preserving law and order. Concluding that the emergency powers regulations were, like the 1965 Constitution, invalid, the Privy Council allowed the appeal and reversed the decision of the Appellate Division of the Rhodesian High Court.

The decision of the Privy Council was, however, not given any effect in Rhodesia; the detention of the applicant's husband again continued. In decisions of August 9, 1968 in R. v. Ndhlovu (1968 (4) S.A. 207) and of August 12 in R. v. Muzeza and Ors. (1968 R.L.R. (2) 280) the General Division of the Rhodesian High Court refused to follow the decision of the Privy Council and to apply it as a precedent. The Appellate Division did likewise in its decision of September 13 in Ndhlovu's case (1968 R.L.R. (2) 339; 1968 (4) S.A. 515). Fully backing the Rhodesian position on the legal status of Rhodesia in the last reported Rhodesian decision on the matter the Court, in declaring a statute enacted after U.D.I. to be valid, said that the British Government would not regain control over Rhodesia. It held that the 1961 Constitution had, therefore, been annulled by the "efficacy of the change", that the Rhodesian Government was the *de jure* government, and that the 1965 Constitution was the only valid constitution.

British decisions on the legal status of Rhodesia, apart from the decision of the Privy Council in Madzimbamuto's case, commenced when Rhodesian decisions on the matter had already come to an end. Regarding themselves as being bound by certificates from the British Government, the courts gave full backing to the British position and also followed the decision of the Privy Council. In the decision of July 31, 1970 in Adams v. Adams ((1971) P. 188) the Probate, Divorce and Admiralty Division of the English High Court held that a Rhodesian divorce decree granted by a judge appointed to the Rhodesian High Court after U.D.I. was, like the appointment of the judge, invalid. Such and similar hardships resulting from U.D.I. were, however, thereafter mitigated by legislation. Further decisions backing the British position came from the Chancery Division and the Court of Appeal in re James (An Insolvent) ((1977) Ch. 41). The Supreme Court of New Zealand in Bilang v. Rigg ((1972) New Zealand Law Reports 954) had also mainly followed the decision in Madzimbamuto's case without drawing all possible conclusions from it.

E. From U.D.I. to Its Revocation

In the British view, the 14 years betwen U.D.I. and its revocation legally formed one single constitutional period determined by the 1961 Constitution and the British legislation responding to U.D.I. In the Rhodesian view, these years were legally divided into three constitutional periods. The constitutional changes marking the beginning and the end of the three constitutional periods naturally also were political changes. The outstanding political change between U.D.I. and its revocation, however, was the result of another event, namely the Portuguese revolution of 1974 with the subsequent commencement of Portuguese decolonization which divided the 14 years into

years of apparent consolidation of U.D.I. and into years of its decay (→ Decolonization: Portuguese Territories).

1. *The Period of the 1965 Constitution*

U.D.I. and the replacement of the 1961 Constitution by the 1965 Constitution for some time meant that all communications between the British and the Rhodesian Governments were discontinued. The British Government declared that there would be no negotiations with an illegal régime, but changed its position after some months. While it did not yield to the demands of some members of the Commonwealth, especially African States, to make the formula "no independence before majority rule" (NIBMAR) part of its policy, it throughout made clear that a settlement would have to be within the "five principles" laid down before U.D.I., and of the "sixth principle" added afterwards that it would be necessary to ensure that there was no oppression of the majority by the minority or of the minority by the majority. Moreover, the British Government demanded the return to legality, before independence would be granted, through the surrender of power by the illegal régime.

Negotiations culminated in two meetings of the Prime Ministers Harold Wilson and Ian Smith which took place in 1966 on board the → warship *Tiger* and in 1968 on board the warship *Fearless*, but the proposals made and the discussions held there as well as subsequent communications eventually failed to produce agreement on a settlement. Having overcome sanctions for years, the Rhodesian Government was not ready to make essential concessions.

Further unilateral steps aimed at a confirmation of U.D.I. On June 20, 1969, the adoption of a republican form of government and proposals for a new constitution were approved at a referendum held among registered voters, the Governor thereupon resigning with the Queen's permission. Having been empowered by the Constitution Amendment (No. 2) Act 1969 to give effect to the wishes of the voters, the Rhodesian legislature on October 29, 1969 passed the Constitution of Rhodesia 1969 which came into force on March 3, 1970. Other statutes coming into force on the same day included the Land Tenure Act 1969 which replaced the Land Apportionment Act 1930, being itself even more racially discriminatory than the latter.

2. *The Period of the 1969 Constitution*

The 1969 Constitution which made Rhodesia a Republic was in the British view as invalid as the 1965 Constitution. The UN Security Council by Res. 277 of March 18, 1970 condemned "the illegal proclamation of republican status . . . by the illegal régime", and reaffirmed its earlier resolutions in this regard.

The new Constitution replaced the Queen by a President who was appointed by the Executive Council. The Constitution also made provision for other basic changes, through which its whole structure differed widely from that of the 1965 Constitution. Parliament was made bicameral, comprising a Senate and a House of Assembly. Constitutional provisions, especially those relating to Parliament and to franchise and electoral law, directly distinguished as to race between Europeans and Africans. The Senate consisted of 23 senators, of whom 10 were Europeans elected by the European members of the House of Assembly; 10 were African Chiefs elected by Chiefs; 3 were appointed by the President. The House of Assembly consisted of 66 members, of whom 50 were Europeans elected by the Europeans on the rolls of European voters; 16 members were Africans, of whom 8 were elected by the Africans on the rolls of African voters, while 8 were elected by Chiefs, headmen and councillors.

The number of African members in the House of Assembly was gradually to increase with increasing proportion of income tax paid by Africans until it would equal the number of European members without further increase thereafter. Although Africans could thus reach parity with Europeans in the House, after decades rather than after years, they could never hope to replace minority rule through majority rule. The share in power given to Africans through their virtual parity with Europeans in the Senate could not really serve to adjust the constitutional retrogression, which was the most criticized feature of the new Constitution, since the House was in effect the prevailing part of Parliament. Moreover, the role given to African Chiefs in comparison with the role given to enrolled African voters could itself be criticized as retrogressive. Other negative points were that the Declaration of

Rights was no longer judicially enforceable, and that the Constitutional Council was replaced by the Senate Legal Committee.

While a settlement of the Rhodesian problem thus for some time appeared to be more unlikely than ever before, it seemed to become imaginable again after a Conservative Government under Edward Heath had taken office in London in 1970. The Foreign and Commonwealth Secretary Sir Alec Douglas-Home visited Rhodesia in November 1971 and reached agreement with the Rhodesian Government on proposals which, *inter alia*, made provision for a remote possibility of majority rule of the Africans. In view of the "fifth principle" for a settlement, a Commission under the chairmanship of Lord Pearce then visited Rhodesia early in 1972. After communication with all Rhodesian groups the Commission reported that the proposals were acceptable to the Europeans but were rejected by the majority of the Africans; the proposals were, therefore, declared not to be acceptable to the Rhodesian people as a whole.

The failure of the proposals put an end to all efforts to settle the problem through bilateral negotiations between the British and Rhodesian Governments. The numerous subsequent efforts involved not only British and Rhodesian communications with other governments, among them those of the United States and South Africa, but also communications with leaders of African nationalists. Guerrilla warfare within Rhodesia had already begun years before and it grew into a vital danger when the Portuguese territories emerged as independent States after the 1974 revolution. Angola, Botswana, Mozambique, Tanzania and Zambia formed the "Front Line States".

Sanctions against Rhodesia became more and more effective. In 1976 the Rhodesian Government accepted American proposals for transition to majority rule within two years, but the Front Line States and African nationalists made counter-proposals. The British Government then convened a conference with participation of leaders of all Rhodesian groups which commenced in October 1976 in Geneva but broke down in January 1977 without resuming. "Anglo-American Proposals" were published in September 1977; they provided, *inter alia*, for the presence in Rhodesia during a transitional period of a United Nations Zimbabwe Force, but they failed like earlier proposals (→ United Nations Forces).

The Rhodesian Government then vigorously sought an "internal settlement" through negotiations with moderate African nationalists without participation of the Zimbabwe African National Union (ZANU) and the Zimbabwe African People's Union (ZAPU) which together formed the Patriotic Front (PF). On March 3, 1978, Prime Minister Ian Smith, Bishop Abel Muzorewa, who represented the United African National Council (UANC), and two other African leaders signed an agreement that a new Constitution would be made which would provide for majority rule on the basis of universal adult suffrage within terms containing safeguards for the European minority. Under the agreement a Transitional Government took office with Ian Smith as Prime Minister and the other African leaders as members of the Executive Council. A Council of Ministers was set up with an equal number of black and white ministers.

Throughout the period of the Transitional Government, the 1969 Constitution and the Parliament elected thereunder continued. On January 30, 1979 the new Constitution was approved through a referendum held among registered voters. Parliament then passed the Constitution of Zimbabwe Rhodesia 1979 which gave the Republic a name expressing its dual character. The Land Tenure Act was repealed. Elections held under the newly introduced franchise and electoral law which were boycotted by the Patriotic Front gave the UANC an overall majority in the new House of Assembly. When the 1979 Constitution came into force on June 1, 1979, the UN Security Council had, however, already condemned the "internal settlement" inclusive of the election through Res. 423 of March 14, 1978 and Res. 448 of April 30, 1979 as part of "manoeuvres by the illegal régime . . . aimed at the retention of power by a racist minority".

3. The Period of the 1979 Constitution

The 1979 Constitution which implemented the "internal settlement" remained in force only for some months. Parliament, as well as the franchise and electoral law, were reconstituted to conform to the principle of universal adult suffrage, but to some extent the constitutional provisions con-

tinued to distinguish as to race: The House of Assembly consisted of 100 members; 72 seats were reserved for "blacks", 28 for "whites".

The Constitution regained a judicially enforceable Declaration of Rights. Specially entrenched constitutional provisions could only be amended with a majority of 78 votes in the House of Assembly, the white members thus being able to block such amendments. The seats reserved for whites were to be retained for ten years; thereafter the House of Assembly could pass an amendment concerning the said seats with a majority of 51 votes on recommendation by a Commission in which whites would be likely to predominate. Similarly composed commissions or boards had functions in relation to the judiciary, the public service, the police force and the defence forces.

The Constitution thus made majority rule subject to severe restrictions which could even be said to have undermined it. Although Zimbabwe Rhodesia had a black President and with Bishop Muzorewa also a black Prime Minister, like the former Rhodesia the country was not recognized by a single Government; moreover, the guerrilla war continued. The taking of office by a Conservative Government under Margaret Thatcher in London in May 1979 had raised some hope that the "internal settlement" would be accepted, but at the latest such hope broke down with the meeting of the Heads of Government of the Commonwealth held in Lusaka in August where agreement both on the way to a settlement and on its substance was reached.

The British Government then convened a new Constitutional Conference which was held at Lancaster House in London from September to December 1979 under the chairmanship of Lord Carrington as Foreign and Commonwealth Secretary heading the British delegation. Bishop Muzorewa headed a delegation including Ian Smith; Robert Mugabe and Joshua Nkomo, the leaders of the Patriotic Front, headed another Rhodesian delegation. The delegations reached agreement on the constitutional terms for the grant of independence, on arrangements for an interim government until the attainment of independence and on a cease-fire agreement. The "Report" of the Conference with some annexes was signed on December 21, 1979 and is commonly referred to as the "Lancaster House Agreement", though the title thus used was unofficial; the Report was not a treaty in the sense of international law for the very reason that only the British delegation was understood to represent a State. Implementing the forthcoming Lancaster House Agreement, the British Parliament had already on November 14 passed the Southern Rhodesia Act 1979 on November 14 and, on December 20, the Zimbabwe Act 1979. Likewise, U.D.I. had already been revoked before the signature of the Report.

F. From the Revocation of U.D.I. to the Attainment of Independence

1. The Return to Legality

U.D.I. was revoked when the Parliament of Zimbabwe Rhodesia on December 12, 1979 passed the Constitution of Zimbabwe Rhodesia Amendment (No. 4) Act 1979 which provided that Zimbabwe Rhodesia should "cease to be an independent State" and should "become part of Her Majesty's dominions". Lord Soames arrived in Salisbury on the same day as the last Governor of Southern Rhodesia, as the colony had to call itself again. The British Government could state that Southern Rhodesia had "returned to legality", since the illegal régime had surrendered power. By regarding herself again as a colony, Southern Rhodesia had in her own view returned to the status which she had held throughout the 14 years after U.D.I. in the British view: The two contrary positions on her legal status after U.D.I. thus came to an end.

2. The Termination of Sanctions

Through Res. 460 of December 21, 1979, adopted on the day of the signature of the Lancaster House Agreement, the United Nations Security Council noted the agreement produced with "satisfaction", and called upon members "to terminate the measures taken against Southern Rhodesia" which then came to an end. The British and some other governments had unilaterally lifted sanctions already upon the return by Southern Rhodesia to legality since they regarded the obligations under the UN Charter as having been discharged with the end of the rebellion. They were, however, vehemently criticized by numerous other governments which were supported by the

UN General Assembly through Res. 34/192 of December 18, 1979, declaring that unilateral termination of sanctions would be in violation of obligations under the Charter.

3. The Interim Government

Provision for the interim government was made under the Southern Rhodesia Act 1979 through the Southern Rhodesia Constitution (Interim Provisions) Order 1979. The Interim Provisions placed the interim government in the hands of the Governor who was given both executive and legislative power. For the first time in her history Southern Rhodesia thus came under direct and full colonial rule. In exercise of his legislative power the Governor made numerous Ordinances, above all the Constitution (Interim Provisions) Ordinance 1979, which with special regard to the "return to legality" after the illegal régime dealt *inter alia* with "existing laws", "existing officers", "judicature and legal proceedings", and the "validation of transactions" done after U.D.I.

Amnesty Ordinances granted general pardon for acts done to further or to frustrate the past rebellion in the law of Southern Rhodesia; in British law such general pardon had been granted through the Zimbabwe Act 1979. Other Ordinances dealt with the elections to be held and the appointments to be made with a view to the coming into force of a new Constitution on the attainment of independence. The election to the House of Assembly of the forthcoming Parliament of Zimbabwe then took place in February 1980 and produced an overall majority of Robert Mugabe's ZANU, while Bishop Muzorewa's UANC suffered a grave defeat, clearly also outdone by Joshua Nkomo's ZAPU. The British Election Commissioner and the observers from the Commonwealth who had been present as supervisors reported that in all the circumstances the election could be regarded as both free and fair.

G. The Attainment of Independence and the Emergence of Zimbabwe

Southern Rhodesia attained independence as a Republic under the name of Zimbabwe through the Zimbabwe Act 1979, the Zimbabwe Independence Order made thereunder having appointed April 18, 1980 as the date of independence. On the same day Zimbabwe became a member of the Commonwealth. The Zimbabwe Constitution Order 1979 made under the Southern Rhodesia Act 1979 set out the Constitution of Zimbabwe in its schedule; together with it the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order 1980 came into force on the date of independence.

With the emergence of Zimbabwe and the coming into force of her Constitution a black President and the black Prime Minister Robert Mugabe assumed office, with a Government consisting of 20 black and 2 white Ministers. Parliament was again bicameral, comprising a Senate and a House of Assembly, the latter being the dominant part. The Senate consisted of 40 members who were indirectly elected or appointed by the President and it again also included some Chiefs; 10 seats were reserved for whites. The House of Assembly consisted of 100 directly elected members; 20 seats were reserved for whites. The Declaration of Rights which contained a very detailed provision on protection from deprivation of property was again made judicially enforceable.

The Constitution of Zimbabwe established black majority rule with safeguards for the white minority which did, however, not come up to those which had been reached under the "internal settlement". Certain provisions of the Constitution were specially entrenched for some years: For ten years constitutional bills concerning the essential parts of the Declaration of Rights had to be passed unanimously by the House of Assembly, i.e. with the votes of all the members of the House. For seven years constitutional bills concerning the seats reserved for whites had likewise to be passed unanimously by the House. Thereafter the entrenched provisions could be amended like all other constitutional provisions, i.e. through a constitutional bill which was passed by the House with not less than 70 votes, the white members thus being unable to block an amendment.

The Constitution of Zimbabwe has, since its coming into force, undergone several basic changes. The most fundamental change was made through the Constitution of Zimbabwe Amendment (No. 6) Act 1987, which was passed after the lapse of seven years from the coming into force of the Constitution. It abolished the reserved white seats both in the Senate and in the House and declared the said seats vacant. An electoral college consisting of the 80 remaining members of the

House filled the vacant seats in the House, while an electoral college consisting of all 100 members of the House then filled the vacant seats in the Senate. One safeguard for the white minority has thus come to an end, while both blacks and whites continue to be protected by the Declaration of Rights the provisions of which, however, ceased to be specially entrenched in 1990.

Southern Rhodesia Constitution Letters Patent 1923 (S.R. & 0 1923, p. 1078).

Southern Rhodesia (Constitution) Act 1961 (10 & 11 Eliz. 2, c. 2).

Southern Rhodesia (Constitution) Order in Council 1961 (S.I. 1961 No. 2314).

Southern Rhodesia Act 1965 (1965 c. 76).

Southern Rhodesia Constitution Order 1965 (S.I. 1965 No. 1952).

Southern Rhodesia Act 1979 (1979 c. 52).

Zimbabwe Constitution Order 1979 (S.I. 1979 No. 1600).

Zimbabwe Act 1979 (1979 c. 60).

Proclamation No. 53 of 1965, dated 11 November 1965 containing Unilateral Declaration of Independence (Rhodesia Government Notice No. 737 N of 1965) with Annex: Constitution of Rhodesia 1965.

Constitution (Ratification) Act 1966 (No. 1 of 1966).

Constitution of Rhodesia 1969 (No. 54 of 1969).

Constitution of Zimbabwe Rhodesia 1979 (No. 12 of 1979).

Report of the Southern Rhodesia Constitutional Conference, British Command Paper Cmnd. 1291 (1961).

Southern Rhodesia, Constitution, Part I – Summary of Proposed Changes, Cmnd. 1399 (1961).

Southern Rhodesia, Constitution, Part II - Detailed Provisions, Cmnd. 1400 (1961).

Southern Rhodesia, Correspondence between Her Majesty's Government and the Government of Southern Rhodesia, Cmnd. 2000 (1963).

Southern Rhodesia, Correspondence between Her Majesty's Government and the Government of Southern Rhodesia, April-June 1963, Cmnd. 2073 (1963).

Southern Rhodesia, Documents relating to the Negotiations between the United Kingdom and the Southern Rhodesian Governments, November 1963-November 1965, Cmnd. 2807 (1965).

Rhodesia, Proposals for a Settlement 1966, Cmnd. 3159 (1966).

Rhodesia, Documents Relating to Proposals for a Settlement 1966, Cmnd. 3171 (1966).

Rhodesia, Report on the Discussions held on board *H.M.S. Fearless*, October 1968, Cmnd. 3793 (1968).

Rhodesia, Report on Exchanges with the Régime since the Talks held in Salisbury in November 1968, Cmnd. 4065 (1968).

Rhodesia, Proposals for a Settlement, Cmnd. 4835 (1971).

Rhodesia, Report of the Commission on Rhodesian Opinions under the Chairmanship of the Right Honourable the Lord Pearce, Cmnd. 4964 (1972).

Rhodesia, Proposals for a Settlement, Cmnd. 6919 (1977).

Rhodesia, Summary of the Independence Constitution, Cmnd. 7758 (1979).

Southern Rhodesia, Report of the Constitutional Conference, Lancaster House, London, September-December 1979, Cmnd. 7802 (1980).

Annual Survey of Commonwealth Law (1965–1977).

J.E.S. FAWCETT, Security Council Resolutions on Rhodesia, BYIL, Vol. 41 (1965–1966) 103–121.

A.J.G. LANG, Madzimbamuto's and Baron's Case at First Instance, Rhodesian Law Journal, Vol. 5 (1965) 65–108.

D. LARDNER-BURKE, Rhodesia – The Story of the Crisis (1966).

L.H. LEIGH, Rhodesia after U.D.I. Some Aspects of a Peaceful Rebellion, Public Law (1966) 148–160.

C. PALLEY, The Constitutional History and Law of Southern Rhodesia 1888–1965 with Special Reference to Imperial Control (1966).

J. BARBER, Rhodesia: The Road to Rebellion (1967).

J.M. EEKELAAR, Splitting the Grundnorm, Modern Law Review, Vol. 30 (1967) 156–175.

R. HIGGINS, International Law, Rhodesia, and the U.N., World Today, Vol. 23 (1967) 94–106.

C. PALLEY, The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary, Modern Law Review, Vol. 30 (1967) 263–287.

Southern Rhodesisa and the United Nations: The U.S. Position, Department of State Bulletin, Vol. 56 (1967) 366–377.

R.S. WELSH, The Constitutional Case in Southern Rhodesia, Law Quarterly Review, Vol. 83 (1967) 64–88.

M. AKEHURST, State Responsibility for the Wrongful Acts of Rebels – An Aspect of the Southern Rhodesian Problem, BYIL, Vol. 43 (1968–1969) 49–70.

R.L. BINDSCHEDLER, Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinigten Nationen, besonders im Falle Rhodesiens, ZaöRV, Vol. 28 (1968) 1–15.

J.L. CHEFKIN, The Rhodesian Question at the United Nations, International Organization, Vol. 22 (1968) 649–669.

R.W.M. DIAS, Legal Politics: Norms behind the Grundnorm, Cambridge Law Journal, Vol. 26 (1968) 233–259.

L.C. GREEN, Rhodesian Independence – Legal or Illegal?, Alberta Law Review, Vol. 6 (1968) 37–66.

A.J.E. JAFFEY, The Rhodesian Constitutional Cases, Rhodesian Law Journal, Vol. 8 (1968) 138–160.

L.J. MACFARLANE, Pronouncing on Rebellion: The Rhodesian Courts and U.D.I., Public Law (1968) 325–361.

H.H. MARSHALL, The Legal Effects of U.D.I. (Based on Madzimbamuto v. Lardner-Burke), ICLQ, Vol. 17 (1968) 1022–1034.

M.S. McDOUGAL and M.W. REISMAN, Rhodesia and the

United Nations: The Lawfulness of International Concern, AJIL, Vol. 62 (1968) 1–19.
W. WENGLER, Richter, Revolution und Notstand, Archiv des öffentlichen Rechts, Vol. 93 (1968) 538–587.
K. ZEMANEK, Das Problem der Beteiligung des immerwährend neutralen Österreich an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens, ZaöRV, Vol. 28 (1968) 16–32.
B.A. BOCZEK, Permanent Neutrality and Collective Security: The Case of Switzerland and the United Nations against Southern Rhodesia, Case Western Reserve Journal of International Law, Vol. 1 (1969) 75–104.
F.M. BROOKFIELD, The Courts, Kelsen, and the Rhodesian Revolution, University of Toronto Law Journal, Vol. 19 (1969) 326–352.
F. CLEMENTS, Rhodesia, The Course to Collision (1969).
D.J. DEVINE, Rhodesia and the United Nations: The Lawfulness of International Concern – A Qualification, Comparative and International Law Journal of Southern Africa, Vol. 2 (1969) 454–466.
J.M. EEKELAAR, Rhodesia: The Abdication of Constitutionalism, Modern Law Review, Vol. 32 (1969) 19–34.
T.O. ELIAS, The Legality of the O.A.U. Council of Ministers' Resolution on Rhodesia in December 1965, Nigerian Law Journal, Vol. 3 (1969) 1–12.
L.C. GREEN, Southern Rhodesian Independence, AVR, 14 (1969) 155–191.
D.B. MOLTENO, The Rhodesian Crisis and the Courts, Comparative and International Law Journal of Southern Africa, Vol. 2 (1969) 254–289, 404–447, Vol. 3 (1970) 18–48.
D. VON SCHENCK, Das Problem der Beteiligung der Bundesrepublik Deutschland an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens, ZaöVR, Vol. 29 (1969) 257–315.
A. WHARAM, Rhodesia and the Crown, Rhodesian Law Journal, Vol. 9 (1969) 21–39.
K. YOUNG, Rhodesia and Independence, A Study in British Colonial Policy (1969).
D.J. DEVINE, Rhodesia: A Duty not to Recognize?, Tydskrif vir Hedendaagse Romeins-Hollandse Reg, Vol. 33 (1970) 152–166.
H.R. HAHLO, The Privy Council and the Gentle Revolution, McGill Law Journal, Vol. 16 (1970) 92–112.
D. RUZIÉ, Les sanctions économiques contre la Rhodésie, Journal de Droit international, Année 97 (1970) 20–56.
R.S. WELSH, The Function of the Judiciary in a Coup d'Etat, South African Law Journal, Vol. 87 (1970) 168–192.
Z. CERVENKA, Rhodesia Five Years after the Unilateral Declaration, Verfassung und Recht in Übersee, Vol. 4 (1971) 9–30.
R.G. FORSTER, An Exercise in Shadow Boxing: Madzimbamuto v. Lardner-Burke and Others, Sydney Law Review, Vol. 6 (1971) 398–413
D.J. DEVINE, The Status of Rhodesia in International Law, Acta Juridica (1973) 1–171, (1974) 109–246, (1979) 321–415.
R.C. GOOD, U.D.I., The International Politics of the Rhodesian Rebellion (1973).
F. NUSCHELER, Der britisch-rhodesische Verfassungskonflikt, Verfassung und Recht in Übersee, Vol. 6 (1973) 407–427.
J.M. FINNIS, Commonwealth and Dependencies, in: Halsbury's Laws of England (4th ed. with Cummulative Supplements, 1974 ff.).
R.D. LESLIE, Non-Recognition of Governments and the Conflict of Laws: The Rhodesian Situation, Juridical Revue (1974) 127–146.
R. ZACKLIN, The United Nations and Rhodesia: A Study in International Law (1974).
H.R. STRACK, Sanctions. The Case of Rhodesia (1978).
E. WINDRICH, Britain and the Politics of Rhodesian Independence (1978).
Zimbabwe Independence Movements, Select Documents (ed. and sel. by Nyangoni and G. Nyandoro) (1979).
C. CADOUX, Naissance d'une nation: Le Zimbabwe, AFDI, Vol. 26 (1980) 9–29.
I.I. DORE, Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems, Vanderbilt Journal of Transnational Law, Vol. 13 (1980) 25–41.
P. SLINN, Zimbabwe Achieves Independence, Commonwealth Law Bulletin, Vol. 6 (1980) 1038–1061.
H. WISEMAN and A.M. TAYLOR, From Rhodesia to Zimbabwe, The Politics of Transition (1981).
R.H.F. AUSTIN, Namibia and Zimbabwe: Decolonisation and the Rule of International Law, Current Legal Problems, Vol. 35 (1982) 203–232.
M. DOXEY, The Making of Zimbabwe: From Illegal to Legal Independence, Yearbook of World Affairs, Vol. 36 (1982) 151–165.
H.H. MARSHALL, From Dependence to Statehood in Commonwealth Africa, Vol. 2, Central Africa, Selected Documents, World War I to Independence (1984).
J. NKALA, The United Nations, International Law and the Rhodesian Independence Crisis (1985).
K.R. RUSH, Zimbabwe, in: Constitutions of the Countries of the World (A.P. Blaustein and G.H. Flanz, eds.) (1987).

WERNER MORVAY

ROCKALL

1. Background

The → island of Rockall was claimed by the United Kingdom in 1955. It is an uninhabited rock which has a base area of 624 square metres and an altitude of 25 metres. Rockall lies approximately

300 miles west of Scotland in the Northern Atlantic Ocean (57° N, 13° W), or 320 miles south-west of the → Faroe Islands. It was incorporated into the United Kingdom by the Island of Rockall Act of February 10, 1972, becoming subject to the law of Scotland. Geologically it is a part of the Faroe-Rockall plateau. East of Rockall lies the Rockall Trough which is up to 3000 metres deep and has a northern continuation known as the Faroe-Shetland Channel. West of the Faroe-Rockall plateau lies a similar trough.

The legal questions in which Rockall is involved mainly concern the United Kingdom, the Republic of Ireland, Denmark and Iceland. One issue which is in dispute among the parties is whether Rockall as a rock is entitled to have its own → continental shelf and whether it forms a natural prolongation of the land mass of one or more of the States mentioned or of the Faroe Islands. Questions of exploration and exploitation rights and of delimitation are thus involved. Another issue is whether Rockall may have its own 200 mile exclusive → fishery zone and an → exclusive economic zone. The United Kingdom, Denmark, Iceland and Ireland all adopted 200 mile fishery zones with effect from January 1, 1977.

These problems remain unsolved as the → negotiations between the parties have not yet led to a solution. Legal guidelines are provided by the Geneva Convention on the Continental Shelf, April 29, 1958 (UNTS, Vol. 450, p. 82), although Ireland and Iceland are not parties, by the judgment of the → International Court of Justice in the → North Sea Continental Shelf Case (1969), and by the judgment delivered by the Court of Arbitration in 1977 in the Anglo-French Continental Shelf Case (→ Continental Shelf Arbitration (France/United Kingdom)). The → United Nations Convention on the Law of the Sea, December 10, 1982 (UN Doc. A/CONF.62/122 with Corr.), which has been signed by all the parties in dispute except the United Kingdom, will offer an answer to most of the outstanding questions when it becomes applicable law.

2. Claims involving Rockall

The United Kingdom, which passed a Continental Shelf Act on April 15, 1964, claims that Rockall has its own continental shelf under present → customary international law. The fact that Rockall is uninhabited and cannot sustain human habitation is held to be of no legal relevance, as present international law does not distinguish between different categories of islands. Reference is made in this respect to Art. 10(1) of the 1958 Geneva Convention which is said to represent customary international law and therefore is binding also for States which are not parties, including Ireland and Iceland. In any case, it is argued that the Rockall area is a natural prolongation of the land mass of the United Kingdom. The Rockall Trough lying between Rockall and the United Kingdom does not constitute an interruption, as the exploitability criterion in the 1958 Geneva Convention may no longer be regarded as placing any limitation upon the seaward extension of the continental shelf (see → Continental Shelf, Outer Limits). Also, the Wyville Thomson Ridge lying north-west of Scotland could be regarded as a connection between the United Kingdom and the Faroe-Rockall plateau. Rockall, as a part of the United Kingdom, has a fishery zone extending 200 miles or up to the median line.

From the Irish side it is contended that Rockall as an uninhabited rock is not entitled to both a continental shelf and a 200 mile fishery zone and plays no role in the delimitation question. According to Irish opinion, the Faroe-Rockall plateau constitutes a natural prolongation of a common British-Irish continental shelf. It is argued that delimitation must therefore be carried out in accordance with equitable principles following the rules of customary international law (→ Equity in International Law). The same applies to the 200 mile fishery zone. Rockall itself should have only a 12 mile fishery zone.

Denmark opposes the British-Irish prolongation argument and states that Rockall forms part of the same geological formation as the Faroe Islands, the Faroe-Rockall plateau, also called the micro-continent. The Rockall area must thus be considered as a natural prolongation of the continental shelf of the Faroe Islands, as Rockall itself is not entitled to its own continental shelf. It is argued that Rockall as a rock plays no role in the delimitation and has its own 12 mile fishery zone.

The Icelandic view is about the same as the Danish but it is held that Iceland has equal rights on the micro-continent because the latter constitutes a natural prolongation of the Icelandic land

mass. Reference is made to the Iceland-Faroe Ridge which lies to the west of the Faroe Islands.

Some of the outstanding disputed questions are answered definitively by the UN Convention on the Law of the Sea. According to Arts. 121(3) and 83 Rockall will not be entitled to its own continental shelf or to a 200 mile fishery or exclusive economic zone. Rockall will have 12 mile → territorial sea and will play no role in the question of delimitation. This is already the present legal situation if one views the above-mentioned articles as representing customary international law. On the other hand, the dispute focuses on the geological question if the Faroe-Rockall plateau constitutes a natural prolongation of the geological formation of one of the States involved. Owing to its depth and extension, the Rockall Trough east of the plateau is in this respect likely to constitute an interruption to the British-Irish continent. Although the plateau could be seen as a natural prolongation of the land mass of the United Kingdom, Ireland or Iceland, it could also be concluded that Denmark, through the Faroe Islands, has a strong claim concerning the continental shelf question.

C.R. SYMMONS, Legal Aspects of the Anglo-Irish dispute over Rockall, Northern Ireland Legal Quarterly, Vol. 26 (1975) 65–93.

E.D. BROWN, Rockall and the Limits of the Jurisdiction of the United Kingdom, Marine Policy, Vol. 2 (1978) 181–211; 275–303.

DIETER STUMMEL

SAAR TERRITORY

1. History

The Saar territory is not a historical unit. The Saar River valley below Sarreguemines was part of the German Reich since the final division of Charlemagne's legacy in 870. Its population speaks German. Part of it later belonged to the dukedom of Lorraine, part to the Count of Nassau-Saarbrücken, and still smaller parts to the archdiocese of Trier as well as to smaller principalities. After 1648, when France expanded into Alsace, the lower Saar became a frontier region. Louis XIV succeeded in capturing a stretch of the Saar River bank and constructed the fortress of Saarelouis (1680–1685). In the Treaty of Rijswick, 1697 (CTS, Vol. 22, p. 7), he had to relinquish many of his acquisitions in Germany, but Art. XXXII left him Sarrelouis. In 1766 the dukedom of Lorraine fell to France, and with it a part of the lower Saar.

During the French Revolution the whole left bank of the → Rhine River became French. After the downfall of Napoleon the pre-revolutionary territorial limits of France were re-established, but Art. III, secs. 3 and 4 of the First Paris Peace Treaty of May 30, 1814 (CTS, Vol. 63, p. 172) allowed France to keep the lower Saar valley. After the French defeat at Waterloo, Art. I, sec. 1 of the Second Paris Peace Treaty of November 20, 1815 (CTS, Vol. 65, p. 253) awarded this region to Prussia (→ Peace Treaties). This may have been the root of the repeated aspirations of France to regain the Saar territory.

Rich in coal and neighbouring on the iron ore mines of Lorraine and Luxemburg, the Saar region became highly industrialized and, moreover, profited from the → annexation of Alsace by Germany in 1871.

