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Supra-National Judicial Decisions and National Courts

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I. THE IMPACT OF THE SUPRA-NATIONAL JUDICATURE ON THE NATIONAL JUDICIARY

What is the importance of international judicial decisions for an international society which is progressing towards a community governed by the rule of law? There is no need to say that uniform laws and their application by a judiciary whose highest court in the hierarchy guarantees their enforcement, afford one of the principal means of converting a society composed of different territories, groups and traditions into a legal community. The historical development of the judiciary in federal States is, *mutatis mutandis*, applicable also to international society. The effective role played by the Court of Justice of the European Communities is a striking example.¹

A. The Problem of Dualism

The importance of the judiciary is an indicator of a society which has reached a high degree of integration. The present international community is halfway between the anarchy of individual and independent sovereign States and organized cooperation. This situation to a large extent prevents an effective comparison of international courts with the national judiciary which applies an elaborate system of norms and acts on the authority of a State to which the parties to the proceedings are subject. International

1. The Court is without doubt the most important regional institution existing today because it exercises jurisdiction in many fields of economic law and economic administration which formerly belonged to the national jurisdiction of the member states. Because of the direct effect of its judgments and the preliminary rulings, the relationship between the national and the community judiciary is unique; it differs from any other type of relationship between international and national courts. See note 8 and accompanying text, *infra*.

courts derive their jurisdiction from *treaties between States*. Their authority is based on the treaty, limited by its terms and by reservations made by the participating States. Despite the fact that the organizational element is a significant feature of modern international society, and the fact that the United Nations' membership is quasi-universal, every State—whether old or new—takes part in international relations as a separate, indivisible legal entity. As a consequence, rights and obligations derived from international law are still imputed to the State as a subject of international law, its internal sphere of jurisdiction being separated from the international legal order.

National courts are organs of the State acting on the basis of the written or unwritten Constitution of the country. In most countries they are independent of the executive branch of the government. Judgments of international courts are, in principle, binding on States as subjects of international law. Nonetheless, they do not create authority and obligations for national courts or other organs of the State acting within its internal legal order.

This is a restatement of the old concept of dualism between international law and international organs on the one hand, and national law and national organs on the other. It was on the basis of the exclusive sovereignty of each State, in conformity with the practice of the nineteenth century, that the first thorough discussions on the effects of international judicial decisions took place at the Second Peace Conference at The Hague in 1907.² There was no doubt that, within the limits of their competence, the organs of the State should ensure that the State comply with an international judgment binding on that State.

It was left to internal law to prevent or eradicate discrepancies between the acts of national organs, including courts, and the duties resulting from international law, including international judgments. A particular problem in this respect is the effect of the interpretation of a treaty by national courts in subsequent cases in

2. Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536 [hereinafter cited as Second Hague Convention]. See ACTES ET DOCUMENTS DE LA DEUXIÈME CONFÉRENCE DE LA PAIX 420 (1907); H. WEHBERG, KOMMENTAR ZU DEM HAAGER ABKOMMEN BETREFFEND DIE FRIEDLICHE ERLEDIGUNG INTERNATIONALER STREITKEITEN VOM 18. OKTOBER 1907, 150-55 (1911); Huber, *Die Fortbildung des Völkerrechts durch die II. internationale Friedenskonferenz im Haag 1907*, 2 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 470, 557-67 (1908); Limburg, *L'autorité de chose jugée et décisions des juridictions internationales*, 30 RECUEIL DES COURS [RdC] 518, 582-84, 1929 V (1931).

which provisions of the same treaty were relevant.

The two Peace Conferences of 1899 and 1907 mark the climax of the movement in the late nineteenth century directed to promoting judicial settlement by arbitral tribunals set up by the litigant States.³ The two standing courts of potentially universal jurisdiction created after World Wars I and II, the Permanent Court of International Justice⁴ and the International Court of Justice,⁵ were not able to modify the dualist relationship between international and national jurisdiction. Some progress, however, was made towards a closer link between the two types of jurisdiction.⁶

As a result of the process of decolonization, the number of sovereign States has increased to about 160, thereby more than doubling the size of the international community since World War II. These new members of the community seem to have decided to establish their nation within its existing frontiers, with the existing population, and with the firm intention of taking part as a sovereign entity in international relations and in international organizations. As a consequence, the old separation of the international and national legal orders is, in theory, maintained in the same manner as it had been in the traditional, more limited international society before 1945. In fact, however, the general interdependence of States, the necessity for mutual cooperation, as well as the network of international organizations of a political, economic and technical character have diminished the sphere of independent action. Thus, the internal order of sovereign states is exposed to many interferences from supra-national decisions, the impact of which depends to a certain extent on the relationship between international and national Courts.

The principal institution for judicial settlement of disputes between States is the International Court of Justice. In the past two decades, this institution did not play the role it should have as the principal judicial organ of the United Nations and as the only judicial institution to which all the States in the world may have access. The reasons for the deplorable abstention by potential liti-

3. Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1799, T.S. No. 392 [hereinafter cited as First Hague Convention]; Second Hague Convention, *supra* note 2.

4. LEAGUE OF NATIONS COVENANT art. 14; PUBLICATIONS OF THE P.C.I.J., ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, ser. D.

5. PUBLICATIONS OF THE I.C.J., ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, no. 3, CHARTER OF THE UNITED NATIONS, Statute and Rules of the Court (1978).

6. The question will be examined in section IV, *infra*.

gants of submitting their disputes to the I.C.J. have often been examined; therefore, there is no need to repeat them here.⁷ At present, a slight upward tendency can be noted. In contrast, the interpretation of general international law and, to a lesser degree, of treaties in force, by the Permanent Court and by the present I.C.J. exercises a great influence on the decisions of national courts (as is shown by many decisions of such courts).

B. Universal, Regional, and Specialized Courts

Apart from these institutions of general jurisdiction, regional and specialized international courts have gained importance. In the author's view, it would be no exaggeration to state that the current trend is more favorable to the use of these kinds of judicial institutions than to submission to the jurisdiction of the I.C.J. The reasons for this trend are complex. They are justified in part by political considerations, by technical specialties of the subject matter, or by the common legal background of a region which guarantees a more effective activity of bodies rendering binding decisions.

These new types of courts are often more closely connected with the internal legal order of the participating States. Yet, such courts are certainly not free from the classic problems resulting from the dualism between the obligation of States in the international sphere and their execution in the national legal order. Nevertheless, the separation is mitigated by provisions of treaties, national legislation, and judicial practice.

The main examples of currently functioning modern international courts of both a regional and a specialized character are the Court of the European Communities at Luxembourg and the European Court of Human Rights at Strasbourg. The former exercises jurisdiction conferred by treaties establishing the so-called "integrated" Communities for Coal and Steel, Economy, and Atomic Energy,⁸ the latter by the European Convention on Human

7. See, e.g., JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (an international symposium held at the Max Planck Institute for Comparative Public Law and International Law, 1974); THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE (L. Gross ed. 1976); Mosler, *The International Court of Justice at its Present Stage of Development*, 5 DALHOUSIE L.J. 545 (1979).

8. Treaty Instituting the European Coal and Steel Community, April 18, 1951, arts. 31-45, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, March 25, 1957, arts. 164-88, 298 U.N.T.S. 11; Treaty Establishing the European Atomic Energy Community, March 25, 1957, arts. 136-60, 298 U.N.T.S. 161; Convention Relating to Certain Institutions Common to the European Communities, March 25, 1957, arts. 3-4, 298 U.N.T.S.

Rights.⁹ Decisions by their Courts furnish most of the recent cases involving questions of the influence of supra-national courts on national law and national courts, because they deal in most cases with individual applications and only exceptionally with inter-State disputes, *i.e.*, between the contracting parties themselves.

C. Individuals as Parties Before International Courts

Judicial settlement in the traditional sense is limited to States as parties. Individuals (natural persons and corporate bodies) as well as international groups and organizations lack *ius standi in iudicio* (the right to appear as a party) before traditional tribunals. The appearance of parties other than States is a new phenomenon first established by the Peace Treaties after the First World War. Mixed Arbitral Tribunals were set up to decide disputes relating to the economic clauses of the treaties and the interested persons themselves appeared as parties.¹⁰ These tribunals and other institutions of a similar kind established after World War II,¹¹ are not typical examples of the international judiciary in the traditional sense because they are designed to settle disputes when at least one party is a private person or corporation, and which have arisen from problems stemming from a war between the contracting States. Additionally, the tribunals' existence is either limited to a certain time or ends with the accomplishment of their task.

In contrast, the Court of European Communities at Luxembourg and the European Court of Human Rights at Strasbourg were established within the framework of international organizations and were given permanent functions on the basis of their constitutive treaties which themselves are intended to have a permanent character. Before the Court of the European Communities, individuals may confront the Commission of the Communities,

267. Jurisdiction was extended in 1972 to Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland by their accession to the Communities.

9. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 19, 38-56, 213 U.N.T.S. 221, and four additional Protocols, [hereinafter cited as European Human Rights Convention]. All cases must be brought first before the European Commission on Human Rights. *Id.* art. 47. If they are not declared admissible, no examination of the merits takes place. *Id.* arts. 25-27.

10. Strupp, *The Competence of the Mixed Arbitral Courts of the Treaty of Versailles*, 17 AM. J. INT'L L. 661-90 (1923); Wühler, *Mixed Arbitral Tribunals*, 1 ENCYCLOPEDIA OF INTERNATIONAL LAW 142-46 (1981).

11. Seidl-Hohenveldern, *Conciliation Commissions Pursuant to Art. 83 of the Peace Treaty with Italy of 1947*, 1 ENCYCLOPEDIA OF INTERNATIONAL LAW 51-54 (1981).

which is the executive organ of the organization.¹² Although an individual who has brought his case before the Commission on Human Rights is not entitled to appear as a party,¹³ the case before the Court concerns the individual's human right which has been allegedly violated by the defendant State. In these cases, the Court is called upon, if necessary, to afford just satisfaction for the injury suffered.¹⁴

Other organizations, economic and political, have followed these examples, *mutatis mutandis*. The most recent examples are found in the treaty of the Andean Group creating the Court of Justice of the Cartagena Agreement¹⁵ and in the Constitution of the Inter-American Court of Human Rights in San José de Costa Rica which started its activities in 1979.¹⁶

This new element, the participation of entities other than States as parties in international judicial proceedings, increases the importance of the problem we are examining, namely, the attitude to be adopted by national courts regarding judgments of international courts. Disputes brought before a court of this kind are much more closely related to internal law than are the classic inter-State disputes, although disputes concerning internal matters of the State litigant can of course also be decided by submission to a legal procedure on the inter-State level.¹⁷

D. Actual Importance of the Problems Relating to the Relationship of National and Supra-National Courts

At the beginning of this study the question was raised whether the problem of taking position with regard to judgments of international courts is of real relevance for national courts. Now the answer can be given: generally speaking, both the number of such cases before national courts, and the legal difficulties involved

12. Treaty Establishing the European Economic Community, *supra* note 8, art. 73.

13. European Human Rights Convention, *supra* note 9, art. 27. Only the Commission and/or a contracting State may bring a case before the Court. *Id.* arts. 43-48.

14. *Id.* art. 50.

15. Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1978, 18 INT'L LEGAL MATERIALS [I.L.M.] 1203. For the text of the Cartagena Agreement, see Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910. For the preparatory work of the proposed Andean tribunal, see F.V. GARCIA-AMADOR, THE ANDEAN LEGAL ORDER 104-07 (1978).

16. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

17. See, e.g., Application of the Convention of 1902 Governing the Guardianship of Infants [1958] I.C.J. 55; Various Serbian Loans [1929] P.C.I.J., ser. A., No. 20; Brazilian Federal Loans [1929] P.C.I.J., ser. A. Nos. 20, 21.

therein, are increasing; this proposition is, however, not valid to the same degree for the national courts of all countries.

Many States have not submitted themselves to any international jurisdiction: for the courts of these countries, international judgments rendered between other States as parties can only have persuasive weight for the national court's own arguments in a matter relating to international law. The situation is quite different for those States which take a friendly attitude towards international judicature and who are parties to treaties providing for the submission of the various types of cases mentioned above for judicial settlement. In broad terms, international judicial settlement, with its consequential problems for national courts, is important in homogeneous geographic regions, in economic organizations and integrated economic communities, in organizations with limited purposes of a technical or similar nature, and in the field of human rights.

