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THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: BACKGROUND AND PERSPECTIVE ON ARTICLE 9(1)*

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I. THE SIGNIFICANCE OF "ARBITRARY" AND THE RELEVANCE OF *Travaux Preparatoires*

Article 9(1) of the International Covenant on Civil and Political Rights[1] (the "Covenant") provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to *arbitrary* arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. [Emphasis added.]

It is self evident that the content of this article would, to a large extent, turn on the meaning of the word "arbitrary." Does it mean "illegal" or "unjust" or both? For if it merely means "illegal," all despotic acts and oppressive laws of a government would be unassail-

* The author gratefully acknowledges the guidance of Professors Louis B. Sohn and Richard R. Baxter in the preparation of this article which is related to the author's two studies, *The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"?*, 10 HARV. INT'L L.J. 225-62 (1969), and *The International Covenants on Human Rights: An Approach to Interpretation*, 19 BUFFALO L. REV. 35-50 (1968-69). The importance of determining the meaning of the word "arbitrary" used in art. 9(1) of the International Covenant on Civil and Political Rights and in other international human rights articles has been highlighted in both these articles.

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1. For an exhaustive summary of the drafting of the Covenant, *see* Sohn, *A Short History of United Nations Documents on Human Rights*, EIGHTEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39, 101-20 (1968). The various stages up to 1954 when the Commission completed the drafting of the Covenant are recorded in Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, 10 U.N. GAOR, Annexes, Agenda Item 28 (Part II), at 2-7 (1955), U.N. Doc. A/2929 (July 1, 1955). In this connection, *see also* Commission on Human Rights, Report of the Tenth Session, 18 ESCOR, Supp. 7, at 3-7, U.N. Doc. E/2573 (1954).

able so long as these legislative enactments are in accordance with municipal laws. If, on the other hand, "arbitrary" is synonymous with "unjust," governments would have to respond to a higher standard.

Prescribing the rules for the interpretation of treaties, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 concede (1) that a special meaning shall be given to a term if it is established that the parties so intended, and (2) the relevance, as a supplementary means, of the *travaux preparatoires*, to the determination of the treaty content. Whether the parties intended that a certain term shall have a special meaning can generally be only established after reviewing the *travaux*. Accordingly, this is a study of the preparatory work of Article 9(1) to determine the understanding behind the adoption of the word "arbitrary" used therein.

A comprehensive drafting history of Article 9(1), however, presents many complex problems. In addition to the unusually long period of over two decades during which it was drafted, this article was referred back and forth in the United Nations to various sessions of the Commission on Human Rights (the "Commission"), the Economic and Social Council (the "Council") and the General Assembly. Within these bodies, the article was referred to their various committees; sometimes special subcommittees and drafting groups were established. Even when the article was not being debated in any organ of the United Nations, it was constantly being commented upon by several governments, specialized agencies, and individuals. Moreover, because of the increase in membership of the United Nations from 51 to 122 States during the period under review, the participants involved in the drafting continually varied.

II. DEVELOPMENT OF "ARBITRARY" IN ARTICLE 9

A. *The Origins (1945-1947)*

The beginnings of the arrest and detention article in the Covenant can be found in the declarations of human rights submitted by Cuba[2] and Panama[3] at the San Francisco Conference.[4] The Cuban

2. 3 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, at 500-02 (1945).

3. *Id.* at 264, 266-69.

4. The origins of this article are also perceptible in some pre-San Francisco Conference declarations. The Declaration of the International Rights of Man (1929), the first international bill of human rights, provided in its art. 1 that it "is the duty of every State to recognize the equal right of every individual to . . . liberty . . . and to accord to all within its territory the full and entire protection of this right." *See* 35 AM. J. INT'L L. 663, 664 (1941). Also relevant is a Bill of Rights included in a 1942 U.S. draft of the U.N. Charter. Its arts. 3 and 9 declared that "no person shall be deprived of . . . liberty . . . except in accordance with humane and civilized processes provided

"Declaration of the International Rights and Duties of the Individual" emphasized the right of every individual to "security of his person."[5] The Panamanian "Declaration of Essential Human Rights" was more elaborate on the subject and dealt with "freedom from arbitrary detention" in its Article 8:

> Every one who is detained has the right to immediate judicial determination of the legality of his detention.
>
> The state has a duty to provide adequate procedures to make this right effective.[6]

A "Statement of Essential Human Rights"[7] submitted later by Panama to the first session of the Council explained that this Article 8 implied that no one could be subjected to arbitrary arrest or be detained except pursuant to law. It also pointed out the "statement of the right does not include a statement of the grounds on which a person may be taken into custody and held for trial; that will depend upon the laws and legal system in the particular state."[8]

At its first session, the Council also had before it another Cuban "Declaration on Human Rights."[9] This Declaration sought to assure to every human being the "right to . . . liberty, to personal security and to respect of his dignity as a human being" and the "right to immunity from arbitrary arrest and to a review of the regularity of his arrest by ordinary tribunals."[10] All these declarations of human rights were, however, not discussed[11] and the first debate on the substance of the international bill took place after the establishment of the Commission.