2. The Saar Basin, 1920–1935

At the end of the First World War, France was unable to achieve the cession of the Saar by Germany. Considering France's need for coal, as a result of the damage her mines in the north had suffered from the war, and her claim for → reparations, the → Versailles Peace Treaty of 1919 (Arts. 45 to 50, with an annex of 40 paragraphs, CTS, Vol. 225, p. 189) transferred the Saar mines to France and instituted an international administration of the "Saar Basin" by a five-member commission of the → League of Nations for 15 years. This territory, with an area of 1912 square kilometres and about 800 000 inhabitants, was much larger than the strip taken from France in 1815 and also comprised a part of the Bavarian Palatinate.

The new régime included a → customs union with France and the free circulation of French currency. Although the → nationality of the population was not to be affected, the commission created the status of "inhabitant of the Saar" and charged France with the → diplomatic protection

of such persons abroad. France felt authorized to exploit the coal sites in the Warndt region in the south of the Saar Basin by means of tunnels originating from the nearby mines on French territory.

The → plebiscite provided for after the 15 years of international administration was held on January 13, 1935. About 91 per cent of the votes cast favoured the return of the territory to Germany, 9 per cent favoured the → *status quo*, and 0.4 per cent sought union with France. Accordingly, the Saar Basin was returned to Germany, which had to buy the coal mines, located in the region, from France.

3. The Saarland, 1946–1956

After World War II France separated a stretch of 2567 square kilometres along the Saar with about one million inhabitants, partly identical with the former Saar Basin, from her occupation zone in Germany to form a separate State known as the Saarland (→ Occupation, Belligerent; → Germany. Occupation after World War II). The Saarland's constitution of December 12, 1947 and a law of July 15, 1948 established a new nationality. Treaties of January 3, 1948 (Amtsblatt des Saarlandes 1948, p. 380), March 3, 1950 (Amtsblatt des Saarlandes 1951, p. 3), and May 20, 1953 (Amtsblatt des Saarlandes 1953, p. 770) regulated the Saarland's relations with France, into whose economic system it was integrated. France also assumed the representation of the Saarland in foreign affairs. Nevertheless, treaties concluded on behalf of the Saarland are rare, and no explicit → recognition of the Saarland by other States seems to have occurred. Germany opposed the régime and repeatedly voiced reservations to its legal status.

The Saarland became an Associate Member of the → Council of Europe in 1950 and signed and ratified a number of the conventions elaborated by the Council, most importantly the → European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. With respect to the → European Coal and Steel Community the Saarland was also integrated in this period within the French economy, but enjoyed some separate representation of its interests at Brussels. It also sent observers to the → International Labour Organisation.

The Saarland took no part in the establishment in 1949 of the Federal Republic of Germany (→ Germany, Legal Status after World War II), in contrast to the other Länder of the western occupation zones.

4. Abolition of the Saar Régime

When the time came for closer cooperation between Germany and the Western Powers, the Saar question had to be resolved. The Council of Europe deserves much credit in elaborating a statute for the Saar territory reconciling the French, German and local interests. A treaty between France and the Federal Republic was accordingly concluded on October 23, 1954 (German Bundesgesetzblatt 1955 II, p. 296). The statute was to be submitted to a plebiscite, and the → Western European Union provided the apparatus for implementing it. The population, however, rejected the statute on October 23, 1955, by a two-thirds majority.

Renewed negotiations resulted in a treaty between France and Germany on October 27, 1956 (German Bundesgesetzblatt 1956 II, p. 1589), which permitted the integration of the Saar territory into the Federal Republic of Germany to take effect on January 1, 1957 and instituted a transitional régime for all matters in which the Saar territory had evolved particular relations with France. Owing to divergent opinions on the status of the Saarland, the treaty at times employs obscure formulae, and the Saarland is not a party to it. However, on the whole, no serious difficulty arose in interpreting and applying the treaty.

There was no need to replace the constitution of 1947, as the modifications made to it by a Saarland law of December 1956 were sufficient (Amtsblatt des Saarlandes (1956) p. 1657). The Saarland Diet proclaimed the adherence of the Saarland to the German constitution or Basic Law (Grundgesetz) according to Art. 23 by a resolution of December 14, 1956 (ibid., p. 1645) and abolished the separate Saarland nationality by a law of December 20, 1956 (ibid., p. 1659). Further details are regulated by the Federal Republic law of December 23, 1956 (German Bundesgesetzblatt 1956 I, p. 1011) and the Saarland legislation of the

last days of 1956, in particular law no. 555 (Amtsblatt des Saarlandes (1956) p. 1667, with a special issue comprising 139 pages as an annex).

The transitional régime was abolished prematurely by exchange of letters between the French Government and the Federal Republic Government on July 5, 1959 (see Bundesgesetzblatt 1959 I, pp. 313–397, 401–406, and Bundesanzeiger (July 6, 1959) special issue).

5. Present Situation

There is no longer a particular international status with respect to the Saar territory. The Saarland is a normal federal state (Land) of the Federal Republic of Germany, although it is not listed in Art. 23 of the Grundgesetz. The text of this article must be considered of merely a historical significance, in as much as the three original Länder in the southwest of the Federal Republic have been combined and the Saarland has acceded to the Grundgesetz without modifying Art. 23.

The continuing economic problem concerning the Saar territory, that is the interest of France in the Saar coal, is the responsibility of the → European Economic Community. For the exploitation of the coal sites there exists a lease convention between the Saarbergwerke AG (owned by the Federal Republic and the Saarland) and the Houillères du Bassin de Lorraine. In this connection, the French Government and the Federal Republic Government have concluded an agreement of August 20, 1981 (German Bundesgesetzblatt 1981 II, p. 1106). The special option for French buyers to a third of the available Saar coal has ceased.

Council of Europe, Consultative Assembly, Document 225: The future position of the Saar. Report of the Committee on General Affairs (with Annex) (1954).

W.R. BISCHOP, The Saar Controversy (1924).

S. WAMBOUGH, The Saar Plebiscite (1940, reprint 1971).

H. LOTTIG, Bibliographie zur Saarfrage (1954).

L. DISCHLER (ed.), Das Saarland 1945–1956 (1956).

M. MERLE, Le règlement de la question sarroise et la liquidation du contentieux franco-allemand, AFDI, Vol. 2 (1956) 181–205.

L. DISCHLER (ed.), Das Saarland 1956–1957: Die Rückgliederung. Darstellung mit Dokumenten (1957).

F. MÜNCH, Zum Saarvertrag vom 27. Oktober 1956, ZaöRV, Vol. 18 (1957) 1–60.

F. MÜNCH, Zur Staatsangehörigkeit im Saarland, ZaöRV, Vol. 19 (1958) 318–336.

J. FREYMOND, The Saar Conflict (1960).

J.H. MARINUS, De internationale Rechtbank in Saarland 1956–1959 (1960).

FRITZ MÜNCH

ST. LAWRENCE SEAWAY

1. General Background

The St. Lawrence Seaway system was opened for navigation in 1959. It was regarded as a significant engineering development making it possible for ships with a 27 foot draught to navigate from the Atlantic to the Gulf of St. Lawrence up the St. Lawrence River, itself one of the great rivers of the world, and into the → Great Lakes, a unique body of fresh water in central North America (→ Navigation on Rivers and Canals). From Belle Isle, at the entrance to and from the Atlantic Ocean, to the heart of Minnesota, the St. Lawrence Seaway system measures 2480 miles and it services major transportation needs both within mid-North America as well as from the many foreign countries that use the Seaway facilities for their ships and commerce.

The Seaway is in some respects a misnomer since it is both a navigation and an electric power system. Indeed, the present facilities could not have been constructed without the parallel development of hydro-electric power in the international section of the St. Lawrence River, particularly the area between Cornwall (Canada) and Messina (United States) on the eastern end of the international section, and between Prescott (Canada) and Ogdenburg (United States) on the western end (→ International Rivers; → Boundary Waters). Hence the Seaway should be designated as a seaway cum power project, united by both economic necessity and engineering arrangements into a common programme without which the seaway system possibly could not have been effectively funded.

The St. Lawrence River, with its access to the Great Lakes, has been a navigational highway since the beginning of exploration and commerce in the late 16th and early 17th centuries. Doubtless, the indigenous North American peoples of

the Great Lakes basin and St. Lawrence River had long used it for communication and other purposes.

The modern Seaway was preceded by several → canals in the Montreal area as early as 1904: the St. Lawrence, Soulange, and Lachine Canals. These were all on the Canadian reach of the river and provided for a draught of 14 feet. After World War I both Canada and the United States, as co-riparians on the international section of the St. Lawrence River and within four of the five Great Lakes through which the Canada-United States boundary ran, undertook serious discussions on improving and deepening the Seaway facilities. After joint studies by engineers of the two countries the concept emerged, by 1927, of a power development plus navigation in the national and international sections of the river.

In 1932 Canada and the United States signed the Great Lake – St. Lawrence Deep Waterway Treaty, July 18, 1932 (United States Department of State Publication No. 347, 1932). However, opposition to the Seaway from state governments and commercial interests fearing the competition of this improved transportation facility, as well as from new sources of hydro-electric power, prevented the United States Senate from ratifying the Agreement. Further delays in studying the project led, by the eve of World War II, to its virtual suspension as a priority. Nevertheless, further negotiations between the two countries continued between 1938 and 1941.

The negotiations took into account not only the legal positions of the two federal governments, Canada and the United States, but also the jurisdiction of Ontario and Québec, the two largest Canadian provinces. These provinces are traversed by the Great Lakes and the St. Lawrence River and enjoy a powerful position, as "owners" of the waters under the Canadian constitution. By contrast, the United States constitution did not vest such general jurisdiction in the eight United States states that were co-riparians. Primacy in the development of power, however, was within the jurisdiction of each state subject to the authority of the Federal Power Commission. In March 19, 1941, because of anticipated power and transportation needs, an agreement was reached between Canada and the United States setting out the rights and duties of each in dredging the St. Lawrence for the new waterway and in the parallel erection of power facilities with equality in sharing the power so generated (DeptStateBull, Vol. 4 (1941) p. 307).

World War II delayed any immediate action, but Canadian impatience led to new → negotiations with the United States for a purely Canadian structure on the Canadian side of the river. In 1951, Parliament enacted legislation creating the St. Lawrence Seaway Authority (St. Lawrence Seaway Authority Act, December 21, 1951, Statutes of Canada 15 & 16 George VI, ch. 24). A second statute provided for the Province of Ontario to develop hydro-electric facilities in the international section of the river (Agreement between the Government of Canada and the Government of Ontario, December 3, 1951, Schedule to the International Rapids Power Development Act, Statutes of Canada, 15 & 16 George VI, ch. 13).

The prospect of a unilateral Canadian navigation project, even though linked to a cooperative Canada-United States (Power Authority of the State of New York and Ontario Hydro) power-sharing and power facilities construction plan, caused considerable concern in the United States. In view of these developments both United States executive and congressional action determined, after negotiations with Canada, that the United States should participate with Canada in a joint navigation and engineering programme. The power aspects already envisaged arrangements between Ontario Hydro and the Power Authority of the State of New York.

2. Legal Aspects

The decision to proceed with the project was formalized by exchanges of → notes on August 17, 1954 (UNTS, Vol. 234, p. 199). Later, a Special Agreement provided for the appointment of a Joint Board of Engineers to coordinate the engineering aspects of the Seaway as well as of the related power facilities. The net result of this lengthy and uneven process was to agree upon the St. Lawrence Seaway and Power development, with two locks on the United States side and the others in Canada, without the benefit of an overall treaty such as had been agreed to in 1932 and again in 1941. It was thus left to piecemeal arrangements

of a less comprehensive nature to be a substitute for an integrated treaty.

All of the above procedures must be understood in the light of certain legal principles and practices governing the rights of Canada and the United States in relation to the St. Lawrence River and the Great Lakes. The American Revolution took what had become a United British North America after the defeat of the French in 1759 and the Treaty of Paris of February 10, 1763 (Martens R, Vol. 1, p. 33), and divided that eastern continental landmass between the new United States and the now 'old' British North America. That division, throughout the 19th century, led to a series of important treaties demarking the boundary of the two countries from the St. Croix River and Passamaquoddy Bay and determining the Maine-New Brunswick boundary westward to the Pacific, where a line from the mainland to Vancouver Island through the Straits of Juan de Fuca completed the boundary-makers' odyssey of almost a century of surveys and agreements.

Out of these boundary decisions came the important division of the Great Lakes and the St. Lawrence River down to Cornwall, Ontario, until the River moved into Québec, from which point seaward, north and east, the River is entirely Canadian.

Through all of these post-revolutionary arrangements the United States was anxious to maintain her right of access to and from the St. Lawrence into and out of the Great Lakes as well as her right to navigate through all the waters of the Great Lakes. The Treaty of Ghent of December 12, 1814 (BFSP, Vol. 2, p. 357), the Webster-Ashburton Treaty of August 9, 1842 (Martens NRG, Vol. 3, p. 456), the Treaty of Washington of May 8, 1871 (Martens NRG, Vol. 20, p. 698) and the Boundary Waters Treaty of January 11, 1909 (Martens NRG3, Vol. 4, p. 208) together may be described as having provided the juridical framework for a St. Lawrence Seaway – Great Lakes navigational system. Of course, there were other documents, notably the Jay Treaty of November 19, 1794 (Martens R, Vol. 3, p. 336), which had begun to spell out the boundary system between the future Canada (in those days British North America) and the new United States.

Despite the Webster-Ashburton Treaty and the Treaty of Ghent, what was left unclear in these instruments, until perhaps the Treaty of Washington of 1871 and the Boundary Waters Treaty of 1909, was the extent to which each country had an absolute right of access to the waters of the other where geography and necessity made such access not merely convenient but imperative.

Indeed, it has been argued that neither the United States nor Canada had ever accepted the growing liberalization of access to international rivers that marked the European river tradition as it developed in the 19th century and which was crystallized by the Barcelona Conventions of April 20, 1921 (→ Barcelona Conference (1921)). That liberalization advanced the position of the ships of all contracting States with regard to a general right of access for peaceful navigation and commercial purposes of waters and rivers navigable to the sea and traversing the boundaries of such States, as in the case of the → Rhine and the → Danube. Of course, the status of the Danube changed later in 1948 with the restructuring of its commission and the exclusion of non-riparians from participation in decision-making.

Nevertheless, the "right of access" to the St. Lawrence Seaway continues to be affected by a certain "national" river concept that had characterized British, American, (and now Canadian) notions of access to the Mississippi and to the St. Lawrence rivers for over 200 years. While *de facto* the shippers of the world are invited to make use of the St. Lawrence Seaway and while *de jure* Canada and the United States are in full agreement with reference to their respective rights, particularly as to access, tolls, and a general joint responsibility for the system, that invitation to the world seems to be qualified by suggesting that entrance and use of the Seaway system is "a privilege", not a right – except for Canadian and United States shipping.

In the absence of a comprehensive treaty, the central mechanisms for defining these Seaway arrangements were exchanges of notes or letters, one important agreement on the Joint Board of Engineers and formal and informal commercial and engineering arrangements between Ontario Hydro and the Power Authority of the state of New York. Fortunately for both governments, this absence of a comprehensive agreement to a very large extent was moderated in its effects by the presence of an already well-established treaty regulating the entire Canada-United States

boundary waters system, namely the 1909 Treaty on Boundary Waters. Art. 3 of the latter requires that any changes in the "levels and flows" of any boundary waters have the approval of the International Joint Commission.

The International Joint Commission was created by the 1909 Treaty and has been operating *inter alia* to "regulate" all boundary and transboundary waters since 1912 when it first met. The Commission has a substantial body of experience and a valuable, even unique, record of achievement in avoiding or settling disputes dealing with such boundary and transboundary water systems. It provided, therefore, an immediate institutional framework within which the two Federal governments, as well as the province of Ontario and the state of New York, could move, with an administrative authority already in place to help manage the relations of all the parties involved in the Seaway power project. The Joint Board of Engineers was an independent body from the time of its formation in 1954 until the Seaway construction was completed in 1959. Thereafter its residual mandate was absorbed into the supervisory activities of the International Joint Commission.

3. *Evaluation*

Both Canada and the United States have managed for over 25 years to operate the Seaway system with navigational and engineering cooperation between two "independent" Seaway authorities – statutory corporations created by the Congress of the United States and the Parliament of Canada – that have quasi-commercial and juridical independence and do indeed cooperate with each other more or less informally. Hence, the overall operation of the navigation and power systems depends upon two Seaway authorities, on the one hand, and two power companies, on the other, managing their cooperative interests without a general treaty umbrella – except for the rights acquired under various *ad hoc* agreements including exchanges of notes and, of course, the special umbrella of the International Joint Commission.

What might have been a difficult problem, namely the question of tolls and pilotage for the use of the Seaway, has not led to any serious differences either between Canada and the United States or *vis-à-vis* world shipping entering the system. That is to say, both governments have understood from the beginning that pilotage and tolls must be determined by agreement, even though the Canadian owned and built Welland Canal in Ontario already had a system of tolls before the Seaway was completed in 1959. Here tolls were charged for an intra-lake transportation system which provided for a 25 foot draught sometime before the 27 foot navigation facility was created for the Seaway system in the St. Lawrence River and elsewhere in the Great Lakes.

The Seaway faces grave problems arising from several factors: the changing character of its use for bulk cargo, for example iron ore and grain; the diversion of much Canadian grain shipments to Pacific coast terminals rather than Great Lakes or St. Lawrence ports; and, for other cargo, the increasing use also of multi-modal transport arrangements where containers are off-loaded onto trucks or railway freight cars. In addition, the Seaway is vulnerable to the stresses of climate. The navigation timetable is governed by the long Canadian winter and by accidents in and related to the several locks that have proven more difficult to anticipate than had been expected. To these difficulties must be added industrial disputes which affect the use of facilities and a continuing challenge to the funding of the Seaway when the decline in revenue from tolls has naturally followed from a decline in traffic. Nevertheless, the Seaway and power system remains a splendid achievement.

Finally, the legal framework of the Seaway system has demonstrated that two co-riparians may build and operate massive navigation and related hydro-electric power systems by rather simple international instruments, informal understandings, and specific agreements on technical matters, for example pilotage and tolls. However, without the Boundary Waters Treaty of 1909, with the powers of the International Joint Commission under that Treaty to regulate "levels and flows" and also to protect the interests of the Seaway Authorities, the two power companies, and all other riparians, it is doubtful whether Canada and the United States could have built and operated so extensive a navigation and power-generating system.

Any lessons which result from this Canada-United States bi-national approach to bi-national

planning and operation have not been explored very fully as yet for application to other co-riparian challenges in comparable river basins. It is reasonably clear, however, that the unique geographic, political, and historic character of Canada-United States relations has made it possible for them to create the Seaway and Power development with a minimum of attention to a juridical architecture that normally would have been present in a venture requiring so much joint planning, construction, and "joint" management.

The St. Lawrence Seaway Authority (ed.), Annual Report[s].
Parliament of Canada (ed.), Correspondence and Documents relating to the Great Lakes-St. Lawrence Basin Development, 1938–41 (1941).
U.S. Department of Commerce (ed.), The St. Lawrence Survey (1941).
R.R. BAXTER, Documents on the St Lawrence Seaway: A Selection of Documents (1960).
H.G. MOULTON, C.S. MORGAN and A.L. LEE, The St. Lawrence Navigation and Power Project (1929).
G.W. STEPHENS, The St. Lawrence Waterway Project (1930).
C.P. WRIGHT, The St. Lawrence Deep Waterway: A Canadian Appraisal (1935).
CHEW and CHURCHILL, References on the Great Lakes. St. Lawrence Waterway Project (1940).
CURRIE, The St. Lawrence Waterway, Queen's Quarterly (1951–1952).
SCHWIETERT and LYON, The Great Lakes-St. Lawrence Seaway and Power Project (1951).
St. Lawrence Seaway Authority (ed.), The St. Lawrence Seaway under Construction (1957).
M. COHEN and G. NADEAU, The Legal Framework of the St. Lawrence Seaway, in: P.O. Proehl (ed.), Legal Problems of International Trade (1959) 29–50.
W.R. WILLOUGHBY, The St. Lawrence Waterway (1961).
R.R. BAXTER, The St. Lawrence Seaway, in: The Law of International Waterways (1964) 91–96.

MAXWELL COHEN

SAN MARINO

The Republic of San Marino is a sovereign → State surrounded by Italian territory in the Appenines near the Adriatic Sea with an area of 60.5 square kilometres and a population of approximately 22 000 (→ Micro-States). San Marino has been a republic since the 13th century. The constitution was adopted in 1600 as part of the "Leges Statutae" which codified earlier statutes. Legislative power is vested in the Grand and General Council (Consiglio Grande e Generale) whose 60 members are elected by universal suffrage for five years. Executive power is held by the Congress of State (Congresso di Stato) with ten members elected by the Council. Every six months the Council elects two of its members as Captains-Regent (Capitani Reggenti) to head the Council, the Congress and the Council of XII (Consiglio dei XII) which is the highest judicial organ.

San Marino's independence was recognized by the pope in 1631. By a treaty of friendship and neighbourhood with Italy of 1862, San Marino accepted the protection of Italy. San Marino's international legal capacity, however, was not thereby affected. San Marino has never been a → protectorate of Italy. The treaty with Italy was renewed in 1872, 1897 and 1939 with several amendments adopted since. San Marino maintains diplomatic and consular representations in a number of countries (→ Diplomatic Agents and Missions). In other countries San Marino is represented by Italy. San Marino is a party to several bilateral and multilateral treaties and a member of some of the → United Nations Specialized Agencies and (since 1988) of the → Council of Europe. San Marino became a party to the Statute of the → International Court of Justice in 1954 and takes part in the → Helsinki Conference on Security and Cooperation in Europe. San Marino forms a → customs union with Italy and therefore is part of the customs area of the → European Economic Community. The EEC Treaty, however, does not apply to San Marino.

Convention between Italy and San Marino for the Preservation of the Independence of the Republic of San Marino, for the Promotion of Friendly Intercourse and for the mutual Surrender of Criminals, March 22, 1862 (BFSP, Vol. 55, p. 965).
Convention of Friendship between Italy and San Marino, March 27, 1872 (BFSP, Vol. 63, p. 265).
General Convention between Italy and the Republic of San Marino, June 28, 1897 (BFSP, Vol. 90, p. 960).
Treaty of Friendship and Bon Voisinage between Italy and San Marino, March 31, 1939 (BFSP, Vol. 143, p. 537).
Accordo aggiuntivo alla convenzione di amicizia e di buon vicinato e scambio di note, March 6, 1968

(Gazzetta Ufficiale della Repubblica Italiana No. 155 of June 22, 1970, 3996–3997).
Accordo aggiuntivo alla convenzione di amicizia e di buon vicinato del 31 marzo 1939. Con scambio di note e una convenzione monetaria, September 10, 1971 (Gazzetta Ufficiale della Repubblica Italiana No. 336 of December 29, 1972, 8380–8382).

J.M. LE BESNERAIS, Le statut international de la République de San Marino, Thesis, University of Paris (1969).
T. VEITER, Die Republik San Marino – staats- und völkerrechtliche Entwicklung, in: D. Wilke and H. Weber (eds.), Gedächtnisschrift für F. Klein (1977) 535–541.

DIETRICH SCHINDLER

SCHELDT RIVER

The Scheldt River has its source in France, traverses Belgium and finally enters the sea after passing through Dutch territory. The Scheldt estuary is often referred to as the Western Scheldt while the Eastern Scheldt is really an arm of the sea within Dutch territory. Belgium and the Netherlands dispute → sovereignty over the Wielingen channel. This is the largest of the three channels giving access to the Scheldt from the North Sea.

The Wielingen channel is situated parallel to the Belgian coast and is entirely contained within Belgian territorial waters. According to the Netherlands, the channel, as a mouth of a river, must be considered to comprise an integral part of the Scheldt. The right of the Netherlands, therefore, is based on the principle that where the mouth of a river belongs to a particular State, the river's outlet to the open sea likewise belongs to this State. Belgium maintains that it would be excessive to assimilate waters which penetrate as deeply into the sea as those comprising the Wielingen channel to the mouth of a river. It can hardly be maintained that a part of the → territorial sea of a State should be subjected to the sovereignty of another State.

While navigation on the Scheldt below Antwerp is important for international trade, from a geographical point of view, Antwerp is an inland seaport. For vessels entering the → port from the → high seas, the régime of maritime navigation should be applied. Nevertheless, in international law, navigation on the Scheldt falls under the scope of river navigation (→ Navigation on Rivers and Canals), as vessels coming from the high seas traverse Dutch territory on the Scheldt River.

Navigation on the upper Scheldt can presently be exercised only by small vessels. In 1970 the French and Belgian Governments instituted a bipartite commission which was charged with organizing canalization works on the upper Scheldt. The completion of these works will permit navigation by vessels of up to 1350 tons.

During the war between the Dutch and the Spanish, Antwerp was held by the Spaniards, and beginning in 1584 the Dutch imposed a → blockade on the Scheldt as a war measure. Art. 14 of the Treaty of Münster of January 30, 1648 (CTS, Vol. 1, p. 1) acknowledged the right of the United Provinces to keep the Scheldt closed even in time of peace. The Dutch wanted to bar Antwerp's function as a port, because it was a rival to the ports of Rotterdam and Amsterdam.

This situation lasted until 1792, when French armies occupied the Austrian Netherlands, including Antwerp. A French Decree of November 16, 1792 declared the navigation of the Scheldt, including its estuary, free to all riparians (see → International Rivers). The decree was put into effect by Art. 18 of the Treaty of Peace between the French and the Batavian Republics on May 16, 1795 (Martens R, Vol. 6, p. 532). According to secret Art. 3, para. 3 of the Treaty of Peace, signed on May 30, 1814 between the Allied Powers and France (CTS, Vol. 63, p. 171) and Annex XVI(C) of the Act of the Vienna Congress of June 9, 1815 (Martens NR, Vol. 2, p. 379), freedom of navigation on the Scheldt shall be established upon the same principle which regulated navigation of the → Rhine River. After the northern and southern Netherlands were united to form a single State by the → Vienna Congress, access to the port of Antwerp caused no problem; the régime of maritime navigation applied, based on equal freedom of all flags (→ Flags of Vessels).

The Belgian Revolution in 1830 and the separation of Belgium from Holland again changed the situation. In light of the strict interpretation of the Vienna articles concerning the navigation of rivers which prevailed at this time,

the application of the Vienna rules on the navigation of the Scheldt would seem to have merely granted liberty of access to the port of Antwerp to the vessels of the riparians. On the insistence of Great Britain, an insertion was made into Art. 9, para. 2 of the definitive Treaty of Separation, signed at London on April 19, 1839 (Martens NR, Vol. 16, p. 772), to the effect that pilotage dues on the Scheldt would be the same for vessels of all nations. This meant a recognition of the equal rights of all nations to benefit from freedom of navigation on the river. The Dutch right to levy charges on vessels navigating on the Scheldt under the Treaty of Separation was purchased by Belgium under the Treaty of May 12, 1863 (Martens NRG2, Vol. 1, p. 117).

In Art. 9, para. 2 of the Treaty of Separation, Belgium and the Netherlands agreed that pilotage, the installation of buoys and the preservation of navigable channels with respect to the Scheldt below Antwerp would be subject to joint control. The text of this section of the Treaty gave rise to differences of opinion between the two countries as to the significance and the scope of the works in question. Belgium relied on Annex XVI(C) of the Act of Vienna which provided that the necessary works in the bed of the Scheldt should be executed in the same manner as agreed upon for the Rhine. According to Belgium, the provisions in the Rhine navigation acts and agreements relating to works carried out in the interest of assuring the navigability of the Rhine indicated the scope of the works necessary to maintain the navigability of the Scheldt. On the Dutch side it was argued that riparian obligations in respect of works to be executed in the bed of the Scheldt under the Treaty of Separation were specifically confined to the "preservation of the navigable channels", i.e. preservation of the level of navigability existing in 1839. Such a "preservation" could not in law be taken to mean "improvement".

On April 3, 1925 a Treaty was signed between Belgium and the Netherlands (E.G. Lagemans, Recueil des traités et conventions conclus par le Royaume des Pays-Bas avec les puissances étrangères, depuis 1813 jusqu'à nos jours, Vol. 19, p. 587) according to which maintenance of the navigability of the Scheldt implied undertaking such works as are necessary for the channel of this waterway to meet, at any time, the requirements necessitated by progress in shipbuilding as well as by increasing traffic.

Ratification of this Treaty was refused by the First Chamber of the Netherlands parliament in 1927. However, a Treaty was concluded on May 13, 1970 (UNTS, Vol. 851, p. 3), concerning the improvement of the shipping route near Walsoorden. In 1975 the two Governments reached an agreement, in principle, on a new canal from Antwerp to the Scheldt, referred to as the Baalhoek Canal. The advantage of this → canal for Belgium would be that vessels of 125 000 tons could proceed from the high seas to Antwerp. Belgium, in turn, would be obligated to clean the polluted waters of the Scheldt before they flow into the Netherlands, and to supply large quantities of water from the Meuse River to the Netherlands to be used as drinking water. The above agreement has not yet been signed.

Under Art. 9, para. 5 of the Treaty of Separation, navigation of the intermediary waters, both natural and artificial, which connect the Rhine with the Western Scheldt on Dutch territory, shall remain free. According to Art. 9, para. 8, if natural events or works of man should render passage on one of the navigable waterways considered intermediary waters impracticable, the Netherlands shall assign other equivalent routes for Belgian navigation. Art. 39 of the Belgian-Dutch Treaty of November 5, 1842, implementing the Treaty of Separation (BFSP, Vol. 31, p. 216), provided that all navigable waterways connecting the Western Scheldt with the Rhine, including the Sloe, the Eastern Scheldt and the Meuse, shall be considered as such intermediary waters.

Art. 2 of the Treaty of May 13, 1963 (UNTS, Vol. 540, p. 3) between the two countries provided for the establishment for a new navigable waterway to improve the connection between the Western Scheldt and the Rhine. Belgium waived, in Art. 33, all claims ensuing from treaties in force for the maintenance of navigable waterways belonging to the category of intermediary waters. This waiver constitutes an abrogation of Art. 9, para. 8 of the Treaty of Separation. In Art. 32, the contracting parties declared that freedom of navigation and the right to enjoy national treatment as guaranteed by the treaties relating to navigation of the intermediary waters in force at the time of signing shall also apply to this new

waterway. The new waterway, 35 kilometres shorter than the one previously existing, was opened to traffic in 1975.

C. DE VISSCHER and F. GANSHOF, Le différend de Wielingen, Revue de droit international et de législation comparée, Vol. 47 (1920) 293–328.

W. VAN EYSINGA, L'entretien de l'Escaut suivant les traités, Revue de droit international et de législation comparée, Vol. 55 (1928) 732–752.

E. ROLIN-JACQUEMYNS, L'entretien de l'Escaut suivant les traités, Revue de droit international et de législation comparée, Vol. 55 (1928) 377–399.

M. SIOTTO-PINTOR, Le régime international de l'Escaut, RdC, Vol. 21 (1928) 285–369.

L.W. WERY, De Rijn- en Scheldeverbindende tusschenwateren, Thesis, University of Leiden (1929).

H. BARON DE GRUBEN, Les aspects juridiques du traité conclu entre la Belgique et les Pays-Bas au sujet de la liaison entre l'Escaut et le Rhin, Chronique de politique étrangère, Vol. 18 (1965) 259–292.

M. ERKENS, Le statut international de l'Escaut, Rev Belge, Vol. 3 (1967) 353–378.

BÉLA VITÁNYI

SIDRA, GULF OF

The maritime area known as the Gulf of Sidra (also Sirte, Surt) covers about 22 000 square miles. As an arm of the Mediterranean Sea, it protrudes southwards to a distance of about 140 miles and is bordered on three sides (east, south and west) by the land territory of Libya (→ Bays and Gulfs).

Under Art. 1 of the Libyan law of February 18, 1959, Libya fixed the limit of her territorial waters at twelve nautical miles (see English translation in UN Doc. ST/LEG/SER.B/16 (1974) p. 14; → Territorial Sea). That law superseded the law in force until then, under which "the territorial sea of Libya extends six miles from the coast, as was the case before Libya's independence" (Note from Libyan Ministry of Foreign Affairs of November 29, 1955, reproduced in UN Doc. ST/LEG/SER.B/6 (1957) p. 32).

Following the overthrow of King Idris I on September 1, 1969 by a "Revolutionary Command Council" headed by Colonel Muammar el-Qaddafi, the new government in 1973 announced that

> "[t]he Gulf of Surt located within the territory of the Libyan Arab Republic . . . and extending North offshore to latitude 32 degrees and 30 minutes, constitutes an integral part of the Libyan Arab Republic and is under its complete sovereignty. As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.
> Through history and without any dispute, the Libyan Arab Republic has exercised sovereignty over the Gulf. Because of the Gulf's geographical location . . . it is, therefore, crucial to the security of the Libyan Arab Republic. Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established in this regard . . . ." (Note Verbale of permanent Mission of Libya to the United Nations of October 19, 1973, reproduced in UN Doc. ST/LEG/SER.B/18 (1976) pp. 26–27).

This Libyan claim, contained also in a note sent to the United States Department of State on October 11, 1973, was rejected by the latter as "unacceptable as a violation of international law" in its reply of February 11, 1974:

> "Under international law, as codified in the 1958 Convention on the Territorial Sea and Contiguous Zone, the body of water enclosed by . . . [the Libyan] line cannot be regarded as the juridical internal or territorial waters of the Libyan Arab Republic. Nor does the Gulf of Sirte meet the international law standards of past open, notorious . . . effective . . . [and] continuous exercise of authority, and acquiescence of foreign nations necessary to be regarded historically as Libyan internal or territorial waters" (reprinted in: AJIL, Vol. 68 (1974) p. 510).

In the debate that took place in the → United Nations Security Council in March 1986, following United States naval activities in the Gulf (→ Naval Manoeuvres), the British representative stated that

> "[t]he vast majority of countries have consistently refused to acknowledge [the Libyan claim] and many have indeed made specific protests . . . [such as] the protest made in September . . . [1985] by the presidency of the European Communities on behalf of its member States . . . over the introduction of illegal

restrictions in the Gulf of . . . Sidra, [rejecting] Libyan claims to sovereignty over the waters extending beyond the legitimate limits of the territorial sea" (UN Doc. S/PV.2669 (1986) pp. 33–35).

A similar position was taken by the representative of France (ibid., at p. 38)

Moreover, even those who opposed the United States naval activities in the Gulf of Sidra, including the representatives of the Soviet Union, Kuwait, Iran, Democratic Yemen and the observer of the League of Arab States (→ Arab States, League of), avoided supporting the Libyan claim (see UN Docs. S/PV.2669 (1986) p. 12; S/PV.2670 (1986) pp. 43, 51–52; S/PV.2671 (1986) p. 7). In fact, the only explicit support for the Libyan claim came from Syria, whose representative did "not for a moment doubt that the Gulf of Sidra is historically an Arab Gulf" (UN Doc. S/PV.2670 (1986) p. 12).