As regards the I.C.J., the trend seems to be away from the use of the optional clause,¹⁸ and rather to favor treaties containing clauses on judicial settlement by the court or a special *ad hoc* agreement¹⁹ between the parties.

The possible importance of international legal decisions in national courts is increased by the fact that not only the courts of the State parties concerned, but also those of States belonging to the same multilateral treaty system whose interpretation is involved, may be affected, the latter by intervention in the proceedings or in an indirect way. This is the problem of the indirect effect of international judgments on third States. When the decision in question is one by the I.C.J. stating or enunciating general principles or rules of law, all national courts of the world may take it into account in one way or another as evidence of the development of international law.

To summarize, our problem has numerous aspects, differing according to the circumstances. The vast majority of the cases before national courts available for scrutiny come from tribunals in Western Europe, the United States, and the Commonwealth countries, including India, which derive their legal system from English tradition. Some cases come from Japan, Latin America, and Iran.

18. Statute of the International Court of Justice, art. 36, para. 2.

19. *Id.* art. 40, para. 1. See, e.g., Special Agreement for the Submission of the Question of the Continental Shelf to the International Court of Justice, June 10, 1977, Libya-Tunisia, 18 I.L.M. 49.

This result of the author's research does not necessarily mean that other countries are not confronted with this problem; the possibility cannot be excluded that there exist collections of judgments which did not come to this author's knowledge or that court decisions exist, but are not published.

Nonetheless, the problem appears to be increasing in importance to the same degree as increasing economic and technical relations bring about a need for judicial settlement.

Finally, two further observations are in order. First, a great many States have been hesitant to submit their disputes to the I.C.J. which, as mentioned above, is the only existing international court of general jurisdiction.²⁰ This situation may change especially if States make use of the possibility afforded by the Statute and the Rules of Court to form chambers for dealing with a particular case.²¹

Secondly, States tend to settle their differences by nonjudicial means or through a friendly settlement in the course of a judicial procedure. For example, from 1972 to 1978, the International Center for Settlement of Investment Disputes [connected with the International Bank for Reconstruction and Development] set up Arbitral Tribunals in nine cases involving private companies with a State member of the Center. Six awards have been rendered so far; several cases have been discontinued because of a settlement between the parties.²²

National courts may be faced with decisions of supra-national judicial bodies in various circumstances. In different situations which may occur in national judicial proceedings the question at issue for the national court may be either the: (1) application of an international judgment as such to the actual case pending before it; (2) application thereof in similar cases; (3) application of a legal

20. At present (Oct. 1981) three cases are pending before the Court: (1) Tunisia/Libya (Continental Shelf), (2) Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal, and (3) Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America, Order of Jan. 20, 1982).

21. Statute of the International Court of Justice, art. 26, para. 2; Rules of the Court, art. 17. See Mosler, *supra* note 7, at 556-61. For the first time, a Chamber of five judges (including the elected judge of U.S. nationality and a Canadian Judge *ad hoc*) has been constituted to deal with the Gulf of Maine dispute, *supra* note 20. (Ed. note: The author is a member of this Chamber.)

22. Convention on the Settlement of Investment Disputes, March 18, 1965, 575 U.N.T.S. 159; INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ELEVENTH ANNUAL REPORT 1976/77 at 32, TWELFTH ANNUAL REPORT 1977/78 at 5, THIRTEENTH ANNUAL REPORT 1978/79 at 5.

rule or a legal dictum enunciated in an international judgment; (4) the use of such a rule or dictum as an authoritative argument for its own reasoning; (5) mention of the international judgment in its own reasoning in giving it legal weight equal to other evidence or other relevant sources of reference (*e.g.*, legal writings, documents, and State practice in international relations).

This is a brief and simplified statement of the main possibilities open to national courts when they must define their attitude toward supra-national judicial decisions. Each possible approach may be adopted on the basis of different legal backgrounds and for different reasons.

National courts of a State bound by an international judicial decision may implement an international judgment or act for the following reasons: (1) in order to execute it within its national legal order; (2) in order to take account of the international legal obligation imposed by the international judgment on the government of the State of the court in question; (3) because the same parties are parties to the national and to the international proceedings; (4) because the national and the international cases are legally identical or analogous and the government of the State of the national court was a party to the international judicial proceedings; or (5) because the national court arrives at the same conclusion as the international judgment.

Similarly, national courts of States not parties to a case submitted to international judicial proceedings may apply legal principles, rules, or considerations set out in the motivation of the decision in this case for the following reasons: (1) because of the binding authority, in the particular circumstances, of the international judgment; (2) because of its persuasive authority; or (3) because it supports the national court's own considerations in the actual case.

Finally, a number of different reasons may lead the national court to include in the motivation of its own decisions references to international judgments; such inclusion may range from using them as an authoritative source of law to inducing a simple quotation from them among other quotations.

Examples of these approaches will be furnished in the course of the following pages.

II. SUPRA-NATIONAL JUDICATURE

The category of supra-national judicature is not confined to

permanent international courts which have been defined by the Permanent Court of International Justice as "[bodies] already constituted and as having [their] own rules or organizations and procedure."²³ There are also other international judicial institutions which may possess the characteristic features of a court. While this study emphasizes permanent courts, it is indispensable to consider other institutions whose decisions raise the same questions with regard to their effects on national courts.

Arbitration, for example, leads to binding settlement of a dispute on the basis of the law, arrived at by judges appointed by or with the consent of the parties. The judges decide the case independently, *i.e.*, free of any instructions from the parties. Arbitral tribunals include both bodies constituted *ad hoc* in case of a particular dispute and bodies established on the basis of a general arbitration treaty or of a compromissory clause providing for procedural mechanisms for the setting up of the tribunal when a dispute occurs. Insofar as they offer the same guarantee of independence and impartiality of the judges, and insofar as they observe the same degree the generally recognized rules of judicial proceedings, and apply the principles and rules of international law, their judgment has the same legal value as that of courts whose bench is constituted in advance for all cases which may arise during the term of office of the judges, and which proceed on rules enacted once for all in advance.²⁴ Leaving aside the elements of permanent organization and a permanent code of procedure (which, strictly speaking, are found only in international courts in the full sense), the following general criteria are common to judicial and arbitral settlement:²⁵ (1) independence from the government and the parties; (2) equality of the parties in the proceedings; (3) objective rules to guide the judge in determining the law; (4) rules of procedure appropriate for the subject matter of the dispute and for a fair conduct of the proceedings; and (5) binding effect of the judicial decision.

Final decisions of such institutions are supra-national within the meaning of that term for the purposes of this study. The term

23. Advisory Opinion [1925] P.C.I.J., ser. B., No. 12, at 30.

24. Simons, *Das Verhältnis der nationalen Gerichtsbarkeit zur internationalen Schiedsgerichtsbarkeit und Gerichtsbarkeit*, 9 MITTEILUNGEN DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 72 (1929).

25. See Mosler, *Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years After the Founding of the World Court*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, *supra* note 7, at 9.

"supra-national," as it is used in international relations today is imprecise due to having both a wider and a more restricted meaning. The more restricted meaning is used in the so-called "integrated" Economic Communities of regional groups of States. Supra-nationalism in this sense, as first defined in the negotiations preparing the establishment of the European Communities,²⁶ has two essential features, the first of which is the power of one or more organs of the community to act, in accordance with the constituent treaty, *directly within the domestic jurisdiction* of all member States without interference by national governments or authorities and with direct legal effect; the second is the independence of the executive organ from the member States. In the European Communities "supra-nationality" is attributed to legislation in the form of regulations and directives, and to executive acts in the form of decisions, and to certain acts of compulsory execution.²⁷ In the broader sense, supra-nationality means the power of an international organ set up by a treaty between States, to take decisions in full independence from the States parties to the treaty, with binding effect *on the States concerned*. The supra-national element of an international organization is strengthened if a judgment by its judicial organ has direct effect within the internal legal order of the State, either by virtue of the treaty or because the national Constitution provides for direct application of decisions of the supra-national judicature.

A. Permanent Supra-National Courts

The following institutions can be considered as permanent supra-national Courts. Although the list does not purport to be complete, it may provide an indication of the States and groups of States involved in a system of judicial settlement and the subject matter presently attributed to specialized international courts.

General jurisdiction open to all States and extending to legal disputes of any kind was exercised between the two wars by the Permanent Court of International Justice and has been exercised since 1947 by the present I.C.J.²⁸ The jurisprudence of the two

26. Mosler, *Die Entstehung des Modells supranationaler Staatenverbindungen in den Verhandlungen über den Schuman-Plan*, in *FESTSCHRIFT FÜR W. HALLSTEIN*, 355-86 (1966).

27. See, e.g., Treaty Establishing the European Economic Community, *supra* note 8, arts. 189, 192, at 78-79; H. MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* 187-88 (1980).

28. See *supra* notes 4 & 5, art. 36, para. 2.

courts is regarded as a continuous whole. In effect, the decisions and advisory opinions of the Permanent Court are quoted by the I.C.J. as authoritative, but not binding, dicta on international law.²⁹

Regional and/or specialized courts of the past or those presently in existence are the following: (1) the Central American Court of Justice,³⁰ the first example of a permanent international court; (2) the European Court of Human Rights;³¹ (3) the Inter-American Court of Human Rights;³² (4) the Court of Justice of the European Communities;³³ (5) the East African Common Market Tribunal;³⁴ (6) the Arbitral College of the Benelux Economic Union;³⁵ and (7) the Court of Justice of the Andean Agreement.³⁶ A convention in connection with the Western European Union, provides for a tribunal for the protection of private interests against the Agency for the Control of Armaments.³⁷ Furthermore, in the framework of the Organization for Economic Co-operation and Development (OECD) and in connection with the European Agency for Atomic Energy, a tribunal was established with the authority to decide appeals against decisions of the Agency.³⁸

Additionally, tribunals composed of judges selected from pre-established lists and constituted *ad hoc* are provided for in the Fisheries Convention of March 9, 1964 (between 10 European

29. See, e.g., Aegean Sea Continental Shelf Case, [1978] I.C.J. 3, at 18, 24, 29, 33.

30. Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 206 Parry's T.S. 79 (expired on March 11, 1918).

31. European Human Rights Convention, *supra* note 9. The Court has delivered 45 judgments between 1960 and February 1981, while several cases are still pending before it.

32. American Convention on Human Rights, *supra* note 16, at 690. The Court was constituted in 1979 and has not yet been seised by an application or by a request for an advisory opinion.

33. See *supra* note 8.

34. Treaty for East African Co-operation, June 9, 1967, Kenya-Tanzania-Uganda, 6 I.L.M. 932.

35. Treaty Instituting the Benelux Economic Union, Feb. 3, 1958, Belgium-Luxembourg-Netherlands, arts. 41-53. 381 U.N.T.S. 165, 186-93.

36. Treaty creating the Court of Justice of the Cartagena Agreement, *supra* note 15. The treaty will enter into force after all subscribing member countries have deposited their respective instruments of ratification. *Id.* art. 37.

37. Convention Concerning Measures to be Taken by Member States of the Western European Union in Order to Enable the Agency for the Control of Armaments to Carry Out Its Control Effectively and Making Provision for a Due Process of Law in Accordance with Protocol No. IV of the Brussels Treaty as Modified by the Protocols Signed at Paris on Oct. 23, 1954, [1961] Bundesgesetzblatt [BGBl] II 386.

38. Convention on the Establishment of a Security Control in the Field of Nuclear Energy, Decs. 20, 1957, art. 12, [1959] BGBl 586, 598.