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by law" and that the "right of people to be secure in their persons . . . from . . . arrest and detention shall not be denied or abridged except by orderly process determined by law and upon the establishment of probable cause." U.S. DEPARTMENT OF STATE, POST-WAR FOREIGN POLICY PREPARATION 1939-1945, at 483-84 (1950). From among the numerous contemporary bills of human rights prepared by private bodies and individuals, only a few had comprehensive articles on arrest and detention. Art. 1 of a bill prepared by Hersh Lauterpacht provided, *inter alia*, that there shall be protection from "arbitrary and unauthorized arrest." *See* H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 70, 93-97 (1945). Art. 15 of the International Bill of Human Rights prepared by the Committee on Human Rights of the Commission to Study the Organization of Peace also included the provision that "every person has the freedom from arbitrary arrest or detention." *See* COMMISSION TO STUDY THE ORGANIZATION OF PEACE, DRAFT INTERNATIONAL BILL OF HUMAN RIGHTS 10 (1947).

5. *Supra* note 2, at 500.

6. *Id.* at 267.

7. U.N. Doc. E/HR/3 (Apr. 26, 1946).

8. *Id.* at 7-8.

9. U.N. Doc. E/HR/1 (Apr. 22, 1946).

10. *Id. See* arts. 1 and 19.

11. The nuclear Commission did discuss, very briefly, the Cuban "Declaration on Human Rights" and the Panamanian "Statement of Essential Human Rights," U.N. Doc. E/HR/8, at 4 (1946); and U.N. Doc. E/HR/13 (1946), but finally decided to leave the drafting of the bill to the Commission, U.N. Doc. E/HR/15, at 5 (May, 1946).

During its first session, the Commission began its discussion on the bill with a debate about the rights that should be included in such a bill.[12] The United States suggested some categories of rights which "persons of differing national, legal, economic and social systems would regard as the human rights and fundamental freedoms to be promoted and respected by the United Nations."[13] Among such categories were included:

> (b) procedural rights, such as safeguards for persons accused of crime.[14]

The United Nations Secretariat's "International Bill of Rights"[15] appears to have contained a similar provision[16] and also included the right to liberty and security.[17] An Indian draft contained a reference to the "right of liberty, including the right to personal freedom."[18]

Another draft before the Commission was the "Declaration of the International Rights and Duties of Man"[19] formulated by the Inter-American Juridical Committee. Article XI of this Declaration related to the "Right to be Free from Arbitrary Arrest" and included the provision that:

> every person accused of crime shall have the right not to be arrested except upon warrant duly issued in accordance with the law, unless the person is arrested *flagrante delicto*.[20]

All these documents and proposals were considered very generally at some meetings.[21] They were eventually overshadowed by debates regarding the creation of a drafting group,[22] the "form" of the

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12. *See* U.N. Doc. E/CN.4/SR.7 (Jan. 31, 1947).

13. U.N. Doc. E/CN.4/4, at 2 (Jan. 28, 1947).

14. *Id.*

15. U.N. Doc. E/CN.4/W.4 (Jan. 13, 1947). This working paper was a restricted document and its text is not available. Other restricted comments of relevance appear to be U.N. Doc. E/CN.4/W.8, W.16, and W.18 (1947). *See* U.N. Doc. E/CN.4/20 (Feb. 26, 1947) which contains a complete list of documentation at this session.

16. See opening remarks of the Chairman, U.N. Doc. E/CN.4/SR. 7, at 2 (1947).

17. See remarks of Malik, U.N. Doc. E/CN.4/SR.9, at 2 (Feb. 1, 1947).

18. U.N. Doc. E/CN.4/11, at 1 (Jan. 31, 1947).

19. U.N. Doc. E/CN.4/2 (Jan. 8, 1947). This Declaration was submitted by the delegation of Chile.

20. *Id.* at 7. A commentary on this article may be found in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, DRAFT DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES OF MAN AND ACCOMPANYING REPORT 40-41 (1946). It must be noted that, as in this article, the word "arbitrary" was used in most of the arrest and detention articles in contemporary draft declarations. It had been used, as we saw, in the draft declaration submitted by Panama at San Francisco and at the first session of the Council; *see supra* notes 6-8. Cuba had used it in its "Declaration" submitted at the first session of the Council; *see supra* notes 9-10. "Freedom from arbitrary arrest" was also used in a draft declaration submitted by the American Federation of Labor; *see* U.N. Doc. E/CN.4/AC.1/3/Add.1, at 46 (June 2, 1947). *See also* art. 1 in H. LAUTERPACHT, *supra* note 4.

21. U.N. Doc. E/CN.4/SR.7-10, SR.13-14 (Jan. 31-Feb. 5, 1947).

22. U.N. Doc. E/CN.4/SR.10-12 (Feb. 3-4, 1947).

bill, and the measures of implementation.[23]

The Drafting Committee, entrusted by the Commission with the preparation of a preliminary draft of an international bill of human rights, had several proposals before it at its first session. Two approaches were suggested with regard to the drafting of an article on arrest and detention. The Secretariat draft[24] and the United States draft[25] both referred to rights against "arbitrary arrest" and "unauthorized arrest" while the United Kingdom[26] enumerated several specific exceptions to the "no deprivation of liberty" rule in a detailed article. The beginning of what was later to become an almost bitter dispute between those who preferred a general article and those who advocated an article with enumerated exceptions was already in the air, but a head-on collision of the two approaches was avoided, at least for the time being, by the utilization of both approaches for different purposes. Thus, while the "general" approach may have been the inspiration behind the arrest and detention article in the proposed draft Declaration,[27] the more detailed articles in the United Kingdom draft formed the basis for a general examination of the possible substantive contents of a draft Convention.[28]

The Drafting Committee decided to submit the United Kingdom draft as a working paper for a Convention, which the Commission might wish to consider and elaborate.[29] Accordingly, Article 10 of the United Kingdom draft was incorporated as Article 4 in Annex G ("Draft Articles on Human Rights and Fundamental Freedoms to be considered for inclusion in a Convention") of the Report of the First Session of the Drafting Committee.[30]

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23. U.N. Doc. E/CN.4/SR.14-16 (Feb. 5-6, 1947).