The United States also formally objected to the Libyan navigational regulations, effective June 1, 1985, aimed at implementing the 1973 Libyan proclamation (see letter of the Permanent Representative of the United States to the → United Nations of July 10, 1985, addressed to the → United Nations Secretary-General, reproduced in UN Law of the Sea Bulletin, No. 6 (October 1985) p. 40).

As long as the crisis involving the American → hostages in Iran (1979 to 1980) was not resolved, the Carter administration refrained from actively challenging the Libyan claim so as not to exacerbate that crisis (→ United States-Iran Agreement of January 19, 1981 (Hostages and Financial Arrangements)). With the release of the American hostages and the advent of the Reagan administration in January 1981, the United States decided to challenge that claim (see K. Booth, Law, Force and Diplomacy at Sea (1985) pp. 175–176), resulting in the incident of August 19, 1981, which took place south of the closing line claimed by Libya at a distance of some sixty miles from the Libyan coast. In the course of that incident two Libyan → aircraft were shot down by United States aircraft. By contrast, "in February 1983, when Libyan aircraft again approached the United States carrier *Nimitz* in approximately the same area of the Gulf of Sirte, . . . they turned tail without a shot having to be fired" (ibid., p. 177). A series of incidents also occurred in the Gulf of Sidra between March 23 and 27, 1986, when United States naval aircraft and vessels crossed the closing line claimed by Libya. In response to Libyan attacks on United States aircraft, four Libyan vessels were hit. According to United States sources, two of them sank. United States aircraft also bombed Libyan radar installations and costal batteries near the town of Sirte.

For a proper evaluation of the Libyan claim, it must be remembered that under general international law, as codified in the Law of the Sea Conventions of 1958 and 1982 (→ Law of the Sea; → Codification of International Law), coastal States may enclose as → internal waters only bays and gulfs whose entrance does not exceed 24 miles. The closing line claimed by Libya is, however, 300 miles long. Such a demarcation could be justified in international law only if Libya were able to demonstrate that the Gulf of Sidra had been claimed as a historical bay over an extended period of time, that Libya had effectively exercised jurisdiction in the Gulf in the appropriate manner, and that Libya's claim and exercise of jurisdiction had been recognized, or at least acquiesced in, by the international community of maritime States (→ Historic Rights; → Effectiveness; → Recognition; → Acquiescence).

There is no evidence that Libya claimed the Gulf of Sidra on historic grounds prior to 1973. Quite to the contrary, from the Libyan legislation referred to above, it clearly emerges that before 1973 Libya claimed as territorial waters a maritime belt, originally, of only six miles and, subsequently, of twelve miles, as measured from the Libyan coast proper. Consequently, according to some commentators, the Gulf is not regarded as falling within the category of historic bays (see e.g. Rousseau, p. 1178). Likewise, no mention is made of the Gulf of Sidra in the survey of historic bays, or bays claimed as such, in the Memorandum on Historic Bays prepared by the UN Secretariat for the 1958 United Nations Conference on the Law of the Sea.

The novel character of the Libyan claim seems to have been implicitly admitted even by the representative of Libya when he told the UN Security Council in March 1986 that "[i]n 1973 Libya declared its historical and inalienable rights

over the Gulf of Sidra" (UN Doc. S/PV.2670 (1986) p. 31).

While the international community may still be willing to recognize, in exceptional circumstances, the validity of already existing historic claims, it has firmly rejected attempts to establish any new claims encroaching upon the common domain of the international community that would deprive it of certain portions of the → high seas. Consequently, Libya's claims to → territorial sovereignty over the Gulf of Sidra cannot be accommodated within the law of the sea of the post-World War II period.

Historic Bays, Memorandum by the UN Secretariat, UN Doc. A/CONF.13/1; UN Conference on the Law of the Sea, Official Records, Vol. 1, Preparatory Documents (1958) 1–38.

Juridicial Régime of Historic Waters, including Historic Bays, Study Prepared by the UN Secretariat, UN Doc. A/CN.4/143; YILC (1962 II) 1–26.

Navigation Rights and the Gulf of Sidra, DeptStateBull, Vol. 87 (1987) 69–70.

C. ROUSSEAU, Extension de la souveraineté de la Libye au Golfe de la Grande Syrte, RGDIP, Vol. 78 (1974) 1177–1179.

J.M. SPINNATO, Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of the Sirte, Ocean Development and International Law, Vol. 13 (1983) 65–85.

F. FRANCIONI, The Status of the Gulf of Sirte in International Law, Syracuse Journal of International Law and Commerce, Vol. 11 (1984) 311–326.

Y.Z. BLUM, The Gulf of Sidra Incident, AJIL, Vol. 80 (1986) 668–677.

YEHUDA Z. BLUM

SIKKIM

1. General Description

Sikkim, since 1975 a state of the Republic of India, is strategically located high on the southern slopes of the Himalaya mountains overlooking the plains of Bengal. Sikkim shares international borders with Nepal in the west, the People's Republic of China to the north and east, and → Bhutan for a short distance in the south-east.

Although only a very small state with an area of some 2700 square miles (7300 square kilometres), Sikkim has always held more than purely local importance because several relatively easily traversed passes in the region give access to and from Lhasa and other parts of → Tibet. Moreover, the region dominates the narrowest section of the vital land corridor in India, immediately to the north of Bangladesh, whereby Assam and Arunachal Pradesh and the other geopolitically sensitive border states of the north-east are joined to the main body of India.

The capital of Sikkim and the only sizeable town is Gangtok. The country is densely settled in the lower fertile areas but is almost uninhabitable at the higher altitudes. The terrain is rugged throughout and there are no railways or airports. The population, estimated at around 400 000, includes an increasing majority of Nepalese origin. This group has almost completely displaced the Lepcha, believed by some to be indigenous inhabitants of the region, as well as the Bhutia who had migrated there from Tibet several centuries ago and in turn have now lost most of their former influence.

Before receiving full statehood in the Indian Union, Sikkim had been briefly associated with India in accordance with an Indian constitutional enactment and previously had been a full → protectorate both of India and of the British in India, under the rule of a local maharaja, also known as the Chogyal, who claimed ancestry from Tibetan nobility. In earlier times Sikkim had been an independent kingdom, and for certain periods had been a tributary of Tibet and China. Upon the merger with India in 1975 the regal institution of Chogyal was discontinued and the deposed monarch, Palden Thondup Namgyal, superseded by a state governor appointed by the Government of India, went into privileged retirement until his death in 1982.

The process of absorption of Sikkim into the Indian Union, which followed upon increasingly vociferous local demands for political reforms, has been described by a few commentators as an → annexation and by others as a long-overdue emancipation from a feudal system of government. Despite some prevailing doubts about the constitutional procedures adopted and about a hastily conducted referendum at the time of the merger, the fact that Sikkim had for long been a protectorate of India, and was fully within the Indian → sphere of influence, enabled the events

which culminated in the creation of the new Indian state to pass without notably adverse international repercussions. However, the People's Republic of China delivered a → protest upon the adoption of the legislation incorporating Sikkim into the Indian Union. Some fifteen years thereafter, in early 1990, China still regarded the incorporation of Sikkim into India as an annexation.

Having occasionally sought to deal with Sikkim on sovereign terms and not through the intermediary of India, China would no doubt have preferred to see the continuation of even a quasi-independent buffer State on the southern border of Tibet. Nepal's monarch also clearly deplored the demise of a neighbouring kingdom. Likewise, at the time of the merger, considerable disquiet was felt among royal circles in Bhutan. This feeling was hardly diminished by Bhutan's relatively recent accession to membership in the → United Nations organization, a form of insurance policy which had at times attracted but finally eluded Sikkim's last dynastic ruler.

Today, Sikkim holds the same constitutional status as any other state of India, but not all legislation applicable elsewhere throughout India is necessarily in force in Sikkim. Moreover, like certain other areas of India having special strategic or political features, the access to and movement within Sikkim in the case of foreigners is permitted on a very restricted basis only, under the control of the Indian ministry of home affairs. The restrictions imposed in this regard are similar to those prevailing in the Indian frontier areas further to the east which also border on China.

2. Historical Background

The erstwhile status of Sikkim as a protectorate of India originated in the period of British colonial rule (→ Colonies and Colonial Régime). British commercial and political relations with Sikkim were consolidated by a treaty signed at Titalya on February 10, 1817 (CTS, Vol. 67, p. 63) under which the Honorable East India Company restored to Sikkim certain territories lost to Nepal. The treaty secured to the British Government the right of → arbitration with binding effect in any disputes between Sikkim and neighbouring States.

In 1835 the ruler of Sikkim ceded to the British the district of Darjeeling, now part of the Indian state of West Bengal. Against a background of rivalry and intermittent hostilities with Tibet, which still had vague claims over the region, Sikkim was then brought under effective British control by armed invasion and → conquest.

The treaty signed at Tumloong on March 28, 1861 (CTS, Vol. 123, p. 265) reflected the new situation and embodied various concessions which amounted to virtual recognition by the ruler of Sikkim of the establishment of a British protectorate over the territory. In retrospect, it appears that the treaty ultimately served to check Tibetan influence in Sikkim, although at the time it was accompanied by further border incidents.

The subsequent convention signed between Great Britain and China at Calcutta on March 17, 1890 (CTS, Vol. 173, p. 131) recognized the British protectorate over Sikkim and defined the → boundary between Sikkim and Tibet. This boundary was endorsed by Tibet under military duress in the Lhasa Convention of September 7, 1904 (CTS, Vol. 196, p. 312). In turn, the Lhasa Convention was recognized and confirmed in the Peking Convention signed between Great Britain and China on April 27, 1906 (CTS, Vol. 201, p. 119).

The border between Sikkim and Tibet, which lies along the crest of the Great Himalaya range, following the watershed of specified rivers, was clearly demarcated on the ground by joint action of both powers. This border, which now constitutes a part of the international frontier between the People's Republic of China and the Republic of India, extending from the tri-junction on the frontier of Nepal in the west to that on the frontier of Bhutan in the east, has remained beyond dispute ever since. The other international frontiers of Sikkim are likewise stable and clearly delimited (cf. → Boundary Disputes in the Indian Subcontinent).

During the 1860s, following the establishment of the protectorate, the British encouraged the → migration of Nepalese labourers and settlers into Sikkim. The Nepali-speaking people, many of whom practised Hinduism, gained numerical and economic ascendancy over the other inhabitants of Sikkim, the majority of whom spoke variants of Tibetan and adhered to Lamaism. In due course, the political aspirations of the Nepalese sector of the population were awakened.

Sikkim's development was influenced ever more strongly by India, while the particular Sikkimese

form of Tibetan culture and the Buddhist religion inexorably declined. The Indian rupee became the standard currency. Nevertheless, Sikkim retained importance as a transit route both to Lhasa and to Bhutan, especially through the Chumbi valley of Tibet. Trade and other traditional links with Tibet continued until the middle of the 20th century, but virtually all contacts were severed following the events there in the late 1950s and the brief Sino-Indian war of 1962, in which Sikkim itself was not directly involved.

3. The Merger with India

Before the transfer of power from Britain to India in August 1947, Sikkim, rather like Bhutan, was for practical purposes regarded by the British not as a foreign power but as an Indian State, albeit one with special characteristics. Unlike Bhutan, Sikkim had been included in the ill-fated Government of India Act, 1935 (25 & 26 Geo. 5, Ch. 42). Because both these remote Himalayan territories were located at the very frontier of India, strategic and pragmatic considerations played a decisive role in determining British policy with regard to their rulers, and subsequent Indian policy proved to be no different. Relations with Sikkim, as with Bhutan, were conducted by the Indian external affairs department through a political officer stationed in Gangtok.

After the transfer of power, the ruler of Sikkim did not accede to the Indian Union. Instead, Sikkim's status as a protectorate was explicitly confirmed in a bilateral treaty with independent India issued in Gangtok on December 5, 1950, which entered into force on the same day. The treaty cancelled all previous treaties between the British Government and Sikkim which were then in effect as between the Republic of India and Sikkim in consequence of a standstill agreement which had been signed in 1948.

Art. 2 of the treaty of 1950 provided as follows: "Sikkim shall continue to be a Protectorate of India and, subject to the provisions of this Treaty, shall enjoy autonomy in regard to its internal affairs." The treaty prohibited the Government of Sikkim from having dealings with foreign powers (→ Foreign Relations Power). It accorded the Government of India wide responsibilities and prerogatives with regard to Sikkim's external affairs, defence matters, communications and construction of strategic facilities in Sikkim. The settlement of disputes was provided for by reference to the Chief Justice of India who was given competence to render a final decision. A small annual subsidy was payable by India, subject to observance of the treaty by the Government of Sikkim.

Sikkim's development proceeded only very gradually until the Sino-Indian border war. India then invested more heavily than before in infrastructural projects, for predominantly military purposes, especially in the north of the country. Following several years of growing agitation for reform, a popularly-elected national assembly was eventually inaugurated in April 1974. By the Constitution (Thirty-fifth Amendment) Act, Sikkim became associated with the Indian Union for a short but turbulent transitional period. The term "associated" in this context and the status of an associated state were constitutional novelties which had been previously unknown in India.

A referendum held in Sikkim on April 14, 1975 provided support for a resolution of the assembly, adopted only four days earlier, abolishing the office of Chogyal and declaring Sikkim to be a constituent unit of India. By the Constitution (Thirty-sixth Amendment) Act of May 16, 1975 the constitution of India was amended to include Sikkim as the 22nd state of the Union, with effect from April 26, 1975.

C.U. AITCHISON, A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, 14 vols. (1862; revised ed. 1929–1933, reprint 1973), Vol. 12 (1931) 51–69.

India-Sikkim Peace Treaty, Gangtok, 5 December 1950, Lok Sabha, Foreign Policy of India, Texts of Documents 1947–1964 (1966) 169–173.

The Constitution (Thirty-sixth Amendment) Act, 1975, 16 May 1975, Government of India, Acts of Parliament (1975) 547.

J.C. WHITE, Sikhim and Bhutan (1909; reprint 1983).

F. BLEIBER, Zum völkerrechtlichen Status der Himalaya-Staaten, Österreichische Zeitschrift für öffentliches Recht, Vol. 7 (1956) 320–334.

P.P. KARAN and W.M. JENKINS, The Himalayan Kingdoms, Bhutan, Sikkim, and Nepal (1963).

United States Army, Area Handbook for Nepal, Sikkim and Bhutan, No. DA Pam 550–35 (1964; 2nd ed., 1973) lxv-lxxvi, 381–411.

H. HECKER, Sikkim und Bhutan, Die verfassungsgeschichtliche und politische Entwicklung der indischen Himalaya-Protektorate (1970).

L.B. BASNET, Sikkim: A Short Political History (1974).
G. FISCHER, Le nouveau statut du Sikkim, AFDI, Vol. 20 (1974) 201–214.
S.C. SEN, Sikkim – Where Feudalism Fights Democracy, Verfassung und Recht in Übersee, Vol. 8 (1975) 345–364.
R. RAHUL, Sikkim of History, International Studies, Vol. 15 (1976) 15–28.
S.R. SHUKLA, Sikkim, The Story of Integration (1976).
P.R. RAU, Sikkim, The Story of its Integration with India (1978).
N. SENGUPTA, State Government and Politics: Sikkim (1985).

PETER MACALISTER-SMITH

SOUTH TYROL

From 1363 to 1919 – with an interruption between 1805 and 1814 – the Tyrol north and south of the Alps was a Habsburg-Austrian possession. Italian-speaking Trentino, which had been an independent prince-bishopric within the Holy Roman Empire, was united with the Tyrol in 1803. In 1805 → Austria, after its defeat by France, had to cede the Tyrol to Bavaria (CTS, Vol. 58, p. 339). In 1809 the Tyrol, under the leadership of Andreas Hofer, rose against the foreign rule. Later in the same year the Tyrol was divided into three parts whereby the south came into the possession of the Napoleonic Kingdom of Italy (CTS, Vol. 60, p. 477). The treaty of Paris of 1814 reunited the whole of the Tyrol with Austria (Convention entre sa Majesté l'Empereur d'Autriche et sa Majesté le Roi de Bavière, June 3, 1814 (BFSP, Vol. 1, p. 177)). In 1918, 525 000 inhabitants of the Tyrol spoke German, 369 000 Italian and 16 000 Ladin. After the unification of Italy in the 19th century an irredentist movement favouring union with Italy grew in Italian-speaking Trentino (→ Irredentism). Italy itself aimed at the → annexation of the whole of South Tyrol, including its German-speaking part, and at fixing the Italo-Austrian frontier at the Brenner Pass for strategic reasons.

On April 26, 1915, Italy and the Allies signed the secret treaty of London whereby Italy was promised the Brenner frontier as a reward for its entry into the First World War on the side of the Allies (BFSP, Vol. 112, p. 973; → Alliance; → Treaties, Secret). In the → Saint-Germain Peace Treaty of 1919 South Tyrol was given to Italy. In disregard of the principle of → self-determination neither was a → plebiscite organized nor a treaty on the protection of → minorities concluded. The fascist régime in Italy carried out a speedy Italianization. The Italian-speaking population in German speaking South Tyrol grew from 3 per cent in 1918 to 25 per cent in 1939. Use of the German language was forbidden in schools and administration. On June 23, 1939, Germany and Italy concluded a treaty under which the South Tyrolese were to opt either for → emigration to Germany and German citizenship or for retention of Italian citizenship (→ Option of Nationality). About 80 per cent opted for Germany, but only a small portion (about 25 per cent) actually left South Tyrol. After World War II many of these people returned.

In 1945 the South Tyrolese demanded of Rome the right of self-determination and unification with Austria. Italy, however, was not ready to cede South Tyrol to Austria, not only for strategic but also for economic reasons (e.g. hydroelectric power essential to the industries of northern Italy). At the Paris Peace Conference of 1946 the foreign ministers decided against a change in the Italo-Austrian frontier. Italy and Austria, however, on September 5, 1946, signed the agreement of Paris (Gruber-de Gasperi agreement, UNTS, Vol. 49, p. 184) which became Annex IV of the Italian peace treaty of February 10, 1947 (UNTS, Vol. 49, p. 3; → Peace Treaties of 1947). The agreement provides that the "German-speaking inhabitants of the Bolzano province and the neighbouring bilingual townships of the Trento province will be assured complete equality with the Italian-speaking inhabitants". Furthermore, the agreement states that the population of these zones "will be granted the exercise of autonomous legislative and executive regional power".

The Italian constitution of 1948 recognized the region of Trentino-Alto Adige as one of five regions with special status. However, the region was to embrace not only the territories of the province of Bolzano and its neighbouring bilingual townships but also the entire territory of the province of Trentino, which produced an Italian-speaking majority in the region as a whole. This arrangement was criticized by South Tyrolese and Austrians as not being in conformity with the

Gruber-de Gasperi agreement. As bilateral negotiations did not lead to any result, Austria in 1960 appealed to the → United Nations. In 1960 and 1961 the → United Nations General Assembly adopted Resolutions 1497(XV) and 1661(XVI) respectively, which urged the two States to resume negotiations with a view to finding a solution for all differences relating to the implementation of the 1946 agreement.

Sensitized by the international attention given to the South Tyrol question the Italian Government in September 1961 set up a commission, in which the German-speaking and Ladin-speaking South Tyrolese were also represented, to propose measures to enlarge the autonomy of the province of Bolzano. The commission's report, which was finished in 1964, was to be the basis for further negotiations with Austria. These negotiations, in which the South Tyrolian People's Party played an important role, finally led to the adoption of the South Tyrol Package (*Südtirol-Paket*) of 1969 (for text, see Alcock (1982) p. 209), a global package deal which was approved by the Italian and Austrian parliaments. The package was supplemented by a time-table for its implementation (*Operationskalender*). As Italy had rejected all attempts to make the package an internationally binding instrument, the time-table should give Austria and the South Tyrolese a certain guarantee for the implementation of the package by Italy.

Only part of the package was adopted in the form of an international treaty; this was the treaty recognizing the jurisdiction of the → International Court of Justice of July 17, 1971 (Accordo concernente la modifica dell'art. 27, lettera a., della convenzione europea per la soluzione pacifica delle controversie nei rapporti tra Italia ed Austria (Gazetta Ufficiale 1973, p. 7291)). The Austrian parliament did not approve this treaty until June 9, 1988, when it decided that ratification should take place as soon as the Government, with the agreement of representatives of South Tyrol, had verified that the package was fully implemented and had submitted a report to that effect to the parliament.

Many of the 137 points of the package of 1969 were implemented by the revised Autonomy Statute of the region of Trentino-Alto Adige which was adopted by a constitutional law of Italy and entered into force on January 20, 1972 (Gazetta Ufficiale 1971, p. 620). Most of the legislative and executive powers previously vested in the region were transferred to the provinces of Trentino and Bolzano, including such powers relating to legislation on traffic and transport of provincial interest, on tourism, agriculture and on cultural and educational matters. The provinces were also given the right to challenge State legislation in case of infringement of their autonomy. Of particular importance are the provisions on the equality of the German and Italian languages and so-called "ethnical proportionality" (*Ethnischer Proporz*). In principle, both languages can be used by the inhabitants of the provinces in their relations with the regional and provincial authorities. Public posts are filled on a proportional basis between the three language groups (as of the 1981 census: 64.9 per cent German, 28.7 per cent Italian, 4.1 per cent Ladin for the province of Bolzano). For most posts an adequate knowledge of the two main languages is required. Applicants must undergo a language test.

On May 13, 1988, the Italian Government enacted the last seven of the 137 measures of implementation of the package of 1969. The South Tyrolese and the Austrian authorities, however, will only declare the package as fully implemented if all the measures have entered into force and are not endangered by contrary acts. At that moment, Austria and Italy are expected to submit to the United Nations a declaration stating that their dispute has been settled.

H. MIEHSLER, Südtirol als Völkerrechtsproblem (1962).
M. DEGENHARD, Der österreichisch-italienische Streit über Südtirol vor den Vereinten Nationen (1968).
A. FENET, La question du Tyrol du Sud. Un problème de droit international (1968).
A.E. ALCOCK, The History of the South Tyrol Question (1970).
H. SIEGLER, Die österreichisch-italienische Einigung über die Regelung des Südtirolkonflikts (1970).
G. VEDOVATO, Il problema dell'autonomia per la minoranza di lingua tedesca dell'Alto Adige (1971).
W. WOLF, Südtirol in Österreich. Die Südtirolfrage in der österreichischen Diskussion von 1945–1969 (1972).
H. KLECATSKY and N. WIMMER, Verwaltungsreform in Südtirol, in: Um Recht und Freiheit, Festschrift für Freiherr von der Heydte (1977) 279–294.
F. PINTER, Changes in the South Tyrol Issue, Yearbook of World Affairs (1977) 66–74.
W. FRICK, La competenza amministrativa della Provincia di Bolzano (1978).

M.E. MATSCHER, Le nuove norma di attuazione della Regione Trentino-Alto Adige. con speciale referimento alla Provincia di Bolzano (1978).
F. WAHLMUELLER, Autonome Provinz Bozen-Südtirol. Das neue Autonomiestatut (1979).
A. MINAR, Die Sicherung von Maßnahmen zur Beilegung des Südtirol-Konflikts (1980).
O. PETERLINI, Der ethnische Proporz in Südtirol (1980).
A.E. ALCOCK, Geschichte der Südtirolfrage. Südtirol seit dem Paket 1970–1980 (1982).
F. ERMACORA, Südtirol und das Vaterland Österreich (1984) [with documents].
D. BLUMENWITZ, Die völkerrechtlichen Grundlagen der Südtirol-Frage. Die Entwicklung eines europäischen Minderheitenproblems in sieben Jahrzehnten, Friedens-Warte, Vol. 66 (1986) 91–113.
L. FRESCHI, Le Haut Adige – Tyrol du Sud, Autonomie et développement, Thesis, University of Grenoble (1987).
R. STEININGER, Los von Rom? Die Südtirolfrage 1945–1946 und das Gruber-De Gasperi-Abkommen (1987).

DIETRICH SCHINDLER

SOUTH-WEST AFRICA *see* Namibia

SPAIN: DEPENDENT TERRITORIES

1. Historical Background

(a) Western Sahara and Ifni

Western or Spanish Sahara, situated on the Atlantic coast of Africa with an area of about 108 000 square miles, is bounded in the north by Morocco and in the east and the south by Mauritania, except for a few miles in the east where it is bounded by Algeria. The territory consists of two regions, Sakiet el Hamra and Rio de Oro. A Spanish → protectorate was established over Rio de Oro on December 26, 1884. Franco-Spanish Conventions of 1900 (Martens NRG2, Vol. 32, p. 59), 1904 (Martens NRG3, Vol. 5, p. 666) and 1912 (Martens NRG3, Vol. 7, p. 323) delimited the possessions of the two powers. Spain annexed Rio de Oro, obtained the region of Sakiet el Hamra and fixed the → boundaries of Ifni, a territory also situated on the Atlantic coast of Africa.

Ifni, surrounded in the north, east and south by Morocco, was transferred to Spain by the Treaty of Tetuan of April 26, 1860 (Martens NRG, Vol. 16, p. 590). After → armed conflicts occurred in Ifni (1957) and Western Sahara (1957 to 1958), Spain decided to treat these territories as Spanish provinces (Decree of January 10, 1958, Boletín Oficial del Estado, January 14, 1958, p. 87).

In 1961 Spain provided information about Western Sahara and Ifni to the → United Nations Secretary-General pursuant to Chapter XI of the → United Nations Charter (→ Non-Self-Governing Territories). The question of the territories' status again came before the → United Nations at the end of 1963. In 1964 the Special Committee on Decolonization called on Spain to implement the provisions of UN General Assembly Resolution 1514 (XV) of December 14, 1960 and the Declaration on the Granting of Independence to Colonial Countries and Peoples, and to liberate Spanish Sahara and Ifni from colonial rule (→ Colonies and Colonial Régime; → Decolonization). This initiative was supported by UN General Assembly Resolution 2072 (XX) of December 16, 1965.

UN General Assembly Resolution 2229 (XXI) of December 12, 1966 called upon Spain to determine at the earliest possible date, together with the inhabitants of the territory and in consultation with Morocco and any other interested party, the procedures for holding a referendum under United Nations auspices to enable the indigenous population to exercise freely its right to → self-determination (→ Plebiscite). Similar demands were made in UN General Assembly Resolution 2354 (XXII) of December 19, 1967 and, with regard to Ifni, in UN General Assembly Resolution 2428 (XXIII) of December 18, 1968.

On January 4, 1969, the Government of Spain transferred → sovereignty over Ifni to Morocco by a treaty concluded at Fez (Boletín Oficial, June 1969, p. 8805).

Following the adoption of Resolutions 2591 (XXIV) on December 16, 1969, 2711 (XXV) on December 14, 1970, 2983 (XXVII) on December 14, 1972 and 3162 (XXVIII) on December 14, 1973, the General Assembly adopted Resolution 3292 (XXIX) on December 13, 1974, asking the → International Court of Justice (ICJ) for an advisory opinion on certain legal aspects of the status of the territory of Western Sahara

at the time of its colonization by Spain (→ Territorial Sovereignty; → Territory, Acquisition; → Territory, Discovery). The latter Resolution also urged Spain to postpone a planned referendum and requested the Special Committee on Decolonization to send a visiting mission to the territory. The ICJ delivered its advisory opinion on October 16, 1975 (ICJ Reports 1975, p. 12; → Western Sahara (Advisory Opinion)). The report of the visiting mission was adopted on November 7, 1975 by the Special Committee on Decolonization.

After Morocco's "Green March" (October to November 1975), Spain, Mauritania and Morocco signed the Madrid Tripartite Agreement Declaration on Principles on Western Sahara, November 14, 1975 (UNTS, Vol. 988, p. 257), according to which Spain would terminate her presence in Western Sahara by February 28, 1976, at the latest, and, in the interim, transfer her responsibilities as administering power to a temporary tripartite administration. It was also agreed that the views of the Saharan population expressed through the Jema'a, the National Assembly created by the Spanish decree of May 11, 1968, would be respected.

The day after the Spanish withdrawal, February 2, 1976, Western Sahara was proclaimed by the Frente Popular para la Liberación de Saguia el Hamra y Rio de Oro (Frente POLISARIO) as the Saharan Arab Democratic Republic, while troops from Mauritania and Morocco occupied the territory.

(b) Equatorial Guinea

Equatorial Guinea consists of Rio Muni, on the west coast of the African continent, and the islands of Fernando Poo and Annobón, and has a total area of 10 830 square miles. Spanish presence in the region dates from the El Pardo Treaty of March 24, 1778 (Martens R, Vol. 1, p. 709). After Spain's transmission of information to the United Nations regarding this non-self-governing territory in 1961, the issue of the territory's status came before General Assembly's 24-member Special Committee in September, 1963. Following a referendum held in December 1963, Rio Muni and the above-mentioned islands were joined to form Equatorial Guinea. Under a new constitution their previous status as provinces was terminated and they were granted their own legislative and executive institutions.

UN General Assembly Resolutions 2067 (XX) of December 16, 1965 and 2230 (XXI) of December 20, 1966 reaffirmed the right of the people of Equatorial Guinea to self-determination, and requested that the participation of the United Nations be ensured in the process leading to independence. Resolution 2355 (XXII) of December 19, 1967 requested Spain to ensure that Equatorial Guinea acquire independence not later than July 1968.

A constitutional conference opened in Madrid on October 30, 1967. Spain granted Equatorial Guinea independence on October 12, 1969.

(c) Protectorate of Morocco

The Franco-Spanish Convention of November 27, 1912 (Martens, NRG3, Vol. 7, p. 323) established the Spanish protectorate of Morocco. The northern part of the protectorate was returned to Morocco by the Madrid Declaration of April 7, 1956. The Tarfaya region, situated between Morocco and Western Sahara, was returned to Morocco by the Cintra Agreement of April 1, 1958.

2. Current International Legal Situation

Equatorial Guinea is an independent → State. Ifni is currently part of the Kingdom of Morocco. Some authors still consider Western Sahara as a non-self-governing territory, with Spain as its administering power. After the renunciation of claims over the territory by Mauritania on August 5, 1979, Morocco is the sole occupying power. The Saharan Arab Democratic Republic has been recognized by more than 60 States (→ Recognition).

3. International Legal Problems

Spain did not hold a referendum allowing for self-determination in Western Sahara before its evacuation, and consequently the decolonization process has not ended. This has also been the Spanish point of view since 1976. United Nations legal doctrine holds that administering powers cannot unilaterally decline their responsibilities.

The UN General Assembly Resolution 2229

(XXI) of December 20, 1966 differentiated between the status of Western Sahara and that of Ifni. The latter, totally surrounded on its landward side by Morocco, was implicitly recognized as an → enclave. The result was in effect to restrict the exercise of self-determination to a single solution involving the return of the territory to the sovereignty of the surrounding territory (→ Territorial Integrity and Political Independence; UN GA Res. 1514 (XV) of December 14, 1960, p. 6).

4. *Other Dependent Territories*

Other Spanish territories (Ceuta, Melilla, Chafarinas Islands, Alhucemas, Velez de la Gomera) are currently the subject of territorial claims at the political level by Morocco. Morocco maintains that these territories are enclaves which constitute a disruption of Morocco's territorial integrity resulting from Spanish colonization in northern Africa. Spain has never recognized the colonial status of these territories, contending that they belonged to her long before the creation of Morocco as a State and that they have always been treated as an integral part of Spain subject to the same legal régime as the rest of her territory. The issue has never been raised before the Special Committee on Decolonization.

Western Sahara, Advisory Opinion of October 16, 1975, ICJ Reports (1975) 12–168.

Report of the UN Visiting Mission to Spanish Sahara, 1975, in the Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/10023/Add.5, Annex (1975); GAOR, 30th Session (1975) Supp. 23, Vol. 3, 12–129.

J.M. CORDERO, Fronteras hispánicas (1960).

E. MANERA, Requiem por Ifni, Revista de Política Internacional, Vol. 102 (1969) 145–155.

M. FLORY, L'avis de la Cour Internationale de Justice sur le Sahara occidental (16 octobre 1975), AFDI, Vol. 21 (1975) 253–277.

J.A. CARRILLO SALCEDO, Libre determinación de los pueblos e integridad territorial de los Estados en el Dictamen del Tribunal Internacional de Justicia sobre el Sahara occidental, Revista Española de Derecho Internacional, Vol. 29 (1976) 33–49.

A. CARRO, La descolonización del Sahara, Revista de Estudios Internacionales, Vol. 144 (1976) 11–38.

J. CHAPPEZ, L'avis consultatif de la C.I.J. du 16 Octobre 1975 dans l'affaire du Sahara Occidental, RGDIP, Vol. 80 (1976) 1132–1187.

T.M. FRANCK, The Stealing of the Sahara, AJIL, Vol. 70 (1976) 694–721.

J. COLA, España y el Sahara Occidental, antecedentes de una descolonización, Revista de Estudios Internacionales, Vol. 154 (1977) 9–52.

E. McWHINNEY, Judicial Opinion-Writing in the World Court and the Western Sahara Advisory Opinion, ZaöRV, Vol. 37 (1977) 1–42.

M. SHAW, The Western Sahara Case, BYIL, Vol. 49 (1978) 118–154.

J.A. CARRILLO SALCEDO, La posición española respecto de la cuestión del Sahara occidental: De la Declaración de principios de Madrid al Comunicado conjunto hispano-argelino, Revista de Política Internacional, Vol. 163 (1979) 117–126.

M. BARBIER, Le conflit du Sahara Occidental (1982).

F. VILLAR, El proceso de autodeterminación del Sahara (1982).

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SPITSBERGEN/SVALBARD

1. *Geographic Data*

The → archipelago of Spitsbergen (Norwegian: Svalbard, meaning "cold coast") comprises all the islands situated between 10 degrees and 35 degrees longitude East of Greenwich and between 74 degrees and 81 degrees latitude North, thus including Bear Island (Bjørnøya). Although the latter is situated 200 kilometres south of Spitsbergen, it is geologically considered to form part of the archipelago. The total area of Spitsbergen is 62 000 square kilometres.