States)³⁹ and in the "INTELSAT"-Convention of August 20, 1971.⁴⁰ Also, the constitution of arbitral tribunals is provided for in the framework of the International Center for Settlement of Investment Disputes.⁴¹

B. "Semi-Permanent" Tribunals

A good deal of the practice of international judicature in relationship to national law and national courts appears in what one can call "semi-permanent" tribunals arising from the framework of peace settlements and treaties after World War II establishing normal relations between the former belligerent countries. Mixed Arbitral Tribunals and Mixed Claims Commissions have been formed under the peace treaties following World War I between each of the Allied and Associated Powers on the one side, and Germany and her Allied Powers on the other.⁴² Mixed Claims Commissions have existed between the United States and some European States on one side, and certain Latin American States on the other.⁴³ After World War II "conciliation commissions" were created between the victorious and defeated States under the Paris Peace Treaties of February 19, 1947, but were in fact arbitral tribunals whose decisions were to be accepted by the Parties "as definitive and binding."⁴⁴ Moreover, a number of arbitral tribunals and commissions have been created in order to settle questions concerning the Federal Republic of Germany arising out of the Second World War.⁴⁵

39. Annex II, 581 U.N.T.S. 57, 68-75.

40. Annex C, 23 U.S.T. 3813, 3880-89, T.I.A.S. No. 7532.

41. Convention on the Settlement of Investment Disputes, *supra* note 22.

42. These tribunals have not been established between all potential parties; the total number of tribunals is 36. See C.F. OPHÜLS, *GEMISCHTE SCHIEDSGERICHTE*; 3 K. STRUPP & H.J. SCHLOCHAUER, *WÖRTERBUCH DES VÖLKERRECHTS*, 173 (1962); *RECUEIL DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES* (à partir de 1922); A. DE LA PRADELLE, *JURISPRUDENCE DES TRIBUNAUX ARBITRAUX MIXTES* (1927); D. SCHINDLER, *DIE SCHIEDSGERICHTSBARKEIT SEIT 1914*, 30 (1938).

43. Their awards are found in the collection *INTERNATIONAL ARBITRAL AWARDS*, published by the United Nations.

44. Peace Treaty with Italy, Feb. 10, 1947, part IX, art. 83, para. 6, 61 Stat. 1245, 1411, T.I.A.S. No. 1648.

45. See, e.g., Convention on the Settlement of Matters Arising out of the War and Occupation, May 26, 1952, 332 U.N.T.S. 219, *amended* by Protocol on the Termination of the Occupation Regime, Schedule IV, Oct. 23, 1954, 331 U.N.T.S. 253 (established the Arbitral Commission on Property, Rights, and Interests in Germany, and the Supreme Restitution Court); Agreement on German External Debts, Feb. 27, 1953, 333 U.N.T.S. 3; Treaty on Property Rights, Austria-Federal Republic of Germany, June 15, 1957, 58 W.G.B.B. 129. (For an evaluation of the work of this tribunal and the text of its Binding Opinion, see J.

Although these institutions produced a rich jurisprudence, the circumstances under which they were created and the situations which they had to settle are of such a peculiar character that it is generally not possible to draw parallels between them and tribunals instituted for normal international relations.⁴⁶ The effect of their decisions with regard to the national legal order and national courts is usually defined in a more precise form than is commonly done in other treaties providing for judicial settlement.⁴⁷ Conflicting international and national decisions are therefore rare, occurring only in exceptional cases.⁴⁸

III. CLASSIFICATION OF SUPRA-NATIONAL JUDGMENTS ACCORDING TO THEIR OPERATIVE CLAUSE ["DISPOSITIF"].

International judgments, like national judicial decisions, may

SEIDL-HOHENVELDERN, *THE AUSTRIAN-GERMAN ARBITRAL TRIBUNAL* (1972). The most recent example of this kind is the Iran-United States Claims Tribunal. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1980, 20 I.L.M. 223, 230.

46. von Mangoldt, *Arbitration and Conciliation*, in *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES*, *supra* note 7, at 417, 463-64.

47. The "Binding Opinions" of the Austrian-German Arbitral Tribunal are binding for the courts and all other competent authorities. Property Rights Treaty, *supra* note 45, art. 108, para. 2. According to the Treaty of Versailles, "The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals." Treaty of Versailles, June 28, 1919, art. 304(g), 225 Parry's T.S. 189, 343. In conformity with this provision, the German *Reichsgericht* (Supreme Court) decided that the examination by domestic courts of the grounds given by the Mixed Arbitral Tribunal for its judgment is inconsistent with art. 304(g) of the Versailles Treaty and with art. 3 of the *Reichsgesetz* of 10 August 1920, concerning the execution of the provisions of the Treaty in regard to Arbitral Tribunals. Judgment of May 25, 1928, 121 *Reichsgericht in Zivilsachen* [RGZ] 180. See Agreement on German External Debts, *supra* note 45, art. 31 (binding effect of the Mixed Commission for the questions regarding Annex IV of the Agreement on German External Debts).

48. In Judgment of Jan. 5, 1965, Corte d'appello, Genoa, [1966] *Rivista di Diritto Internazionale* 395, the Court of Appeal of Genoa refused to follow the interpretation of art. 78 of the Paris Peace Treaty of 1947 given by the Conciliation Commission established by the same treaty whose decisions were to be "accepted by the parties as definitive and binding." Peace Treaty with Italy, *supra* note 44, art. 83, para. 6, 61 Stat. 1245, 1411, T.I.A.S. No. 1648. The court considered the decision of the Commission as confined to the individual case. The rule of interpretation would have been binding in the internal Italian order in other cases of the same kind only on the basis of a legislative measure. *Pavia v. Amministrazione di Finanze*, Jan. 5, 1965. These cases are discussed by Schreuer, *The Authority of International Judicial Practice in Domestic Courts*, 23 INT'L & COMP. L.Q. 681, 686-87 (1974).

be classified and analyzed according to the purposes of their operative clause. Proceedings before any court, national or international, may be directed to obtaining a decision which creates a *new legal situation* (e.g., the adjudication of a title to jurisdiction), or one which gives an order to *perform an act* (e.g., to pay compensation), or one which states, *in a declaratory form*, how the law disputed between the parties is to be applied and interpreted; or the decision may be to *dismiss* the action, when study of the reasons permits one to learn what kind of claim was involved in the case.

The effect of judgments with regard to the parties and their national courts and, possibly, with regard to third States and their national courts is largely dependent on the nature of international judgment involved.⁴⁹

A. Assignment of Territorial and Personal Jurisdiction

Decisions may determine title to territory. For example, the I.C.J. found in the *Minquiers and Ecrehos* case:

[T]hat the sovereignty over the islands and rocks of the Ecrehos and Minquiers groups, in so far as these islands and rocks are capable of appropriation, belongs to the United Kingdom.⁵⁰

A judgment in similar terms was rendered by the I.C.J. in the *Case Concerning Sovereignty over Certain Frontier Land*.⁵¹

The question of right of passage over foreign territory was disputed by Portugal and India before the I.C.J.⁵² Furthermore, jurisdictional rights of the parties in international waterways have several times been decided by the Court.⁵³ Questions of territorial status also relate to the international validity of the delimitation of fisheries zones and the base lines of the territorial waters. For example, in a case concerning illegal fishing by a British subject, the Norwegian Supreme Court mentioned the recognition of the fisheries limits by the judgment of the I.C.J. in the *Norwegian Fisheries* case⁵⁴ as an argument that the municipal courts of Nor-

49. C.W. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 711-13 (1964); Verzijl, *Inter-State Disputes and Their Settlement*, in *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, Part VIII, 592-93 (1976).

50. [1953] I.C.J. 47, 72.

51. [1959] I.C.J. 209, 230. Cf. *Temple of Preah Vihear (Merits)* [1962] I.C.J. 6, 36. For other examples see C.W. JENKS, *supra* note 49, at 711.

52. *Case Concerning Right of Passage Over Indian Territory*, [1960] I.C.J. 6, 43, 46.

53. C.W. JENKS, *supra* note 49, at 711 n.12 (with references).

54. [1951] I.C.J. 116, 143.

way should operate to ensure complete respect for this limit.⁵⁵

Judgments which relate to the continental shelf belong to the same group of decisions involving territorial jurisdiction.⁵⁶ Territorial title is disputed although the delimitation of the boundaries may not be fixed in detail in the operative clause of a judgment. For example, in the *North Sea Continental Shelf* cases, the I.C.J. defined the principles and rules of international law applicable to delimitation as between the parties of the continental shelf areas in the North Sea.⁵⁷ A case of a similar nature involving Tunisia and Libya is currently pending before the Court.⁵⁸

With regard to jurisdiction over persons in foreign territory the I.C.J. case concerning *Rights of Nationals of the United States of America in Morocco* offers an example of a decision on the extent of consular protection.⁵⁹

International judgments may also recognize the right to fly the flag of a specific State and the nationality of persons and companies.⁶⁰

Operative clauses in this category delimit the respective jurisdictional titles of the parties. Normally, the dispute exists only between the parties, one of whom possesses the title which the Court will assign as appropriate. In these cases, however, the judgment has effect *erga omnes*: it has to be respected by all other States and their organs, including the national courts. The above mentioned decision of the Supreme Court of Norway is not here a good example because Norway was herself a party to the proceedings before the I.C.J.⁶¹ There is, however, no doubt that other States are bound to recognize the respective limits of jurisdiction between the litigants, unless third States have themselves a claim to the

55. *Rex v. Cooper*, 20 I.L.R. 166 (Supreme Court, Norway, 1953). In another case, the accused, who had appealed on the ground that the Norwegian fisheries line was contrary to international law, abandoned this contention after the International Court of Justice had rendered the Fisheries Case decision. *Rex v. Martin*, 20 I.L.R. 167 (Supreme Court, Norway, 1953).

56. See *Arbitration on the Delimitation of the Continental Shelf* (United Kingdom v. France) 18 I.L.M. 397 (1979).

57. [1969] I.C.J. 3, 53.

58. [1978-79] I.C.J.Y.B. 124. On April 14, 1981, the Court denied Malta's application to intervene in this case. *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment on Application to Intervene, [1981] I.C.J. 3, 20.

59. [1952] I.C.J. 176, 212.

60. *Verzijl*, *supra* note 49, at 592.

61. Similarly, the French *Cour de cassation*, in a judgment of Oct. 20, 1959, did not question that the Minquiers and Ecuehos Islands were under British sovereignty according to the 1953 decision of the I.C.J. 39 I.L.R. 425-26.

subject of the litigation. If, for example, only two of four coastal States adjacent to the same continental shelf are parties to a judgment delimiting the submarine zones as between them, the other two are not concerned with the effect of the judgment.

B. Judgments for Calling for the Performance of a Specific Act by the Parties

A judgment may order the payment of a certain sum by one party to another.⁶² Several judgments of the European Court of Human Rights have condemned the defendant State, after having stated that the State had violated the Convention, to pay a certain sum of money to the applicant ("the injured party" in the terms of the convention) as a "just satisfaction."⁶³

The act of performance ordered by a judgment may of course consist of acts other than payment.

Judgments of this type state that because an obligation exists, the State concerned must comply with the order of the decision. Their legal effect is the same as that of any other international obligation resulting from any source of international law.⁶⁴ The *dispositif* is binding only on the party or parties which are ordered to act.

C. Declaratory Judgments

Declaratory judgments have been defined by several judgments and advisory opinions of the Permanent Court of International Justice as decisions "the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuring therefrom are concerned."⁶⁵ The Court made clear

62. See, e.g., *The S.S. Wimbledon*, [1923] P.C.I.J., ser. A., No. 1; *Corfu Channel Case*, [1949] I.C.J. 244, 259; 12 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1432 (1971).

63. See, e.g., *Ringeisen Case*, [1972] Y.B. EUR. CONV. ON HUMAN RIGHTS 678 (Eur. Ct. of Human Rights, ser. A., No. 14); *Neumeister Case*, [1974] Y.B. EUR. CONV. ON HUMAN RIGHTS 536 (Eur. Ct. of Human Rights, ser. A., No. 15); *Engel Case*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 500 (Eur. Ct. of Human Rights, ser. A., No. 22). Five other such cases had been decided as of February, 1981.

64. *Ruiloba-Santana, Eficacia de las sentencias internacionales en el orden interno de los estados*, 1973 JURIDICA 627, 643-44.

65. Interpretation of Judgments Nos. 7 and 8 Concerning the Case of the Factory at Chorzów, [1927] P.C.I.J., ser. A., No. 11. See also *Case Concerning Certain German Interests in Polish Upper Silesia*, [1926] P.C.I.J., ser. A., No. 7; *Polish Postal Service in Danzig*, [1925]

that it was not prevented by its Statute from giving judgments in a declaratory form; however, its decision has no binding force except between the parties and in respect of that particular case.⁶⁶ The purpose of this provision was, in the view of the Court, simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes.