24. The text of arts. 5, 6, and 7 may be found in U.N. Doc. E/CN.4/AC.1/3, at 2-4 (1947). For a documented outline of these articles, which includes comments and proposals made at the first session of the Commission and related provisions in Constitutions of member States, *see* U.N. Doc. E/CN.4/AC.1/3/ Add.1, at 25-58 (1947).

25. U.S. art. 7 read: "No one shall be subjected to arbitrary or unauthorized arrest or detention." For text of arts. 6 and 7 proposed by the United States, *see* U.N. Doc. E/CN.4/AC.1/8, at 1-2, and Rev. 1, at 1 (June 11-19, 1947).

26. U.N. Doc. E/CN.4/AC.1/4, at 9-10 (June 5, 1947). It was pointed out by the U.K. representative that the U.K. draft articles did not represent the final views of his Government but were merely intended as a basis of discussion. U.N. Doc. E/CN.4/AC.1/SR.10, at 7 (June 20, 1947).

27. Commission on Human Rights, *Report of the First Session of the Drafting Committee*, U.N. Doc. E/CN.4/21, Annex F, art. 8, at 73, 74-75 (July 1, 1947).

28. *Id.* at 4-5, paras. 14, 18.

29. Report, *supra* note 27, at 5, para. 18. Eleanor Roosevelt, as Chairperson, pointed out that, with regard to the U.K. draft, there had been general approval in principle only. *See* U.N. Doc. E/CN.4/AC.1/SR.11, at 14-15 (July 3, 1947).

30. Report, *supra* note 27, at 82, 83.

B. *The Opening of Pandora's Box: The Second Session of the Commission (1947)*

The Working Party on the Convention appointed by the Commission considered, as the basis of its work, Annex G of the Report of the First Session of the Drafting Committee. As the United States was not represented on the Working Party, it was decided that its 18-article "Proposal for a Human Rights Convention" be presented and explained, on its behalf, by an observer.[31]

The United States "Proposal" included a two sentence article on arrest and detention that began with the provision that "No one shall be subjected to arbitrary arrest or detention."[32] The United Kingdom, on the other hand, suggested additions to what was already a detailed Article 4 of the Drafting Committee's draft Convention.[33]

The text of Article 8,[34] dealing with arrest and detention proposed by the Working Party, adopted both the "arbitrary arrest" sentence of the United States and the enumeration of exceptions as originally proposed by the United Kingdom. This article, which was probably the first article on arrest and detention ever to be drafted by an international group, with resulting legal obligations in mind, foreshadowed Article 5 of the European Convention on Human Rights.[35]

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31. Commission on Human Rights, *Report of the Working Party on the Convention*, U.N. Doc. E/CN.4/56, at 3, para. 4 (Dec. 11, 1947). The U.S. "Proposal" is in U.N. Doc. E/CN.4/37 (Nov. 26, 1947).

32. Art. 9, U.N. Doc. E/CN.4/37, at 4 (1947).

33. Among them was the proposal to add the provision that "no person shall be convicted of, or punished for, crime save by judgment of a competent tribunal and in conformity with the law." Other additions related to "fair trial" provisions. *See* para. 2 of U.N. Doc. E/CN.4/39 (Nov. 26, 1947).

34. U.N. Doc. E/CN.4/56, at 7-8. The relevant first two paragraphs of the five-paragraph art. 8 proposed by the Working Party provided:

> 1. No person shall be subjected to arbitrary arrest or detention;
> 2. No person shall be deprived of his liberty save in the case of:
>
> (a) the arrest of a person effected for the purpose of bringing him before a court on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime;
>
> (b) the lawful arrest and detention of a person for noncompliance with the lawful order or decree of a court;
>
> (c) the lawful detention of a person sentenced after conviction to deprivation of liberty;
>
> (d) the lawful detention of persons of unsound mind;
>
> (e) the parental or quasi-parental custody of minors;
>
> (f) the lawful arrest and detention of a person to prevent his effecting an unauthorized entry into the country;
>
> (g) the lawful arrest and detention of aliens against whom deportation proceedings are pending.

35. For text of art. 5 of the European Convention, *see* EUROPEAN COMMISSION OF

With regard to the first paragraph, the adoption of the "arbitrary arrest" sentence by the Working Party is significant. This was the first occasion when the word "arbitrary" was discussed in connection with an arrest or detention article. Although, as we saw, "arbitrary arrest" had been used in several international bills of human rights submitted to the Council and the Commission,[36] it had never been debated earlier. Equally important was the fact that the Working Party adopted the word "arbitrary" in preference to "unlawful."