Due to its latitude, the archipelago has a distinctively arctic climate, but the warm current of one branch of the Gulf Stream provides a moderating influence along the western and northwestern coasts. This means that the fjords along the western edge of Spitsbergen are open for shipping, fishing and tourist transport during the arctic summer, depending, however, on ice conditions. The eastern side of the archipelago is largely ice-bound and most of the islands are permanently ice-covered.

The importance of Spitsbergen results from its rich natural resources (fish, coal and potentially oil) and its geo-strategical situation. The seasonally changing population – there being no

indigenous inhabitants – numbers roughly 4000 people, many of whom are employed in the mining industries run by Norwegian and Soviet companies.

2. *Historical Development*

Spitsbergen was probably discovered by Viking sailors as early as in the 12th century but remained, due to its harsh climate, virtually unvisited. This did not change until 1596 when the Dutch explorer Willem Barents on his search for the Northern Passage rediscovered Spitsbergen and its rich hunting and fishing grounds. During the following centuries, the waters off Spitsbergen were regularly visited by rivalling British, Danish, Dutch, French, Hanseatic, Norwegian, Russian and Swedish whalers and fur-hunters.

Although Norway attempted several times to have her claims to → territorial sovereignty over Spitsbergen recognized, this question remained unresolved since Norway did not prevent foreign powers from using the waters off Spitsbergen. Thus, Spitsbergen was generally considered *terra nullius*. In 1871, reaffirmation by Norway of her claims to territorial sovereignty were met by Russian protests.

By the end of the 19th century, the question of territorial sovereignty regained some importance following the discovery of rich deposits of coal, which resulted in conflicting claims to mining rights by British, Dutch, Norwegian, Russian, Swedish and United States companies and individuals. In order to solve these problems, Norway, which had attained independence from Sweden in 1905, proposed an international conference in a note dated February 25, 1907 to the interested powers, i.e. Belgium, Denmark, Germany, the Netherlands, Russia, Sweden and the United Kingdom. After several drafts for a treaty were presented by Norway, Sweden and Russia, a conference was finally convened in Christiania from June 16 to July 31, 1914. Participants were the States invited in 1907, with the exception of Belgium, and the United States, in recognition of her nationals' interests in coal-mining in Spitsbergen. The conference failed, however, to reach any results, mainly due to conflicts between Germany and Russia. The outbreak of World War I finally terminated any attempt to conclude an agreement.

Upon the initiative of Norway, the Supreme Council of the Allied Powers took up the question of Spitsbergen during the Paris Peace Conference. On July 10, 1919, a commission consisting of representatives of France, Italy, the United Kingdom and the United States was established which drafted a treaty after receiving various proposals from Denmark, the Netherlands, Norway and Sweden. The Treaty Regulating the Status of Spitsbergen and Conferring the Sovereignty on Norway (LNTS, Vol. 2, p. 7) was signed in Paris on February 9, 1920 by Denmark, France, Italy, Japan, the Netherlands, Norway, Sweden, the United Kingdom and the United States. It did not enter into force until August 14, 1925, when the Norwegian Mining Code for Spitsbergen, provided for in Art. 8 of the Treaty, was proclaimed. In Art. 1 of the Treaty, the contracting parties recognize, subject to the stipulations of the Treaty, the full and absolute → sovereignty of Norway over the archipelago of Spitsbergen. The Soviet Union, which had strongly protested against the Treaty in 1920 and 1923 (→ Protest), agreed, following her *de jure* → recognition by Norway, in a → note dated March 5, 1924, to Norway's assumption of territorial sovereignty over Spitsbergen and acceded to the Treaty on May 7, 1935. Today, the Treaty is in force for 38 States.

During World War II, a Soviet plan for military occupation of Spitsbergen in order to secure her supply-lines failed due to British and Norwegian opposition. In November 1944, the Soviet Union suggested a revision of the 1920 Treaty, whereby Bear Island would be ceded to the Soviet Union and a Soviet-Norwegian → condominium over Spitsbergen would be created. During subsequent → negotiations between the two governments concerned, the Soviet Union renounced her claims to Bear Island and dropped her demand for the creation of a condominium, but proposed a joint military fortification of the archipelago. Further negotiations were to be conducted over this proposal on the basis of a joint → declaration made by the two governments on April 9, 1945. However, as a result of fundamental changes in international politics during the "cold war", such negotiations were never held.

Another controversy arose in 1951 when Norway decided to place Spitsbergen under the command of the → North Atlantic Treaty Orga-

nization (NATO). A Soviet protest of October 15, 1951 was based upon the argument that military use of the archipelago constituted a breach of its status under the 1920 Treaty and a risk to the special security interests of the Soviet Union. Norway rejected this protest by emphasizing that the stipulations of the 1920 Treaty on the → demilitarization of Spitsbergen were not encroached upon since no military installations were to be established.

The most recent and as yet unresolved dispute between Norway and the Soviet Union concerns the question as to whether the Norwegian Act No. 91 of December 17, 1976 (Norsk Lovtidend 1976 I, p. 932), establishing an economic zone in the seas adjacent to the Norwegian coasts, extends to the waters around Spitsbergen (→ Exclusive Economic Zone).

3. The 1920 Treaty

The legal status of Spitsbergen has been regulated in the above-mentioned 1920 Treaty. In Art. 1, the contracting parties undertake to recognize, subject to the other provisions of the Treaty, the full and absolute sovereignty of Norway over the archipelago of Spitsbergen. According to this provision, the affected area comprises, with Bear Island, all the islands situated between 10 degrees and 35 degrees longitude East of Greenwich and between 74 degrees and 81 degrees latitude North, i.e. especially West Spitsbergen (Vestspitsbergen), North-East Land (Nordaustlandet), Barents Island (Barentsøya), Edge Island (Edgeøya), Wiche Island (Kong Karls Land), Hope Island (Hopen), and Prince Charles Foreland (Prins Karl Forland), together with all islands great or small and rocks appertaining thereto. There is no mention made of territorial or other waters (→ Territorial Sea).

According to Art. 2, ships and nationals of all contracting parties enjoy equal rights to fishing and hunting in the territories specified in Art. 1 and in their territorial waters. Norway is, however, free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions and their territorial waters. This provision today serves as a legal foundation for Norwegian measures aiming at environmental protection.

Under Art. 3, the nationals of all contracting parties have equal liberty of access and entry for any reason or object to the waters, fjords and → ports of the territories specified in Art. 1. Moreover, such nationals must be permitted under the same conditions of equality to establish and pursue maritime, industrial, mining or commercial enterprises both on land and in the territorial waters. No monopoly may be established on any account or for any enterprise.

Art. 6 recognizes all acquired rights of nationals of the contracting parties and stipulates that claims arising from taking possession or from occupation of land before the signature of the Treaty are to be dealt with in accordance with the Annex to the Treaty. Under this Annex, a Commissioner of Danish nationality to be named by the Danish Government was to decide upon conflicting claims, such decisions being subject to special rules of → arbitration. In 1927, however, all claims which had not been recognized by the Commissioner were withdrawn, thus making arbitration unnecessary.

As to methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Art. 1, Art. 7 obliges Norway to grant to all nationals of the contracting parties treatment based upon complete equality.

Under Art. 8, Norway was to provide the territories specified in Art. 1 with mining regulations which, especially as regards taxes or charges of any kind and general or particular labour conditions, exclude all privileges, monopolies or favours for the benefit of any State or nationals of any of the contracting parties, including Norway. Norway was also obligated to guarantee to the employees of all categories the remuneration and protection necessary for their physical, moral and intellectual welfare. The pertinent Mining Code (Norsk Lovtidend 1925 I, p. 408) entered into force by Royal Decree of August 7, 1925, having been consented to by the signatories of the 1920 Treaty. Art. 8 provides, moreover, that any taxes, dues and duties levied must be devoted exclusively to the territories forming Spitsbergen and not to exceed what is required for the object in view. As regards the export of minerals, Norway is entitled to levy an export duty not exceeding one per cent of the

maximum value of the minerals exported, up to 100 000 tons; beyond that quantity, the duty diminishes proportionately.

Art. 9, finally, concerns the demilitarization of Spitsbergen, obliging Norway not to create or to allow the establishment of any naval base, and not to construct any fortifications in the territories specified in Art. 1, which may never be used for warlike purposes.

As regards international law, the 1920 Treaty is an interesting document in at least two respects. First, in Art. 1, Norway's territorial sovereignty over Spitsbergen is recognized by contracting parties. These parties, however, lacked any sovereign rights over the territories concerned. Consequently, this provision has been questioned as to its conformity with the maxim *nemo plus juris transferre potest quam ipse habet*. Second, in the subsequent articles of the Treaty, Norway's territorial sovereignty over Spitsbergen is subjected to restrictions in such a way as to allow for considering the legal status of Spitsbergen as being close to an internationalized area, although this expression is not used in the Treaty itself (→ Internationalization).

4. Norwegian Law

The legal status of Spitsbergen under Norwegian law has been regulated in the Act on Spitsbergen of July 17, 1925 (Norsk Lovtidend 1925 I, p. 322). According to Art. 1, Spitsbergen, the area of which is determined as in Art. 1 of the 1920 Treaty, is part of the Kingdom of Norway. Under Art. 2, Norwegian private, penal and procedural law apply to Spitsbergen insofar as nothing has been explicitly provided to the contrary; other statutory provisions do not apply to Spitsbergen unless specifically provided.

Norwegian statutes relating to public officials, payment for public acts, currency, weights and measures, postal and telegraph services, and labour protection and labour disputes apply under Art. 3 to Spitsbergen with such amendments as the King of Norway may lay down out of regard for local conditions. Moreover, according to Art. 4, the King may issue general regulations concerning the church, school and social services, public order, expulsion, medical and health services, building and fire services, shipping, aviation and other media of communications, mining, hunting, fishing and other industries, protection of animals, plants and natural formations, etc. This competence has been widely used.

Government and administration of justice in Spitsbergen are subject to detailed regulations in Arts. 5 to 13 of the 1925 Act. A Governor (Sysselmann) having the same authority as a District Governor (Fylkesmann) in mainland Norway is to be appointed by the King. Administration of justice is conferred on the courts belonging to the judicial circuit of Tromsö in northern Norway.

Special rules relating to property in Spitsbergen are to be found in Arts. 22 to 28 of the 1925 Act. According to Art. 22, all land which is not assigned to any person as his or her property pursuant to the 1920 Treaty is State land and as such subject to the State's right of ownership. The acquisition of a prescriptive right of ownership or use of such State land is precluded. Art. 23 stipulates that nationals of the contracting parties of the 1920 Treaty may without special license acquire both rights of ownership and use of land which has been assigned to private proprietors under the 1920 Treaty.

Notwithstanding this legal foundation for Norwegian administration, Norwegian authorities seem to have been reluctant to implement Norwegian laws in Spitsbergen, with the possible exception of environmental protection regulations, with respect to Soviet mining communities. At present it seems doubtful whether this situation will change, despite the efforts of certain political forces in Norway.

5. Current Legal Issues

The major current legal issue relating to Spitsbergen concerns the question if and to what extent Norway is entitled to claim sovereign rights over maritime areas such as the → continental shelf, or to proclaim an exclusive economic zone, or a fishery protection zone, around Spitsbergen, since these recently developed legal concepts could not have been envisaged at the time when the 1920 Treaty was concluded. It should be stressed, however, that notwithstanding the fact that Art. 1 of the 1920 Treaty does not mention territorial waters, it is now commonly held that the régime of the 1920 Treaty applies to such waters.

Norway maintains that she is legally entitled to claim sovereign rights over the continental shelf around Spitsbergen and to establish economic and related zones there, e.g. with regard to fishery protection. This position is based upon two legal arguments. First, the continental shelf around Spitsbergen is said to be a natural prolongation of the continental shelf of the Norwegian mainland; and second, it is asserted that Spitsbergen is entitled to a continental shelf of its own. Thus, the Norwegian Royal Decree of May 31, 1963 relating to the continental shelf of Norway (Norsk Lovtidend 1963 I, p. 573) is held to apply to the shelf around Spitsbergen.

Moreover, Norway is of the opinion that the legal régime of the 1920 Treaty does not apply to the continental shelf around Spitsbergen since the 1920 Treaty confers full and absolute sovereignty over the archipelago of Spitsbergen to Norway, with pertinent restrictions applying only to the islands and territorial waters of the archipelago but not to other areas such as the continental shelf. This means that nationals of the contracting parties to the 1920 Treaty would not have equal rights to engage in mining and, more particularly, in oil-drilling activities on the shelf as provided for in Art. 3 of the 1920 Treaty. This position has met with strong opposition by the Soviet Union and other States, such as the United Kingdom and the United States, which recognize the existence of a continental shelf around Spitsbergen but consider it to be subject to the régime of the 1920 Treaty. Since the huge costs of oil-drilling off Spitsbergen have until now prevented interested companies from engaging in such activities, this problem has so far remained without practical importance.

Following the promulgation of a provisional 200-mile fishing zone comprising the areas north of the Eurasian coast by the Soviet Union on December 10, 1976 (Vedomosti Verchovnogo Soveta SSSR, Vol. 39, p. 843), the Norwegian Parliament, on December 17, 1976, passed an Act (Norsk Lovtidend 1976 I, p. 932) establishing a 200-mile economic zone understood to extend also to the areas around Spitsbergen. Again, the Norwegian position is, in principle, that the restrictions of the 1920 Treaty do not apply.

Probably due to opposition by the Soviet Union and other States parties to the 1920 Treaty, the Royal Decree of June 3, 1977 establishing a 200-mile fishery protection zone around Spitsbergen (Norsk Lovtidend 1977 I, p. 508), made pursuant to the Act of December 17, 1976, stipulates in Art. 2 that the rules prescribed in Art. 3 of the 1976 Act relating to the economic zone of Norway, which exclude persons who are not Norwegian nationals from fishing within the Norwegian economic zone, shall provisionally not apply within the fishery protection zone around Spitsbergen. Thus, fishing in this zone is allowed, on a non-discriminatory basis, for nationals of all States, including States not parties to the 1920 Treaty. However, fishing activities by foreigners remain subject to the regulations issued by the Norwegian Ministry of Fisheries under the 1977 Decree. Such regulations concern, *inter alia*, the prohibition of fishing in specified areas in order to secure fish stocks, the establishment of maximum allowable catches for certain species of fish, and the submission of final catch reports to the Norwegian Directorate of Fisheries by the fishery authorities of the States concerned. It seems as if this solution constitutes a compromise acceptable, at least for the time being, to all interested parties.

Another dispute still waiting for final legal determination concerns the delimitation between Spitsbergen, claimed by Norway, and the Soviet archipelago of Franz Josef Land with regard to the continental shelf and economic zones. This question is to be seen, however, in the larger context of the conflict between Norway and the Soviet Union regarding the delimitation of maritime boundaries in the → Barents Sea (→ Maritime Boundaries, Delimitation). Whereas the Norwegian position is based upon the median line or equidistance principle, the Soviet Union claims follow the so-called sector principle. Presently, the delimitation negotiations between the two States seem to be caught in a dead-lock with the Soviet Union not really pressing for a solution, mainly because of military security concerns.

M. CONWAY, No Man's Land. A History of Spitsbergen From Its Discovery in 1596 to the Beginning of the Scientific Exploration of the Country (1907).

R. WAULTRIN, La question de la souveraineté des terres arctiques, RGDIP, Vol. 15 (1908) 78–125, 185–209, 401–423.

C. PICCIONI, L'organisation du Spitzberg, RGDIP, Vol. 16 (1909) 117–134.

J.B. SCOTT, Arctic Exploration and International Law, AJIL, Vol. 3 (1909) 928–941.
T.W. BALCH, The Arctic and Antarctic Regions and the Law of Nations, AJIL, Vol. 4 (1910) 265–275.
A. RAESTAD, Norges hoihetsret over Spitsbergen i aeldre tid (1912).
R. LANSING, A Unique International Problem, AJIL, Vol. 11 (1917) 763–771.
F.K. NIELSEN, The Solution of the Spitzbergen Question, AJIL, Vol. 14 (1920) 232–235.
C. PICCIONI, Le Spitzberg et la convention du 9 février 1920, RGDIP, Vol. 17 (1923) 104–115.
W. LAKHTINE, Rights over the Arctic, AJIL, Vol. 24 (1930) 703–717.
V. BÖHMERT, Die Spitzbergensche Fischereigrenze, Zeitschrift für Völkerrecht, Vol. 23 (1939) 317–338, 449–482.
R. DOLLOT, Le droit international des espaces polaires, RdC, Vol. 75 (1949 II) 121–176.
T. MATHISEN, Svalbard i Internasjonal Politikk 1871–1925 (1951).
T. MATHISEN, Svalbard in the Changing Arctic (1954).
P. BRETTON, L'Union soviétique et la clause de non-militarisation du Spitzberg, AFDI (1965) 122–144.
P. BERNHARDT, Spitzbergen: Jurisdictional Friction Over Unexploited Oil Reserves, California Western International Law Journal, Vol. 4 (1973) 61–120.
W. ØSTRENG, Økonomi og politisk suverenitet. Interessespillet om Svalbards politiske status (1974).
K. ERIKSEN, Svalbard 1944–47 – et brennpunkt i øst-vest-rivaliseringen, Internasjonal Politikk (1976) 109–137.
C.A. FLEISCHER, Svalbards folkerettslige stilling, in: Norges havretts-og resurspolitikk (ed. by A. Treholt) (1976) 139–155.
F. SOLLIE and W. ØSTRENG, Betydningen av Svalbard-traktatens artikkel 9 i relasjon til den militær-strategiske utvikling i Barentshav-Svalbard-området, Internasjonal Politikk (1977) 653–689.
C.A. FLEISCHER, Le régime d'exploitation du Spitsberg (Svalbard), AFDI (1978) 274–300.
B. BROMS, The Demilitarization of Svalbard (Spitsbergen), in: Essays in Honour of Eric Castrén (1979) 6–18.
C.A. FLEISCHER, The Northern Waters and the New Maritime Zones, GYIL, Vol. 22 (1979) 100–118.
H. KLEPSVIK, Norges kontinentalsokkel og eksklusive økonomiske sone. Noen betraktninger om delingen av sokkel og sone i Barentshavet, inkludert Svalbard og rundt Jan Mayen, Internasjonal Politikk (1979) 343–392.
T. SCOVAZZI, Antiche e recenti problemi del regime giuridico delle Spitsbergen, in: Studi in onore di Cesare Grassi, Vol. III (1980) 1676–1704.
E. SINGH, The Spitsbergen (Svalbard) Question: United States Foreign Policy 1907–1935 (1980).
B. JOHNSON THEUTENBERG, The Arctic Law of the Sea, NordTIR, Vol. 52 (1983) 3–39.
L. KELLBERG, The Spitzberg Treaty of 1920. A Contribution to the Diplomatic History of its Drafting (from Swedish Diplomatic Archives), NordTIR, Vol. 52 (1983) 40–83.
J. ANDENAES, Suverenitet og eiendomsrett på Svalbard (1984).
R. CHURCHILL and P. OREBECH, Om norsk lovgivnings anvendelse på Svalbard, Lov og Rett (1985) 164–177.
W. ØSTRENG, Delimitation Arrangements in Arctic Seas, Marine Policy, Vol. 10 (1986) 132–154.
E. MORELLI, Il regime giuridico dello Svalbard e il nuovo diritto del mare (1988).

RAINER HOFMANN

SPRATLY ARCHIPELAGO

1. Introduction

The Spratly Archipelago, which is called Nansha ch'un-tao (Wade-Giles) or Nansha Qundao (Pinyin) in Chinese and Quan Dao Truong Sa in Vietnamese, is a group of small islets, reefs and banks. The → archipelago lies roughly between 109°30' and 117°50' longitude East of Greenwich, and between 11°30' and 4° North latitude, in the South China Sea. It consists of more than 50 islets, shoals, reefs or cays, scattered over a vast oval with a maximum diameter of about 1000 kilometres. The centre of the Spratly Archipelago is located at a point about 1000 kilometres from the Chinese island of Hainan, 700 kilometres from the → Paracel Archipelago, 400 kilometres north-east of the northern tip of Borneo or Malaysia and the Palawan Island of the Philippines, and about 500 kilometres from the Vietnamese coast.

The Western names of major islets, cays or reefs and their present occupiers are listed below:

(1) North Danger Group: North-East Cay (Vietnam); South-West Cay (Vietnam).

(2) Thi Tu Island Reefs: Thi Tu Island (Philippines); Sandy Cay (Philippines).

(3) Loai Ta Islands and Reefs: Lamkiam Cay Loai Ta Island (Vietnam).

(4) Tizard Bank and Reefs: Itu Aba Island (Republic of China (→ Taiwan)) – this is the largest → island in the Spratlys with 0.432 square kilometres; Sandy Cay; Namyit Island (Vietnam).

(5) London Reefs: Central Reef; West Reef; East Reef; Cuarteron Reef.

(6) Spratly Island (Vietnam).

(7) Amboyna Cay (included in the Malaysian continental shelf claim).

(8) North Luconia Shoal (included in the Malaysian continental shelf claim).

(9) Friendship Shoal (included in the Malaysian continental shelf claim).

(10) South Luconia Shoal (included in the Malaysian continental shelf claim).

(11) James Shoal (included in the Malaysian continental shelf claim). This is located at 4° North Latitude and 112°15' East of Greenwich, about 160 kilometres west of the Sarawak coast. This is the southernmost point of the Spratly Archipelago and is included in the Chinese claim area.

(12) Union Bank and Reefs: Sin Cowe Island (Vietnam).

(13) Reed Banks (Philippines).

(14) Flat Island (Philippines).

(15) Nanshan Island (Philippines).

Until recently, the Spratlys primarily served as bases for → fishing boats or as sites of guano deposits, which can be used in manufacturing fertilizers. With the emergence of the régime of a 12 mile → territorial sea, → continental shelf and 200 mile → exclusive economic zone, these islands, reefs or shoals may serve as bases for the owning State to claim an extensive maritime zone and sea-bed resources in the South China Sea (→ Sea-Bed and Subsoil).

With the recent discovery of oil deposits in some parts of the South China Sea, the Spratlys have become more important to their claimants. The Philippines have already explored the oil resources in the Reed Bank area. Strategically, the → sea lane between the Paracels and the Spratlys is a major route for oil tankers and other vessels from the Middle East to China, Taiwan and Japan.

2. *Claims of Vietnam, China, the Philippines and Malaysia*

The dispute over the Spratlys did not arise until the 1930s when France occupied some of the islands on behalf of Vietnam, then its → protectorate. In 1939, Japan occupied the Spratlys, together with the Pratas (Tung-sha ch'ün-tao in Wade-Giles and Dongsha Qundao in Pinyin) and the Paracels (Hsi-sha ch'ün-tao, or Xisha Quandao), renamed them as Shinnan Gunto (New South Archipelago) and placed them under the administration of Kao-hsiung District of Taiwan, then occupied by Japan. The occupation ended in 1945 with the defeat of Japan in World War II. In the San Francisco Peace Treaty (September 8, 1951 (UNTS, Vol. 136, p. 5)) and the bilateral Peace Treaty with the Republic of China (April 28, 1952 (UNTS, Vol. 138, p. 3)), Japan renounced all claims to these islands (→ Peace Treaty with Japan (1951)). In the mid-1950s, the Philippines joined a claim and Malaysia followed suit in the mid-1970s.

(a) Basis of Vietnamese claims

According to the now defunct Republic of Vietnam's Foreign Ministry, Vietnamese history books often made reference to the "Dai Truong Sa Dao", a term used to designate both the Paracels and Spratlys and, more generally, all insular possessions of the Vietnamese.

A map published in 1838 by Phan Huy Chu called Dai Nam Nhat Thong Toan Do or Detailed Map of the Dai Nam expressly mentioned the Spratlys, under the name Van Ly Truong Sa, as part of Vietnamese territory, although the archipelago was not represented at its proper place because of the use of out-dated geographic techniques (→ Maps). However, Vietnamese emperors did not implement a systematic policy of occupation on the Truong Sa islands as they had for the other archipelago, Hoang Sa (the Paracels). Moreover, Vietnam lost interest in the islands off the Cochinchinese shore as the French occupation of Chochinchina began in 1885.

The present Vietnamese Government's basis of claiming the Spratly Islands does not refer to the above historical facts. It only asserts that in 1776 Nguyen Princes sent detachments to exploit both the Hoang Sa and the Truong Sa islands. It based the Vietnamese claim on the 1933 French occupation of the Spratlys. It is said that the French Foreign Ministry issued a communiqué on taking possession of the islands in the Truong Sa Archipelago and also published it in the Official Journal of the French Republic (July 26, 1933). Moreover, the French Cochinchina Governor Krautheimer issued an ordinance annexing the archipelago to Ba Ria province (Ordinance No. 4762-CP of December 21, 1933). After annexation, France built a meteorological station and a radio transmission station on Itu Aba Island. In 1956, the Saigon administration sent a → warship to Truong Sa to effect control over this archipelago and decreed the annexation of Truong Sa to Phuog

Tay province, and in 1961 sovereignty markers were installed on Truong Sa Archipelago. In May, the armed forces of the Provisional Revolutionary Government of the Republic of South Vietnam (now incorporated into Vietnam) "liberated" a number of islands in the Truong Sa Archipelago.

(b) Basis of Chinese claims

During the Ming (1368 to 1644) and Ch'ing (Qing, in Pinyin, 1644 to 1911) Dynasties, the officially compiled local chronicles Kuangtung T'ung-chi (in Pinyin, Guangdong Tongzhi), Ch'iung-Chou Fu-chi (Qiongzhou Fuzhi) and Wang-Chou Chi (Wang-zhou Zhi) all record, in the section on "territory" or "geography, mountains and waters", that "Wang-chou covers Ch'ien-li, Ch'ang-sha (Qianli Changsha, or thousand-li sand cay) and Wang-li Shih-t'ang (Wangli Shitan, ten thousand-li rocky reefs)". This shows that the Nan-sha Islands were administered by the Wang-chou County (now Wan-ning (Wanning) and Ling-shui (Lingshui) counties) of Kuangtung (Guangdong) Province.

In several official maps, such as Huang Ch'ing Ke Chi Sheng Fen-t'u (Huang Qing Ge Zhi Sheng Fen Tu, or Map of the Provinces Directly Under the Imperial Ch'ing (Qing) Authority, 1755) and Ta Ch'ing Yi-t'ung T'ien-hsia Ch'üan-t'u (Da Qing Yi Tong Tian Xia Quan Tu, Map of the Unified Territory of the Great Ch'ing (Qing) Empire, 1817), the Nan-sha Islands were recorded as Chinese territory. In 1883, Germany had to stop certain surveys on the Nan-sha Islands because of Ch'ing Government protests.

In 1933, upon learning of the French occupation of several islands in the Nan-sha Archipelago, China voiced strong opposition to France through diplomatic channels. In 1934 to 1935, China sent an official survey team to the South China Sea and then compiled and published the Map of the South China Sea Islands, on which the Nan-Sha Islands, the Tung-sha (Pratas) Islands and the Hsi-sha Islands (Paracels) were all clearly marked as belonging to China. After the defeat of Japan in 1945, the Chinese Government in November and December 1946 designated senior officials to proceed to the Nan-sha Islands by warships to take over these islands, and to erect stone tablets and station garrison troops there.

According to the Foreign Ministry of the People's Republic of China, on June 15, 1956, two high officials of the Foreign Ministry of the Democratic (now Socialist) Republic of Vietnam told the chargé d'affaires *ad interim* of the Chinese embassy in Vietnam that the Xisha and Nansha Islands "are historically part of Chinese territory" (Chinese Foreign Ministry's Memorandum on Question of Xisha and Nansha Islands, May 12, 1988).

(c) Basis of the Philippine claim

In July 1971, President Ferdinand Marcos announced that the 53-island group known as Kalayaan, exclusive of the Spratlys, which the Philippine explorer Tomas Cloma explored and occupied from 1947 to 1959, was regarded as *res nullius* and may be acquired according to the modes of acquisition of territory recognized under international law, among which are occupation and effective administration (→ Territory, Acquisition). The Republic of China (Taiwan), the People's Republic of China, and the Republic of Vietnam soon protested against the Philippine claim. This claim was reasserted, however, by the Philippines on several occasions. Finally, Presidential Decree No. 1596, issued on June 11, 1978, formally declared that these islands were part of the Philippine territory.

(d) Basis of the Malaysian claim

Malaysia does not claim the whole Spratlys. However, under Malaysia's 1966 Continental Shelf Act (Act of Parliament No. 57 of 1966, July 28, 1966), the continental shelf area off her coast up to a depth no greater than 200 metres below the surface of the sea is subject to her sovereignty. This claim would include Amboyna Cay, North Luconia Shoal, Friendship Shoal, South Luconia Shoal, James Shoal and others claimed by China (both governments) and Vietnam.

3. Development of the Dispute

Despite her claim to the Spratlys, it was not until 1987 that the People's Republic of China began to exercise control over an island there, the Yung-shu Chiao (Yongshu Jiao in Pinyin, Fiery Cross Reef in English). The Republic of China's forces withdrew to Taiwan in 1950 but in 1956 garrison forces were sent to Itu Aba Island, the largest

island in the Spratlys, and they have been stationed there ever since.

During the Republic of Vietnam period, garrison forces were maintained on North-East Cay, South-West Cay, Loai Ta Island, Namyit Island, Spratly Island (Nan-wei tao) and Sin Cowe Island. After the collapse of the Republic, the Socialist Republic of Vietnam appears to have replaced her forces in these islands.

Although the Philippines also claim all islands in the Spratlys, their forces appear to occupy only five islands there, viz. Thi Tu Island, Sandy Cay, Reed Banks, Flat Island and Nanshan Island.

On March 14, 1988, Chinese and Vietnamese warships exchanged fire in the South China Sea in a dispute over the Spratly Island.

Republic of Vietnam, Ministry of Foreign Affairs, White Paper on the Hoang Sa (Paracel) and Truong Sa (Spratly) Islands (1975).

Information and Press Department, Ministry of Foreign Affairs, Socialist Republic of Vietnam, Vietnam's Sovereignty Over the Hoang Sa and Truong Sa Archipelagoes (1979).

Ministry of Foreign Affairs of China, China Indisputable Sovereignty Over the Xisha and Nansha Islands, Beijing Review, Vol. 23, No. 7 (February 18, 1980) 15–24.

Ministry of Defense of the Philippines, The Kalayaan Islands (1982).

Ministry of Foreign Affairs of China, Memorandum on Question of Xisha and Nansha Islands (May 12, 1988), Foreign Broadcast Information Service, China (May 13, 1988) 12–14.

J.A COHEN and H. CHIU, People's China and International Law, A Documentary Study, Vol. 1 (1974) 341–346.

H. CHIU, Collection of Articles concerning Questions of International Law relating to the Territory of China (1975) 215–240 [in Chinese].

H. CHIU and CHOON-HO PARK, Legal Status of the Paracel and Spratly Islands, Ocean Development and International Law, Vol. 3 (1975) 1–28.

D. HEINZIG, Disputed Islands in the South China Sea (1976).

H. CHIU, Chinese Attitude Toward Continental Shelf and Its Implication on Delimiting Seabed in Southeast Asia, Occasional Papers/Reprints Series in Contemporary Asia Studies, No. 1 (1977).

The Spratlys, A 2000-year-old claim, Far Eastern Economic Review, August 7, 1981, 30–31.

M.S. SAMUELS, Contest for the South China Sea (1982).

H.B. YORAC, The Philippine Claim to the Spratly Islands Group, Philippine Law Journal, Vol. 58 (1983) 42–63.

HUNGDAH CHIU

SUEZ CANAL

1. History

There was probably a maritime connection between the Mediterranean and the → Red Sea already almost 4000 years ago. During the XIXth Dynasty in Egypt (1350 to 1200 B.C.), there existed a → canal which partly made use of the → Nile River. Several canal routes were built later and used until the Caliph Abu-Jafar-al-Mansour closed the then existing canal for strategic purposes in A.D. 767.

The idea of building a new canal through the Isthmus of Suez was considered by the Venetians towards the end of the 15th century. This plan, however, never materialized. Likewise, the proposals put before different French governments from the time of Louis XIV until the creation by Napoleon of a commission to study the possibility of building a canal never led to the stage of construction.

2. Status until 1889

Egyptian officials again began to discuss the idea of building a canal at the beginning of the 19th century. Eventually Ferdinand de Lesseps was granted a Firman of Concession on November 30, 1854 (BFSP, Vol. 55, p. 970) by Mohammed Said, the Viceroy of Egypt, which at that time still formally retained its status as a province of the Ottoman Empire.

According to the terms of the Firman of Concession, the Universal Suez Maritime Canal Company under the direction of de Lesseps was to build the Canal. The Company was incorporated under Egyptian law; the director of the Company was to be appointed by the Egyptian Government, as far as practicable, from among the group of shareholders holding the most interest in the Company. The Government of Egypt promised to give the Company all the necessary land, not belonging to private owners, free of cost. Nevertheless, the Company was to execute the work of construction at its own cost. The Government of Egypt was to receive annually 15 per cent of the net profits, whereas 75 per cent went to the Company and 10 per cent to its founding members. The tariffs of dues for shipping were to be agreed upon between the Viceroy and the Company on the basis of equality for all nations. The grant was

limited to 99 years from the day of the opening of the Canal. At the end of this period the Egyptian Government was to assume the role of the Company and enjoy all the rights of the Company including its rights in the Canal furnishings.

After elaborate negotiation, the shares of the Company were distributed on December 15, 1858, mostly to foreigners, and the Suez Canal Company was able to begin the actual work of building in April 1859. The Suez Canal was opened to traffic on November 17, 1869.

With a view to strengthening British interests in the region, Great Britain acquired almost half the shares of the Company in 1875. In 1882 Britain occupied Egypt, which had become a vassal State of the Ottoman Empire in 1873. For practical purposes, Egypt was from that point on considered a → protectorate of Great Britain until it became an independent State in 1922, with certain important powers being retained by Britain.

Questions concerning the legal status of the Suez Canal were discussed at several conferences. In 1879, the Canal was the subject of discussions of the → Institut de Droit International. On October 29, 1888 the delegates of Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey signed at Constantinople a Convention respecting the Free Navigation of the Suez Maritime Canal (Martens NRG2, Vol. 15, p. 557). This agreement, the Constantinople Convention, still forms the main basis for the legal considerations concerning the status of the Suez Canal.