Other international courts follow the example of the Permanent Court. Declaratory judgments are a normal form of final and binding judicial decisions. The declaration of the legal situation or of a legal rule existing between the parties can have various objectives. It may consist either in an interpretation of a treaty provision binding on the parties or in a statement that certain acts of a national organ, including the legislature or judiciary, are inconsistent with the obligations under the treaty or under general international law. For example, the condemnation of a defendant State by the European Court of Human Rights is expressed in the operative clause by a statement that the State violated one or more provisions of the Convention. The facts which constitute the violation are not mentioned in the operative clause, but are stated in the reasons for the judgment. On the other hand, consequences of the decision to be deduced from the decision by the government and by its organs are not pointed out either in the operative clause or in the reasoning.

Declaratory judgments of international judicial bodies are much more problematic for national courts than are other kinds of judgments. In its early years, the Permanent Court of International Justice made a clear distinction between the operative part of a declaratory judgment and the reasons:

The Court is unable to see any ground for extending the binding force attaching to the declaratory judgment on the point decided to reasons which were only intended to explain the declaration contained on the operative portion of this judgment. . . .⁶⁷

It pointed out, however, in the same advisory opinion that "all parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative por-

P.C.I.J., ser. B., No. 11.

66. Statute for the Permanent Court of International Justice, art. 59.

67. Polish Postal Service in Danzig, [1925] P.C.I.J., ser. B, No. 11, at 30.

tion.”⁶⁸ Thus, this issue may arise before national courts. Even though the sole addressees of the judgment are States, domestic courts will probably take into account the statement of law contained in an international judgment. The limits of the *res judicata* effect of declaratory decisions are less strict than those of the effect of judgments concerning performance of acts and adjudicating jurisdictional titles.

The government which has been a party to the international proceedings is bound to derive the appropriate conclusions from the declaratory statement in terms of its own internal legal order. An important case illustrative of this effect occurred in 1979 before the European Court of Human Rights.⁶⁹ On the application of an illegitimate child and her mother of Belgian nationality, the Court found that Belgian legislation applying to the rights of illegitimate children and to the family relations between mother and child violated the right of family life guaranteed by the European Convention. The violations stemmed not from individual measures against the applicants, but directly from the contested Belgian provisions.⁷⁰

This judgment has a declaratory character. The legal status of the child and the mother and their relations in law with each other are not changed directly by the effect of the statement. According to the Court, “the judgment is essentially declaratory and leaves to the State the choice of the means to be utilized in its domestic system for performance of its obligations under Article 53. . . .” (*e.g.*, the undertaking of the Parties to abide by the decision of the Court).⁷¹

The Belgian State has the duty to give the two applicants a legal position in conformity with the *ratio decidendi* of judgment. This result can only be achieved by a legislative change within the country itself. The Belgian State is therefore under an obligation deduced from the operative part of the judgment as explained by the *ratio decidendi* to bring legislation on the matter into line with the requirements of the Convention. Even if it were possible to “wipe out all the consequences of the violations of the Convention

68. *Id.* at 29.

69. Marckx Case, [1979] Y.B. EUR. CONV. ON HUMAN RIGHTS 410 (Eur. Ct. of Human Rights, Judgment of June 13, 1979, ser. A., No. 31, para. 58).

70. *Id.*

71. *Id.* On the obligation of states to abide by the Court's decisions see European Human Rights Convention, *supra* note 9, art. 53.

in the case of the two applicants and to reestablish the situation which would have existed if the individual violation had not occurred", it follows from the judgment that Belgium must amend her general legislation with regard to the family relations of illegitimate children.⁷² By participation in the Convention, Belgium has undertaken to secure to everyone within her jurisdiction the rights and freedoms defined therein.

All member States of the European Convention are bound by the Convention to guarantee in their internal legal order the exercise of the same rights and freedoms including those defined in the judgments.⁷³ In contrast, their legal obligation to abide by a decision of the Court is restricted to any case to which they are parties.⁷⁴ A member State's own legislation may contradict one of the rights guaranteed by the Convention as interpreted by the Court in a case concerning another contracting party. Although they are certainly not bound directly, the declaratory judgment rendered against another party to the Convention may in practice cause legislative reforms to be considered and enacted elsewhere. In countries where international treaties are applied as part of national law, the same question which in other countries is to be considered by the government and the legislature comes up before national courts in cases in which the application of the Convention as national law is involved.

If the operative clause of a declaratory judgment does not clearly define the rule applied by the court, the reasoning has even greater weight. The reasoning must necessarily be consulted if the operative clause does not lay down a rule in explicit terms and only states that there is an inconsistency between the duty of the State under treaty law or general international law on the one hand, and its actual behavior on the other.

Definitions of legal rules pronounced in declaratory judgments or explained in the *ratio decidendi* of any judgment are relevant not only to the national courts of States parties to the dispute, but also to national courts of other States. Therefore, the relevance of judgments declaratory of general international law is not limited to national Courts of member States of a treaty system like the European Convention on Human Rights, but extends also to national

72. Jayme, *Europäische Menschenrechtskonvention und deutsches Nichtehe-
lichenrecht*, [1979] NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2426.

73. European Human Rights Convention, *supra* note 9, art. 1.

74. *Id.* art. 53.

courts of other States generally.⁷⁵

D. Dismissal of Action

If an application to the court is rejected by a final judgment, the operative clause consists only of the declaration of dismissal. It orders or declares nothing, its wording is purely negative, and its meaning can only be deduced from the reasoning. The State which has lost its case is, of course, bound to drop its claim against the other party. The effect of dismissal on its national courts depends upon the legal status accorded to international law and international judgments in the national legal order. Everyone, including national Courts, may take the legal reasoning of the case as an authoritative argument, but are not bound to follow it. For example, the Court of Appeal of Brussels rejected an applicant's argument based on the principle of non-retroactivity of criminal legislation as embodied in the European Convention of Human Rights⁷⁶ because the European Commission on Human Rights had in another case declared this article inapplicable to fiscal matters.⁷⁷

E. Preliminary Rulings

In order to guarantee the uniform application of a law-making treaty, and in order to strengthen the supra-national character of international judicial decisions, it has often been suggested that when a question of international law is essential to the decision of a case pending before the national courts, these courts should suspend their proceedings until an international court has issued a preliminary ruling on the matter. At present, the most widely known and significant realization of this procedure in a treaty provision is article 177 of the treaty establishing the European Economic Community.⁷⁸ According to this provision, the Court of Justice of the Communities is empowered to issue a preliminary decision concerning (1) the interpretation of the treaty; (2) the validity; (3) the interpretation of the acts of the institutions of the Community; and (4) the interpretation of the statutes of any bod-

75. See, e.g., the *ratio decidendi* of the judgments of the Court in the *Nottebohm* Case, [1955] I.C.J. 4, and in the *Barcelona Traction* Case [1970] I.C.J. 3.

76. European Human Rights Convention, *supra* note 9, art. 7.

77. Judgment of Nov. 12, 1976, [1977] Y.B. EUR. CONV. ON HUMAN RIGHTS 270 (Cour d'appel, Bruxelles).

78. *Supra* note 8.

ies set up by an act of the Council of the Communities, where such statutes so provide. Referral of such legal questions is mandatory for municipal courts of last resort; it is optional for lower courts.⁷⁹ The national court hearing the case is bound by the ruling given by the I.C.J., but may nonetheless submit further questions to the Court for further enlightenment.⁸⁰

This provision is one of the most marked indications of the supra-national character of the European Communities. However, the possibility exists that the national courts, particularly the highest court, which is obligated to refer the preliminary question of Community law to the Court of Justice, may follow the French doctrine of *acte clair*, arguing that the rule of Community law is unequivocal and does not require a preliminary ruling.⁸¹

According to the German Federal Constitutional Court, the preliminary ruling of the Court of the Communities is binding on all German courts which have to deal, at the different levels of jurisdiction, with the same case. This ruling applies to the Federal Constitutional Court itself when it is examining constitutional aspects of the case.⁸² Furthermore, the Constitutional Court held that it is not competent to interpret or apply provisions of the EEC Treaty in contradiction to a preliminary ruling of the Court of Justice at Luxembourg.⁸³ When evaluating this absolute superiority of the Luxembourg Court, one must not forget that the European Communities have created an autonomous legal order. The relationship between the organs of the Community and the organs of member States does not correspond to the normal relationship between international institutions and internal organs of States. As a rule, the confrontation between the international legal order and the organ acting on behalf of it on the one hand, and the national legal order and the State governmental entity on the other, does not exist in the European Communities. The circumstances calling

79. Identical provisions exist in the Treaty Establishing the European Atomic Energy Community, *supra* note 8, art. 150. Slightly different ones are found in the Treaty Instituting the European Coal and Steel Community, *supra* note 8, art. 41.

80. Case 29/68, 8 Comm. Mkt. L.R. (pt. 35) 390 (1969); Marquis, *Legal Integration in the Common Market*, 1979 SYRACUSE J. INT'L L. & COM. 207, 211.

81. Marquis, *supra* note 80, at 212. For the practice of the French *Cour de cassation*, see Weiss, *Self-Executing Treaties and Directly Applicable EEC Law in French Courts*, 1979 LEGAL ISSUES OF EUROPEAN INTEGRATION 51, 79-82.

82. Order of the Second Senate of the Federal Constitutional Court, June 8, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 142.

83. Order of the Second Senate of the Federal Constitutional Court, July 25, 1979, 52 BVerfGE 187-203.

for a preliminary ruling arise when a national court cannot decide a case according to national law unless a preliminary question of Community law has been answered. Thus, the interrelations between Community law and the remaining part of national jurisdiction are so closely connected that a case may have aspects of both.

Despite this peculiarity of the law of the European Communities, the submission of questions to international courts for preliminary ruling may be applied, *mutatis mutandis*, to other organizations and treaties. For example, there is a movement, particularly in the Parliamentary Assembly of the Council of Europe, in favor of conferring on the Human Rights Court competence to issue rulings on the interpretation of the provisions of the Convention when an application is received either from member States or their national courts. An alternative solution following this rationale but having lesser effect, is the advisory jurisdiction of the recently created Inter-American Court of Human Rights.⁸⁴

National courts may be *permitted*, either by treaty law or by national legislation, to suspend proceedings in a pending case until an essential preliminary decision regarding international law has been given.⁸⁵ The preliminary ruling differs from all other forms of international judicial decisions inasmuch as the rule defined by the judgment is directly binding on the national court concerned.

The extension of this procedure in order to create a uniform application of treaty law or of general international law raises difficult questions. In the author's opinion, trends in this direction should be encouraged, but realization of this procedure can be expected only when relatively small and homogeneous groups of States are involved.

IV. THE EFFECT OF SUPRA-NATIONAL JUDGMENTS ON THE NATIONAL JUDICIARY OF THE STATES CONCERNED

As long as no international constitution exists to which the States are subordinated, the dualism between international and national law, international organizations and national organs, will

84. American Convention on Human Rights, *supra* note 16, art. 64.

85. A French-Italian Conciliation Commission deduced the necessity to discontinue proceedings in a municipal court because of the supremacy of the Commission over municipal courts. The case is reported in C. H. SCHREUER, *DIE BEHANDLUNG INTERNATIONALER ORGANAKTE DURCH STAATLICHE GERICHTE* 316 (1969).

not disappear. Although the separation of the two legal orders is no longer as strict as it was before the First, and to a certain extent before the Second World War, there is no doubt that there exists no hierarchical relationship between international institutions and the internal order of the member States. The international legal order and the domestic jurisdiction of States are not, however, independent from one another, but must be considered as components of a general system of law. Even during the period of history when the dualist doctrine was at its apogee, no one denied the obligation of States to behave in conformity with general international law and their treaty commitments.⁸⁶ As early as the 1907 negotiations of the Second Hague Peace Conference, efforts were made to provide some binding effect of international judgments on the national judiciary.⁸⁷ Unfortunately, the time was not yet ripe for the contracting parties to accept such concessions infringing upon their sovereignty.