The acceptance in principle of the need for a second paragraph to contain exceptions to the right against arrest seems to have opened a Pandora's box. Discussions on the arrest and detention article in the Working Party were dominated by several proposals to include more, or modify existing, limitations.[37] In the final text of Article 8, the Working Party suggested a list of seven exceptions.[38] There were, however, already some doubts that a list of exceptions could be exhaustive.[39]

The active cooperation of the U.S. observer, Plaine, stands out as the most noteworthy feature in the discussions of the Working Party in the formulation of the exceptions.[40] Later on, as we will see, the United States strongly opposed the enumeration of exceptions.

On December 13, 1947, when Article 8 of the Draft of the Working Party on the Convention was considered by the Commission,[41] Malik, Rapporteur of the Working Party, explained that paragraph 2 was "certainly not intended to be exhaustive. It represented the restrictions which had occurred to members of the Working Group, and representatives were free to suggest others based on the internal

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HUMAN RIGHTS, DOCUMENTS AND/ET DECISIONS 8-11 (1955-57). The European Convention may also be found in 213 U.N.T.S. 221; UNITED NATIONS YEARBOOK ON HUMAN RIGHTS FOR 1950, at 418 (1952); and in 45 AM. J. INT'L L. Supp. 24 (1951). Generally speaking, and keeping in mind the deletion of "arbitrary" in the European Convention, it might be fair to remark that art. 8 of the Working Party on the Convention anticipated art. 5 of the European Convention. Compare particularly the enumerated exceptions to the right against arrest and detention in both articles.

36. *See supra* note 20. *See also* the earlier discussion of drafts before the first session of the Drafting Committee.

37. *See* U.N. Doc. E/CN.4/AC.3/SR.6, at 10-15; SR.7, at 2; and SR.9, at 3-5 (Dec. 9-10, 1948).

38. For these exceptions, *see* text of para. 2, in *supra* note 34.

39. *See, e.g.*, the comment of the Egyptian representative in U.N. Doc. E/CN.4/AC.3/SR.6, at 13 (1948).

40. Plaine suggested "parental custody of minors" to replace "lawful custody of minors," a proposal which, with an addition, was accepted. U.N. Doc. E/CN.4/AC.3/SR.6, at 12-13 (1948). At the ninth meeting, he suggested the addition of a limitation to cover the case of civil arrest. *See* U.N. Doc. E/CN.4/AC.3/SR.9, at 3-4 (1948).

41. U.N. Doc. E/CN.4/SR.36, at 6-8 (Dec. 13, 1947).

laws of their countries."[42] The representative of the Soviet Union, however, opposed the enumeration of exceptions on the ground that they were the subject of different legislation in each country and that the Commission was not empowered to take any decision regarding them.[43] Chile was also of the view that it was unwise to make too many exceptions which might render the text valueless.[44] The United States, on the other hand, agreed to the text of Article 8, but for a minor reservation on the sufficiency of one of the limitations to cover all cases of civil arrest, and endorsed paragraph 2.[45] Subject to a minor modification, France also seemed to agree with paragraph 2.[46]

While in the Commission, therefore, there was some reaction to paragraph 2, paragraph 1 containing the word "arbitrary" escaped criticism. Article 8, as recommended by the Working Party on Convention, was adopted by 11 votes to 0, with 7 abstentions[47] and was incorporated as Article 9 in the draft Convention proposed by the second session of the Commission.[48]

C. *The Draftsmen's Dilemma: Brevity versus the "Limitations" (1948-1952)*

1. *Plethora of Limitations: The Second Session of the Drafting Committee*

In response to the request by the Secretary-General,[49] several governments submitted their comments on the draft Convention proposed by the second session of the Commission.

From these comments on Article 9, it was clear that the biggest issue likely to emerge before this session would relate to the "limitations" in paragraph 2. While previous drafting stages had seen no

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42. *Id.* at 7.

43. *Id.* at 4.

44. *Id.* at 6.

45. *Id.* at 7. The reservation was regarding 2(b) of art. 8 which the United States felt did not adequately cover all cases of civil arrest.

46. *Id.* at 6. Cassin suggested that the word "crime" in 2(a) be changed to "criminal offense." With this change, he pointed out, the article will cover minor offenses.

47. *Id.* at 8.

48. Commission on Human Rights, *Report of the Second Session*, 6 ESCOR, Supp. 1, U.N. Doc. E/600, Annex B, Part I, at 26 (1948). *See also* comments on art. 9 in Annex B, Part II, at 32; Uruguay felt that the text should be drafted in a less detailed form. India suggested an addition to paragraph 2(b). The United States repeated its reservation made before the Commission; *see supra* note 45.

For an appraisal of the work of the second session of the Commission, *see* Hendrick, *An International Bill of Human Rights*, 18 DEP'T STATE BULL. 195, 208 (1948); and Lockwood, *Drafts of International Covenants and Declaration on Human Rights*, 42 AM. J. INT'L L. 401-05 (1948). Lockwood concludes that the principles in the Covenant covered the right not to be deprived of one's life or liberty without due process of law. *Id.* at 402.

49. *Report of the Second Session, supra* note 48, at 3-4, para. 13.

more than a general discussion on this issue, the second session of the Drafting Committee was to witness the first detailed articulation of the two opposing points of view regarding the desirability of enumerating limitations.