3. Convention of Constantinople (1888)

(a) Freedom of navigation

The Constantinople Convention stresses the international status of the Canal. Art. 1 provides as follows: "The Suez Maritime 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." To this, Art. 2 adds that the Contracting Parties would in no way interfere with the free use of the canal in time of war as in time of peace and that "the Canal shall never be subjected to the exercise of the right of blockade" (→ Blockade). Furthermore, the contracting parties agreed not to interfere in any way with the security of the Canal and its branches, or to make any attempt to obstruct the working of the Canal. Under Art. 3, the contracting Parties undertook to respect the plant, buildings, establishments and other works of both the maritime and the fresh-water portions of the Canal.

Under Art. 16, the signatory States undertook to bring the Convention to the knowledge of other States, inviting these to accede to the Convention. Thus, it was expected that the Convention would become applicable in such a way as to secure a broadly based system of free transit, on the basis of equality of all nations (→ States, Equal Treatment and Non-Discrimination). A clause which served to protect Egyptian interests, as well as the interests of the international community, was inserted in Art. 12, providing that the signatory States "by application of the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty", agreed not to try to obtain with respect to the Canal territorial or commercial advantages or privileges in any international agreement.

(b) Rules during times of war; status of warships

Defining the legal position of the Canal during a state of → war caused great difficulties to the negotiators. In this respect Art. 4 provides as follows:

> "The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers."

Vessels of war (→ warships) were not allowed to revictual or to take in stores either in the Canal waters or at the → ports of access, "except so far as may be strictly necessary". Detailed rules as to transit through the Canal and the stay of vessels of war at Port Said and in the roadstead of Suez were inserted in the Convention. To safeguard the ships of belligerent States, it was provided that a period of 24 hours must elapse between the sailing of a

belligerent ship from the ports of access and the departure of a vessel belonging to an adversary party to the war.

Art. 6 provides that all prizes are to be subjected in all respects to the same rules as vessels of war belonging to belligerent States. According to Art. 7 the signatory States agreed not to keep vessels of war in the waters of the Suez Canal including Lake Timsah and the Bitter Lakes. Vessels of war could, however, be stationed in the ports of access to the Canal, Suez and Port Said. Their number was limited at any particular time to two vessels of war belonging to the same State. The belligerent States were not to exercise this right. Belligerent States were also forbidden to embark or disembark within the Canal or at its ports of access any troops, munitions or materials of war as long as the state of war lasted. Only an accidental hindrance in the Canal could justify an exception to the rule.

(c) Execution of the Convention

According to Art. 9, the Egyptian Government is charged with the execution of the Convention. If Egypt proves herself unable to fulfil this provision, the Ottoman Government was to take the necessary measures after having given notice to the signatory States and consultation, if necessary. As provided in Art. 8, the signatories were generally empowered to supervise the execution of the treaty, special provisions being added on the applicable procedure in case the security or the free passage régime of the Canal were threatened. No general clause on dispute settlement was included in the Convention.

(d) Rights retained by the Ottoman Empire and Egypt

It is obvious that the rules on free navigation, and the Convention as a whole, implied a broad renunciation of sovereign territorial rights on the part of the Egyptian Government and the Ottoman Empire. Nevertheless, interpretation of the Convention must take into account that, according to Art. 13, sovereign rights "are in no way affected", with the exception of the obligations expressly provided. Moreover, the rights of Turkey as the territorial power are explicitly reserved in Art. 12.

In this context, it must also be noted that Art. 10 contains special provisions concerning the rights retained by Egypt and the Ottoman Empire with regard to the defence of Egypt and the maintenance of public order. Art. 10 states that if Egypt and the Ottoman Empire find that defence or public order are threatened, the measures taken by Egypt or the Ottoman Empire are not to be restricted by the provisions of Art. 4 (passage in time of war), Art. 5 (status of belligerent powers), Art. 7 (stationing of vessels of war in peacetime and wartime), and Art. 8 (supervision of execution of the treaty by the signatories).

4. Developments since 1889

In 1914, Great Britain confirmed the protectorate over Egypt (BFSP, Vol. 108, p. 185) and, by the terms of the Treaty of Lausanne (→ Lausanne Peace Treaty (1923); → Peace Treaties after World War I), Turkey gave up all her rights over Egypt. When Egypt became independent in 1922 (British Command Papers, Cmd 1592, Treaty Series No. 1 (1922) p. 29), the question of defence of the Suez Canal was postponed to later → negotiations between Egypt and Great Britain. In 1936, these two States entered into a Treaty of Alliance which transformed the Suez Canal into an important military installation for Great Britain (LNTS, Vol. 173, p. 401).

Under the Anglo-Egyptian Treaty of Alliance the parties concluded a political → alliance "with a view to consolidating their friendship, their cordial understanding and their good relations". As a general principle the two States undertook not to adopt, in relation to other States, any attitude inconsistent with the alliance or to enter into political treaties inconsistent with their Treaty of Alliance. In case of a dispute with a third State involving a risk of rupture with that State, the two governments were to consult each other in an effort to reach a peaceful solution in accordance with the Covenant of the → League of Nations and other international commitments. Faced with the possibility of becoming parties to a war, Great Britain and Egypt promised to come to each other's aid in the capacity of an ally. This was, however, without prejudice to the parties' rights and obligations under the Covenant of the League of Nations and the → Kellogg-Briand Pact (1928).

In case of war, Egypt was to furnish, in accordance with Egyptian administrative rules and

legislation, all the facilities and assistance required, including the use of ports, aerodromes and means of communication. From the legal point of view, it may be presumed that these provisions also applied to the territory of the Suez Canal. Detailed provisions as to the status of the Suez Canal were also included in the Treaty of Alliance. Although the Suez Canal was considered an integral part of Egypt in accordance with Art. 8, it was also described as "a universal means of communication between the different parts of British Empire", and the British Government was authorized to station forces in the Egyptian territory in the vicinity of the Canal, with a view to ensuring cooperation with the Egyptian forces for the defence of the Canal.

During World War II, Egypt fortified the Suez Canal Zone, a frequent target of air raids which also involved the dropping of magnetic mines in the Canal waters. The defence of the Canal was successful enough to prevent an efficient blocking of the transit facilities. British warships were stationed in the Canal waters and used the ports of access for the embarkation and disembarkation of military troops and war material. At the beginning of the war, neutral → merchant ships were allowed to pass through the Canal (→ Neutrality in Sea Warfare). Later, their transit was sometimes refused. At times only military vessels belonging to the Allied Powers were allowed to enter the Canal.

When hostilities between Egypt and Israel broke out in 1948, the Egyptian authorities began to search vessels entering the Canal, and contraband goods intended for Israel were confiscated (→ Israel and the Arab States). In 1954 Egypt and Great Britain reached an agreement regarding the Suez Canal base (UNTS, Vol. 210, p. 3). The Treaty of Alliance of 1936 was declared terminated and the British forces were to be withdrawn from Egyptian territory within 20 months from the signature of the Agreement.

Once the British troops had been withdrawn, the Egyptian Government decided to nationalize the Suez Canal Company in 1956. The Egyptian nationalization decree did not as such affect freedom of passage in the Canal (Presidential Decree of July 26, 1956, AVR, Vol. 7 (1958/1959) p. 146), and the Egyptian Government underlined its adherence to the 1889 Convention. The shareholders were promised compensation for their shares in accordance with the value of the shares shown in the closing quotations of the Paris Stock Exchange on the day previous to the entering into force of the nationalization decree. This provision led to a controversy between the Egyptian Government and the shareholders. The Suez Canal area was subsequently invaded and occupied by Great Britain and France in October 1956, while Israel occupied the Sinai Peninsula. The → United Nations Security Council discussed the issues which had arisen and, in Resolution 118 of October 13, 1956 (UN Doc. S/3675) spelled out requirements for a satisfactory settlement of the dispute and the future status of the Canal.

Thereafter France, Great Britain and the United States issued invitations to an international conference on the status of the Canal (see E. Hoyt, The Unanimity Rule in the Revision of Treaties, a Re-Examination (1959) pp. 234 et seq.). 24 States were invited, among which only Egypt and Greece did not attend. The conference gave rise to discussions regarding the question of which States were to be considered parties to the Convention. The absence of Egypt led to the failure of the conference.

On April 24, 1957, Egypt issued a unilateral declaration contained in a letter addressed to the → United Nations Secretary-General (UNTS, Vol. 265, p. 300) stating, *inter alia*, Egypt's will "to afford and maintain free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888". The letter also dealt with matters concerning tolls, with settlements of disputes with other nations concerning the use of the Canal, and with settlement of disputes with the expropriated share owners. The latter dispute was settled in 1958. In July 1957, Egypt accepted the compulsory jurisdiction of the → International Court of Justice (ICJ) in respect of all legal disputes that might arise with regard to the interpretation or application of the Constantinople Convention. Remarkably, only disputes between Egypt and States parties to the Convention are thereby covered (ICJ Yearbook, Vol. 12 (1957/1958) p. 211).

Navigation in the Canal was resumed in April 1957. On April 24, 1957, Egypt adopted the Code of the Suez Canal Authority which reconfirmed the validity of the 1888 Convention (UN Doc. A/

3576, S/3818 (1957)). The Suez Canal Authority has been empowered to issue Rules of Navigation, extending also to matters such as safety of ships, dangerous cargo, pollution, and navigation dues. After ships were sunk by mines in 1984, the Authority announced, moreover, that vessels in the Canal could be supervised at the discretion of the authorities.

After 1957, transit traffic continued until 1967. Before the Six Day War broke out, the average daily number of ships in transit was already 60. During the state of war many vessels were sunk in the Canal waters. Subsequently, a large number of mines remained in those waters. It took nine years before the Canal, on June 5, 1975, was reopened for traffic after very extensive cleaning operations.

Traffic in the Suez Canal has increased continuously. The Egyptian Government and the Suez Canal Authority have done their utmost to widen and deepen the Canal in view of the expansion in the size of ships. This was necessitated by the fact that the large oil carriers could no longer pass through the Canal. The statistics for 1985 show that the daily average of transiting ships was 58 and the daily average of transiting tonnage was 1014 thousand tons. The ships in transit flew 110 different flags (→ Flags of Vessels).

5. Special Legal Problems and General Assessment

The question of rights of non-parties to the 1888 Convention was raised between 1948 and 1979 when Egypt closed the Canal to Israeli ships and to certain cargoes intended for import to or export from Israel (see UN SC Res. 95 (1951), UN Doc. S/2322; see also SC Res. 242 (1967)). Egypt argued, *inter alia*, that Israel was not entitled to transit rights because she was not a party to the 1888 Convention. Among the legal commentators, the opinion as to the rights of non-parties under the treaty has been divided (see e.g., Buell, p. 57 and Obieta, p. 87). The issue is closely linked both to the interpretation of Art. 1 of the 1888 Convention and the general question of the rights of States not parties to a treaty (see → Treaties, Effect on Third States). Israel and Egypt settled their dispute in Art. V, para. 1 of the 1979 Peace Treaty (ILM, Vol. 18, p. 362), according to which ships of Israel and cargoes for or coming from Israel " . . . shall enjoy the right of free passage through the Suez Canal and its approaches . . . on the basis of the Constantinople Convention of 1888, applying to all nations".

A second legal issue which has arisen in connection with the 1888 Convention concerns the extent of the regulatory powers of Egypt. While it is clear that Egypt is free to enact regulatory standards concerning safety, pollution and other related matters, such provisions must not in effect run counter to the provisions of the 1888 Convention. The line between admissible regulation and measures violating the treaty will have to be drawn in accordance with the applicable treaty provisions as interpreted in the light of general rules of treaty interpretation (→ Interpretation in International Law) and applicable international standards on safety, pollution and other related matters.

The Canal dues, based on tonnage, have resulted in steadily increasing profits. The Egyptian authorities have allowed vessels of war which are not carrying nuclear weapons to make use of the transit right, thus following the early practice. It is to be presumed that once the continuing efforts to widen and deepen the Canal have been brought to a successful conclusion, the Suez Canal, as the longest canal in the world without any locks, and with an almost non-existent percentage of accidents as compared with other waterways, will continue to be a proof of the wisdom of its planners and builders.

Convention between Great Britain, Austria-Hungaria, France, Germany, Italy, the Netherlands, Russia, Spain and Turkey, respecting the Free Navigation of the Suez Maritime Canal (Constantinople Convention), October 29, 1888, Martens NRG2, Vol. 15 (1890) 557–566.

Treaty of Peace between the State of Israel and the Arab Republic of Egypt, March 26, 1979, ILM, Vol. 18 (1979) 362–393.

R.L. BUELL, Le canal de Suez et les sanctions de la S.D.N., RGDIP, Vol. 43 (1936) 50–76.

E. KIENITZ, Der Suez-Kanal (1957).

B.AVRAM, The Evolution of the Suez Canal Status from 1869 up to 1956 (1958).

E. LAUTERPACHT (ed.), The Suez Canal Settlement. A Selection of Documents relating to the Suez Canal Dispute, the Clearance of the Suez Canal and the Settlement of Disputes between the United Kingdom, France and the United Arab Republic October 1956 – March 1959 (1960).

J.A. OBIETA, The International Status of the Suez Canal (1960).
B. BROMS, The Legal Status of the Suez Canal (1961).
R.R. BAXTER and J.F. TRISKA, The Law of International Waterways, with Particular Regard to Interoceanic Canals (1964).
Y. VAN DER MENSBRUGGE, Les garanties de la liberté de navigation dans le canal de Suez (1964).
H. SCHONFIELD, The Suez Canal in Peace and War, 1869–1969 (1969).
C.W. HALLBERG, The Suez Canal, Its History and Diplomatic Importance (1974).
G.H. BLAKE and W.D. SWEARINGEN, The Suez Canal: A Commemorative Bibliography (1975).
D. MOMTAZ, La régime de la navigation dans le canal de Suez, Revue Iranienne des Relations Internationales (1975) 155–167.
R. LAPIDOTH, The Reopened Suez Canal in International Law, Syracuse Journal of International Law and Commerce, Vol. 4 (1976) 1–49.
P. RONDOT, Le canal de Suez après sa réouverture, Revue Française d'Etudes Politiques Méditerranéennes, Vol. 2 (1976) 9–20.
G. WARNER, "Collusion" and the Suez Crisis of 1956, International Affairs, Vol. 55 (1979) 226–239.
R. LAPIDOTH-ESCHELBACHER, The Red Sea and the Gulf of Aden (1982).
A. ADAMTHWAITE, Suez Revisited, International Affairs, Vol. 64 (1988) 449–464.
G. MARSTON, Armed Intervention in the 1956 Suez Canal Crisis; The Legal Advice Tendered to the British Government, ICLQ, Vol. 37 (1988) 773–817.
T.A. SINTSOVA, The Régime of Navigation in the Suez Canal, Marine Policy, Vol. 12 (1988) 263–272.

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SVALBARD *see* Spitsbergen/Svalbard

TABA ARBITRATION

1. Background

This dispute between Egypt and Israel concerned a very small but beautiful area on the western shore of the Gulf of → Aqaba, situated a few kilometres south of the Israeli town of Eilat and consisting of a 5-star hotel, a vacation village and some shore-facilities.

On October 1, 1906 Turkey and Egypt concluded an agreement on the delimitation of their "Separating Administrative Line" (CTS, Vol. 203, p. 19). This line was soon thereafter demarcated by telegraph poles, which were later replaced by permanent masonry pillars. During World War I, the Sinai Peninsula was first occupied by Turkey, which probably destroyed the boundary pillars, and later by Great Britain, which built new ones. After Egypt's independence (1922) and the establishment of the British → Mandate in → Palestine (1923), the British and the Egyptian authorities by an exchange of notes in 1926 recognized the 1906 line as the common boundary. There was, however, a discrepancy between the provisions of the 1906 Agreement, which had foreseen the erection of pillars at "intervisible points" along the line (Art. 3), and the actual position of the pillars in the Taba area, which were not intervisible.

The 1979 Peace Treaty between Egypt and Israel (ILM, Vol. 18, p. 362) foresees that "[t]he permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . " (Art. II). A Joint Commission charged with the demarcation of that boundary agreed on the location of almost 100 pillars; disagreement persisted, however, with regard to 14 pillars, of which the most important was pillar no. 91 in the Taba area. Upon Israel's final withdrawal from the Sinai on April 25, 1982, the parties agreed that, until resolution of the dispute, each party should "move behind the lines indicated by the other" (ILM, Vol. 26, p. 14).

According to the Peace Treaty, disputes not settled by → negotiations "shall be resolved by conciliation or submitted to arbitration" (Art. VII). Negotiations having failed, the parties agreed to submit the dispute to → arbitration under the terms of the → Compromis of September 11, 1986 (ILM, Vol. 26, p. 1), but during the stage of the written pleadings, a parallel attempt at → conciliation was to be made by a chamber of the Tribunal (Art. IX of the Compromis). According to the Compromis, "[t]he Tribunal is requested to decide the location of the boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine, in accordance with the Peace Treaty, the April 25, 1982 Agreement, and the Annex" (Art. II), and "[t]he Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel . . . " (Annex, Art. 5).

2. *The Award*

(a) General observations

In the Award of September 29, 1988 (ILM, Vol. 27, p. 1427), the majority of the Tribunal expressed the opinion that it had to decide "on the basis of the boundary . . . as it was demarcated, consolidated, and commonly understood during the period of the Mandate . . . " (para. 172), and it decided in favour of the *de facto* situation on the ground. The Award stated further that, only "[i]n so far as there are doubts as to where the boundary pillars stood . . . or for confirmation of its findings, the Tribunal . . . will also consider the 1906 Agreement" (para. 173). In case of a possible contradiction between the physical location of the pillars and the provisions of the Agreement, the physical location should prevail since "the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred" (para. 210). The majority thought that this attitude enhances the stability and finality of boundaries as recommended in the 1962 → Temple of Preah Vihear case (paras. 210, 235).

In the Tribunal's opinion, it was not authorized to determine the course of the boundary from the last pillar (no. 91) to the shore (about 170 metres) and beyond (para. 177).

(b) The northern pillars

With regard to the northern pillars, the Tribunal decided unanimously in favour of five locations claimed by Egypt and four claimed by Israel and, by a majority, in favour of four additional locations claimed by Egypt.

(c) The pillar in the Taba area (no. 91)

According to the Compromis, "[f]or the final boundary pillar no. 91, which is at the point of Ras Taba on the western shore of the Gulf of Aqaba, Israel has indicated two alternative locations, at the granite knob and at Bir Taba, whereas Egypt has indicated its location, at the point where it maintains the remnants of the boundary pillar are to be found" (Annex, Art. 2).

The majority found that during the critical period there were in the Taba area two pillars situated 284 metres apart, one at the location claimed by Egypt for boundary pillar no. 91, and the other, not claimed by any of the parties, the so-called "Parker Pillar", near the shore (paras. 227 to 229). The majority decided in favour of the location claimed by Egypt for pillar no. 91, although the pillar which had existed there was probably erected after the 1906 to 1907 demarcation operations, and despite the lack of intervisibility, since the situation on the ground during the critical period was the basis preferred by the majority for reaching a decision (para. 237).

As to the condition laid down in the 1906 Agreement and the 1986 Compromis that pillar no. 91 had to be the final pillar at the point of Ras Taba on the shore, these words were originally "conceived for the Parker pillar and could, in the time of the Mandate, be understood in this sense only". However, in 1986 they "could reasonably be understood as applying to" the location claimed by Egypt for pillar no. 91, since the majority thought that "an indication on the ground would not have been conceivable for the Parker pillar" in 1986 due to the removal in about 1970 of the cliff on which it had stood (paras. 241 to 244).

(d) The minority opinion

According to the minority, the "recognized boundary" refers to the lawful legal line, established by the 1906 Agreement and recognized in 1926 by Egypt and Great Britain (paras. 14 to 18). This conclusion also corresponds to the principle of → *uti possidetis juris* (paras. 19, 43). The minority also found that the preservation of the stability and finality of boundaries applies to the lawful legal line and not to the physical situation on the ground (paras. 42, 89). Moreover, there is no general rule that physical demarcation prevails over the text of a delimitation agreement, but at the most a rebuttable presumption in favour of the former (paras. 29 to 31). Finally, an erroneous *de facto* boundary may under certain circumstances be corrected even after the passage of an extended period of time, as shown by the 1980 Swiss case concerning the Nufenenpass (paras. 46 to 48).

In the Taba area, both the location claimed by Egypt for pillar no. 91 and the Parker location lacked intervisibility with pillar no. 90 and hence were not to be sanctioned (paras. 66 to 75, 95). Moreover, even according to the criterion adopted by the majority, i.e. the factual situation on the ground, the location claimed by Egypt should have

been rejected, since the finding that during the critical period the Parker pillar was the final one, at Ras Taba on the shore, precluded a finding that pillar no. 91 E conformed to these same conditions (paras. 55 to 65, 91 to 93).

On the other hand, the location on the granite knob was in conformity with both the 1906 Agreement and the 1986 Compromis since it was intervisible with regard to pillar no. 90; it was located on the promontory of Ras Taba, the final pillar on the shore (paras. 112 to 118).

3. Implementation and Subsequent Events

The Award was promptly implemented. The line from pillar no. 91 to the shore was settled by an agreement of February 26, 1989 (slightly supplemented on March 7, 1989) (ILM, Vol. 28, p. 611), under which the boundary ends on the shore at a place corresponding in fact to the location of the Parker pillar. This location left to Israel 250 metres of shoreline originally claimed by Egypt, while leaving the hotel and other facilities to Egypt. By way of "Agreed Minutes" the parties simultaneously reached agreement on the grant of facilities to tourists coming from Israel to Taba.

Award of the Egypt-Israel Arbitration Tribunal Established in Accordance with the Compromis Signed September 11, 1986, ILM, Vol. 27 (1988) 1427–1536.

Agreement regarding the permanent boundary between Egypt and Israel and Agreed Minutes Concerning Tourism in South Sinai Through Check-Point Number 4, February 26, 1989, ILM, Vol. 28 (1989) 611–619.

W. RAAFAT, The Taba Case (Between Egypt and Israel), RevEgypt, Vol. 39 (1983) 1–22.

R. LAPIDOTH, The Taba Controversy, Jerusalem Quarterly, No. 37 (1986) 29–39.

D.W. BOWETT, The Taba Award of 29, September, 1988, Israel Law Review, Vol. 23 (1989) 429–442.

E. DECAUX, La sentence du tribunal arbitral dans le différend frontalier concernant l'enclave de Taba (Egypt-Israël) 29 Septembre 1988, RGDIP, Vol. 93 (1989) 599–622.

G. LAGERGREN, The Taba Tribunal 1986–89, African Journal of International and Comparative Law, Vol. 1 (1989) 525–532.

E. LAUTERPACHT, The Taba Case: Some Recollections and Reflections, Israel Law Review, Vol. 23 (1989) 443–468.

R. PINTO, La délimitation de la frontière entre l'Egypte et Israël dans la zone de Taba, Journal du Droit International, Vol. 116 (1989) 569–619.

P. WEIL, Some Observations on the Arbitral Award in the Taba Case, Israel Law Review, Vol. 23 (1989) 1–25.

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TAIWAN

1. General Description and History

Taiwan, known in Portuguese as Formosa, is also called Nationalist China and officially is known as the Republic of China (Chinese: "Zhonghua minguo"). As an → island of 13 800 square miles situated 100 miles off the south-east coast of the mainland of China, Taiwan is bounded by the East China Sea, the Pacific Ocean, the Bashi Channel, and the Taiwan Strait, which contains the Pescadores Archipelago, traditionally belonging to Taiwan, and offshore islands such as Jinmen and Mazu traditionally belonging to the Chinese mainland province of Fujian but at present controlled by Taiwan.

Since 1949, having lost the → civil war against the Communists on the mainland, Taiwan has been the seat of the Nationalist Chinese → government, which continues to claim jurisdiction over the mainland of China (→ Jurisdiction of States). Consequently, political institutions established in China in 1947 are all maintained in Taiwan.

The population of Taiwan reached 20 million in 1989. Han Chinese comprise 98 per cent (18 per cent of whom came after 1948 from the mainland); the remainder are indigenous people of Malay origin. Mandarin Chinese is the official language; Taiwanese dialects of Chinese and aboriginal languages are also spoken. Taiwan has a developed market economy. Per capita gross domestic product is about US $ 6300, per capita income about US $ 6500, the highest in Asia after Japan, → Hong Kong and the city State of Singapore.

Although the Chinese were aware of the existence of Taiwan as early as the 7th century A.D., major Chinese settlement of the island did not begin until the 17th century. The Dutch then in control of the islands were ousted in 1661 by an influx of Chinese refugees (loyalists of the deposed Ming dynasty, 1368 to 1644). In 1683 the Manchus

(Qing dynasty, 1644 to 1911) nominally annexed and incorporated Taiwan into Fujian province until 1887 when Taiwan herself became a Chinese province. Eight years later, in 1895, following the Chinese-Japanese war, Taiwan was ceded to Japan by Art. 2(b) and (c) of the Treaty of Shimonoseki of April 17, 1895 (CTS, Vol. 181, p. 217).

2. *Developments after World War II*

In the Cairo Declaration of December 1, 1943 Roosevelt, Churchill and Chiang Kai-shek declared their "purpose" that Taiwan would be returned to the "Republic of China" (DeptStateBull, Vol. 9, No. 232 (1943) p. 393). The Cairo Declaration was incorporated in paragraph 8 of the Potsdam Declaration issued by the Allies on July 26, 1945 (DeptStateBull, Vol. 13 (1945 II) p. 137), which was accepted by Japan on September 2, 1945 in her Instrument of Surrender (→ Surrender). Pursuant to the provisions of the Instrument of Surrender, the office of the Supreme Commander for the Allied Powers issued General Order No. 1, directing, *inter alia*, Japanese forces in China and Taiwan to "surrender to Generalissimo Chiang Kai-shek", and in October 1945 Chinese authorities occupied Taiwan, which soon thereafter was declared to be a province of China.

On January 5, 1950 United States President Truman stated that, in keeping with the terms of the Cairo Declaration, Taiwan "was surrendered to . . . Chiang Kai-shek, and for the past four years, the United States and the other Allied Powers have accepted the exercise of Chinese authority over the Island" (DeptStateBull, Vol. 22 (1950 I) p. 79). Soon afterwards, following the outbreak of the Korean War and the dispatch of United States naval forces to the Taiwan Strait, Truman stated that "the determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations". When the → peace treaty with Japan was signed on September 8, 1951 in San Francisco (UNTS, Vol. 136, p. 45), its major drafters, the United States and the United Kingdom, arranged to have the treaty's language merely provide for the Japanese renunciation of "all right, title and claim to Formosa and the Pescadores" (Art. 2(b)), without explicitly providing for their restoration to China.

On December 2, 1954 the Nationalist Government and the United States signed a Mutual Defense Treaty (UNTS, Vol. 248, p. 217) providing for → collective self-defence of the Pacific territories of the two parties. The territory of the Republic of China was defined to mean Taiwan, including the Pescadores.

In October 1971 a United Nations resolution was passed ousting Taiwan as the representative of China and replacing it with the Government of the People's Republic of China (PRC) (UN GA, Res. 2758 (XXVI) of October 25, 1971). This event, and the United States-Peking *rapprochement*, led many countries to recognize officially the People's Republic of China and sever formal → diplomatic relations with Taiwan (→ Recognition).

On January 1, 1979, the United States recognized the People's Republic of China as the sole legal government of China and also gave one year's notice of her intention to sever the Mutual Defense Treaty with Taiwan. In the same year the United States Congress passed the Taiwan Relations Act (April 10, 1979, Public Law No. 96–8, 93 Stat. 14), which committed the United States to provide Taiwan with defensive arms and declared, *inter alia*, that all United States laws referring to foreign States shall also be applied to Taiwan. In the United States-China Joint Communiqué of August 1982 the United States expressed the intention "to reduce gradually its sales of arms to Taiwan, leading over a period of time to final resolution".

Taiwan currently maintains diplomatic relations with 22 – mostly small – States; most States, which have recognized the People's Republic of China continue to have unofficial ties with Taiwan. Since the end of the 1980s there is a tendency in Taiwan to avoid further international isolation by no longer adhering to her claim to represent China. Thus, in summer of 1989, Taiwan established official relations with Grenada, although this Caribbean State maintained official relations with the People's Republic of China, which were soon broken off by the People's Republic. Both Chinese governments are members of the Asian Development Bank.

In 1981 the People's Republic of China announced a nine-point proposal for Taiwan's "return to the motherland", promising a high degree of autonomy after the return of Taiwan as a

"special administrative region" of China. Martial law, enforced in Taiwan since 1949, was eventually lifted in 1987. Since then Taiwan's virtual one-party political system, formed by the "Nationalist Party" (Guomindang), has been developing into a more pluralistic political culture. The most influential opposition party is the "Democratic Progressive Party" (Minjindang) founded in 1986.

3. *The Question of Sovereignty*

(a) Until 1972

The question whether Taiwan forms a part of China has long been an object of controversy. Under international law a transfer of → sovereignty from Japan to China could have accrued through a peace treaty or the operation of certain doctrines concerning the acquisition of territory (→ Territory, Acquisition).

When a Treaty of Peace with Japan was signed in San Francisco on September 8, 1951 by 51 Allied Powers but without any Chinese participation, Art. 2 of the Treaty merely stipulated that "Japan renounces all rights, title and claim" to Taiwan, without making any provision for the state which would succeed Japan in exercising sovereignty over Taiwan. A similar renunciation clause was embodied in the Treaty of Peace between the Republic of China and Japan, signed on April 28, 1952 (UNTS, Vol. 138, p. 3).

Apart from "historic title" (→ Historic Rights), which has been contested by pointing to China's only very loose, partly ineffective, control between 1683 and 1887, several arguments have been put forward to explain the transfer of sovereignty to China prior to the conclusion of these peace treaties. Thus, it is claimed that China already recovered sovereignty over Taiwan with the declaration of war on Japan, December 12, 1941, and with the formal abrogation of the Treaty of Shimonoseki effected by this declaration. This view is opposed by pointing to the generally recognized rule that treaties stipulating State rights of a permanent character connected with sovereignty and status of territory, such as those created by a treaty of cession, are considered not to be affected by the outbreak of war between the contracting parties (→ War, Effect on Treaties).

It is further alleged that China acquired Taiwan by means of cession when signing the Japanese Instrument of Surrender incorporating the Cairo Declaration. This argument is challenged insofar as it is difficult to regard the Cairo Declaration as something other than a non-self-executing statement of intention, which could not vest China with title to Taiwan.

Another contention is that China recovered Taiwan by virtue of → annexation. Since no resistance was made by Japan to the Chinese incorporation of Taiwan as a province of China, it is claimed that China thereby acquired legal title. Apart from the fact that conquest and annexation may no longer be considered legal (→ Stimson Doctrine), and resort to violence against an aggressor (→ Aggression) in → self-defence is not without limits and does not justify the annexation of territory, a title acquired by annexation would only be justified for the conquering party. In the instance of Taiwan, this party was the Allied Powers, with the United States as their main contributor.

Under a more restrictive view, occupation as a mode of acquisition may be considered to apply only for uninhabited territories. It has been pointed out in this regard that the Japanese evacuation was not an abandonment of territory but an execution of the Instrument of Surrender. Thus, by transferring the territory of Taiwan to Chinese troops, which were acting as an agent of the Allies – with Japan remaining the *de jure* sovereign until 1952 when the Peace Treaty came into force – Japan did not render Taiwan *terra nullius* and a proper object for occupation. This may appear to have changed after Japan renounced sovereignty over Taiwan in the Peace Treaty of 1951. It can hardly be argued, however, that this relinquishment left Taiwan "terra nullius", since the island continued after 1952 to be controlled by an effective, organized government. Nevertheless, it is argued

> "that Japanese relinquishment, which took place against a background of a commitment to return Taiwan to China, and the continued occupation of Taiwan by a recognized government of China, operated to revest sovereignty in China" (Crawford, p. 148).

Since relinquishment, as a mode of transfer of territory, would be of a *sui generis* nature, and since it is argued that the Nationalist Government was considered by many States not to represent

China at the time of the Japanese renunciation and the People's Republic of China has always refused to recognize any laws or regulations of the Nationalist Government on Taiwan, it has been concluded that the Government of the Republic of China on Taiwan "must be regarded under international law as the government of the sovereign State of Formosa" (Kirkham). This result has been questioned insofar as the present Government of Taiwan claims jurisdiction also over mainland China. For this reason it is argued that Taiwan does not comply with the requirements of Statehood because she does not possess a defined territory (→ State).

Finally, it is contended that China has acquired sovereignty through → prescription by means of uninterrupted and undisturbed exercise of authority over Taiwan since 1945. Irrespective of the controversial status of prescription in international law, it appears unlikely that the duration of the exercise of authority over Taiwan by the Government of the Republic of China in the name of China, from October 1945 to October 1949, could be considered as having been long enough to bring about prescription. Moreover, it is argued that because States which recognized the Republic of China Government to be the legal government of China since 1950 have also repeatedly pointed out that they regard Taiwan's legal status as "undetermined", an "undisturbed" exercise of authority would seem to be doubtful.

In addition, it is argued that although these modes of effecting a transfer of sovereignty have historically been recognized by international law, they might be regarded as illegal under the → United Nations Charter. The latter is seen as having led to a reinterpretation of the law of territorial acquisition based on the principle of → self-determination.

(b) Since 1972

Because the status of Taiwan was regarded by many States as "undetermined" and the language used in the San Francisco Peace Treaty was deliberately designed to avoid conferring recognition on the People's Republic of China's sovereign claim to Taiwan by those countries which were parties to the Treaty and had recognized the People's Republic of China, it became one of the People's Republic of China's major foreign policy objectives to seek international recognition of her sovereign claim to Taiwan. The language used in "joint communiqués" issued when announcing the establishment of diplomatic relations with certain important States ranges from mere "taking note" (e.g. the Communiqué with Canada of October 13, 1970), to "acknowledging" (e.g. Communiqué with the United States of February 28, 1972, December 15, 1978 and August 17, 1982), to "fully understanding and respecting" (Communiqué with Japan of September 29, 1972), in respect of China's sovereign claim to Taiwan.

Since the Chinese position rather than the matter as such was "acknowledged" or "respected" by these joint communiqués, the establishment of official relations with the People's Republic of China had no direct implications concerning the question of sovereignty over Taiwan. However, the People's Republic of China was assured that the countries concerned do "not challenge" the one-China position held by "all Chinese on either side of the Taiwan strait" and that these countries are "interested in a peaceful settlement of the Taiwan question by the Chinese themselves" (1972 Communiqué with the United States). This promise has been interpreted to the effect that the United States, similar to the other countries concerned, is bound so long as the two Chinese governments are in agreement with each other over the one-China position.