Although the theory that States are bound in their capacity as subjects of international law is still generally accepted, the situation has changed considerably in favor of the application of international law, including treaty provisions, in the national sphere of jurisdiction. Constitutions, legislation, and recognized principles of internal law are all directed to ensuring, insofar as they have to deal with matters involving the international responsibility of the government, the observance of general and contractual international general law.⁸⁸ These efforts to facilitate the application of international law and enforcing international obligations including judgments, in what was once the reserved domain cannot entirely erase the demarcation between the international and national legal orders. Such efforts may, however, lower the barrier between them, thereby permitting international law to penetrate the veil of sovereignty into the internal sphere of State jurisdiction. This development is an appropriate means to circumvent the undesirable consequences of obsolete dualism of classical international law by technical devices tinged with monism.

The existence of this tendency in national law is an undenia-

86. Triepel, *Les rapports entre le droit interne et le droit international*, 1 RdC 77 (1923).

87. See *supra* note 2.

88. de Visscher, *Les tendances internationales des constitutions modernes*, 80 RdC 515 (1952); Mosler, *L'application du droit international public par les tribunaux nationaux*, 91 RdC 619, 625-705 (1957).

ble fact.⁸⁹ Nevertheless, the development of general international law along these lines has not reached the point where the State concerned is legally bound to open its internal sphere of jurisdiction to the binding effect of international judicial decisions and other international acts.⁹⁰

Treaties instituting organs for judicial settlement of disputes usually define in a special article the effects of such judgments. Normally, the treaties prescribe that the decision of the court is final, that it has binding force between the parties, and that it imposes obligations on them within the context of the particular case.⁹¹ The effect of these and similar provisions is that the government concerned is under an international obligation to accept all the consequences of the judgment. For example, if a title of jurisdiction is recognized or denied, the State is bound to assure that all national organs exercise their competence within the limits of this title. If the judgment directs the performance of an act, the government must perform, either through its executive branch if so empowered by its legal system or by any other organ which can contribute to this effect. If the judgment contains declaratory provisions, the State, according to the *Marckx* judgment mentioned above, has the choice of the means of bringing about the effect called for by the judgment.⁹²

When deciding the status of certain territories in the Rann of Kutch, the Supreme Court of India made it clear that the international arbitral award between India and Pakistan was not called in question:

If we were sitting in appeal on the award of the Tribunal we might have formed a different opinion of the material, but we are

89. Ruiloba-Santana, *supra* note 64, at 672.

90. For a general evaluation of the practice regarding the compliance with international acts see C. H. SCHREUER, *supra* note 85, at 339-44.

91. See Statute of the International Court of Justice, art. 59; European Human Rights Convention, *supra* note 9, art. 53.

92. See text accompanying notes 69-71, *supra*. In *Marckx*, the Court of Human Rights stated:

Admittedly, it is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violations found stem directly from the contested provisions and not from individual measures of implementation, but the decision cannot of itself annul or repeal these provisions: the Court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53 [of the Convention].

Judgment of June 13, 1979, ser. A, No. 31, para. 58.

not. The fact remains that India undertook to be bound by the award pledging the national honour and we must implement the award. The only question is as to the steps to be taken.⁹³

Although a State's constitutional provisions may not permit the implementation of all the consequences flowing from the judgment the State is still internationally obligated to abide by the decision. It is generally recognized that acts violating international obligations of the State engage its international responsibility without regard to the internal structural organization of the State and without regard to the separation of powers protecting the independence of the judiciary. Article 6 of the Draft Articles on State Responsibility prepared by the International Law Commission speaks, in unequivocal terms, of the irrelevance of the internal organization of the State.⁹⁴ Article 7 adds that responsibility for the conduct of an organ (of a territorial governmental entity) within a State shall also be considered as an act of that State under international law.⁹⁵

In an individual case, the subject matter of the international decision might fall outside the competence of the executive branch of government. For example, compensation in money may be accorded by the government, an administrative measure may be ordered by it, or the conduct to be observed in international relations as prescribed by a judgment may be adopted by the government as representative of the State in external affairs. It may, however, happen that the subject matter of the judgment relates to acts which, according to national law, cannot be executed by either the government or by authorities subordinated to it. The national courts belong to this latter category of organs.

The international judgment has no direct effect on such organs. On this point the traditional dualistic analysis of the situation is still valid as general international law regardless of the type of operative clause in the international judgment⁹⁶ and regardless of what principles, rules, and evaluations of law are defined or indicated in the reasoning of a judgment.⁹⁷

93. *Patel v. Union of India*, 1978 Commonw. Int'l L. Cases 232, 267.

94. [1971] 2 Y.B. INT'L L. COMM'N (pt. 1) 243-53.

95. [1976] 2 Y.B. INT'L L. COMM'N (pt. 2) 73.

96. See Section III, *supra*.

97. See, e.g., Verzijl, *supra* note 49, at 594; Ruiloba-Santana, *supra* note 64, at 642, 644; 1 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE* 129 (1965); Golsong, *L'effet direct des normes de la Convention européenne des Droits de l'Homme et des décisions prises par les organes institués par celle-ci*, in *LES RECOURS DES INDIVIDUS*

For instance, the Court of Appeal of the International Tribunal of Tangier, has taken the position that a judgment of the I.C.J. is binding only upon the High Contracting Parties which must then take the necessary internal legislative measures to carry out the decisions of that High Court. For these reasons, the judgment cannot have an obligatory character on individuals who might litigate similar measures. Nonetheless, the Court of Appeal recognized that such decisions "might at best provide inspiration and guidance, although not because [they] have any binding force in municipal courts."⁹⁸

International courts are not appellate courts or courts of last resort with power of review over national courts. This is true even where international jurisdictions are competent to examine national legislation, administrative acts, and judgments of national tribunals. Because the European Convention on Human Rights⁹⁹ guarantees the free exercise of certain individual rights within member countries, the jurisdiction of the Strasbourg Court (and the previous jurisdiction of the European Commission on Human Rights) must inevitably interfere with the internal legal order. Although its judgments bind only the contracting party concerned,¹⁰⁰ the Court has the duty of qualifying internal measures as being either in conformity with or in violation of articles of the Convention. The Court has repeatedly pointed out that it cannot assume the role of the competent national authorities for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. "Review by the Court concerns only the conformity of these measures with the requirements of the Convention."¹⁰¹

In the *Sunday Times* case, the Court again drew attention to its earlier dictum that "it is in no way [its] task to take the place

DEVANT LES INSTANCES NATIONALES EN CASE DE VIOLATION DU DROIT EUROPÉEN 59-83 (1978).

98. Judgment of August 13, 1954, [1954] I.L.R. 136, 137. The court said rightly that a judgment of the International Court of Justice in the case concerning rights of United States nationals in Morocco was limited to the French zone of Morocco and therefore not applicable to the Tangier zone. The *obiter dictum* here quoted was not a necessary element of the motivation.

99. *Supra* note 9.

100. *Id.*, art. 53. See Drzemczewski, *The Authority of the Findings of the Organs of the European Human Rights Convention in Domestic Courts*, in 1 *LEGAL ISSUES OF EUROPEAN INTEGRATION* 6 (1979).

101. Case relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium (Merits), Judgment of July 23, 1968, ser. A., No. 4, at 35; Handyside Case, Judgment of Dec. 7, 1976, ser. A., No. 24, at 22.

of the competent national courts but rather to review under Article 10 [freedom of expression] the decisions they delivered in the exercise of their power of appreciation."¹⁰² Thus, the Strasbourg Court does not have the power of judicial review which, on the national level, is normally assigned to a national Court of Cassation. Nevertheless, the influence of its judgments goes beyond giving rise to an obligation on the State found guilty of a violation of the Convention to do everything to bring its national order into conformity with the exigencies of the Convention as interpreted by the Court. In a number of cases where violation of the Convention was due to the application of internal legislation, the national parliament enacted a new statute or amended an existing one.¹⁰³ It has also happened that without having lost a case a State has nonetheless changed its law in order to avoid future conflicts with the Court's interpretation of a protected right by the Convention.¹⁰⁴ Furthermore, other member States of the Convention commonly check their legislation on the basis of standards established by the Court.

If a judgment accords "just satisfaction" to the injured individual, the State must give effect to the judgment. Up to the present, in every case the sum fixed by the Court has been paid to the applicant. For this reason, the question whether the claim to the compensation fixed by the Strasbourg Court can be enforced before national courts has not yet arisen. It depends on the national law whether in countries where the Convention forms part of the internal law, this status is extended to claims the legal basis of which is derived from a judgment of the Court. In the author's opinion, it is improbable that any State will go this far even if the rights guaranteed in the Convention are incorporated into national law by statutory or constitutional law, or even as international law having priority over national legislative and constitutional norms.¹⁰⁵

The preceding considerations relate to the international aspect of the binding force of judgments; they give, however, only one side

102. Judgment of April 26, 1969, ser. A., No. 30, para. 59.

103. See, e.g., Schindler, *Die innerstaatlichen Wirkungen der Entscheidungen der europäischen Menschenrechtsorgane*, in *FESTSCHRIFT FÜR M. GULDENER* 273, 281 (1973).

104. In 1965, the Federal Republic of Germany amended the provisions of the code of criminal procedure regarding preventive detention *STRAFPROZESSORDNUNG* [StPO] paras. 112, 121, 122a (W. Ger.). In the *Wemhoff Case*, which related to the length of preventive detention (art. 5, para. 3 of the Convention) and went back to the time before the amendment, the Court concluded on no violation (Judgment of June 27, 1968, ser. A, No. 7).

105. Drzemczewski, *supra* note 100, at 6.

of the picture. The real effect within the national legal order is much greater than would appear from the strict rules of international law. The general trend of national legal orders and the efforts of courts in all countries to prevent a situation arising whereby their government would not have complied with international obligations, seem to indicate that, even on the basis of international law, an *opinio juris* is developing that the municipal organs of States must do everything in their competence to give to international judgments the full effect to which they are directed.¹⁰⁶

Conversely, a national judgment cannot indirectly render ineffective a judgment of an international court. The Permanent Court of International Justice declared that a Polish tribunal could neither render nonexistent the violation of an international convention recognized in a former judgment of the Permanent Court, nor destroy one of the grounds on which that judgment was founded.¹⁰⁷

A. Treaty Provisions

Contracting parties to a treaty establishing an international jurisdiction may agree to give a stronger effect to international judgments and attribute to them a direct effect within their national domain.

For example, in matters concerning the Revised Rhine Navigation Act¹⁰⁸ and the Convention on the Canalization of the Mosel,¹⁰⁹ the parties who wish to appeal a decision by a national "Rhine" or "Mosel" navigation tribunal have the choice between a national Court of Appeal, the Central Commission for the Rhine Navigation, or the Commission of Appeal of the Mosel Commission.

Another example of international judgments possessing a certain internal effect are the awards rendered by a Tribunal of the International Center for Settlement of Investment Disputes. According to the Convention establishing the Center, "Each Con-

106. C.W. JENKS, *supra* note 49, at 715.

107. Chorzów Factory Case, [1928] P.C.I.J., ser. A., No. 17, at 34.

108. Revised Rhine Navigation Act of Oct. 17, 1868 (as later amended) art. 37, 37 L.N.T.S. 210; Convention Amending the Act, Nov. 17, 1963, 35 REVUE DE LA NAVIGATION INTÉRIEURE ET RHÉNANE 894 (1963).

109. Convention on the Canalization of the Mosel, Oct. 27, 1957, art. 34, [1956] BGBI II 1848.

tracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."¹¹⁰

Courts of economic communities are competent as to some economic matters formerly reserved to the national domain, but only in exceptional cases do these courts decide inter-State disputes in the traditional sense, i.e., between member State governments. In most cases, natural and juridical persons are entitled to seise such a court of justice. Its primary character is that of a tribunal for administrative matters. Judgments in this field have a direct effect within all member States. The same is true, as pointed out above, of rulings given, at the request of national courts, on preliminary questions of community law in cases pending before those courts.