The difficulty in drafting a list of limitations acceptable to all the parties was already becoming apparent. While some governments suggested additions[50] to the already long list adopted at the second session of the Commission, others pointed out several of their national laws that allowed arrests and detentions in cases not seemingly covered by paragraph 2.[51] The result was that as many as 40 suggested limitations were before the Drafting Committee.

Anticipating the inherent difficulties in the formulation of an exhaustive list of limitations, there gradually evolved, under the leadership of the United States, opposition to the enumeration of exceptions in the article. Commenting generally on the draft Covenant in its reply to the Secretary-General, the United States had argued that "the attempt to define in detail all the limitations permissible under each article is unnecessary and probably impossible"[52] and pointed out that "technological developments, whose nature cannot be forecast in any way, are bound to arise . . . . [e]ven existing contingencies cannot all be mapped out . . . . [t]he only type of document on which general agreement can possibly be secured is one of a general nature."[53] Accordingly, the article proposed by the United States did not contain any limitations. Instead, it provided that "no one shall be deprived of liberty without due process of law."[54]

In the Drafting Committee,[55] reacting against the possibility of a too detailed and yet possibly an inexhaustive list of limitations, Chile, China and the Soviet Union joined the United States in opposing the enumeration of exceptions. Favoring the principle of enumerating limitations were Malik (Lebanon) and Wilson (United King-

50. *See, e.g.*, replies of the Netherlands, U.N. Doc. E/CN.4/82/Rev. 1, at 9 (1948); Brazil, *id.* Add.2, at 9; and Norway, *id.* Add.5.

51. *See, e.g.*, replies of South Africa, *id.* Add.4, at 14; Norway, *id.* Add.5; and Sweden, *id.* Add.11, at 2.

52. U.N. Doc. E/CN.4/82/Rev.1, at 20 (1948).

53. *Id.* at 21.

54. *See* U.N. Doc. E/CN.4/AC.1/SR.23, at 5 (May 10, 1948); and U.N. Doc. E/CN.4/AC.1/19, at 9 (May 3, 1948). The approach against enumerating exceptions was also adopted in a contemporary draft prepared by Professor H. Lauterpacht, *Human Rights, The Charter of the United Nations, and the International Bill of Rights of Man*, and presented to the International Law Association, Brussels Conference, 1948. *See* U.N. Doc. E/CN.4/89, at 35, 37 (May 12, 1948). *See also* H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 70, 93-97 (1945).

55. The arrest and detention article was discussed at three meetings of the Drafting Committee, U.N. Doc. E/CN.4/AC.1/SR.23, at 4-9; SR.30, at 6-7; and SR.32, at 11-13 (May 10-26, 1948).

dom) who felt that, in the absence of enumerated restrictions, States may arrogate to themselves the widest possible powers over the individual. They felt that the Drafting Committee should concern itself less with brevity and more with precision.[56] The preference for this approach was also implicit in the texts of articles proposed by France[57] and New Zealand.[58]

The Drafting Committee, therefore, was faced with, on the one hand, proposals to delete the limitations and, on the other hand, equally forceful suggestions that they be retained. However, even those who wanted to enumerate exceptions did not seem to be able to agree on an acceptable list of limitations. Attempts at compromise seem to have failed and the Drafting Committee was at a dead-end.[59]

Helplessly, therefore, the Drafting Committee, unable to take any decisions on this issue, had to refer the whole matter to the Commission.[60] Forwarded to the Commission were:[61]

> (a) a slightly amended text of Article 9 originally forwarded by the second session of the Commission,
> (b) a list of limitations before the Drafting Committee,
> (c) the text proposed by the United States and
> (d) the text proposed by the Soviet Union. The Drafting Committee did indicate, however, that it preferred the Commission text.[62]

While the deadlock on the issue of limitations may be the most notorious aspect of the second session of the Drafting Committee, another potentially explosive issue, which was soon to dominate the entire debates on this article, began to shape up. The United Kingdom had proposed the deletion of paragraph 1 of the Commission text on the ground that the word "arbitrary" was "imprecise, indefinite and vague" and, as such, did not add anything to the rest of the article.[63] It was also pointed out that, while such a "subjective" word might be suitable for a Declaration, it was totally inappropriate for a Covenant.[64] Although, during the debates of the Drafting Committee, active opposition to the word "arbitrary" came forth only from the United Kingdom, it must be noted here that none of the several alternate texts for Article 9 submitted at this session contained the word "arbitrary." The texts proposed by France[65] and New Zealand[66]

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56. U.N. Doc. E/CN.4/AC.1/SR.23, at 4-6 (1948).
57. U.N. Doc. E/CN.4/82/Add.8, at 9-10 (1948).
58. U.N. Doc. E/CN.4/82/Add.12, at 11-12 (1948).
59. *See* U.N. Doc. E/CN.4/AC.1/SR.32, at 11-13 (1948).
60. *Id.* at 13.
61. Commission on Human Rights, *Report of the Second Session of the Drafting Committee*, U.N. Doc. E/CN.4/95, Annex B, art. 9, at 20-26 (May 21, 1948).
62. U.N. Doc. E/CN.4/95, at 20 (1948).
63. U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (1948).
64. U.N. Doc. E/CN.4/82/Add.4, at 3-4 (1948).
65. U.N. Doc. E/CN.4/82/Add.8, at 9-10 (1948).

contained the limitations but omitted paragraph 1. The shorter articles of the United States[67] and the Soviet Union[68] also avoided "arbitrary."