4. Consequences of De-Recognition

Irrespective the question of sovereignty over Taiwan the Government of the Republic of China was regarded for more than 30 years by many States and the United Nations to be the *de jure* Government of the State of China. The recognition of the Government of the People's Republic of China as the sole legal government of China and the de-recognition of the Republic of China Government confronted those States which maintained intensive economic and cultural relations with Taiwan with certain novel problems. These problems resulted from the fact that the traditional approach to recognition considers the failure or refusal to extend recognition (→ Non-Recognition) as implying that the "government" or "State" in question is legally non-existent. However, the case of Taiwan did not involve the refusal

to extend recognition to a new government or State, but rather the effect of withdrawal of recognition of a régime which continues to exist in the international community and which maintains substantial relations with the de-recognizing countries. This has been referred to as an "essentially unprecedented situation" for which "international law does not provide much clear guidance" (Li).

Especially after the Second World War, the international community was confronted with the phenomenon of régimes not recognized as State governments, but exercising effective control over a certain territory. Considering the pacifying function of international law, such → *de facto* régimes cannot be ignored by international law, but must be regarded as international legal persons, i.e. as → subjects of international law with certain international legal rights and duties. Thus, it is generally accepted that the international prohibition of the → use of force also applies to *de facto* régimes and that such régimes bear international legal responsibility for their unlawful acts, are capable of maintaining and concluding → treaties, and are entitled to claim sovereign immunity, etc. However, a right to institute legal proceedings in the courts of a non-recognizing State has not often been granted.

In a move to further reconcile the rigidity of the law of recognition with the practical needs of the international community, the United States has enacted domestic legislation. The United States "Taiwan Relations Act" of 1979 provides that "the absence of diplomatic relations or recognition shall not abrogate . . . or otherwise affect in any way rights or obligations under the laws of the United States . . . acquired by or with respect to Taiwan", including the capacity of Taiwan to sue and be sued in courts of the United States. This statute further provides, that "whenever the laws of the United States refer or relate to foreign countries, nations, states, governments or similar entities, such terms shall include and such laws shall apply with respect to Taiwan" (see Wolff and Simon, p. 289). As one commentator has aptly stated, this amounts to "legislative re-recognition" (Gable).

In a similar application of the concept of *de facto* régime, Japanese courts affirmed in the so-called "Kokaryo" Case that the authorities of Taiwan have standing to bring a suit, and awarded the disputed property to Taiwan because her Government "in fact controlled and effectively ruled Taiwan" (see Osaka High Court, Hanrei Jiho, No. 1053 (1982) p. 115; Osaka District Court, Hanrei Jiho, No. 1199 (1986) p. 131; Osaka High Court, Hanrei Jiho, No. 1232 (1987) p. 119). In regard to the Japanese and American developments, Chinese commentators have maintained a violation of the relevant United States-China joint communiqués and the → Vienna Convention on the Law of Treaties, which forbids a party to "invoke the provisions of its internal law as justification for its failure to perform a treaty". This claim has in turn been challenged to the effect that irrespective of the nature of the joint communiqués concerned, these instruments took no position towards the Chinese sovereign claim over Taiwan and, thus, could hardly be referred to in connection with a treaty violation.

The semi-official or unofficial offices which have been established linking Taiwan with more than 100 countries are sometimes allowed by the host country to perform essentially consular tasks, such as the issuance of visas. In October 1980 the "American Institute in Taiwan" and Taiwan's "Coordinations Council for North American Affairs" signed an agreement granting a number of traditional diplomatic immunities to each party. This development has been referred to as "an emerging international law of quasi-diplomatic relations" (Lee).

5. *Future Prospects*

To deal with Taiwan as a *de facto* régime, rather than as a subordinate unit of China, seems to be an adequate response to the facts and to Taiwanese measures aimed at transforming Taiwan from a State allegedly representing all of China to an entity with some new and still undefined status. "What that new status should be must be decided by all of the people on Taiwan" (Li).

As early as the San Francisco Peace Conference in 1951 the principle of self-determination was put forward as applicable to Taiwan. Thus, the Egyptian representative interpreted

> "the reason behind . . . [the] omission [in Art. 2 of the Peace Treaty, in which Japan renounced title to Taiwan without China being stipulated as the beneficiary, as having been intended] to

afford the opportunity to deal with this question in accordance with the United Nations Charter, taking into consideration the principles of self-determination and the expressed desire of the inhabitants of these territories".

(Conference for the Conclusion and Signature of the Treaty of Peace with Japan, p. 144). In any event, attempts to solve the problem of Taiwan otherwise than by peaceful means must now be found to constitute a situation, "likely to endanger the maintenance of international peace and security" under Art. 33 of the UN Charter.

Conference for the Conclusion and Signature of the Treaty of Peace with Japan: Record of Proceedings, United States Department of State Publication No. 4492 (1951).

H. CHIU (ed.), China and the Question of Taiwan. Documents and Analysis (1973).

A. DEAN, United States Foreign Policy and Formosa, Foreign Affairs, Vol. 38 (1954/1955) 360–375.

Q. WRIGHT, The Chinese Recognition Problem, AJIL, Vol. 49 (1955) 321–338.

K. ZEMANEK, Die völkerrechtliche Stellung Formosas, AVR, Vol. 5 (1955) 308–319.

D.P. O'CONNELL, The Status of Formosa and the Chinese Recognition Problem, AJIL, Vol. 50 (1956) 403–416.

C. PHILLIPS, The International Legal Status of Formosa, Western Political Quarterly, Vol. 10 (1957) 278–289.

R. HARVEY, The United States and the Legal Status of Formosa, World Affairs Quarterly, Vol. 30 (1959/1960) 134–153.

P. DAI, Recognition of States and Governments under International Law with Specific Reference to Canadian Postwar Practice and the Legal Status of Taiwan (Formosa), CanYIL, Vol. 3 (1963) 290–305.

J. JAIN, The Legal Status of Formosa, AJIL, Vol. 57 (1963) 25–45.

T. CHEN, Legal Status of Formosa, Philippine International Law Journal, Vol. 4 (1965) 99–151.

G. KERR, Formosa Betrayed (1965).

F. MORELLO, The International Legal Status of Formosa (1966).

L. CHEN and H. LASSWELL, Formosa, China, and the United Nations: Formosa in the World Community (1967).

D.B. KIRKHAM, The International Legal Status of Formosa, CanYIL, Vol. 6 (1968) 144–163.

D. MENDEL, The Politics of Formosan Nationalism (1970).

W. BUEHLER, Taiwan: A Problem of International Law or Politics?, The World Today (1971) 257–266.

L. CHEN and W. REISMAN, Who Owns Taiwan: A Search for International Title, Yale Law Journal, Vol. 81 (1971/1972) 599–671.

J. SAXENA, The Legal Status of Taiwan, Indian JIL, Vol. 12 (1972) 100–108.

J. COPPER, The Future of Taiwan: An Analysis of its Legal and Political Status, Asia Quarterly (1973) 195–220.

K. IRIYE, The Joint Communiqué of Japan and the People's Republic of China and the Taiwan Issue, Japanese Annual of International Law, Vol. 17 (1973) 52–61.

T. KURIYAMA, Some Legal Aspects of the Japan-China Joint Communiqué, Japanese Annual of International Law, Vol. 17 (1973) 42–51.

P. BURSCHIK and B. KAUFMANN, Die VR China und die Taiwan-Frage, Asien, Afrika, Lateinamerika, Vol. 3 (1975) 621–638.

M. PENG and Z. HUANG, The Legal Status of Taiwan (1976) [in Japanese].

V.H. LI, De-Recognizing Taiwan: The Legal Problems (1977).

Z. CHEN, The Legal Status of Taiwan and Penghu, in: Z. Chen, Articles in International Law (1978) 1–49 [in Chinese].

S. MIYAZAKI, The Nationality of Inhabitants of the Renounced Territory Formosa, Horitsu Ronso, Vol. 51, No. 1 (1978) 37–70 [in Japanese].

D. SCHEFFER, The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China, Harvard ILJ, Vol. 19 (1978) 931–1009.

J. CRAWFORD, The Creation of States in International Law (1979).

C. GABLE, Taiwan Relations Act: Legislative Re-Recognition, Vanderbilt Journal of Transnational Law, Vol. 12 (1979) 511–532.

V.H. LI, The Law of Non-Recognition: The Case of Taiwan, Northwestern Journal of International Law and Business, Vol. 1 (1979) 134–162.

J. CHENG, Normalization of Sino-Japanese Relations: China's Bargaining Position Regarding the Taiwan Question, Asia Quarterly (1980) 245–272.

R. HEUSER, Taiwan und Selbstbestimmungsrecht, ZaöRV, Vol. 40 (1980) 31–75.

J. JACOBS, Taiwan 1979: "Normalcy" after "Normalization", Asian Survey, Vol. 20 (1980).

A. MANIN, Taiwan: Nouveaux aspects juridiques, AFDI (1980) 141–174.

A. SHEIKH, The United States and Taiwan After Derecognition: Consequences and Legal Remedies, Washington and Lee Law Review, Vol. 37 (1980) 323–341.

H. CHIU, The International Law of Recognition and Multi-System Nations. With Special Reference to the Chinese Case, Chinese Yearbook of International Law and Affairs, Vol. 1 (1981) 1–16.

R. CLOUGH, Taiwan's International Status, Chinese Yearbook of International Law and Affairs, Vol. 1 (1981) 17–34.

J. GRAY, International Agreements: United States – Taiwan Relations, Harvard ILJ, Vol. 22 (1981) 451–457.

J. JAVITS, Congress and Foreign Relations: The Taiwan Relations Act, Foreign Affairs, Vol. 60 (1981) 54–62.
R. KRYS, The Taiwan Relations Act Adopted by the Congress of the United States, Revue de Droit International, de Science Diplomatiques et Politiques, Vol. 59 (1981) 89–105.
A. MANIN, Divided Nations and International Law: The Case of Taiwan, in: H. Chiu and R. Downen (eds.), Multi-System Nations and International Law (1981) 160–166.
R.S. RANDOLPH, The Status of Agreements between the American Institute in Taiwan and the Coordination Council for North American Affairs, International Lawyer, Vol. 15 (1981) 249–262.
L. SHEN, The Taiwan Issue in Peking's Foreign Relations in the 1970s, Chinese Yearbook of International Law and Affairs, Vol. 1 (1981) 75–96.
L. WOLFF and D. SIMON (eds.), Legislative History of the Taiwan Relations Act (1982).
T. CHEN, Some Legal Problems in Sino-US Relations, ColJTransL, Vol. 22 (1983) 41–60.
G.T. HSIAO, The Legal Status of Taiwan in the Normalization of Sino-American Relations, Rutgers Law Journal, Vol. 14 (1983) 839–913.
H. ZHANG, The United States "Taiwan Relations Act" Viewed against International Law, Selected Articles from Chinese Yearbook of International Law (1983) 189–203.
H. CHIU, The Use of International Law in Communist Chinese Treaty Negotiations and Implementation – Four Case Studies with the United States, Issues and Studies (1984) 37–56.
D.S. CHOU, The International Status of the Republic of China, Issue and Studies (1984) 11–21.
K. CHRISTIANSEN, Self-Determination for the People of Taiwan, California Western International Law Journal, Vol. 14 (1984) 471–500.
B. WENG, Taiwan's International Status Today, China Quarterly (1984) 462–480.
L. ZHAO, The Main Legal Problems in the Bilateral Relations Between China and the United States, International Law and Politics, Vol. 16 (1984) 543–565.
G. CHAPS, The "Two-China" Problem and the Olympic Formula, Pacific Affairs, Vol. 58 (1985) 473–490.
T. FENG, Studies on the Problem of the International Legal Status of Taiwan (1985) [in Chinese].
A. WU, "One Country, two Systems": A Model for Taiwan?, Issues and Studies, Vol. 21 (1985) 33–59.
S.K. YU, Republic of China's International Status as Exemplified by the Taiwan Relations Act, in: Y.S. Wang (ed.), The China Question – Essays on Current Relations between Mainland China and Taiwan (1985) 50–71.
T.R. CHAI, The Future of Taiwan, Asian Survey, Vol. 26 (1986) 1309–1323.
J. SHEN, The Taiwanese Authorities have no Right to Institute Legal Proceedings in Japanese Courts, Guoji wenti yanjiu, No. 3 (1987) 4–19 [in Chinese].
T. LEE, Quasi-Diplomatic Relations of the Republic of China: Their Development and Status in International Law, Issues and Studies, Vol. 24 (1988) 104–117.
W. BADER and J. BERGNER (eds.), The Taiwan Relations Act: A Decade of Implementation (1989).
R. HEUSER, Zur Rechtsstellung des de facto Régimes im Völkerrecht. Die "Kokaryo"-Entscheidung des OLG Osaka, ZaöRV, Vol. 49 (1989) 335–342.
Y. TAKANO, The Kokaryo Case and International Law, Hanrei-jihō, No. 1301 (1989) 3–9 [in Japanese].

ROBERT HEUSER

TANGIER

1. History up to 1923

At the beginning of the 20th century the civic administration of Tangier was internationalized owing to the strategic position of the city and its hinterland (about 350 square kilometres) and to the interest of the → great powers in preserving free access to the Mediterranean.

The ancient Roman city of Tingis had been a Byzantine possession and was already the most important city in north-west Africa at the time of the Arab conquest in 682. The Portuguese took possession of the city in 1471 in the course of their expansion in North Africa, continuing their administration during the Portuguese-Spanish union (1580 to 1640). In 1661 the territory fell to England as the dowry of Princess Catherine of Braganza when she left Portugal to marry Charles II. England abandoned the city in 1684 after the destruction of the fortress, and established a base in → Gibraltar in 1704. As the years went by, the Sultan of Morocco was forced to grant concessions for the protection of the Europeans settled there, for example in the Franco-Moroccan treaty of August 19, 1883 (BFSP, Vol. 66, p. 734), to which other States acceded. Since these rights were also claimed on behalf of native residents in European service (Madrid Treaty of July 3, 1880; BFSP, Vol. 71, p. 639), the sherif government strove to restrict the number of privileged persons, although revision was not achieved until the Tangier Convention of 1923.

As early as 1792 questions relating to health protection for Europeans had been in the charge of a *conseil sanitaire*, its instructions having to be approved by the sultan. The *commission d'hygiène* set up in 1870 consisted of 26 members, of whom

10 were appointed by the legations. The 1923 convention provided for it to cease its activities, but this was prevented by the protests of Italy and the United States. The commission finally expired under Spanish occupation for lack of funds. Morocco's efforts to cut back similar special European rights in this region can also be seen in her taking over the nearby lighthouse of Cape Spartel. The international administrative authority set up under the treaty of May 31, 1865 (BFSP, Vol. 55, p. 16), and revived after the Spanish occupation, ended its activities through transfer to Morocco under the protocol of March 31, 1958 (UNTS, Vol. 320, p. 104). The postal and news services run by the European powers (Great Britain from 1857, France from 1860, Spain from 1861, Germany 1899 to 1914) did not close down until after 1956, although Morocco had joined the → Universal Postal Union in 1920. The delimitation of French and Spanish interests in Morocco also included the territorial boundaries of the Tangier area, as laid down under the treaty of November 27, 1912 (BFSP, Vol. 106, p. 1025).

2. The International Régime from 1923 to 1956

In 1913 a Franco-British-Spanish committee began drafting a treaty for the joint administration of Tangier, resuming work again after World War I. The process was concluded with the adoption of the convention of December 18, 1923 after the Tangier conferences of London (June 1923) and Paris (October 1923) (BFSP, Vol. 117, p. 117; p. 499).

The fundamental principles of the Tangier Statute were the recognition of the → sovereignty of the sultan, lasting neutrality, → demilitarization, free trade and movement of capital while retaining fiscal jurisdiction, replacement of capitulations by a joint court and the equal rights of all signatory powers. Despite all changes in detail, these principles prevailed until 1956, even after Spain's unilateral administration from 1940 to 1945. The sultan was represented by the *mendoub*, who was responsible for the administration of the indigenous population and presided over the legislative assembly, although without the right to vote. The latter comprised 26 members (27 in 1928, 30 in 1945) with a four-year term of office, 17 of them (later 21) being appointed by the consulates of the signatory powers from the foreign settlers and 9 by the *mendoub* from among the Moroccan and Jewish populations. The observance of the statute was supervised by a control commission made up of the consuls of the signatory powers and chaired by one of them for a year in the alphabetical order of his country. This commission had the right to veto the laws and regulations decided by the legislative assembly. The decisions taken in this way by the assembly were carried out by an administrator, supported initially by four and later by six top-level civil servants of agreed nationality. Other administrative bodies were a customs authority, a port commission, a debt management department and a police troop under a Belgian commander. A joint court made up of British, French and Spanish judges administered justice for the citizens of the signatory powers and those under their protection.

After the accession of Belgium, the Netherlands, Portugal and Sweden, the statute took effect on July 1, 1924 and was applied from June 1, 1925. Yet Italy felt by-passed and Spain's expectations were disappointed, and so they both sought a revision of the convention. This ensued with the final protocol of July 25, 1928 (BFSP, Vol. 128, p. 449), adopted by all the signatories to the 1923 convention, again without the United States. On further pressure from Spain, France made new concessions in the agreement of November 13, 1935 (BFSP, Vol. 130, p. 285).

In the → Spanish Civil War General Franco respected the neutrality of Tangier, the adjacent Spanish zone of Morocco serving as a base for operations. However, taking advantage of the military situation, Spain invaded the city on June 13, 1940. The legislative assembly and control commission were dissolved on November 3, 1940; all administrative authorities were taken over, including the lighthouse, and annexed to the Spanish North Zone. A German consulate-general was opened in 1941, but closed again in February 1944, when measures were taken against German nationals and German property. Due to the collapse of the Axis powers the Spanish position likewise became untenable. The Anglo-French agreement of August 31, 1945 (BFSP, Vol. 145, p. 881) for the restoration of the international régime was concluded at the Paris conference in August

1945, attended by France, Great Britain, the Soviet Union and the United States, but not by Italy and Spain. Spain had to withdraw her troops on November 10, 1945 and was excluded from the joint administration.

3. The Period after 1945

The Moroccan independence movement in the country and in Tangier was also promoted by general developments. On April 11, 1947 the sultan publicly spoke of freedom for his country, on the occasion of the first State visit by a sultan during the international régime. On April 19, 1951 the four groups of Moroccan nationalists concluded the so-called pact of Tangier to free it from foreign rule. Owing to repeated unrest, however, Spanish police from the North Zone had to be called in to help in April 1952. Spain was then brought back into the administration under a Franco-British agreement of November 10, 1952 (UNTS, Vol. 214, p. 255), thereby restoring the situation which had prevailed between 1923 and 1928.

In the following years Morocco received full independence, sealed by the Franco-Moroccan treaty of March 2, 1956 (BFSP, Vol. 162, p. 958) and the Spanish-Moroccan treaty of April 7, 1956 (BFSP, Vol. 162, p. 1017). The signatory powers accordingly signed a protocol on July 5, 1956 (BFSP, Vol. 162, p. 816) regarding a transitional régime, followed by the protocol of October 29, 1956 (BFSP, Vol. 162, p. 1038). After that, the international administration was gradually dismantled, the position of administrator being taken over by the *mendoub*, who was raised to the rank of governor. On August 26, 1957 (BFSP, Vol. 163, p. 431) the sultan unilaterally decreed the so-called Charter of Tangier, declaring the end of the international régime and initially granting it freedom of trade and foreign exchange for the "province of Tangier". The administrative and economic integration of Tangier into Moroccan sovereign territory was continued and confirmed on the introduction of a new currency by the *dahir* of October 17, 1959 (Bulletin officiel, 1959, p. 1766). After the lifting of the customs barrier between Tangier and the surrounding territory by the *dahir* of April 11, 1960 (Bulletin officiel, 1960, p. 866), the Moroccan legislation was gradually introduced by vizierial decree. The feared economic and trade decline was countered by the establishment of a free trade zone and other measures.

L. DELOUCHE, Statut international du Maroc (1912).
E. ROUARD DE CARD, Le Statut de Tanger d'après la Convention du 18 décembre 1923 (1925).
M.D. MERRY, Tánger, Tratados Códigos, Leyes e Jurisprudencia de la Zona Internacional (1950).
G.H. STUART, The International City of Tangier (1955).
G. CASTELLANI PASTORIS, Sviluppi e conclusione della questione di Tangeri (1964).

OTTO STEINER

TIBET

Geographically, Tibet covers a vast and sparsely populated area north of the Himalayas, consisting largely of high plateau. Lhasa, the capital, is the only town of any size in the whole of Tibet. The Tibetan people are related to, but distinct from, the Mongols in race and language, but the most striking feature of Tibetan society is the manner in which religion has shaped its history.

Buddhism was introduced into Tibet from India in the seventh century, but in its developed form Tibetan Buddhism differed from Mahayana Buddhism in several very important respects. The monastic life is central to the practice of Buddhism in Tibet, and the many monasteries played a crucial role in the functioning of Tibetan society, since they were far more than mere religious houses and served also as forts, granaries, centres of education and guardians of Tibetan culture. Doctrinally the most important tenet of Tibetan Buddhism, or Lamaism, is the belief in the reincarnation of the spirit of Living Buddhas in successive grand lamas, and in particular the reincarnation of the Bodhi-sattva Chenrezi in the Dalai Lama. With State and religion being virtually identified in Tibetan society, the Dalai Lama has always held supreme temporal power as well as supreme religious authority for Tibetan Buddhists.

At the height of their secular power in the ninth century the Tibetans ruled large areas of Western China, as well as → Bhutan, → Sikkim and Nepal, but were themselves under Mongol rule for

several centuries after that. It was the Mongols who established the position of Lhasa as the greatest centre of Lamaism and who, in 1577, created the title of Dalai Lama.

For the purposes of international law, the modern history of Tibet really begins in 1720 when the Emperor of China, having defeated a Dzungarian invasion of Tibet and rescued the Dalai Lama from personal captivity, concluded an agreement with the Dalai Lama by which Tibet became in some sense a vassal or feudatory of the Manchu Emperor. It is impossible to define the incidents of this relationship in modern legal terms: the most likely view seems to be that it was in the nature of a personal bond by which the Dalai Lama acknowledged the authority of the Emperor. It is unclear to what extent Tibet was surrendering her autonomy to China.

It is true that from 1720 until well into the nineteenth century the Chinese Ambans (residents) generally exercised some authority in the running of Tibetan affairs. However, instances can also be found of Tibet acting independently of China even in foreign affairs, as when, in 1856, Tibet concluded a treaty with Nepal following a Nepalese invasion of Tibet. When the British sought to establish trade relations between India and Tibet in 1873, the view was taken that authority lay with the Chinese in such a matter. Accordingly, a treaty was concluded with China on September 13, 1876, by which it was agreed that China would make the necessary arrangements for a British mission to visit Tibet. In fact, Tibet refused to recognize the treaty and the British did not attempt to enter the country.

In 1886 Tibetan troops advanced into Sikkim, which was under British control, and British → protests to China again proved ineffective. Nevertheless, following the expulsion of the Tibetan forces, Britain maintained her policy of dealing only with China in matters affecting Tibet and concluded the Convention of March 17, 1890 setting out the → boundary between Sikkim and Tibet. On December 5, 1893 Britain and China agreed on Trade Regulations which purported to open Tibet to British trade. As before, the Tibetans refused to implement the agreement and declined to enter into negotiations; Britain, therefore, accepting the fact of Chinese ineffectiveness in Tibet, sent a military mission under Younghusband to Lhasa in 1904, which forced the Tibetans to agree to respect the 1890 Convention and the 1893 Trade Regulations which were appended to it. This Convention of September 7, 1904 between Britain and Tibet was expressly recognized and confirmed by China in the Sino-British Convention of April 27, 1906.

The implications of these events for the legal status of Tibet are far from clear. In the Convention of August 31, 1907 between Great Britain and Russia relating to Persia, Afghanistan and Tibet, the parties recognized the "suzerainty" of China over Tibet and agreed not to deal with Tibet except through the Chinese Government. It seems probable, however, that this was intended merely as a diplomatic formula to keep Russia out of Tibet and that "suzerainty" was a conveniently imprecise term without real legal substance. In any event, of course, nothing in the 1907 Convention could bind either Tibet or China as they were not parties to it.

On April 20, 1908 further Trade Regulations for Tibet were signed by Britain and China, which appeared to indicate that China had succeeded in reasserting her authority in Tibet. Soon afterwards China began to use military force to implement a policy of incorporating Tibet as a province of China. In 1910 the Dalai Lama fled to India, but the 1911 revolution in China and the fall of the Manchu Dynasty led to the collapse of the Chinese operation in Tibet and the expulsion of the Chinese forces. By 1912 Tibet was *de facto* independent of China, and concluded a treaty with Mongolia whereby each recognized the other's independence.

China, however, continued to regard Tibet as a province and sought to subdue Tibet by force. In 1913 Britain invited China and Tibet to a tripartite conference at Simla with a view to settling the border between Tibet and India. A draft convention adopting the so-called McMahon Line as the → boundary was initialled by all three representatives, but the Chinese refused to sign or ratify the Convention, which was therefore signed, on July 3, 1914, by Britain and Tibet alone. The Convention again referred to China's suzerainty over Tibet, but contained an undertaking that China would not convert Tibet into a Chinese province – an apparent denial of Tibetan inde-

pendence which is impossible to reconcile with the objective situation of Tibet at the time.

Between 1914 and 1950 Tibet resisted numerous attempts by China to persuade or coerce her into becoming a province of China and maintained her independent identity. In 1950 the government of the People's Republic ordered the invasion of Tibet and took control of the country. On May 23, 1951, an Agreement on Measures for the Peaceful Liberation of Tibet was signed in Peking. It provided that "the Tibetan people shall return to the big family of the Motherland – the People's Republic of China" with the right of "exercising national regional autonomy under the unified leadership of the Central People's Government", or in other words that Tibet should cease to have an independent existence. The Agreement also guaranteed that the existing political system, the status, functions and powers of the Dalai Lama, religious freedom and the monasteries would not be affected.

The overwhelming weight of evidence points to the fact that the Chinese authorities have systematically pursued a policy aimed not at protecting religion and the existing system in Tibet but at eradicating them. In 1959, after an armed uprising, the Potala Palace came under shell fire and the Dalai Lama fled to India where he was granted political → asylum. Since then the → United Nations General Assembly has passed resolutions calling for the cessation of practices which deprive the Tibetan people of their fundamental → human rights and freedoms. Not surprisingly, the People's Republic of China maintains that Tibetan affairs are within China's → domestic jurisdiction, though this of course does not preclude discussion of human rights issues in the General Assembly.

Since 1980 the People's Republic of China has been seeking to prepare the ground for the eventual return of the Dalai Lama to Tibet as spiritual leader. Representatives of the Dalai Lama have visited Tibet, but the execution by the Chinese authorities in 1983 of a number of political dissidents in Tibet caused consternation among the Dalai Lama's followers and in March 1989 martial law was imposed following wide-spread riots around the 30th anniversary of the uprising. As a result, it does not now seem likely that the Dalai Lama will return in the near future, and even if he did, it would not be on the basis that legal independence was thereby being restored to Tibet.

C. BELL, Tibet Past and Present (1924).
C.H. ALEXANDROWICZ-ALEXANDER, The Legal Position of Tibet, AJIL, Vol. 48 (1954) 265–274.
T.-T. LI, The Legal Position of Tibet, AJIL, Vol. 50 (1956) 394–404.
G. SCHULEMANN, Geschichte der Dalai Lamas (1958).
International Commission of Jurists, The Question of Tibet and the Rule of Law (1959).
International Commission of Jurists, Tibet and the Chinese People's Republic (1960).
K.K. RAO, The Sino-Indian Boundary Question and International Law, ICLQ, Vol. 11 (1962) 393–404.
H.E. RICHARDSON, A Short History of Tibet (1962).
A. LAMB, The McMahon Line. A Study in the Relations between India, China and Tibet, 1904–1914 (1966).
D.A. McCABE, Tibet's Declaration of Independence, AJIL, Vol. 60 (1966) 369–371.
TSEPON W.D. SHAKABPA, Tibet: A Political History (1967).
A.P. RUBIN, The Position of Tibet in International Law, The China Quarterly, No. 35 (July – September 1968) 110–154.
M.C. VAN WALT VAN PRAAG, The Status of Tibet (1987).
W. LEDGER, The Chinese and Human Rights in Tibet, a Report to the Parliamentary Human Rights Group, House of Commons, London (1988).

A.D. HUGHES

TORRES STRAIT

The Torres Strait lies between Cape York, the most northerly part of the Australian mainland, and Papua New Guinea, which ended its status as an Australian → protectorate and attained independence in 1975. Up until this time, an imprecise "border" between the countries, established by an 1879 Royal Proclamation (BFSP, Vol. 70, p. 543), had led to Australian → sovereignty extending over virtually all → islands in the → Strait, including the major inhabited islands of Boigu, Dauan and Saibai which lie within metres of the Papua New Guinean coast. The Torres Strait islanders, who still maintain many traditional activities, are ethnically distinct from both the mainland Australian Aboriginal and Papua New Guinean populations.

As Papua New Guinea moved towards independence, it was clear that the new State would not accept the historically anomalous 1879 border, partly because it wished to preserve the fishing

industry operating off the Papuan coast. However, Australia recognized the need to preserve the traditional way of life of the indigenous Torres Strait islanders, who expressed a wish not to be transferred to Papua New Guinea. In addition, Australia's federal constitutional structure constrained any transfer of territory to Papua New Guinea.

The 1978 Treaty delimiting the maritime boundaries between the two countries dealt with these concerns in a unique fashion (→ Maritime Boundaries, Delimitation). Under its provisions, Australia retains its three-mile → territorial sea, as well as sovereignty over the islands of Boigu, Saibai and Dauan and each island's three-mile territorial sea. A sea-bed jurisdiction line demarcates sovereign rights over → continental shelf mineral resources. This delimitation consists basically of a mainland-to-mainland median line taking into account to some extent the division of sovereignty over islands in the Strait. A fisheries jurisdiction line coincides with the sea-bed jurisdiction line except in the centre of the Strait where it runs to the north of the islands of Boigu, Dauan and Saibai (→ Fishery Zones and Limits).

Within the "hat shaped" area formed by the deviation of sea-bed and fisheries lines, "residual jurisdiction" (→ Maritime Jurisdiction), defined to include preservation of the → marine environment, scientific → marine research and the production of energy from water, currents and winds (Art. 4(4)), is to be exercised only with the concurrence of the other party.

Innovative is the creation of a Protected Zone covering virtually the whole of the Strait, in which each party shall permit freedom of movement by the traditional inhabitants without normal border checks (→ Border Controls), and the performance of traditional fishing, marketing, religious and social activities (Art. 11).

Traditional fishing is to have priority over Protected Zone commercial fisheries, the latter being defined to include sedentary species (Art. 20(1); → Fisheries, Sedentary). The parties are to determine jointly the allowable catch of these commercial fisheries (Art. 23(2)), which shall be distributed between the parties according to a complicated formula (Art. 23(4) to (8)). Licences for Protected Zone commercial fisheries may only be granted to nationals of third States with the consent of both parties (Art. 27(2)).

Enforcement of fishery laws applicable in the Protected Zone is related to the nationality of the violating vessel or person concerned (Art. 28(6)). Provision is made for handing over offenders and evidence to the other party where apprehension is made by the party in whose area of jurisdiction the offence occurred and the person apprehended is a national of the other party (→ Extradition; → Extradition Treaties).

The parties are also bound to take action, including legislative measures, to minimize marine pollution in the Protected Zone, including that from land-based sources (Art. 13), and to protect indigenous species of fauna and flora (Art. 14). Mining and drilling of the sea-bed in the Protected Zone is banned for a period of ten years (Art. 15).

Finally, the treaty provides for freedom of transit for international navigation (Art. 7; → Navigation, Freedom of) and the establishment of an advisory and consultative body, the Torres Strait Joint Advisory Council, on which representatives of the traditional inhabitants find a place (Art. 19).

The Torres Strait Treaty shows that by a differentiation between sea-bed, fisheries and territorial jurisdictions, satisfactory solutions may be negotiated for disputes involving complex ocean boundary delimitations. Success in protecting the traditional life-style and environment of the islanders remains dependent upon the enactment and effective administration of national legislation implementing the rights conferred on the indigenous population by the Treaty. In 1984 the Australian Parliament passed the Torres Strait Fisheries Act which gave effect to the provisions of the Torres Strait Treaty concerning fisheries. The Act gives the Minister a broad discretion in relation to the granting of licences for commercial fishery and fishery carried on by traditional inhabitants. Maintaining a reasonable balance between commercial and traditional fishing will be crucial in the future administration of the Treaty.

Treaty between Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as Torres Strait, and Related Matters,

December 18, 1978, ILM, Vol. 18 (1979) 291–331; Australian Treaty Series 1985 No. 4.

An Act relating to Fisheries in Certain Waters between Australia and the Independent State of Papua New Guinea of April 26, 1984 (Torres Strait Fisheries Act 1984), Acts of the Parliament of the Commonwealth of Australia (1984 I) Act No. 23, p. 305.

K.W. RYAN and M.W.D. WHITE, The Torres Strait Treaty, Australian YIL, Vol. 7 (1976–1977) 87–113.

H. BURMESTER, The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement, AJIL, Vol. 76 (1982) 321–349.

PETER LAWRENCE

TRIESTE

1. The Peace Treaty of 1947

The Peace Treaty of Paris of February 10, 1947 (→ Peace Treaties of 1947) between the Allied and Associated Powers, on the one hand, and Italy, on the other, contained a special régime concerning the Free Territory of Trieste, which was to be established under Art. 21 (see → Free Cities). The territorial clauses of the Treaty provided further for the fixing of the frontier between Italy and the Free Territory (Art. 4) and between Yugoslavia and the Free Territory (Art. 22). Annexes VI to X to the Peace Treaty were intended to establish a general juridical status for Trieste as a territory governed by an international → government, supervised by the → United Nations. These annexes provided for a permanent statute of the Free Territory, a provisional régime, as well as a free → port, and contained additional provisions on matters of technical and economic importance.