The principal example and model for other institutions of a similar kind is the Luxembourg Court of the European Communities. The Andean Court, which can also be seised by natural and juridical persons, is similarly endowed with a jurisdiction effective within the member-countries: "To be enforceable, the rulings of the Court shall not require homologation or exequatur in any of the member-countries."¹¹¹

B. *Res Judicata*

The effect of *res judicata* is limited to parties to the dispute and to the decision as it is expressed in the operative clause. This is a general principle of law, and it is repeated in treaty provisions which define the obligation of the parties resulting from judgments.¹¹² The jurisprudence of the Permanent Court as well as that of the present International Court leaves this statement unquestioned. The Permanent Court, in its Advisory Opinion on *The Polish Postal Service in Danzig*, made it clear that the operative clause determines the scope of *res judicata*: "the reasons contained in a decision, at least insofar as they go beyond the scope of the operative part, have no binding force as between the Parties concerned."¹¹³

110. Convention on the Settlement of Investment Disputes, *supra* note 22, art. 54.

111. Treaty Creating the Court of Justice of the Cartagena Agreement, *supra* note 15, art. 32.

112. See, e.g., Statute of the International Court of Justice, art. 59.

113. [1925] P.C.I.J., ser B., No. 11, at 29-30. See also Temple of Preah Vihear, [1961]

The limitation of *res judicata* to the parties and to the subject matter which has been the object of the dispute is also taken as axiomatic by legal writers.¹¹⁴

This emphasis laid on the concept of *res judicata* between the interested parties, however, does not mean that international judgments may not have, in particular circumstances, legal effects *erga tertios*, or may not at least exercise even without the legally binding authority, an influence on the conduct of third parties. Mention has already been made of international judgments adjudicating a territorial or personal title of jurisdiction. In appropriate cases, the effect of such judgments may be *erga tertios* and even *erga omnes*.¹¹⁵

A certain extension of strict *res judicata* is indicated in the Advisory Opinion of the Permanent Court of International Justice concerning the *Polish Postal Service in Danzig*. In that case the Court admitted that all parts of a judgment concerning the points in dispute are to be taken into account in order to determine the scope of the operative portion.¹¹⁶ Certainly, the reasons necessary to motivate the operative clause explain the scope of that clause and give the party concerned guidance on the action required to implement it.¹¹⁷

In fact, reasons stated in international judgments, particularly those of the I.C.J., are commonly applied not only by the parties to the dispute. For example, it is quite natural for parties to proceedings before the I.C.J. to support their own case with earlier dicta of the Court. The same is true in disputes before other international judicial institutions.

As a rule, the *res judicata* effect of an international judgment

I.C.J. 17, 27.

114. See, e.g., Limburg, *supra* note 2, at 523; D. SCHINDLER, *supra* note 42, at 168; S. ROSENNE, *supra* note 97, vol. 1 at 130, vol. 2 at 628; Simons, *supra* note 24, at 41.

115. 1 S. ROSENNE, *supra* note 97, at 130-31.

116. [1925] P.C.I.J., ser. B, No. 11, at 30.

117. In this respect, the Court of Arbitration constituted in the *Continental Shelf Case* between France and Great Britain pointed out:

The Court of Arbitration considers it to be well settled that in international proceedings the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not to its reasoning. In the opinion of the Court, it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif* (cf. Chorzów Factory Case, P.C.I.J., ser. A, No. 13).

Interpretation of the Decision of June 30, 1977, 54 I.L.R. 139, 170 (1979).

does not extend to proceedings before national courts. This follows from the general principle that only the State is directly bound, not its organs. The result may be contrary if the treaty itself provides for this effect within the national legal order.¹¹⁸

Direct *res judicata* effect on proceedings of national courts is impossible in all inter-State judicial settlements because such settlements fail to fulfill the requirements of identity of the parties and, normally, the subject of the case.¹¹⁹ For instance, the Civil Court of Brussels rejected the contention of a plaintiff company who sought to provide international recognition to an executory judgment for the purpose of obtaining sums which had been attached. The Court reasoned it

cannot maintain that the decision of 15 June 1939 in a dispute between the Greek State and the Belgian State—taking up its case before the Hague Court—was a judgment in its favour even though it was not a party to the case. It is inconceivable that a party which, by definition, is not admitted to the bar of an international court, should be able to rely on a judicial decision in a case to which it was not a party.¹²⁰

This judgment, however, met with considerable criticism; the question was raised why the international judgment had not been recognized as evidence of the plaintiff's title.¹²¹ The lack of identity of the parties (and of the subject-matter) is not an obstacle to the effect as *res judicata* before municipal courts if one of the parties to the international judgment is an individual or a company. There exists, however, no rule of international law as to the direct effect in national proceedings, unless such is provided for by treaty.

The European Convention on Human Rights, for example, does not require that judgments of the Strasbourg Court be treated as *res judicata* before the national courts of the State against which the judgment is given.¹²² The applicant who has

118. The question of *res judicata* should not be confused with the obligation to execute an international decision by the competent national authorities. Such provisions are found in the Treaty Establishing the European Communities, *supra* note 8, art. 192, and the Treaty Creating the Court of Justice of the Cartagena Agreement, *supra* note 15, art. 32.

119. Schreuer, *The Implementation of International Judicial Decisions by Domestic Courts*, 24 INT'L & COMP. L.Q. 153, 165 (1975); 1 S. ROSENNE, *supra* note 97, at 130.

120. *Socobel v. Greek State*, 18 I.L.R. 3-5 (Tribunal Civil de Bruxelles 1951).

121. 1 S. ROSENNE, *supra* note 97, at 132.

122. Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member-States*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS 97 (British Institute of International and Comparative Law ed. 1965); Drzemczewski, *supra* note

seised the European Commission is not entitled to bring a case before the Court even though his application which had been admitted by the Commission is under consideration. Since he is not a party to the proceedings, the judgment theoretically concerns only the defendant State. Furthermore, the object of the proceedings is not the same since the judgment merely declares whether or not there has been a violation of their right by the defendant State.

The negative result does not necessarily indicate that national courts are unable to implement judgments of the European Court and other international courts. Although they are in theory not directly bound either by the operative part of the judgment or by the reasons, national courts will take into account the dicta of international courts either as persuasive authority, or as a statement of the international obligations of their own State, which they will seek to comply with as far as possible.

Following a finding of a violation of the European Convention, in the additional proceedings to determine just satisfaction to the applicant the prevailing applicant is provided with a right to compensation.¹²³ Nevertheless, he has even in this part of the proceedings no *jus standi in judicio* before the Court. Member States are, however, not debarred from permitting, in their legislation, internal judicial proceedings in which the judgment on satisfaction is treated as *res judicata*. This has been accomplished in a Belgian case by the *Tribunal de Premiere Instance* at Brussels which rejected the claim of an applicant for compensation on grounds that the European Court of Human Rights had declared the same claim not well founded.¹²⁴

V. RELEVANCE OF THE LEGAL STATUS OF INTERNATIONAL LAW AND THE INTERNATIONAL JUDICATURE IN NATIONAL LAW AND BEFORE NATIONAL COURTS

The competence of national courts to enforce international judgments, to apply the rules stated or the legal arguments set out therein, depends on the status of treaties as well as customary international law in the national legal order. The position of the national legal order may be that treaties, insofar as their provisions

100, at 608.

123. European Human Rights Convention, *supra* note 9, art. 50.

124. Judgment of Jan. 16, 1976, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 1118.

are self-executing, and/or the principles and rules of general international law, form part of the national law or are applied as if they were national law. Even if this is the route chosen by a State in its constitution or by its unwritten internal law, it does not necessarily follow that national courts are authorized to apply international judgments or to treat their reasoning as binding on them. Whether this is done depends on closer examination of the legal order of each State.

The application of treaty provisions is normally prescribed in explicit terms, while that of general international law may often be left to judicial practice. In many countries the prevailing trend is towards liberalized application of international law; the differences are therefore not as great as one might suppose in view of the different constitutions, laws, and traditions of the various states.

National law usually makes a distinction between treaty law and customary international law. In most countries of continental Europe, in the United States, and in other countries following the same traditions, such treaty provisions are self-executing, *i.e.*, need no further implementation by the national legislature and therefore are applied as national law. Constitutions differ in the position attributed to such treaty law in the hierarchy of the national system of norms. As a rule, treaty provisions having a self-executing character are applied on the same level as national statutory law enacted by the parliament. They are regarded as being on equal footing with original statutes of the legislature, *i.e.*, the later act prevails over the previous one.

A. Countries Incorporating Treaty Provisions

Under this system, the legislature can overrule the treaty by enacting a statute in contradiction to the treaty's provisions thereby engaging the international responsibility of the government. In countries where either treaty provisions in general or particular treaties have the same authority as constitutional law (as, for example, in Austria, the European Convention on Human Rights) the earlier treaty supersedes even later statutes enacted by parliament. The question may arise whether treaty provisions having constitutional character prevail over other conflicting provisions of the constitution.

A similar issue, although on a somewhat different legal basis, gave rise to a famous decision of the Federal Constitutional Court of the Federal Republic of Germany. At the request of a German

administrative tribunal, the Court of Justice of the European Communities gave a preliminary ruling stating that the individual right to freedom of commerce and profession—as defined by the EEC Treaty—was not, in the particular case, violated by application of a norm of Community law. The administrative tribunal expressed doubt whether the effect of this ruling might not amount to a denial of the right to the free exercise of a profession guaranteed by [article 12 of] the Basic Law, *i.e.* the Constitution of the Federal Republic of Germany. The tribunal submitted to the Federal Constitutional Court the question of compatibility of the ruling with the Basic Law: Finding there was no conflict in the particular case,¹²⁵ the Court expressed regret that the Communities lacked a specific bill of rights and a democratically legitimated parliament possessing legislative powers directly elected by general suffrage. The Court further intimated that as long as these conditions were not fulfilled, the fundamental rights guaranteed by the *Grundgesetz* must prevail.¹²⁶ The problem in this case, and in parallel cases before other high jurisdictions¹²⁷ (as, for example, the Italian Constitutional Court) is not one of a conflict between two norms of constitutional character because the European Communities form an autonomous legal order in themselves. The interpretation of Community law by the Luxemburg Court is binding on every organ and every person subjected to this legal order. Community law, therefore, as a matter of principle, has priority over national law and over the decisions of national courts. However, as regards the application of Community law within the Federal Republic of Germany, the latter must not, according to the Federal Constitutional Court, prevail in case of conflict with fundamental rights of the Constitution. From this aspect, the conflict of norms has been analogized by the constitutional courts in Germany and Italy to a conflict between rules derived from different sources where one rule must be given priority in a concrete case.¹²⁸

125. Decision of May 29, 1974, 37 BVerfGE 271; 14 Common Market L.R. 540. The case is reported and discussed at length by Marquis, *supra* note 80, at 223-29.

126. [1949] BGBI I, arts. 1-19.

127. For the jurisprudence of the Italian Constitutional Court, see Marquis, *supra* note 80, at 221-23.

128. The importance of the German decision should not, however, be overemphasized. The Federal Constitutional Court recognizes that the Luxembourg Court adopts the rules embodied in the European Convention on Human Rights, although it is not formally bound by them. In a recent decision, the Court of the Communities emphasized that it takes account of the fundamental rights recognized in the constitutional traditions of the member

Conflicts of this kind cannot arise in countries in which self-executing provisions of international agreements prevail over the constitution itself and must be applied by the courts with priority over all domestic legislation.¹²⁹

National constitutions and laws are normally silent on the functions of national courts with regard to international judgments. Nonetheless there are exceptions. For example, the Netherlands Constitution provides that the rule giving priority to self-executing provisions of international agreements applies similarly to "decisions made by organizations based on international law." The conclusion drawn from this is that self-executing decisions of international courts may be given the same precedence over the Netherlands Constitution and legislation as are the self-executing provisions of treaties themselves. So far, no conflict has arisen between the Dutch legislation and the European Convention.¹³⁰

The status accorded treaty provisions as law applicable in the internal legal order does not necessarily dictate the enforceability of international judgments before national courts. Illustrative examples are rare, probably because national codes of judicial procedure do not envisage this situation.¹³¹ This position is borne out by the fact that a judgment of a national court which has been found, on the international level, to be a violation of State's obligation is not thereby invalidated; rather, it can only be deprived of its internal effect if national legislation provides procedural means to reopen the case.¹³² If, however, an international tribunal renders a binding decision which does not relate to a previous national judgment, it is quite probable that national courts will contribute, as far as possible, to the execution of the international judgment.

states, Case 44/79, *Hauer v. Rheinland-Pfalz*, [1979] E. Comm. Ct. Rep. No. 10, para. 15, at 3729, 3744.