Yet, the formal proposal to delete paragraph 1 was resisted by the representatives of Lebanon and Chile on the ground that it contained the central idea of the article.[69] Malik felt that "arbitrary" was the most important word in the entire article and preferred it to "due process of law" because under the latter the "notion of law was left entirely to the subjective interpretation of the state."[70] When put to a vote, paragraph 1 of the Commission text was adopted by a vote of four to none, with two abstentions.[71] Thus, by the time Article 9 had been discussed before the second session of the Drafting Committee and was referred to the Commission, both the issues of "arbitrary" and "limitations" were ripe for exploitation.[72]

2. *The Triumph of Brevity: The Fifth Session of the Commission*

When the first two paragraphs of Article 9[73] were discussed at the fifth session of the Commission,[74] three principal approaches were suggested and debated:

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66. U.N. Doc. E/CN.4/82/Add.12, at 11-12 (1948).

67. U.N. Doc. E/CN.4/AC.1/19, at 9 (1948); and U.N. Doc. E/CN.4/AC.1/SR.23, at 5 (1948).

68. U.N. Doc. E/CN.4/AC.1/31 (1948).

69. U.N. Doc. E/CN.4/AC-1/SR.23, at 4-7 (1948). *See also* statement of Malik quoted at U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (May 10, 1948).

70. U.N. Doc. E/CN.4/AC.1/SR.23, at 6 (1948).

71. U.N. Doc. E/CN.4/AC.1/SR.23, at 7 (1948).

72. It has been remarked that the principal issue raised at, and left unresolved by, the second session of the Drafting Committee, related to "limitations." Numerous limitations each were suggested for several articles, including the one on arrest and detention. For a discussion of the controversy over short or detailed articles at this session, *see* Hendrick, *Progress Report on Human Rights*, 19 DEP'T STATE BULL. 159, 160-62 (1948); Simsarian, *Third Session of United Nations Commission on Human Rights*, 42 AM. J. INT'L L. 879, 881-32 (1948).

73. As the third session of the Commission did not consider the draft Convention proposed in Annex B of the *Report of the Second Session of the Drafting Committee, supra* note 61, this draft Convention, unamended, was incorporated in Annex B of the Commission on Human Rights, *Report of the Third Session*, 7 ESCOR, Supp. 2, U.N. Doc. E/800, at 12 (1948). Regarding art. 9, *see id.* at 15-20. The draft Convention was also not considered at the fourth session; this time, however, it was not included in the Commission's Report of the Fourth Session, U.N. Doc. E/1315 (Apr. 15, 1949). The fifth session, therefore, had before it the draft Convention as incorporated in the Commission's Report of the Third Session.

74. U.N. Doc. E/CN.4/SR.95 and SR.96 (May 31-June 1, 1949). Amendments relevant to paras. 1 and 2 are in U.N. Doc. E/CN.4/170 and Add.4, 188, 203, 206, 231, and 235 (May 6-23, 1949). Recapitulation of some of these amendments may be found in U.N. Doc. E/CN.4/212 (May 19, 1949).

(a) deletion of paragraph 1 with "arbitrary" and the retention of the limitations;
(b) retention of both "arbitrary" and the "limitations";
(c) adoption of a short article with "arbitrary" and without the limitations.

Although it was the third approach that was eventually adopted at this session, this choice did not come easily to the Commission.

a. *The "Arbitrary Arrest" Paragraph*

While opposition to this paragraph by the United Kingdom could have by now been anticipated, what may have surprised some was the change of heart in the Lebanese position.[75] It was Malik who, as we noted, championed the retention of this paragraph before the second session of the Drafting Committee. Now, he preferred to do without it. He pointed out that the law could not be its own master in deciding what was just, and that, by the use of the word "arbitrary," Article 9 to some extent established a law above the law.[76]

Members supporting the retention[77] of paragraph 1 contested this "law above the law" interpretation of "arbitrary" and pointed out that "arbitrary" could have "no other meaning but that of non-compliance with the law,"[78] that it "had an exact legal meaning and offered sufficient guarantee against any illegal arrest,"[79] that it undoubtedly meant "contrary to the law"[80] and "illegal."[81] Sensing the majority feeling in favor of paragraph 1 and perhaps in the hope that both "arbitrary" and "limitations" could be incorporated in the final article, the representatives of Lebanon and United Kingdom joined in the unanimous adoption of paragraph 1.[82]

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75. Para. 1 was omitted in texts of art. 9 submitted by the U.K., U.N. Doc. E/CN.4/188 (1949), and Lebanon, U.N. Doc. E/CN.4/206 (1949). Representatives of both these countries also initially opposed this paragraph at the meeting held on May 20, 1949, U.N. Doc. E/CN.4/SR.95, at 2-4 (1949).

76. U.N. Doc. E/CN.4/SR.95, at 5 (1949).

77. Representatives of India, Egypt, United States, Philippines, France, Guatemala, and Soviet Union, for example, made express statements in favor of para. 1. *See id.* at 3-6. The paragraph was also included in a new text proposed by Australia. *Id.* at 4. Yet, in the Report of this session of the Commission, Australia and France are listed as having joined Denmark, Lebanon and the U.K. in opposing para. 1. *See* Commission on Human Rights, *Report of the Fifth Session*, 9 ESCOR, Supp. 10 U.N. Doc. E/1371, Annex II, at 31-33 (1949).