The Peace Treaty also contained political clauses (Arts. 19 and 20) which provided for legislation on minority rights (→ Minorities), → nationality and the right of option (→ Option of Nationality). Annex VI contained additional political clauses concerning the integrity and independence of the Free Territory, the international status of which was assured by the → United Nations Security Council (Art. 2; → Guarantee Treaties), and its "demilitarization and neutrality" (Art. 3; → Demilitarization; → Neutralization). This annex also provided, in Art. 6, that Italian citizens in the Free Territory "shall become original citizens . . . with full civil and political rights . . . [and] shall lose their Italian citizenship". However, such persons were entitled to opt for Italian citizenship within a fixed period.

2. The London Memorandum

The juridical régime of the Peace Treaty concerning the Free Territory of Trieste never developed into an effective organization with independent status. This régime was already suspended when the Security Council failed to reach agreement on the election of a governor as the representative of the United Nations and as high-authority for the Free Territory, as provided for in the Treaty. Pending the assumption of office by a governor, the "Territory" was to be jointly and temporarily administered under the command and control of the Allied Military Government. The United Kingdom and United States military authorities administered so-called Zone A, which consisted of 210 square kilometres including the city of Trieste and its municipalities. The commander of the Yugoslavian forces, also a temporary military occupant, administered so-called Zone B, which entailed 523 square kilometres including Capodistria, Buia, Cittanova and other minor cities. Zone B was virtually incorporated into Yugoslavia (see UN Doc. S/707, March 31, 1948, SC OR (3rd year) Supp. for August 1948).

The Governments of the United Kingdom and the United States later decided to terminate the Allied Military Government and to relinquish the administration of Zone A to the Italian Government, having in mind the predominantly Italian character of the Zone (see Joint Statement, October 8, 1953, BFSP, Vol. 160 (1953) p. 374). The United Kingdom and the United States subsequently intervened in the form of the Memorandum of Understanding of October 5, 1954 (UNTS, Vol. 235, p. 99) to promote the territorial division of the Free Territory between Italy and Yugoslavia. The 1954 instrument expressly provided for the following: (i) The termination of the military government in Zones A and B of the Free Territory by the three occupying powers; (ii) the redefinition of territorial boun-

daries, i.e. the so-called "boundary adjustment", through demarcation lines to be decided by appointment of a "Boundary Commission" (→ Boundaries); and (iii) the extension of Italian administration to Zone A and Yugoslavian civil administration, replacing the Yugoslavian military occupation, to a newly defined Zone B.

The London Memorandum represented an attempt to put the Trieste problem in the larger context of an overall Italo-Yugoslavian "rapprochement". Especially the United States and the United Kingdom were not thinking in terms of a local settlement, or even of Italo-Yugoslavian relations alone, but rather of the key political and military nature of this area of the Mediterranean (→ Balkan Pact 1953/1954). In this larger context, the Memorandum of London does not comprise a single document or unique agreement, but rather a series of agreements concerning particular points which include social and economic matters (see e.g. Arts. 5 to 8 on minorities and local border traffic, and Annex II containing a special statute concerning minorities.

3. *Problems of Sovereignty under the Peace Treaty and the London Memorandum*

The basic juridical question flowing from the coordination and interpretation of the territorial clauses of the Peace Treaty and the London Memorandum concerns the attribution of → sovereignty over the Free Territory. In Art. 21, the Peace Treaty contains an explicit and unconditional relinquishment of sovereignty on the part of Italy in the sense that Italian sovereignty would cease after 1947 upon the coming into force of the Treaty. However, this transfer of sovereignty would have required the factual establishment of the Free Territory. For this reason, both State practice and legal doctrine have always favoured → recognition of the continuity of Italian sovereignty over Trieste, at least in Zone A of the territory, because of the practical incorporation of Zone B in the Yugoslav national régime. This approach is also supported by the London Memorandum, in which both the impossibility of putting into effect the related provisions of the Peace Treaty with Italy and the temporary power of the military occupants in Zone A (United Kingdom and United States) and in Zone B (Yugoslavia) were recognized.

From the general legal point of view, an occupier's authority must be exercised with respect to the purpose of the occupation, as limited by international law. In the case of Trieste, the occupation was aimed at entrusting the occupied territory to an international organization, under Art. 21 of the Peace Treaty, or to another State, under the London Memorandum.

The situation has not radically changed since the London Memorandum. The Memorandum utilized an unfortunate juridical provision concerning the nature of the Italian and Yugoslavian administrative authorities respectively in Zones A and B, whereby these authorities "extend their civil administration over the area for which they will have responsibility". However, "administration" is not "jurisdiction" and never "sovereignty" (→ Jurisdiction of States). In subsequent practice both States considered their respective Zone as an object of sovereign power, opening the door to legal scrutiny and speculation (see Note of April 16, 1974 by the Italian Government and Note of March 30, 1974 by the Yugoslavian Foreign Secretary).

4. *The Treaty of Osimo*

The recent Treaty of Osimo signed on November 10, 1975 (Gazzetta Ufficiale 1977, No. 77, p. 3), which entered into force on April 3, 1977, finally settled the problem of defining what territory was to belong to the Free Territory of Trieste by specifically demarcating the territory's new internal boundaries, as requested by the London Memorandum, and by including political clauses which reflect intensive cooperation regarding minorities and local economic traffic. This Treaty was ratified promptly and almost simultaneously by Italy and Yugoslavia, on May 14, 1977 and March 2, 1977 respectively; whereas the Memorandum of London, as an executive agreement, had not been ratified by Italy, but simply approved by Parliament, on October 8, 1954 in the Senato and on October 19, 1954 in the Camera dei Deputati.

The Treaty of Osimo seems to contain a reasonable solution to the problem of establishing a juridical and non-controversial régime for the

territory of Trieste. However, there is nothing in the provisions of the Treaty to support any of the views on the *de jure* situation derived from the previous agreements of Paris and London concerning the disputed "cession" of Italian sovereignty over Zone B. On the contrary, the new agreement appears to have been drafted in such a way as to avoid, on the one hand, any reference to the conflicting national standpoints and, on the other hand, to confirm the *de facto* situation which exists in respect of the State frontiers between Italy and Yugoslavia.

Treaty of Peace with Italy, February 10, 1947, UNTS, Vol. 49 (1950) 126–235.

Memorandum of Understanding regarding the Administration in Zone A of the Free Territory of Trieste, May 9, 1952, UNTS, Vol. 168 (1953) 65–74.

Memorandum of Understanding between the Governments of Italy, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia regarding the Free Territory of Trieste, October 5, 1954, UNTS, Vol. 235 (1956) 99–119.

Traité entre la République Italienne et la République socialiste fédérative de Yougoslavie, November 10, 1975, Gazzetta Ufficiale della Repubblica Italiana (G.U.) No. 77 of March 21, 1977, 3–150.

Accord sur la promotion de la coopération économique entre la République Italienne et la République socialiste fédérative de Yougoslavie, November 10, 1975, G.U. No. 77 of March 21, 1977, 151–189.

Acte finale, November 10, 1975, G.U. No. 77 of March 21, 1977, p. 190.

Exchange of Notes dated November 10, 1975, between Italy and Yugoslavia, G.U. No. 77 of March 21, 1977, 191–192.

M. ZOLI, Trieste e la Regione Giulia nella ricostruzione europea (1946).

J. LEPRETTE, Le statut international de Trieste (1949).

B. CONFORTI, L'attuale situazione giuridica del territorio di Trieste, RivDirInt, Vol. 38 (1955) 568–583.

V. CRISAFULLI, Principi generali e ordinamento vigente a Trieste, Rivista Trimestrale di Diritto Pubblico, Vol. 5 (1955) 189–212.

L. TONCIC-SORINJ, Das Schicksal Triests. Seine Bedeutung und Stellung in Vergangenheit und Gegenwart, Europa-Archiv, Vol. 10 (1955) 7461–7482.

C.A. CAILLIER, Questions d'histoire diplomatique: le problème de Trieste et de son territoire libre (1956).

M. UDINA, Gli accordi per Trieste, in: Scritti di Diritto Internazionale in onore T. Perassi, Vol. 2 (1957) 335–352.

F. CAPOTORTI, Ancora sullo status giuridico di Trieste, Foro Italiano, Vol. 87 (1962 IV) 113–120.

J.B. DUROSELLE, Le conflit de Trieste 1943–1954 (1966).

M. UDINA, Scritti sulla questione di Trieste sorta in seguito al secondo conflitto mondiale ed i principali atti internazionali ed interni ad essa relativi (1969).

B. NOVAK, Trieste 1941–1954. The Ethnic, Political and Ideological Struggle (1970).

J. JERI, The Special Statute (Annex to the London Memorandum of Understanding) and Some Elements of the Legal Situation of the Slovenian Ethnic Group in Italy and of the Italian in Yugoslavia (1974).

G. BATTAGLINI, Amministrazione e sovranità nell'ex Territorio libero di Trieste (in margine a una attuale controversia), in: Studi in onore di Manlio Udina, Vol. 1 (1975) 71–156.

F. FLORIO, Sulla delimitazione del Golfo di Trieste fra Italia e Jugoslavia, in: Studi in onore di Manlio Udina, Vol. 1 (1975) 299–330.

G. CAGGIANO, Some Reflections on the Treaty of Osimo between Italy and Yugoslavia, ItalYIL, Vol. 2 (1976) 248–272.

J. CAMPBELL, Successful Negotiation: Trieste 1954 (1976).

L. TONCIC-SORINJ, Triest – Symbol der Pax Adriatica, Europa-Archiv, Vol. 31 (1976) 571–574.

B. VUKAS, Solution définitive de la question de Trieste par la conclusion des accords entre l'Italie et la Yougoslavie à Osimo (Ancona) le 10 novembre 1975, AFDI, Vol. 22 (1976) 77–95.

S. BARTOLE, Tutela della minoranza linguistica slovena ed esecuzione del Trattato di Osimo, RivDirInt, Vol. 60 (1977) 507–525.

G. CONETTI, La cooperazione economica italo-jugoslava secondo gli accordi di Osimo del 1975, RivDirInt, Vol. 60 (1977) 442–466.

G. COX, The Race for Trieste (1977).

F. FLORIO, Problemi della frontiera marittima nel Golfo di Trieste, RivDirInt, Vol. 60 (1977) 467–484.

A. SINAGRA, Problemi di cittadinanza e di indennizzi nel Trattato italo-jugoslavo di Osimo del 1975, RivDirInt, Vol. 60 (1977) 485–506.

M. UDINA, Gli accordi italo-jugoslavi di Osimo del 10 novembre 1975, RivDirInt, Vol. 60 (1977) 405–441.

A. JELIC, The Osimo Treaties, Jugoslovenska Revija za Medjunarodno Pravo, Vol. 25 (1978) 146–164.

B. BONAMORE, Disciplina giuridica delle istituzioni scolastiche a Trieste e Gorizia. Dalla monarchia austro-ungarica al Governo militare alleato e dal memorandum di Londra al Trattato di Osimo (1979).

F. SMETS, Rijeka – Triest: Die Verlagerung eines italienisch-jugoslawischen Konfliktes, Thesis, University of Munich (1979).

E. SPATAFORA, Le frontiere dell'Italia (1979) 155–230.

M. UDINA, Gli accordi di Osimo (lineamenti introduttivi e testi annotati) (1979).

E. KLEIN, Statusverträge im Völkerrecht, Rechtsfragen territorialer Sonderregime (1980) 39–42.

D. DE CASTRO, La questione di Trieste. L'azione politica e diplomatica italiana dal 1943 al 1954, 2 vols. (1982).

A. BOWMAN, Zone of Strain. A Memoir of the Early Cold War (1983).
A. DE ROBERTIS, Le Grandi Potenze e il confine giuliano 1941–1947 (1983).
A. CALAMIA, P. MENGOZZI and N. RONZITTI, I rapporti di vicinato tra l'Italia e Jugoslavia (1984).

MASSIMO PANEBIANCO

UNITED ARAB EMIRATES

1. *Introduction*

The United Arab Emirates (U.A.E.) is an independent sovereign Arab State. It is made up of the union of seven Emirates: Abu Dhabi, Dubai, Sharjah, Ajman, Om al-Quwain, Fujairah and Ras Al-Khaimah.

It is bordered by Qatar and the Arabian Gulf (→ Persian Gulf) in the North and North-West, Saudia Arabia in the West and South, and Oman and the Gulf of Oman in the East and North-East. The U.A.E. covers an area of 91 700 square kilometres and its population, which increased rapidly through immigration after the discovery of oil in 1958, totalled 1 040 000 according to the 1980 census. The population was estimated in 1985 at 16 million. Expatriates constitute the great majority of the total population. They include persons living in Iran, India, Pakistan, Bangladesh, other Arab countries and Europe.

The religion of the U.A.E. is Islam. Arabic is the national language.

2. *Historical Background*

(a) *Early history*

Alexander the Great was the first to appreciate the strategic importance of the Gulf region to international trade. In 323 B.C. he had plans for seizing it before sending his troops eastwards. The Sassanian Dynasty controlled the area until the rise of Islam in the seventh century A.D.

Under the influence of Islam the Gulf witnessed development in all aspects of life.

The area became the focus of attention of the European powers in the 16th century. Portugal set her sights on the Gulf area immediately after Vasco da Gama discovered the sea route to India. The Portuguese added full control of the trade in diamonds and pearls in the area to their control of trade with the East in the first decade of the 16th century. Their occupation of the area lasted for more than a century.

(b) *British occupation*

By 1617 the British East India Company had established itself in the Gulf, following its success in India. This marked the beginning of the British → hegemony in the area which would continue for the next two centuries.

Towards the end of the 19th century, France, Holland and other European countries showed increasing interest in the Gulf area, but it was the British who managed to replace the Portuguese and occupy the Gulf area after subduing fierce resistance from the Arab tribes of Bani Yas and Al-Qawasim. The destruction of Qawasim fortifications and the burning of the tribe's big ships by the British was followed by the signing in 1820 of a maritime treaty between the British and the Sheikhs of the coast of Oman (General Treaty with the Friendly Arabs, January 8, 1820, BFSP, Vol. 23, p. 1069). This treaty, which prohibited the building of big ships and fortifications along the coast, marked the start of British military and political domination in the Gulf. After 1853, when the British signed a maritime truce with the local rulers, the area came to be known as the "Trucial Coast", also called "Trucial Oman" (Treaty of Perpetual Peace (Maritime Truce) agreed upon between the Chiefs of the Arabian Coast under the Mediation of the British Resident in the Persian Gulf, May 4, 1853, BFSP, Vol. 58, p. 311).

In 1892 the British Political Resident signed yet another treaty with the Sheikhs, according to which Britain would control the Sheikdoms' foreign affairs and assume their defence. In addition the Sheikhs were prohibited from giving any concession other than to Britain and were left to handle domestic affairs (Treaties between Great Britain and Abu Dhabi, Ajman, Debai, Shargah, Ras-el-Khaimah and Umm-al-Kawain (Trucial Sheikhdoms of Oman), March 6, 7, 8, 1892, CTS, Vol. 176, p. 457).

The British occupation lasted until December 1971 (→ Decolonization: British Territories). All existing treaties between Britain and the Trucial States were replaced by the treaty of friendship between the United Kingdom and the newly

formed U.A.E. of December 2, 1971 (UNTS, Vol. 834, p. 273).

(c) Independence and establishment of the federation

The announcement of the United Kingdom's plans to withdraw from the area paved the way to → federalism (→ Confederations and Other Unions of States).

In 1968, Sheikh Zayed Bin Sultan of Abu Dhabi and Sheikh Rashid Bin Saed of Dubai agreed to federate their Emirates and invited the rulers of the other Emirates to join their efforts. The rulers of the seven Emirates that presently make up the U.A.E., and those of Bahrain and Qatar, agreed on February 28, 1968 to form a federation and proceeded to draft its constitution. However, Bahrain and Qatar later declared that they would not join the federation after the British evacuation. They proclaimed their independence in August and September 1971 respectively.

In July 1970, the rulers of six Emirates met in Dubai and agreed to establish a federal union among them bearing the name of United Arab Emirates. This federal union, which is the only existing federation in the Middle East, was declared on December 2, 1971. Later, in February 1972, the seventh Emirate (Ras Al Khaimah) joined the new federation.

The U.A.E. joined the Arab League (→ Arab States, League of) on December 1971 and the → United Nations in 1972. The U.A.E. is one of the → non-aligned States and a member of the → Organization of Petroleum Exporting Countries and of the → Organization of Arab Petroleum Exporting Countries. The U.A.E. has also joined with five other Arab Gulf States to form the Gulf Co-operation Council or Co-operation Council of the Arab Gulf.

(d) Discovery of oil

Until the discovery of oil in Abu Dhabi, the economy of the country was based mainly on trading, fishing and pearling (→ Pearl Fisheries). Today the economy is dominated by petroleum. Oil represents 95 per cent of the gross national product and 98 per cent of the country's exports. With the revision of oil prices in 1973, the country witnessed rapid economic development.

3. Constitution

The legal basis on which the seven Emirates were federated is the Provisional Constitution for the U.A.E., which took effect in December 1971. It was, however, agreed in December 1976 to extend the Provisional Constitution for another five years. Despite considerable and repeated efforts to draft a permanent federal constitution, the Provisional Constitution has since remained the basis for the federation.

The 152 articles of the Provisional Constitution are divided into ten parts. Part four deals with the organs of the federation, which consist of the following: the Supreme Council of Rulers, the President of the federation and his Deputy, the Council of Ministers, the Federal National Council, and the Federal Judiciary.

The highest federal authority is the Supreme Council of Rulers (Arts. 46 to 50), which consists of the rulers of the seven Emirates. The Supreme Council sanctions all laws and decrees before their promulgation, ratifies treaties, appoints judges of the Supreme Court and has ultimate control over the affairs of the federation. It elects the President and Vice-President of the federation for a renewable five-year period from among its members. Decisions of the Supreme Council on substantive matters are taken by majority of five members which must include the rulers of Abu Dhabi and Dubai. However, decisions on procedural questions are adopted by a simple majority vote (Art. 49).

The President is the highest executive authority of the State (Arts. 51 to 54). The President may also exercise legislative functions by issuing decrees between sessions of the Supreme Council (Arts. 113 to 115). He appoints the Prime Minister and the Council of Ministers (Arts. 55 to 67). Sheikh Zayed Bin Sultan of Abu Dhabi was the first President of the federation and was, as of 1988, still in office.

The Federal National Council (F.N.C.) is the legislature of the federation (Arts. 68 to 93). It consists of 40 members representing the various Emirates. Allocation of seats is according to wealth and importance: 8 seats each for Abu Dhabi and Dubai; 6 seats each for Sharjah and Ras Al-Khaimah; and 4 seats for each of the other Emirates.

Each Emirate freely determines the mode of

selecting its representatives to the F.N.C. The F.N.C. studies laws proposed by the Council of Ministers and can reject them or suggest amendments. The Federal Judiciary is composed of a Federal Supreme Court and Primary Federal Tribunals (Art. 95 of the Constitution and the Law of June 9, 1978 establishing the new federal courts). The Federal authorities exercise exclusive jurisdiction over a number of issues related to the strengthening of the federation, i.e. foreign affairs, defence and armed forces, security, finance, communications, traffic control, education, currency measures, standards and weights, nationality and emigration, union information, etc. (Arts. 120 and 121). However, each Emirate continues to regulate its local affairs independently (Arts. 116 to 118).

Ministry of Information and Culture, The United Arab Emirates, Annual Yearbook, 1982 - 1983 (1982).

J. NANO, Union of Arab Emirates, Beirut (1971) [in Arabic].

J.D. ANTHONY, The Union of Arab Emirates, Middle East Journal, Vol. 26 (1973) 271-287.

J.Z. KASSIM, The Arab Gulf, A Study of Modern History, 1945 - 1971 (1974) [in Arabic].

H.M. AL BAHARNAH, The Arabian Gulf States (1975).

S.M. IBRAHIM, Political and Constitutional Organization of the United Arab Emirates (1975) [in Arabic].

M.M. ABDULLAH, The Modern History of the United Arab Emirates (1978).

A. AL-TABTABAEI, The Federal Union of Arab Emirates, A Comparative Study (1978) [in Arabic].

S.H. AMNI, International and Legal Problems of the Gulf (1981).

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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND: DEPENDENT TERRITORIES

1. Notion

The United Kingdom of Great Britain and Northern Ireland is a unitary State, commonly referred to in international relations as the United Kingdom. The geographical land areas over which the United Kingdom exercises or claims to exercise sovereignty are divisible into three categories: first, the British Islands; second, the Dependent Territories; and third, the Sovereign Base Areas.

The British Islands comprise the following: the mainland of Great Britain (England, Wales and Scotland) and a large number of small islands off her shores; → Northern Ireland; the Channel Islands (divided into two Bailiwicks: the Bailiwick of Jersey, including the islets and reefs of the Minquiers and Ecrehos; and the Bailiwick of Guernsey, including the islets of Jethou and Lithou, Alderney and Sark); and, lastly, the Isle of Man (→ Channel Islands and Isle of Man).

The Dependent Territories are the following: Anguilla; Bermuda; the British Antarctic Territory (→ Antarctica); the British Indian Ocean Territory (comprising the Chagos archipelago of island groups, Diego Garcia being the only island of any size in the territory); the British Virgin Islands (comprising 36 islands, of which Tortola, Anegada, Virgin Gorda and Jost Van Dyke are the largest); the Cayman Islands (comprising Grand Cayman, Cayman Brac and Little Cayman); the → Falkland Islands (Malvinas); → Gibraltar; → Hong Kong; Montserrat; the Pitcairn Group of Islands (comprising Pitcairn, Henderson, Ducie and Oeno); St. Helena and its Dependencies (Ascension and Tristan Da Cunha); South Georgia and the South Sandwich Islands (sometimes known as the Falkland Islands Dependencies); and the Turks and Caicos Islands (comprising Grand Turk, South Caicos, East Caicos, North Caicos, West Caicos, Providenciales and numerous other islands).

The Sovereign Base Areas are those of Akrotiri and Dhekelia, two areas in the south of the island of → Cyprus.

2. Historical Development and Legal Status

(a) British Islands

Great Britain was formed in 1707 upon the union of Scotland with England and Wales (the latter having been an integral part of England since 1536). The union of Great Britain with Ireland took place in 1801. Ireland was partitioned in 1922, when the Irish Free State was formed as a self-governing Dominion, i.e. an independent State but still owing allegiance to the Crown and still within the Commonwealth (then known as the → British Commonwealth). In 1937 the Irish Free

State adopted a new constitution and became known as Eire, and in 1949 severed all connections with the Crown, became a Republic and left the Commonwealth. Following partition, six northern counties, commonly though inaccurately referred to as Ulster, remained part of what became the United Kingdom of Great Britain and Northern Ireland. The United Kingdom and the Republic of Ireland agreed the delimitation of the → continental shelf in the Irish and Celtic Seas in 1988 (UK-Republic of Ireland Agreement on Delimitation of Areas of the Continental Shelf, in force January 11, 1990, British Command Paper (1988) Cm. 535).

The Channel Islands and the Isle of Man are internally self-governing dependencies of the British Crown which, owing to their history, have remained legally distinct from the United Kingdom from the point of view of constitutional law. It should, however, be noted that these islands are treated as part of the United Kingdom for the purposes of the British Nationality Act 1981 (→ British Commonwealth, Subjects and Nationality Rules), and that certain provisions of the law of the → European Communities apply to them (see Art. 227 of the Treaty Establishing the European Economic Community, Rome March 25, 1957, UNTS, Vol. 297, p. 300; Arts. 25 to 27 and Protocol 3 of the Treaty Concerning the Accession of the United Kingdom to the European Economic Community and European Atomic Energy Community, 1972, British Command Papers, Cmnd. 4862, Treaty Series No. 1 (1973)). The United Kingdom Parliament possesses legislative supremacy over the local legislatures and the Government of the United Kingdom is responsible for the external relations and defence of the islands. From the point of view of international law, the Channel Islands and the Isle of Man are regarded simply as territory over which the United Kingdom has sovereignty by reason of historic title and unchallenged long possession (see → Minquiers and Ecrehos Case (France v. UK) ICJ 1953, p. 47; → Historic Rights).

(b) British Dependent Territories

The terms "dependency" and "dependent territory" are not technical terms. In general usage, and from the point of view of international law, the term "British Dependent Territories" describes the territories outside the British Islands over which the United Kingdom has sovereignty and for whose → international relations she is therefore responsible. From the point of view of United Kingdom constitutional law, these territories are the territories outside the British Islands which are part of the dominions of the Crown in right of the Government of the United Kingdom. The Sovereign Base Areas are not generally regarded as embraced by the term in either context, though they in fact satisfy the description in each case. Unlike French Overseas Departments, British Dependent Territories are not integral parts of the metropolitan territory and they have no representation in the United Kingdom Parliament. However, subject to the legislative supremacy of that Parliament and to certain reserve powers vested in officials who are responsible to the United Kingdom Government, they enjoy a large measure of internal self-government. The extent of this, and the constitutional arrangements for giving effect to it, vary from territory to territory.

In 1946 the list of territories for whose international relations the United Kingdom was responsible (comprising colonies, protectorates, protected States, condominia, and mandated or trust territories) numbered nearly fifty. As these territories have achieved full independent statehood the number has rapidly diminished (→ Decolonization: British Territories). The remaining British Dependent Territories, with the exception of Hong Kong, fall into two classes. First, those territories whose inhabitants have so far expressed the desire to remain dependent. Second, those territories which, by reason of their very small population (Pitcairn Island, for example, has a population of about fifty) or the absence of any permanent population (Ascension Island, British Indian Ocean Territory, British Antarctic Territory, South Georgia and South Sandwich Islands), do not satisfy the criteria of effective statehood.

Under Art. 227(4) of the Treaty Establishing the European Economic Community, Gibraltar is included in the → European Community as a European territory for whose external relations a member State is responsible (→ European Economic Community). However, certain provisions of the Treaty are excluded (the application of the

Common Customs Tariff, the Common Agricultural Policy and Value Added Tax). The other British Dependent Territories with the exception of Hong Kong are associated with the European Community under Part IV of the Treaty of Rome, as are also the overseas territories of Denmark, France and the Netherlands.

(c) Sovereign Base Areas

Under Art. 1 of the Treaty concerning the Establishment of the Republic of Cyprus (August 16, 1960, UNTS, Vol. 382, p. 5476) between the United Kingdom, the Republic of Greece, the Republic of Turkey and the Republic of Cyprus, the two areas defined in the Annex, namely the Akrotiri Sovereign Base Area and the Dhekelia Sovereign Base Area (comprising some 264 square kilometres), remained under the sovereignty of the United Kingdom, which had previously exercised sovereignty over the whole island of Cyprus. The Sovereign Base Areas were retained purely for defence purposes, and at the time of independence the Government of the United Kingdom informed the Government of the Republic of Cyprus that it would not administer them as colonies. They are administered by an Administrator responsible to the Secretary of State for Defence of the United Kingdom Government. They are excluded from the Treaty of Rome (see Art. 227(3) and Annex IV).

3. Specific Legal Issues

(a) External relations

The Government of the United Kingdom is responsible for the conduct of the international relations of British Dependent Territories, including the negotiation and conclusion of treaties affecting them. A treaty of general applicability to which the United Kingdom becomes a party binds it and operates for its benefit in respect of all British Dependent Territories unless the contrary intention is expressed in, or is to be inferred from, the treaty or a document such as an instrument of ratification relating to the treaty. It is in fact the current practice of the United Kingdom Government to seek to ensure that the treaties into which it enters do include provisions expressly regulating their application to British Dependent Territories or to deal with the question in its instrument of ratification or a notification to the → depositary. Such a treaty provision may take the form of a list of the territories to which the treaty is to apply, for example, in the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (August 5, 1968; UNTS, Vol. 480, p. 43). An alternative form is a provision to the effect that the treaty is to apply only to those British Dependent Territories which are subsequently designated by the United Kingdom Government in accordance with a specified procedure, for example, the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (British Command Papers, Cmnd. 6723, Treaty Series No. 16 (1977)). A further, though less common, alternative is a provision under which the treaty will not apply, for example, the International Convention for the Unification of Certain Rules concerning the Immunity of State Owned Ships, April 10, 1926 (British Command Papers, Cmnd. 7800, Treaty Series No. 15 (1980)). The special arrangements providing for the association of British Dependent Territories with the European Community have been referred to above (see also → Lomé Conventions).

The ultimate responsibility for relations between foreign States and any British Dependent Territory rests with the Government of the United Kingdom, and this applies even where what is involved is the conclusion of an international agreement relating to the affairs of a particular territory. It is the general practice for these agreements to be concluded directly between the Government of the United Kingdom and the Government of the foreign State concerned, as for example in the Agreement between the United Kingdom and the United States of America concerning obtaining of evidence from the Cayman Islands with regard to Narcotics Activities (Exchange of Letters), July 26, 1984 (British Command Papers, Cmnd. 9344, Treaty Series No. 70 (1984)). Other examples are the various agreements that have been concluded between the United Kingdom and the United States providing for the establishment of United States defence installations or facilities in particular British

Dependent Territories. However, authority is sometimes delegated to the Government of an individual British Dependent Territory to conduct international relations, or even to negotiate and conclude international agreements, with respect either to a particular matter or to a general class of matters. An illustration of this is the authority that was expressly delegated to the Government of Montserrat to become a member of the Organisation of Eastern Caribbean States (OECS) under the Treaty constituting the OECS (June 18, 1981, ILM, Vol. 20 (1981) p. 1166). This case also illustrates the general lack of international capacity enjoyed by British Dependent Territories in that, when Montserrat became a member of the Organisation, the United Kingdom Government made a declaration under Art. 23 of the Treaty, notifying the Director-General of OECS of the intention of the Colony of Montserrat to withhold its participation in respect of foreign affairs and defence and security matters of the OECS, to the extent that any decision of the Organisation might require action to be taken by the Montserrat Government inconsistent with the views, policies and obligations of the United Kingdom Government.

The inhabitants of British Dependent Territories, other than the inhabitants of the Falkland Islands, are not British citizens under the citizenship laws of the United Kingdom (British Nationality Act 1981 (ch. 61); British Nationality (Falkland Islands) Act 1983 (ch. 6)). They do not have the right of residence in the United Kingdom. But their British nationality is regulated in British nationality legislation (they are mostly British Dependent Territories citizens); and they are nationals of the United Kingdom in international law and the United Kingdom claims the right of → diplomatic protection over them.

(b) Territorial and boundary disputes and delimitations

The territorial jurisdiction of the United Kingdom over the Minquiers and Ecrehos (part of the Bailiwick of Jersey) has been upheld by the International Court of Justice in the Minquiers and Ecrehos case. The delimitation of the continental shelf around the Channel Islands has been the subject-matter of an arbitration (see → Continental Shelf Arbitration (France/United Kingdom)).

The Caribbean territories of Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands and also the Colony of Bermuda have a history of British administration and settlement going back to the 17th century and the United Kingdom's title to them is undisputed. Neither is there any present dispute regarding title to St. Helena, which was captured from the Dutch in 1673 and has been a British possession ever since, the St. Helena Dependencies (Ascension and Tristan da Cunha), or the Pitcairn Group (Pitcairn Island was originally settled by mutineers from HMS Bounty in 1790).

Mauritius has from time to time advanced claims of sovereignty over the British Indian Ocean Territory (the Chagos archipelago, along with Mauritius and the Seychelles, were French possessions which were ceded to Great Britain by the Treaty of Paris of May 30, 1814, BFSP, Vol. 1, p. 151).

At present, Argentina claims sovereignty over the Falkland Islands, South Georgia and the South Sandwich Islands; and both Argentina and Chile have claims in respect of parts of the British Antarctic Territory (see → Antarctica Cases (U.K. v. Argentina; U.K. v. Chile)). Spain seeks the return of Gibraltar. The future status of Hong Kong has now been agreed between the United Kingdom and the People's Republic of China: The territory will be restored to the People's Republic of China with effect from July 1, 1997 (Joint Declaration on the Question of Hong Kong of December 19, 1984, British Command Paper, Cmnd. 9543, Treaty Series No. 26 (1985).

Notwithstanding the large number of → islands which comprise the Dependent Territories, there exists at present only one agreement relating to → maritime boundary delimitation, namely between the Pitcairn Group and the Tuamotu Archipelago (Convention between the United Kingdom and France on Maritime Boundaries of October 25, 1983, British Command Paper, Cmnd. 9294, Treaty Series No. 56, 1984). The maritime boundaries of the Republic of Cyprus *vis-à-vis* the Sovereign Base Areas were defined in Section 3 of the Treaty of Establishment of 1960.

(c) Self-determination

In 1976, the United Kingdom ratified the → human rights covenants, i.e. the United Nations Covenant on Civil and Political Rights and the United Nations Covenant on Economic, Social and Cultural Rights, the common Art. 1 of which states: "All peoples have the right of self-determination". It was made clear that ratification extended also to British Dependent Territories. Moreover, those Dependent Territories which have a permanent population are *prima facie* → non-self-governing territories within Art. 73 of the → United Nations Charter, whose inhabitants are entitled to exercise the right to → self-determination. The United Kingdom sends information annually to the → United Nations Secretary-General, pursuant to Art. 73(e), in respect of the following territories: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and the Turks and Caicos Islands.

Art. 73 of the UN Charter provides that " . . . the interests of the inhabitants of these territories are paramount . . . ". The United Kingdom interprets this as meaning that it is the wishes of the inhabitants that are paramount. Controversy has arisen over this issue and over the interaction between the right to self-determination and other aspects of → decolonization such as → territorial integrity. In particular, it is a matter of dispute whether the inhabitants of the Falkland Islands and Gibraltar constitute populations which can enjoy the right to self-determination.

(d) Special treaty régimes

The *sui generis* nature of the Sovereign Base Areas under the Treaty of Establishment of the Republic of Cyprus, and the treaty arrangements recently made regarding Hong Kong have already been referred to above. Certain provisions of the Treaty of Utrecht of July 13, 1713 (CTS, Vol. 28, p. 295) are relevant to the present status of Gibraltar.

The British Antarctic Territory is subject to the régime of the Antarctic Treaty. The Convention on the Antarctic Marine Living Resources of 1980 (British Command Paper, Cmnd. 8217, UK Miscellaneous Series No. 9 (1981)) extends north of 60° South (the Antarctic Treaty limit) to the Antarctic convergence; South Georgia and the South Sandwich Islands lie south of this Antarctic convergence and the 1980 Convention has been applied to them (see European Council Decision, September 4, 1981, Official Journal of European Communities 1981 L.252, p. 26).