129. CONSTITUTION OF THE NETHERLANDS, art. 66.

130. *Id.* art 67; Evans, *The Practice of European Countries Where Direct Effect Is Given to the European Convention on Human Rights in Internal Law*, in COUNCIL OF EUROPE, PROCEEDINGS OF THE COLLOQUY ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Athens, Sept. 21-22, 1978) 109, 162-63, 166 (1979).

131. *Id.* at 154-56. See also the Order of the German Federal Administrative Court, on the application of Dr. E. König, that decisions on cases tried by the European Court of Human Rights cannot quash judgments of national courts. (Order of Sept. 10, 1979, not published).

132. Austria has established, by a Federal Act of March 26, 1963, the right of a condemned person to apply for a retrial of his case, if his recourse to the European Commission on Human Rights has been declared admissible. [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 804.

In principle, the national judge, who is generally obliged by constitution or statute to implement international law, may take account of an international judgment if he is not barred from so doing by an explicit national provision to the contrary.

If an international court is competent to interpret a treaty to which the State is a party, then the State is obligated to apply the treaty as interpreted by the international court. Consequently, national courts must decide cases in conformity with the rule so interpreted even if they expressed another viewpoint in previous cases. For example, the European Court of Human Rights has decided that the Convention includes the right to have the free assistance of an interpreter if the defendant cannot understand or speak the language used in court and that he may not be ordered to reimburse the expenses so incurred even if he loses his case. In response to this Convention, German courts have changed their case law which has conceded the free assistance of an interpreter only to defendants who were acquitted.¹³³

It is not free from doubt that this view of the competence of national courts to enforce international judgments is generally recognized in practice.¹³⁴ The reason for the author's conclusion is the following: This section of the present study refers to states which have opened their national legal order to the application of international law. The extent of that application depends on two conditions. First, it depends on the bearing of the obligation imposed on the State by the treaty; the treaty provisions are to be interpreted according to the rules of the Vienna Convention on the Law of Treaties, which are applied, as the I.C.J. and the European Court of Human Rights have repeatedly declared, as customary international law.¹³⁵ Secondly, only self-executing provisions are directly applicable. Yet, the concept of "self-executing" is not limited to such matters of substantive law as civil rights or criminal offenses. It includes any provision which can be applied without further implementation by any national organ whether executive, administrative or judicial.

133. Art. 6, para. 3e; Luedicke Case, Judgment of Nov. 28, 1978, Eur. Ct. of Human Rights, ser. A, No. 29. In response to this interpretation, German courts whose case law had not been uniform generally apply the Court's doctrine. See, e.g., 1979 N.J.W. 2484.

134. See Evrigenis, *Reflection on the National Dimension of the European Convention on Human Rights*, in COLLOQUY ON HUMAN RIGHTS, *supra* note 130, at 78.

135. Vienna Convention on the Law of Treaties, May 22, 1969, arts. 31-33, 8 I.L.M. 679 (1969).

B. Countries Not Incorporating Treaty Provisions

In countries where self-executing provisions of treaties do not operate in the internal legal order, the position of municipal courts, as explained previously, differs from national courts in countries which incorporate treaty provisions.

The most important country of the group which does not admit the internal application of treaty obligations in the absence of legislative incorporation is England. Consulting Halsbury's *Laws of England*, one finds:

International agreements may be referred to if they are embodied in the statute or have in effect been incorporated in the statute, in accordance with powers conferred by it, by means of subordinate legislation; but where a statute is unambiguous reference cannot be made to a draft convention scheduled to it in order to give a section a meaning other than its natural meaning.¹³⁶

Based on the supposition that "there be some municipal legislation giving enforceability to the right," the Supreme Court of India recognized that rights stated by an international court (reference was made to the Permanent Court of International Justice) can be claimed in a municipal court.¹³⁷

In recent years, the question has arisen several times before English courts whether, and if so to what extent, rights embodied in the European Convention on Human Rights (to which Great Britain is a party) could be applied or taken into account. In *R. v. Chief Immigration Officer, Heathrow Airport, ex parte Salamet Bibi*, Lord Denning said:

[W]hen Parliament is enacting a statute or the Secretary of State is framing rules, the courts will assume that they have regard to the provisions of the convention and intended to make the enactment accord with the convention, and will interpret them accordingly. But I would dispute altogether that the convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament."¹³⁸

136. 36 HALSBURY'S LAWS OF ENGLAND, ¶ 623, at 411 (3d ed. 1961).

137. *Rao v. Union of India*, 5 Commonw. Int'l L. Cases 1, 27 (1976).

138. [1976] 3 All E.R. 843, 847, C.A.. See 48 BRIT. Y.B. INT'L L., 348-52 (1976-77). See also *Cheney v. Conn.* [1968] 1 W.L.R. 242, 9 Brit. Int'l L. Cases 795-99 (Supp. 1966-70, 1973) where reference is made to 1 L. OFFENHEIM, INTERNATIONAL LAW 40 (8th ed. 1955): Such treaties as affect private rights and, generally, as require for their enforcement by English courts a modification of common law or of a statute, must receive parliamentary assent through an enabling Act of Parliament. To that extent bind-

To what extent a judgment of the European Court of Human Rights would have an influence on an English court was dealt with as recently as 1979 by the Chancery Division of the High Court in *Malone v. Commissioner of Police of the Metropolis (No. 2)*.¹³⁹ During a previous criminal trial, prosecuting counsel stated that the telephone of his client had been tapped by police on the authority of a warrant issued by the Secretary of State. The client, plaintiff in the case, issued a writ against the police claiming, *inter alia*, that any tapping of telephone lines violated the European Convention for the Protection of Human Rights. Plaintiff contended that Article 8 of the Convention conferred on him a direct right to have his "private and family life, his home and his correspondence" respected. Alternatively, if the convention did not confer a direct right, it was at least a guide to the interpretation and application of English law.¹⁴⁰ In 1978, the European Court of Human Rights, in the *Klass* case, considered whether a German statute which permitted, under certain conditions, governmental surveillance of post and telecommunications without requiring the authorities to notify those concerned, was in conformity with Article 8 of the Convention. The European Court was satisfied with the German measures of control which were designed to prevent abuses.¹⁴¹ In the *Malone* case, the judge dismissed the claim stating that the Convention "does not, as a matter of English law, confer any direct rights on the plaintiff that he can enforce in the English courts."¹⁴² The judge found himself unable to construe the English law as based on the Convention and on the interpretation given by the Strasbourg Court in the *Klass* case. It appeared to the judge:

[t]hat where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."¹⁴³

ing treaties which are part of international law do not form part of the law of the land unless expressly made so by the legislature.

Compare *R. v. Secretary of State for the Home Department, ex parte Phansopkar*, [1976] Q.B. 606.

139. [1979] 1 Ch. 344.

140. *Id.* at 351. See European Human Rights Convention, *supra* note 9, art. 8.

141. Case of *Klass*, [1978] Y.B. EUR. CONV. ON HUMAN RIGHTS 622.

142. *Malone v. Metropolitan Police Commissioner*, [1979] 1 Ch. at 378.

143. *Id.* at 379.

The only remedy is to interpret English law as being, as far as possible, in harmony with treaty obligations entered into by the Crown.

The well-known rule regarding general international law that "international law is part of the law of the land" allows the courts to apply such principles and rules to the point until legislation explicitly prevents them from doing so. In this respect, the legal situation is no different from the position of the courts in countries which allow self-executing treaties.

According to universal practice, municipal courts construe national law in such a way that its application will not engage the responsibility of their government in international relations. All English decisions, quoted above attempt to follow this principle. For this reason, conflicts between national and international judgments are rare.

If legislation seems to contradict a prior treaty, national courts may, in order to avoid international difficulties for the government, construe the relationship between the treaty and the subsequent statute as a relationship between *lex specialis* and *generalis*. For example, the former German *Reichsgericht* (Supreme Court of the German *Reich*) preserved some rights conceded to Russian nationals in a treaty of 1894, although a later statute of a general character applying to all persons under German jurisdiction, did not permit such rights. The court reasoned that a later *lex generalis* could not abrogate the earlier treaty (applicable as German law) which was directed solely to the status of a certain group of persons, *i.e.*, Russian nationals in Germany.¹⁴⁴

VI. THE EFFECT OF INTERNATIONAL JUDGMENTS ON NATIONAL COURTS OF NON-PARTY STATES

The binding effect of international judgments does not extend beyond the parties to the dispute. Thus, absent special circumstances, third-party States and, *a fortiori*, their municipal courts are in principle not concerned with such judgment. Special situations in which a direct or indirect influence is exercised may, however, arise in the following special situations: (1) intervention by third States in the proceedings; (2) implementation of a judgment interpreting a multilateral convention by municipal courts of

144. 111 RGZ 40 (1929).

States who are parties to the dispute; or (3) reference to principles, rules, and legal arguments in the reasoning of international judgments, made by a municipal court confronted with the same legal question.

A. Intervention

Intervention as a concept of international procedural law dates back to the Hague Peace Conferences of 1899 and 1907.¹⁴⁵ The example of the Hague Conventions has been followed by judicial instruments of such universal character as the Statutes of the Permanent Court and the I.C.J.¹⁴⁶ and by the 1928 Geneva General Act for the Pacific Settlement of International Disputes.¹⁴⁷

Two forms of intervention exist, distinguished by the particular legal interest of the third party seeking to take part in the proceedings. The first presupposes an interest of a legal nature which may be affected by the decision in the pending case.¹⁴⁸ The second requires disagreement as to the construction of a convention to which States other than those participating in the case are parties.¹⁴⁹ The consequences of the first form of intervention are not explicitly defined. It may be concluded from the silence of the convention or the Statute on this point that the intervening State is bound to the same extent as the original parties to the dispute, that is in the mutual relationship of all States participating in the proceedings to each other, and with restriction to the actual case. As regards the effect of the judgment on the municipal courts of the intervening State, the same considerations are relevant as have been set out in Section IV, *supra*, with reference to the national courts of the State concerned as a party to a legal dispute.

The legal consequence of the second form of intervention is that the construction of the treaty given by the judgment will be equally binding on the intervening State.¹⁵⁰ A State which intervenes because it is interested in a certain construction of the convention in question and wants to avoid the risk of an unfavorable construction without having its arguments heard. Having inter-

145. First Hague Convention, *supra* note 3, art. 56; Second Hague Convention, *supra* note 2, art. 84.

146. Statute of the International Court of Justice, arts. 62-63.

147. Sept. 26, 1928, arts. 36-37, 93 L.N.T.S. 344, 359.

148. Statute of the International Court of Justice, art. 62.

149. *Id.* art. 63.

150. *Id.* para. 2.

vened, it is obliged to act in conformity with the construction defined by the judgment in the operative clause or in the *ratio decidendi*. It is doubtful whether *res judicata* goes as far as to prevent the intervening State from disputing this construction before the same court in a subsequent case involving the same legal problem. The municipal courts of the intervening States are not directly affected by the judgment, but must take this into account in order to avoid their government being held responsible for non-compliance with the convention. Here again, the same reflections are to be made as in the parallel situation of national courts of the original parties to the dispute.

If a multilateral treaty system expressly permits the right to intervene in order to influence the construction of the treaty, it follows that parties to the convention in question who do not avail themselves of this right are not bound by the judgment given between other parties. The effect of *res judicata* extends only to intervening States. Contracting States not intervening do, however, incur the risk that the court will take the same line in the future. If the State is not bound, its national organs, including the courts, are *a fortiori* not concerned. The courts can, of course, use the international judgment and its reasons as authority in their own reasoning in cases involving the same legal question.

The problem is more difficult if a multilateral treaty does not provide for intervention by States seeking to influence the construction thereof, although it is to be expected that a court will apply the same construction in similar cases concerning other contracting parties. The European Convention on Human Rights is the most striking example of this problem; there is no article in the Convention providing for intervention. As a practical matter, decisions of the Court and, to a certain extent of the Commission, have a prejudicial effect on other contracting parties.