78. From remarks of Mehta (India), U.N. Doc. E/CN.4/SR.95, at 3 (1949).

79. From remarks of Eleanor Roosevelt, *id.*

80. From remarks of Cassin (France), *id.* at 5.

81. From remarks of Pavlov (Soviet Union), *id.* at 6. Representatives of Guatemala and Philippines also agreed that "arbitrary" meant "illegal" or "contrary to the law" was "unrealistic" and "not universally accepted." *Id.* at 5-6.

82. *Id.* at 7.

b. *Retention of both "Arbitrary" and the "Limitations"*

Initially favored by Australia and France,[83] this approach was formally put forth in a text proposed by Belgium. The formula proposed in this Belgian text was that after providing that "no one shall be subjected to arbitrary arrest or detention," the article should enumerate the limitations which "shall be deemed to be arbitrary and therefore prohibited."[84] Although both the United States and the Soviet Union received this proposal favorably,[85] the problem of formulating an exhaustive list of exceptions seems to have obscured the attractiveness of this approach. An opportunity to define "arbitrary arrest and detention" presented at this session was, therefore, passed.

c. *The Limitations*

Conscious of the fact that the "yet incomplete" list of limitations before the second session of the Drafting Committee had included about 40 exceptions, the United States realized that it would be difficult to formulate a concise, exhaustive and acceptable set of exceptions. It, therefore, recommended that a short article, providing against "arbitrary arrest" but without the limitations, be adopted.[86] Eleanor Roosevelt pointed out that the presence of the word "arbitrary" made a list of exceptions quite unnecessary.[87]

The opposite point of view, regarding the necessity of including the limitations, was advocated by the representatives of the United Kingdom, Lebanon, France, Denmark and Australia.[88] They felt that Article 9 would not be complete without a full list of exceptions. Addressing herself to the criticism that it would be impossible to formulate an unwieldy and exhaustive list, Bowie (United Kingdom) pointed out that the list proposed by her delegation had not only reduced the exceptions to a reasonable number, but that it also "covered the vast majority of cases in which an individual could justly be deprived of his liberty," including all exceptions brought up before the second session of the Drafting Committee.[89]

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83. *Id.* at 4-5.

84. U.N. Doc. E/CN.4/235.

85. Eleanor Roosevelt felt that this proposal might provide the means of finding a solution to the various approaches suggested at this session. U.N. Doc. E/CN.4/SR.96, at 5. Pavlov found the proposal "interesting," but while the Belgian representative pointed out that it was essential that the list of limitations be "exhaustive," Pavlov was prepared only to accept it as illustrative. *Id.* at 7.

86. U.N. Doc. E/CN.4/170/Add.4, at 1.

87. U.N. Doc. E/CN.4/SR.95, at 9. Garcia Bauer (Guatemala) was of the same view. *See id.* at 8.

88. *See generally* their statements in U.N. Doc. E/CN.4/SR.95 and SR.96. *See also* the U.K. and Lebanese alternative texts of art. 9, U.N. Doc. E/CN.4/188 and U.N. Doc. E/CN.4/206, respectively. Related is the Belgian proposal, U.N. Doc. E/CN.4/235. All these alternate texts enumerated the exceptions under 7-8 subclauses.

89. U.N. Doc. E/CN.4/SR.95, at 9 and SR.96, at 5.

After considerable controversy and despite some severe opposition, the Commission finally not only adopted the "arbitrary arrest" paragraph, but also voted the "limitations" out.[90] The representatives of Australia, Denmark, France, Lebanon and the United Kingdom, however, joined to record their "minority position"[91] against the Commission decisions.

The issue of "limitations" and the use of the word "arbitrary" at the fifth session also aroused considerable interest among commentators outside the Commission. Hersch Lauterpacht, after a penetrating survey of the disadvantages of excessive elaboration, strongly favored the exclusion of limitations and urged the adoption of a briefer article with the word "arbitrary."[92] It was generally conceded that the drafting of the article on arrest and detention was one of the most difficult tasks faced by the Commission.[93]

The acceptance of the word "arbitrary" by the Commission was explained as a compromise between the positions taken by the United States and the United Kingdom.[94] "Arbitrary" was generally understood to mean "due process of law,"[95] and it was pointed out that it should provide an effective safeguard against bad and oppressive laws.[96]

3. *Another Unsuccessful Attempt to Include the Limitations: The Sixth Session of the Commission*

In the Commission, another attempt was made to broaden the participation in the drafting of the Covenant by inviting comments

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90. The text of 1 and 2 of art. 9 adopted at this session:

1. No one shall be subjected to arbitrary arrest or detention.
2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

In favor: Chile, China, Guatemala, India, Iran, Philippines, Ukraine, Soviet Union, United States and Yugoslavia.

Against: Australia, Belgium, Denmark, Egypt, France and U.K.

See, Report of the Fifth Session of the Commission, 9 ESCOR, Supp. 10, U.N. Doc. E/1371, Annex I, at 19 (1949).

91. The "minority position" will be found in *id.*, Annex II, at 31-33. For an effective refutation of the "minority position" and of the "minority" article, *see* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 327-33 (1950). See particularly *id.*, at 328-29 n.6.