J.E.S. FAWCETT, The British Commonwealth in International Law (1963).

K.O. ROBERTS-WRAY, Commonwealth and Colonial Law (1966).

W.L. DALE, The Modern Commonwealth (1983).

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UNITED STATES: DEPENDENT TERRITORIES

1. General Remarks

The United States of America is a → federal State with numerous dependent territories, which enjoy various degrees of self-government under United States law and several options under international law. The most important outlying areas under United States → sovereignty are the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam and the Commonwealth of Northern Mariana (formerly part of the Trust Territory of the → Pacific Islands).

Common to all dependent territories is the exercise of the → foreign relations power and defence by the United States Government. Persons born in dependent territories are United States nationals (→ Nationality) and carry modified United States → passports, but they cannot vote in United States elections; they elect their own Governors by direct vote and send one delegate, sometimes called Commissioner, to the United States House of Representatives, who may vote in committees but not in the plenary. The

territories have their own constitutions, legislatures and courts. Residents are subject to local but not federal taxation on local income; United States companies with branches in dependent territories do not enjoy tax shelter. The currency used is the United States dollar. The official language is English, sometimes together with the local language, for example Spanish in Puerto Rico. The treaties ratified by the United States apply also in all territories for whose foreign relations the United States is responsible. No special → notification through diplomatic channels is necessary to make a treaty applicable to dependent territories (→ Treaties, Territorial Application).

By Presidential Proclamation 5030 of March 10, 1983 (Federal Register, Vol. 48, No. 50 of March 14, 1983, p. 10605), the United States claimed an → exclusive economic zone of 200 nautical miles "contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands . . . and United States overseas territories and possessions" (→ Law of the Sea). Sovereignty over → natural resources, in particular those found on the → sea-bed and subsoil, lies with the federal government (cf. → United States v. California (Monterey Bay Case)). With regard to fisheries, the United States claims a "fishery conservation zone" of 200 nautical miles by virtue of the 1976 Fisheries Conservation and Management Act (Public Law 94–265, 90 STAT. 331). The coastal states of the Union and the dependent territories retain authority within their maritime boundaries.

As to the current status of United States dependent territories, they constitute separate juridical entities under international law. For their future there are at least five possible options: Statehood, commonwealth, compact of federal relations, free association and independence (→ Decolonization; → Secession). The decision can be taken by → plebiscite, and many have been held in the recent past. Hawaii, for instance, is a former United States territory that joined the union as the fiftieth state in 1959. The Marshall Islands and the Federated States of Micronesia were formerly parts of the Trust Territory of the Pacific Islands, but in 1986 they opted for self-government through a compact of free association.

2. The Role of the United Nations

(a) Non-self-governing territories

Chapter XI of the → United Nations Charter provides that members of the → United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount. To this end they assume certain obligations enumerated in Art. 73 of the Charter, *inter alia* to ensure their political, economic, social and educational advancement, to assist them in developing self-government, and to transmit regularly to the → United Nations Secretary-General statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories. Pursuant to this article the United States periodically transmits to the United Nations information concerning American Samoa (e.g. UN Doc. A/AC.109/953) and the United States Virgin Islands (UN Doc. A/AC.109/954, 955 and 956; → Non-Self-Governing Territories).

In 1960 the → United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (Res. 1514(XV) of December 14, 1960). Known as the Declaration on Decolonization, it proclaims the right of all peoples to → self-determination. In 1962 the General Assembly established the Special Committee on Decolonization (also known as the Committee of 24) to monitor the implementation of the Declaration. This Committee periodically compiles lists of dependent territories, among them American Samoa, Guam, and the United States Virgin Islands, and has repeatedly called on the United States to take all the necessary steps to enable non-self-governing peoples to exercise their right to self-determination and independence. Concern has been expressed in connection with the economic exploitation of these territories, the presence of military bases and the importance of preserving the native cultures (cf. → Indigenous Populations, Protection; → Minorities). Over the years the Special Committee has, with the cooperation of the United States, dispatched a number of visiting missions to the territories in

order to obtain first-hand information about prevailing conditions and about the wishes of the inhabitants concerning their political future. Such missions have been sent *inter alia* to American Samoa, Guam and the United States Virgin Islands. The UN Committee on the Elimination of Racial Discrimination, established under the Convention on the Elimination of all Forms of Racial Discrimination of March 7, 1966 (UNTS, Vol. 660, p. 195; in force 1969), also monitors the observance by administering authorities of the → human rights of the inhabitants of non-self-governing territories, including United States possessions (→ Racial and Religious Discrimination).

(b) Trust territories

Chapters XII and XIII of the UN Charter are devoted to the → United Nations Trusteeship System, which originally encompassed eleven territories. Pursuant to Art. 88 of the Charter, the Administering Authority of a Trust Territory must submit annual reports to the United Nations on the political, economic, social and educational advancement of the inhabitants. With regard to three of the four territories composing the former Trust Territory of the Pacific Islands (cf. Special Committee Doc. A/AC.109/957), the United States reported annually, until 1987, to the Trusteeship Council; she continues to report with regard to Palau (see *infra*). The Council, in turn, reports to the → United Nations Security Council with respect to → strategic areas such as Micronesia.

3. Trust Territory of the Pacific Islands

As originally constituted, the Trust Territory of the Pacific Islands consisted of three → archipelagos: the Marshalls, the Carolines and the Marianas (except the island of Guam). The three archipelagos include more than 2100 islands and atolls in the Western Pacific north of the Equator and east of the Philippines, with a combined land area of approximately 1854 square kilometres (716 square miles). Only 98 of the islands are inhabited. The population of the Territory is estimated at approximately 170 000 ethnic Micronesians and Polynesians, living under four constitutional governments: the Federated States of Micronesia (96 000; formerly the Caroline Islands, consisting of the districts of Yap, Truk, Pohnpei and Kosrae), the Marshall Islands (39 000), the Commonwealth of Northern Mariana (21 000) and Palau (14 000).

In 1885 Germany had assumed a → protectorate over the Marshall Islands and in 1899 purchased the Northern Mariana and Caroline Islands from Spain (Declaration between Germany and Spain for the Cession of the Carolines, February 12, 1899, (CTS, Vol. 187, p. 187); → Territory, Acquisition). The islands were mandated to Japan by the → League of Nations in 1919 (→ Mandates); on April 2, 1947 the UN Security Council approved a trusteeship agreement proposed by the United States under which the islands became a Strategic Trust Territory. Executive and administrative authority was exercised by a High Commissioner, appointed by the United States President and responsible to the Secretary of the Interior. The islanders were citizens of the Trust Territories and not of the United States; unlike the inhabitants of other territories, they never had a delegate in the United States House of Representatives. From 1946 to 1958 the United States conducted 66 → nuclear tests on Bikini and Eniwetok atolls in the Marshall Archipelago. A Nuclear Claims Tribunal has been set up to satisfy claims arising from nuclear testing, and the United States has established a trust fund of $150 million to settle such claims.

In February 1975 a covenant was signed by the United States and the Marianas Political Status Commission, which provided that the 14 islands in the Northern Marianas would become a commonwealth under American sovereignty. The covenant was approved by 78 per cent of the voters in a 1975 plebiscite held under United Nations supervision. Under the Covenant, Northern Mariana citizens became citizens of the United States since 1986. Commonwealth status was, however, rejected by the other three Micronesian governments, which, after extensive negotiations, preferred to sign a compact of free association in 1982. Under the compact the United States continues to be responsible for defence but no longer for the foreign affairs of the freely associated sovereign States; United States citizenship was not conferred upon the islanders. The people of the new Republic of the Marshall Islands and of the Federated States of Micronesia approved the respective compacts by plebiscites

held in 1983 under United Nations supervision. These compacts came into force on October 21 and November 3, 1986, respectively (UN Doc. T/1903). By Resolution 2183 (LIII) of May 28, 1986, the Trusteeship Council noted that the peoples of the Trusteeship Territory had freely exercised their right of self-determination in plebiscites observed by the missions of the Council, and acknowledged that the Government of the United States as Administering Authority had satisfactorily discharged its obligations under the terms of the Trusteeship Agreement, and that it was appropriate for the Agreement to be terminated. Accordingly, on November 3, 1986, the Trusteeship Agreement was terminated as to these three territories by proclamation of the President of the United States. Thus, under this new status the Marshall Islands and the Federated States of Micronesia are sovereign, self-governing States fully capable of conducting → international relations in their own name and right. Since the economies of the new republics are weak, substantial foreign aid is being provided by the United States and also by Japan (→ Foreign Aid Agreements).

In August 1987 the Republic of the Marshall Islands and the Federated States of Micronesia formally established diplomatic relations with each other (→ Diplomatic Relations, Establishment and Severance). By virtue of the 1982 Nauru Agreement (Agreement Concerning Co-Operation in the Management of Fisheries Common Interest, FAO Fisheries Report No. 293 (1983) p. 206), the Federated States of Micronesia, the Marshall Islands, the Republic of Kiribati, the Republic of Nauru, the Republic of Papua New Guinea and the Salomon Islands each claimed an exclusive economic zone or fisheries zone of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In 1987 the Federated States of Micronesia, the Marshall Islands and Palau concluded foreign fishery agreements to allow foreign fishing vessels to operate within the 200 mile exclusive economic zone.

The Trusteeship Agreement remains in effect with respect to the Republic of Palau, since the compact of free association with the United States has not come into force yet. Plebiscites monitored by United Nations observers were held in February 1986 (72 per cent in favour), December 1986 (66 per cent in favour), June 1987 (68 per cent) and February 1990 (60 per cent). In spite of this substantial majority for the compact, it has not been adopted yet because the constitution of Palau requires 75 per cent approval. Some objectors to the compact aim to establish a → nuclear-free zone in Micronesia. By virtue of the proposed compact of free association with Palau, the United States would continue to have the right of transit for nuclear and other types of weapons through the waters and territory of Micronesia; United States vessels carrying nuclear devices and nuclear weapons would be ensured continued access to → ports and → airports (→ Nuclear Warfare and Weapons).

All four Micronesian governments are members of the → South Pacific Commission and associate members of the Economic and Social Commission for Asia and the Pacific, and are either members or enjoy observer status in a number of other intergovernmental organizations (→ Regional Cooperation and Organization: Pacific Region). Legislative power is vested in the respective congresses or parliaments. Executive power is vested in a president or Governor, who is elected by the respective congresses for a term of four years.

4. Guam

The largest of the Mariana Islands, Guam (capital, Agaña) comprises 549 square kilometres (209 square miles). It is an unincorporated territory, i.e. one which has not been incorporated into the body politic of the United States by an act of congress, making the constitution of the United States expressly applicable to it. Guam has been self-governing since 1950, and in 1970 it elected its first Governor. English is the official language, but Japanese and Chamorro are also spoken.

In 1898, following the Spanish-American war the United States acquired the island of Guam from Spain by virtue of the Treaty of Paris of December 10, 1898 (Martens NRG2, Vol. 32, p. 74) and without consultation with the inhabitants. During World War II Guam was seized by the Japanese (→ Occupation, Belligerent). Its population of some 110 000 persons of mostly Indonesian stock have United States citizenship pursuant to the Organic Act of August 1, 1950

(Public Law 630, 64 STAT 3), but they cannot vote in national elections. In 1972 Guam elected its first non-voting delegate to the United States House of Representatives. By referendum held in January 1982, Guam voters chose to become a commonwealth of the United States; but any change in Guam's political status must be approved by the congress of the United States. In November 1987, in a popular referendum, voters supported proposals for Guam to negotiate a new relationship with the United States. The executive branch of the Guam Government remains under the general supervision of the United States Department of the Interior. Judges in the Superior Court of Guam are appointed by the Governor. The judge of the District Court of Guam is appointed by the United States President; appellate jurisdiction lies with the Ninth Circuit Court and with the Supreme Court of the United States. The → foreign investment, principally from Asian manufacturers, amounts to some $150 million.

The armed forces of the United States maintain important military facilities on Guam. Active-duty personnel and their dependents make up approximately 20 per cent of the territory's population. Andersen air force base is the home of nuclear-capable B-52 bombers, whose primary mission continues to be nuclear deterrence. This base plays an important role in strategic air command operations and is equipped with a sophisticated radar system, a satellite control facility and a submarine communications monitoring station. It is reported that some 3678 nuclear warheads have been emplaced on Guam. There are also numerous naval facilities including the Santa Rita naval magazine, the naval air stations at Brewer Field and Apra Harbor and the naval communications station at Barrigada. Guam serves as a base for the repair, maintenance and provisioning of the seventh fleet and for polaris → submarines, as well as being the home port of five naval vessels.

5. American Samoa

Like Guam, American Samoa (capital, Pago Pago) is an unincorporated territory, administered by the United States Department of the Interior. It consists of four volcanic islands and two coral atolls of the Samoan group (Tutuila, Aunuu, Ofu, Olosega, Tau and Rose) in the South Pacific, together with Swains Island, some 2 600 miles southwest of Hawaii; the territory's total land area is 199 square kilometres (77 square miles) and the population numbers some 37 000 persons, mostly ethnic Samoans. By the Treaty of Berlin of December 2, 1899 (Martens NRG2, Vol. 30, p. 683), the United Kingdom and Germany acknowledged the United States interests over the islands. In 1900 and 1904 Samoan high chiefs formally ceded the islands to the United States; Swains Island was annexed in 1925 (→ Annexation). The first constitution for the territory was signed on April 27, 1960 and was revised in 1967 and 1977. A constitutional convention completed a comprehensive rewriting of the constitution in 1986. The new version is now under review by the United States congress. Pursuant to an Act of the United States congress, the inhabitants of the territory are the final ratifying authority over their constitution, and the Secretary of the Interior is no longer authorized to make changes unilaterally in the constitution of American Samoa. Unlike the inhabitants of Guam, who are United States citizens, American Samoans are "nationals" of the United States, but they may acquire American citizenship without difficulty. American Samoa has become virtually self-governing, electing its own governors and law-making bodies by direct vote. It sends a non-voting delegate to the United States House of Representatives.

In 1981 a United Nations observer mission visited American Samoa and reported that elected and traditional leaders had expressed satisfaction with the territory's existing political status. Nevertheless, by Resolution 42/88 of December 4, 1987, the UN General Assembly called upon the United States to expedite the process of decolonization of the territory and to intensify efforts to strengthen and diversify its economy in order to reduce its economic and financial dependence on the United States. The economy of the territory is based primarily on the fishing and fish-canning industry; American Samoa is the fourth largest tuna processor in the world. According to the United Nations Centre on Transnational Corporations (UN Doc. A/38/444), eight affiliates of → transnational enterprises were operating in American Samoa; seven of these had United States parent companies and one was affiliated with a Canadian firm. The companies were

involved primarily in banking, insurance and food processing.

American Samoa is a member of several regional organizations, including the South Pacific Commission, the Pacific Basin Development Council, the Pacific Tuna Development Foundation, the Pacific Islands Association, and the South Pacific Regional Environment Programme. It also belongs to various regional bodies of the United Nations system, including the → World Health Organization (WHO) Regional Office for the Western Pacific and the WHO Western Pacific Regional Centre for the Promotion of Environmental Planning and Applied Studies.

American Samoa should not be confused with Western Samoa, which was a German → colony until 1914, subsequently a New Zealand mandate and United Nations Trusteeship until it became independent in 1962.

6. United States Virgin Islands

The United States Virgin Islands (capital, Charlotte Amalie on the Island of St. Thomas) are situated 40 nautical miles east of Puerto Rico and comprise 6 main islands and 75 islets, the largest of which are St. Croix with 218 square kilometres (84 square miles), St. Thomas with 83 square kilometres (32 square miles) and St. John with 52 square kilometres (20 square miles). The population numbers some 110 000 persons, about 80 per cent of whom are ethnic blacks. English is the official language, but Spanish and Creole continue to be widely used.

In 1916 the United States acquired the islands, formerly known as the Danish West Indies, by purchase from Denmark (Martens NRG3, Vol. 10, p. 357), without consultation with the inhabitants. Congress granted United States citizenship to the islanders in 1927. Administration is vested in the Department of the Interior and the islands have the status of an incorporated territory of the United States, i.e. the provisions of the United States constitution and its amendments apply. Since 1970, the Governor has been elected by direct popular vote, and since 1973 a non-voting delegate has been sent to the United States House of Representatives. The constitution of the Virgin Islands is the Revised Organic Act of 1954 (Public Law No. 517), as amended during the period 1968–1980. The principal industry is → tourism, but there is also some farming, fishing and cattle-raising, as well as industrial production of rum, watches and costume jewelry. The territory participates in the activities of intergovernmental bodies, including the Economic Commission for Latin America and the Caribbean Development Co-Operation Committee, but it does not yet participate in the Caribbean Community and Common Market (→ Caribbean Cooperation). It maintains a close relationship with Puerto Rico and the British Virgin Islands.

United States military installations on the United States Virgin Islands include a radar and sonar calibration station on St. Croix. A detachment of the United States Coast Guard is located on St. Thomas. The Virgin Islands national guard, which is affiliated to the United States army, also has its headquarters in St. Thomas. In April 1988 a major ocean-venture exercise was carried out by the United States navy in the area (→ Naval Manoeuvres).

The United States Virgin Islands should not be confused with the adjacent British Virgin Islands, which are self-governing associated States, with the United Kingdom controlling foreign affairs and defence. In October 1987 the Governor of the United States Virgin Islands proposed the establishment of a political union, Greater Virgin Islands, composed of the British Virgin Islands and the American Virgin Islands.

By Resolution 42/89 of December 4, 1987, the UN General Assembly reiterated the responsibility of the United States to create such conditions in the territory as will enable its people to exercise their right of self-determination. At a referendum in November 1990 the islanders will be able to determine their future status by choosing from among the options of statehood, independence, free association, incorporated territory, → *status quo*, commonwealth, and compact of federal relations.

7. Puerto Rico

A Caribbean island, some 100 miles long and 35 miles wide and comprising 8959 square kilometres (3459 square miles), Puerto Rico (capital, San Juan) is a commonwealth freely associated with the United States (Estado Libre Asociado). A Spanish colony since its discovery by Columbus in 1493 (→ Territory, Discovery), Puerto Rico was

ceded to the United States under the Treaty of Paris after the Spanish-American war of 1898, without consultation with the inhabitants. Pursuant to the Jones Act of 1917 (Public Law No. 368, 39 STAT 951), Puerto Ricans are United States citizens. Some 3.4 million persons live on the island; an additional 2 million Puerto Ricans have migrated to the United States mainland and live primarily in the states of New York and Florida.

On July 3, 1950 (Public Law No. 600) the United States congress adopted an act providing for a compact of commonwealth status with the people of Puerto Rico, to become operative upon its approval by a referendum held on June 4, 1951. A constitutional convention met from September 1951 to February 1952 and drafted a constitution, approved by referendum on March 3, 1952, and proclaimed by Governor Luis Muñoz Marin on July 25, 1952. The constitution provides that the Government consists of a Governor, elected for four years, a legislative assembly comprising two houses, whose members are elected by direct vote, a Supreme Court and lower courts. Puerto Rico is represented before the Government of the United States by the Resident Commissioner, who is a non-voting member of the United States House of Representatives but a voting member of the committees on which he sits.

Pursuant to section 2 of the Federal Relations Act (Public Law 600 of 1950, as amended), "the rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union". Pursuant to section 5a, citizens of the United States who reside in the island for one year are also citizens of Puerto Rico. Pursuant to section 9, "the statutory laws of the United States not locally inapplicable ... shall have the same force and effect in Puerto Rico as in the United States". The laws on interstate commerce do not apply to Puerto Rico. The Act also provides for the economic union of Puerto Rico and the United States, consisting in free trade between the two and the inclusion of Puerto Rico in the United States tariff system. The United States has exclusive jurisdiction to establish tariffs; → border controls and customs controls are conducted by federal officers. The Merchant Marine Act applies to Puerto Rico, and thus only United States flagships can be used for the transportation of merchandise. No federal income tax is collected from residents of the island on income earned from local sources in Puerto Rico. Official languages are Spanish and English.

The current commonwealth status of Puerto Rico gives the island's citizens virtually the same control over their internal affairs as citizens of the fifty states of the United States. Puerto Rico has its own independent judiciary. Appellate jurisdiction over the Supreme Court of Puerto Rico lies within the United States Supreme Court in the same manner as the latter's jurisdiction over state courts of last resort. A United States District Court sits in San Juan. Appellate jurisdiction from this court lies with the United States Court of Appeals for the First Circuit, sitting in Boston, Massachusetts. As to the status of Puerto Rico, the First Circuit stated in 1970: "Puerto Rico enjoys sovereign immunity in common with other governments" (424 F 2d 435). In 1985, in an *obiter dictum* in United States v. Quiñones (758 F 2d 40) the court stated:

> "In 1952 Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress ... Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rican Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power."

The United States Supreme Court, in the 1982 decision in Rivera Rodriguez v. Popular Democratic Party (457 U.S. 1), stated: "Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution."

Economically the island enjoys the highest per capita income in Latin America. Principal manufactured goods include pharmaceuticals, chemicals, machinery, textiles, fish and petroleum products. Chief crops are coffee, bananas, sugar and tobacco. Besides the United States, the principal trading partners are Japan, Ecuador, Venezuela, the United Kingdom and Brazil.

By Resolution 748 (VIII) of November 27, 1953, the UN General Assembly determined that Puerto Rico had attained the status of self-government, thus relieving the United States of her obligation under Art. 73(e) of the Charter to

transmit information to the United Nations on a "non-self-governing territory". For the same reason Puerto Rico is not in the list of dependent territories compiled by the Special Committee on Decolonization. Nevertheless, the Special Committee has affirmed in numerous resolutions the applicability of the Declaration on Decolonization to Puerto Rico and appointed a Rapporteur in this connection (UN Docs. A/AC.109/798, 844, and 925, emphasizing the unity and cultural identity of the peoples of Latin America). In response to these resolutions, the Permanent Representative of the United States to the United Nations has repeatedly made declarations with the following effect:

> "In 1952, the people of Puerto Rico exercised their right of self-determination. Since that time, they have been self-governing. They have the power to change their political status at any time, through their thriving, democratic political system. The Special Committee has no jurisdiction over Puerto Rico, and its consideration and adoption of a resolution on the issue of Puerto Rico are not only inappropriate but a serious breach of its mandate" (UN Doc. A/AC.109/L.1633).

Attempts to place the issue of Puerto Rico on the agenda of the General Assembly have been defeated by large margins.

The question of self-determination and independence for Puerto Rico has also been discussed by the movement of → non-aligned States at several of their recent conferences. The United States Government views such statements as interference in its internal affairs (→ Domestic Jurisdiction). Nonetheless, United States Presidents have consistently declared that the United States remains committed to the principle of self-determination for Puerto Rico and that it will respect whatever decision the people of Puerto Rico may wish to take: Statehood, independence, Commonwealth status or mutually agreed modifications in the island's status.

The independence movement in Puerto Rico stresses that Puerto Ricans are Latin Americans; they object to United States legislation that affects the development of Puerto Rican culture. In particular, they object to the fact that → immigration is an area of exclusive jurisdiction of the federal government, and that any United States citizen or resident can enter and reside in Puerto Rico, thus further endangering the preservation of the specific Latin American character of the island. They also argue that since the authority to enter into international treaties rests with the United States, Puerto Rico cannot enter into bilateral agreements with its Latin American neighbours so as to maintain and develop its cultural life.

8. Defence and Special Areas

The United States has sovereignty over several previously uninhabited islands and atolls in the Pacific Ocean. Baker, Howland and Jarvis Islands are atolls some 2000 miles northeast of Hawaii. In 1974 they became part of the national wildlife refuge system, administered by the United States Fish and Wildlife Service of the Department of the Interior. Johnston Atoll, some 700 miles southwest of Hawaii, consists of four small islands, which were claimed by Hawaii and later became a United States possession. The territory is a naval defence sea area and airspace reservation and is closed to the public; it is administered by the United States Nuclear Defense Agency. Kingman Reef, some 1000 miles south of Hawaii, is a defence sea area and airspace reservation. No vessels, except those authorized by the United States Secretary of the Navy, can navigate in the area within the 3-mile limit. Midway Islands, some 1150 miles west-northwest of Hawaii, are similarly within a naval defence sea area and are administered by the Navy Department. Wake, Wilkes and Peale Islands lie about halfway between Midway and Guam, and have been used as a commercial base since 1938. Wake is administered by the United States air force. Palmyra is an atoll about 1000 miles south of Hawaii and is administered by the Department of the Interior.

In the Caribbean, between Jamaica and Haiti, the United States owns the Island of Navassa, which is used for → lighthouse purposes.

By Treaty of November 18, 1903 (Martens NRG2, Vol. 31, p. 599), the United States guaranteed the independence of Panama, which in turn granted the United States the use, occupation and control of a specially created canal zone for the construction and operation of the → Panama Canal. By Treaty of September 7, 1977 (ILM, Vol. 16, p. 1022), the United States agreed to turn over

the → canal to Panama on December 31, 1999, upon a guarantee of the area's neutrality after the year 2000 (→ Permanent Neutrality of States). It was also agreed that the United States could use military force to keep the waterway open, but not to intervene in "the internal affairs of Panama" (ILM, Vol. 16, p. 1040; → Use of Force; → Intervention).

9. Former United States Dependent Territories

The Canton and Enderbury Islands, the largest of the Phoenix group, are situated some 1600 miles southwest of Hawaii. They were discovered by United States whalers in the 18th century and, pursuant to an agreement of April 6, 1939 (LNTS, Vol. 196, p. 343), were jointly administered by the United States and Great Britain (→ Condominium). The United States renounced her claims in a treaty of friendship with the newly independent Republic of Kiribati on September 20, 1979 (United States Treaties and Other International Acts Series 10777). The United States still maintains an air force space and missile test centre at Canton (→ Military Bases on Foreign Territory).

In June 1968 the United States returned to Japan the Bonin Islands, the Volcano Islands, including Iwo Jima, and Marcus Island (UNTS, Vol. 683, p. 285), and in 1971, Okinawa, the other Ryukyu Islands and Daito (UNTS, Vol. 841, p. 249). The United States, however, still maintains a military base on Okinawa.

In the Caribbean, the United States claimed the uninhabited islands of Quita Sueño, Roncador and Serrana, which lie between Nicaragua and Jamaica, but relinquished these claims by virtue of a treaty with Colombia on September 17, 1972 (UST, Vol. 33, p. 1405; in force 1981).

Documents of the UN General Assembly Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. See the 1988 Reports on Guam (A/AC.109/949), American Samoa (A/AC.109/953), United States Virgin Islands (A/AC.109/954, 955 and 956) and the Trust Territory of the Pacific Islands (A/AC.109/957).

Trusteeship Agreement for the Trust Territory of the Pacific Islands (United Nations Publication, Sales No. 57.VI.A.1).

United States, High Commissioner of the Trust Territory of the Pacific Islands. Report to the Secretary of the Interior. L951/52–19071 (1952–1972).

Trust Territory of the Pacific Islands, Annual Report[s] to the United Nations on the administration of the Trust Territory of the Pacific Islands, transmitted by the United States of America to the United Nations pursuant to Article 88 of the Charter of the United Nations (Department of the Interior).

Official Records of the Security Council, Fortieth Year, Special Supplement No. 1 (S/17334 and Corr.1). Official Records of the Security Council, Forty-second Year, Special Supplement No. 1 (S/19596).

Official Records of the Trusteeship Council, Fifty-fourth Session, Supplement No. 2 (T/1919).

Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau in August 1987. Official Records of the Trusteeship Council, Fifty-fourth Session, Supplement No. 3 (T/1920).

Study prepared by the Rapporteur of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Mr. Ahmad Farouk Arnouss (UN GA Doc. A/AC.109/L.1572).

A. BLAUSTEIN and P. BLAUSTEIN (eds.), Constitutions of Dependencies and Special Sovereignties: Panama Canal Zone (1980); United States Territory Virgin Islands (1980); Trust Territory of the Pacific Islands (1982); Commonwealth of Puerto Rico (1985); American Samoa (1986); Guam (1986).

J.N. MURRAY, The United Nations Trusteeship System (1957).

J. GRAY, American Samoa (1960).

P. CARANO and P. SANCHEZ, A Complete History of Guam (1964).

R. HUNTER, Historical Survey of the Puerto Rico Status Question 1898–1965, in: Status of Puerto Rico. Selected Background Studies Prepared for the United States-Puerto Rico Commission (1966).

A. LEIBOWITZ, The Applicability of Federal Law to the Commonwealth of Puerto Rico, Georgetown Law Journal, Vol. 56 (1967) 219–271.

J. BOUGH and R. MACRIDIS, Virgin Islands: America's Caribbean Outpost (1970).

S. DE SMITH, Microstates and Micronesia: Problems of America's Pacific Islands and other Minute Territories (1970).

L.L. CRIPPS, Puerto Rico: The Case for Independence (1974).

I. DOOKHAN, A History of the Virgin Islands of the United States (1974).

D.T. HUGHES and S. LINGENFELDER (eds.), Political Development in Micronesia (1974).

A. LOPEZ and J. PETRAS (eds.), Puerto Rico and Puerto Ricans (1974).

D.F. McHENRY, Micronesia: Trust Betrayed (1975).

W.M. REISMAN, Puerto Rico and the International Process (1975).

D. KITCHEL, The Truth About the Panama Canal (1977).

W. LAFEBER, The Panama Canal (1977).

P. RYAN, The Panama Canal Controversy (1977).

H. NUFER, Micronesia Under American Rule, An

Evaluation of the Strategic Trusteeship (1947–77) (1978).
L. FIGUEROA, El Caso de Puerto Rico a Nivel Internacional (1979).
R. KRUEGER and M. NORDQUIST, The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin, Virginia Journal of International Law, Vol. 19 (1979) 321–399.
P. MANHARD, Micronesia in Free Association (1979).
J. TRIAS MONGE, Historia Constitucional de Puerto Rico, 4 vols. (1980–1983).
D.J. ATTARD, The Exclusive Economic Zone in International Law (1987).

ALFRED-MAURICE DE ZAYAS

WALVIS BAY

Walvis Bay is located on the coast of South-West Africa (→ Namibia). It comprises a territory of 1124 square kilometres which has about 19 000 inhabitants and a → port handling about 920 000 tons of freight. Walvis Bay is the only deep-water port on this long coast, and the foreign trade of Namibia depends essentially on it.

Discovered in 1485 by the Portuguese and occupied in 1792 by the Dutch, Walvis Bay was first used as a base for whalers and later also for the export of cattle to St. Helena and Cape Town. In 1878 it was annexed by Great Britain and, in 1884, integrated into the Cape Colony (→ Annexation).

Germany proclaimed a → protectorate in 1884 over South-West Africa between the Orange and Kunene rivers, respecting the British title to Walvis Bay and to twelve uninhabited guano → islands south of it which had been annexed earlier by Great Britain.

Walvis Bay developed into a type of → enclave on the coast of the German possession, a fact which hampered its development considerably for the next 50 years, although it became a → free port in 1885. The Germans used Swakopmund on the north side of the Bay as their port and starting point of the South-West African railway network (→ Bays and Gulfs).

In 1885, a British officer demarcated the → boundaries of Walvis Bay, but Germany contested the conformity of the southern part of the demarcation with the delimitation described in the annexation act. An arbitral award given in 1911, however, confirmed the demarcation (→ Arbitration). This award sheds light on some of the conditions prevailing in Walvis Bay from about 1875 to 1910. According to it, the settlement was unimportant and had limited resources; part of a Hottentot tribe maintained seasonal dwellings in the south-eastern corner of the territory, but lived mainly under German rule.

In 1920 South-West Africa became a → League of Nations category C → mandate. An act of 1922 arranged for Walvis Bay to be treated in judicial and administrative matters as if it were part of the mandate. Thus, it was placed under the authority of the administrator of the mandate residing at Windhook. This was done for the sake of convenience and because South Africa understood the mandate as having been integrated into its territory. For the same reason, the so-called Caprivi Strip, part of the mandate, had been administrated by the Betchuanaland authorities for some time.

The League's Mandate Commission was informed of developments in the mandate and reported to the League's Council in 1923. The reports of the South African Government to the League's Mandate Commission include some information on Walvis Bay and seem to maintain the thesis that it continued to be South African territory.

At the beginning of the 20th century, Walvis Bay had hardly 1000 inhabitants. It began to develop significantly after 1945, but apparently suffered from recession. Fishing and fish processing dwindled inasmuch as fish resources on the South-West African coast were heavily exploited by countries far away from the region.

In 1966 the → United Nations revoked the mandate for South-West Africa. South Africa, in turn, revoked the arrangement of 1922 and placed Walvis Bay back under the administration of the Cape (Proclamations R 202 and 203 of August 31, 1977). The → United Nations Security Council disapproved of this action in its Resolution 432 of July 17, 1978 and demanded that Walvis Bay be integrated into South-West Africa. Thus, Walvis Bay has become an important issue in the dispute over the → decolonization of the one-time mandate. However, it would seem that the legal problems of the two entities are different. The arrangements of December 1988 for the independence of South West Africa/Namibia do not seem

to refer to Walvis Bay, so that the question, if there seriously was one, is left open.

The Walvis Bay Boundary Case, RIAA, Vol. 11 (1962) 263–308.

F. MÜNCH, Walvis Bay, un arbitrage peu connu, Comunicazioni e Studi, Vol. 14 (1975) 607–625.

T. HUARAKA, Walvis Bay and International Law, Indian JIL, Vol. 18 (1978) 160–174.

J.J.J. WILKEN and G.J. FOX, The History of the Port and Settlement of Walvis Bay 1878–1978 (1978).

N.J. BOTHA, Walvis Bay: Miscellany, Comparative and International Law Journal of Southern Africa, Vol. 12 (1979) 255–271.

I. BROWNLIE, African Boundaries (1979) 1273–1288.

J.A. FARIS, The Administration of Walvis Bay, SAYIL, Vol. 5 (1979) 63–81.

M. SILAGI, Territoriale Integrität abhängiger Gebiete und Entkolonisierung, Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Neue Folge, Vol. 30 (1979) 235–256.

R. DREYER, Dispute over Walvis Bay: Origins and Implications for Namibian Independence, African Affairs, Vol. 83 (1984) 497–510.

R. MOORSOM, Walvis Bay, Namibia's Port (1984).

E.A. PARTINGTON, Walvis Bay: South Africa's Claims to Sovereignty, Denver Journal of International Law and Policy, Vol. 16 (1988) 247–321.

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