The government of the United Kingdom felt this situation was unfavorable to non-parties in certain cases. For example, the compatibility of internal statutes with provisions of the Convention could be of interest not only for the defendant State, but also for other member countries where legislation existed relating to the point at issue. The United Kingdom, therefore, asked for an opportunity to present its legal views to the Court in a case involving a conflict between private citizens and the Netherlands. After an exchange of letters between the government and the registry had taken place, the Court took account, in its judgment, of an exposé

by the British Government transmitted to the Court by the delegates of the Commission which took part in all proceedings before the Court. The Commission does not only submit the applicant's case to the Court, but also represents the common interest of all contracting States in a proper application and interpretation of the convention.¹⁵¹ This quasi-intervention certainly does not have the effect that the interpretation given to the article in question affects the United Kingdom to a greater extent than the other parties to the convention which were not parties to the case.

This case shows that contracting parties feel judgments which formally bind only the defendant State have in fact a wider bearing. Their desire to influence the construction of the Convention, and to explain to the Court its consequences and indirect impact on other countries, is perfectly legitimate. Although the Court normally makes inquiry into comparative law before it decides a question which may have a prejudicial effect on countries other than the defendant State, it may overlook problems resulting from legal traditions or particular conditions of contracting parties not participating in the dispute. Accordingly, the need to permit intervention increases with the number of member States with different legal systems and methods of legal thinking.

B. Implementation of Judgments by National Courts of States Belonging to a Treaty System

One of the purposes of a multilateral treaty system is to provide for the uniform application and interpretation of all treaty provisions by and within the member States. Treaties establishing international organizations, in particular economic communities and so-called "law-making" treaties, are clear examples of the need for uniformity.

In the present context it is no longer necessary to discuss the European Communities because they possess an autonomous legal order of their own and a judiciary which possesses the monopoly of binding decisions on the application and interpretation of Community law.

On the other hand, the case law of the Strasbourg Court confronts all 21 member States of the European Convention on Human Rights with the problem of how to react to a decision in-

151. Winterwerp Case, [1979] Y.B. EUR. CONV. ON HUMAN RIGHTS 426, (Judgment of Oct. 24, 1979, ser. A, No. 33, para. 7 at 6). See also Drzemczewski, *supra* note 100, at 49.

volving a question of interpretation which easily can be brought in future Strasbourg proceedings against other defendant States. According to the terms of the Convention, the obligation to abide by a decision is imposed only upon the party or the parties to the dispute.¹⁵²

Unlike the Mixed Arbitral Tribunals set up after the First World War in Germany,¹⁵³ the Strasbourg Court does not hold a position equivalent to a municipal court of a member State. It can, however, be maintained that the interpretation of a provision of a convention by the Strasbourg Court is an authoritative definition of that provision at least to the extent that the interpretation when isolated from the facts of the actual application is not so closely tied to the specific case that it has no importance in itself.

In the case of several Dutch soldiers against the Netherlands,¹⁵⁴ the Strasbourg Court decided that although military disciplinary measures have no penal character, the guarantees provided for by article 6, paragraph 1, of the Convention for the "determination of any criminal charge" were applicable if the penalty imposed by the judgment could be of the same severity as that normally imposed only after criminal proceedings with full judicial guarantees. Insofar as military legislation in some other countries did not correspond to this interpretation, the question arose whether these countries should change or amend their rules of military discipline. The Swiss Federal Council, in a message to the Swiss Parliament, took the view that the Swiss Penal Military Code should be amended in view of this judgment.¹⁵⁵

In another case relating to the period of the applicant's continued detention on remand, the Swiss Federal Court (Constitutional Chamber) stated that notice must be given to the guarantees conferred by the Convention which were relied on by the applicant, and in particular, to their interpretation by the decisions of the tribunal set up by the Convention. In this connection, the Swiss Federal Court quoted the *Wemhoff* and *Neumeister* judgments of the Strasbourg Court, relating to Germany and Austria

152. European Human Rights Convention, *supra* note 9, art. 53.

153. Judgment of June 15, 1923 (German Supreme Court) A II 1 FONTES JURIS GENTIUM 258 (1931).

154. Case of Engel [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 490, (Judgment of June 8, 1976, ser. A, No. 22, at 3).

155. See Malinverni and Wildhaber, *La pratique suisse relative à la Convention Européenne des Droits de l' Homme*, in 34 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 181-83 (1977).

respectively, and applied the rules set out therein to the case of the Swiss applicant.¹⁵⁶

The judgment in the *Engel* case was also taken into account by the Constitutional Court of Austria. The Court held "the consequences in domestic law of this judgment of the European Court of Human Rights need not, however, be examined in the instant case since the judgment appealed against does not impose a sentence of imprisonment."¹⁵⁷ In a case concerning the guarantee of article 7 of the Convention (non-retroactivity of Penal Laws) the same court said that it "adopts" the opinion of the European Commission of Human Rights in the matter.¹⁵⁸

Although the English courts must not apply the European Convention on Human Rights and, *a fortiori*, cannot make a judgment of the Strasbourg Court the basis of their decision, the *dicta* of Strasbourg may be relevant for the construction of English law in order to avoid discrepancies between an English judgment and an international obligation of the Crown. In *Attorney General v. British Broadcasting Corporation*, this consideration was called "a question of legal policy."¹⁵⁹

From these and other cases, it may be concluded that municipal courts of other States which are parties to the Convention are not bound by the interpretation given by the Strasbourg Court. They normally adopt the interpretation of the Court as the official and authoritative meaning of the provision in question. The legal

156. Decision of Nov. 3, 1976, [1977] Y.B. EUR. CONV. ON HUMAN RIGHTS 801-03. The guarantees in question of the Convention were articles 5 para. 3, and 6 para. 1.

157. Decision of Oct. 15, 1976, [1977] Y.B. EUR. CONV. ON HUMAN RIGHTS, 686-89.

158. *Id.* at 674-75.

159. [1980] 3 All ER 161. As Lord Scarman put it:

Of course, neither the convention nor the European Court's decision in *Sunday Times v. United Kingdom* (1979) 2 EHRR 245 is part of our law. This House's decision, even though the European court has held the rule it declares to be an infringement of the convention, is the law. Our courts must continue to look not to the European court's decision reported as *Sunday Times v. United Kingdom* but to the House of Lords decision reported in *Attorney General v. Times Newspapers Ltd.* [1973] 3 All ER 54, [1974] A.C. 273 for the rule of English law. Yet there is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations. . . . I do not doubt that, in considering how far we should extend the application of contempt of court, we must bear in mind the impact of whatever decision we may be minded to make on the international obligations assumed by the United Kingdom under the European convention. If the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country's international obligation to observe the European convention as interpreted by the European Court of Human Rights.

Id. at 177-78.

formulation to be given to this fact does not matter. Of significance is the intention to contribute to the uniform application of the rights guaranteed by the Convention in all member countries. The rationale underlying the practice may also be that there is a risk of losing future cases of the same kind if the government were to find itself in the position of the defendant State. Another viewpoint may be that all member States which made special declarations recognizing as compulsory the jurisdiction of the Court and the right of individual petition to the Commission¹⁶⁰ are obliged to consider the decisions of these organs as having persuasive authority. The influence of Strasbourg case law will be greater as more consistent jurisprudence is developed.¹⁶¹

C. National Court Citation of International Judgments

National bodies, including courts, often refer to international decisions and their reasoning. This reference is the most important manner by which the international judicature exercises its influence. In any given case, however, it is difficult to determine on what basis the international judgment forms part of the reasoning of the national court. Occasionally, the international court's argument is used in support of the municipal court's own reasoning. Sometimes the international court is quoted along with other authorities, *e.g.*, legal writings and national judgments, in order to show that a rule is generally recognized internationally, or that a new rule is developing and can already be applied without violating international law.

The terms "source" and "evidence" of law have, in certain aspects, different meanings, but, as far as reference to international judgments in national decisions is concerned, no sharp distinction can be made between them since the intention of the judge to give one a different degree of weight than the other is not normally indicated. This author, therefore, shares the view of H. Lauterpacht that the distinction between the evidence and the source of many rules is more speculative and less rigid than is commonly supposed.¹⁶² All that can be said is that "evidence" of a rule is a more appropriate definition of the importance which references of this

160. European Human Rights Convention, *supra* note 9, arts. 25, 46.

161. Drzemczewski, *supra* note 100, at 47.

162. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 21 (1958).

kind have in the context of the national court's decision. The international judicature, taken as a whole, is certainly a source which contributes to the development of law. If it is relied upon in a national judicial decision, the national court takes it as "evidence" of the existence of the rule which it is going to apply.

Out of innumerable examples the following may be selected: The case decided by the Supreme Court of Nova Scotia concerning, *inter alia*, the status of the so-called Spanish Bay on the coast of Cape Breton, the decision in the North Atlantic Coast Fisheries Arbitration of 1909,¹⁶³ and the judgment of the International Court of Justice in the Norwegian Fisheries case of 1951,¹⁶⁴ have been quoted, by several judges, on an equal footing with national decisions and legal writings.¹⁶⁵

In its Judgment of July 22, 1952, the District Court of Tokyo has referred to the interpretation given by the I.C.J. regarding the concession agreement entered into between the Persian Government and the Anglo-Persian Oil Company. The Higher Court of Tokyo took the same line without mentioning the I.C.J. judgment.¹⁶⁶

The Federal Constitutional Court of the Federal Republic of Germany which is authorized, according to the Basic Law, to define general principles and rules of international law with binding force within the German legal order, usually carries out thorough research into international and national judgments relating to the rule in question. For instance, the Court examines the extent of immunity to be accorded to foreign governments in national legal proceedings. References to international and national judgments, as well as to legal writings of well known authors, are amply quoted in the motivation of the operative clause. The operative clause itself serves as a precise definition of the international rule in the form which the court has determined such rules should be expressed.¹⁶⁷

Rules of general international law are not static but may change entirely or in part. This may be demonstrated by changes in some very important rules; examples include the breadth of the

163. 11 R. Int'l Arb. Awards 173 (1910).

164. [1951] I.C.J. 116.

165. Cape Breton Case (1963), 9 Commonw. L. Cases 221-86 (1978).

166. Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 305, 308-12 (Dist. and High Courts, Japan, 1953).

167. See, e.g., the judgment concerning the distinction between *acta jure imperii* and *acta jure gestionis*, in the Judgment of Dec. 13, 1977, 46 BVerfGE 342, 361.

territorial sea, the status of the continental shelf, the developing maritime economic zone, the extent of the protection due to the property of foreign nationals and companies, and the extent of sovereign immunity before foreign courts. Rules may also develop their bearing through the interpretation given by international courts, especially by the I.C.J.

In countries whose courts do not adhere to *stare decisis* and in which general international law is applied as part of the law of the land, no difficulty arises with regard to the implementation of rules of general international law as they develop through an evolutive or dynamic interpretation of an international court. In contrast, in countries where the courts are bound by precedent, the question may arise whether they are able to follow changes in the law or whether they must apply rules of international law according to the established definition.¹⁶⁸ The answer given by English courts appears to be that the *stare decisis* rule cannot apply to the definition of a rule of general international law given in an earlier judgment if the rule or interpretation has changed before the question is re-examined for decision.¹⁶⁹ The latter solution is a logical consequence of the rationale underlying the principle that the State integrates into international society through application of the common law of that society as precedent in its national legal order.

168. See Sawyer, *Australian Constitutional Law in Relation to International Relations and International Law*, in *INTERNATIONAL LAW IN AUSTRALIA* 35, 48-52 (1975).

169. *Report on Decisions of British Courts during 1976-1977*, (quoting Lord Denning in 2 U.I.R., 365 (1977)), 48 BRIT. Y.B. INT'L L. 357-59 (1978). See also *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] 1 All E.R. 881; Drzemczewski, *Judicial Reaffirmation of the Doctrine of Adoption*, 42 MOD. L. REV. 212 (1979); Drzemczewski, *British Courts and the European Human Rights Convention*, 1979 TOPICAL LAW 40. The *Trendtex* judgment related to the changed conceptions of sovereign immunity.