92. H. LAUTERPACHT, *supra* note 91, at 314, 327-33.

93. *See* Simsarian, *supra* note 72, at 780.

94. C. MALIK, THE COVENANT ON HUMAN RIGHTS 7-8 (1949).

95. Holcombe, *The Covenant on Human Rights*, 14 LAW & CONTEMP. PROB. 418 (1949); E. FERNANDO, AN INTERNATIONAL BILL OF HUMAN RIGHTS 17 (1948). *But see* Simsarian, *supra* note 72.

96. *See* Fawcett, *A British View of the Covenant*, 14 LAW & CONTEMP. PROB. 438, 442-43 (1949). C. MALIK, *supra* note 94, at 8, seems to admit that "arbitrary" limits the freedom of action of governments.

of governments on the draft prepared at its fifth session.[97] Of the twelve governments[98] that responded to the Secretary-General's letter, nine had some comments on Article 9, and as was expected, many of these related to its paragraphs 1 and 2.[99]

The governments, it will be recalled, had before them not only the short text of paragraphs 1 and 2 adopted at the fifth session, but a "minority text," detailed with limitations, proposed by the representatives of Australia, Denmark, France, Lebanon and the United Kingdom at that session. The comments received from the governments indicated that while the United Kingdom[100] would continue to feel strongly about the inclusion of the limitations, Denmark[101] and France[102] might reconcile themselves to a shorter article. Although the United Kingdom must have been disheartened by this "defection," it probably found some comfort in the support for the "minority text" by the Philippines,[103] particularly when, at the fifth session, the Philippine representative had supported the United States position against the limitations.[104] Also, a statement of preference for the "minority text" came forth from the Government of Norway.[105]

But when paragraphs 1 and 2 were considered at the sixth session,[106] any real "comfort" that the representatives of the United Kingdom might have sought, they probably found in the most eloquent support for the limitations by Malik (Lebanon). Realizing, perhaps, that they were outnumbered, Bowie and Hoare (later Sir Samuel Hoare) of the United Kingdom and Malik joined to make a most determined effort to have the limitations incorporated. If sheer

97. *See Report of the Fifth Session of the Commission, supra* note 90, at 7-8, para. 16.

98. Soviet Union, United States, United Kingdom, Philippines, Israel, Yugoslavia, the Netherlands, Denmark, France, India, Australia, and Norway. U.N. Doc. E/CN.4/353 and Add. 1-11 (Dec. 29, 1949-Apr. 22, 1950). Besides the Netherlands, Israel and Norway, all the other governments were represented on the Commission. Thus the objective of broadening the participation base, through comments of governments, may not have been all that successful at this date.

99. *See* U.N. Doc. E/CN.4/365, at 30-32 (Mar. 22, 1950) and U.N. Doc. E/CN.4/353/Add.10, at 7 (1950), and Add.11, at 1.

100. U.N. Doc. E/CN.4/365, at 30 (1950).

101. *Id.* at 31.

102. *Id.* at 32.

103. *Id.* at 30-31.

104. For the Philippine position at the fifth session *see* U.N. Doc. E/CN.4/SR.96, at 9 (1950).

105. U.N. Doc. E/CN.4/SR.144, at 9-17; SR.146, at 3-15; SR. 147, at 3-12; and SR.154, at 6-7 (Apr. 12-21, 1950). Relevant documents and proposals at this session; U.N. Doc. E/CN.4/397, 400, 401, 402, 405, 405/Rev.1, and 409 (Apr. 3-5, 1950).

106. *See* U.N. Doc. E/CN.4/SR.144, at 9-17; SR.146, at 3-15; SR.147, at 3-12; and SR.154, at 6-7 (Apr. 12-21, 1950). Relevant documents and proposals at this session: U.N. Doc. E/CN.4/397, 400, 401, 402, 405, 405/Rev.1, and 409 (Apr. 3-5, 1950).

unrelenting determination and effort were the sole arbiters of success, the victory, perhaps, should have been theirs, but they lost primarily because they could not convince the other members of the Commission that it was possible to draft a comprehensive, exhaustive and universally acceptable list of limitations.

Dissatisfaction with lists of limitations, a perennial problem, was not confined to only those members who, on principle, favored a short article. Even those who favored the inclusion of a list of limitations found it difficult to agree on any one list. Thus, both the United Kingdom[107] and the Philippines[108] sought to amend the "minority text" by suggesting some modifications and additions to the list in that article.

The United States, leading the opposition against the limitations,[109] argued that no list could be complete as it is "scarcely possible to foresee all possible exceptions."[110] Concern was also expressed that the enumeration of exceptions would turn the Covenant "into a document of limitations rather than a document of freedoms."[111]

While the difficulties in formulating a list of limitations provided the main argument for those who favored a short article, on the positive side these "generalists" pointed out that the word "arbitrary" in paragraph 1 of the Commission text constituted a real safeguard against arbitrary action. Most of these representatives interpreted "arbitrary" to include the idea of "injustice" and argued that, as such, it was an effective deterrent against any possibility of abuse.[112]

When all these proposals regarding deletion of "arbitrary," retention of limitations, and the merging of the first two paragraphs were voted upon on April 5, 1950, they were rejected most decisively.[113] Adopted by substantial majorities were paragraphs 1 and 2 as recommended by the fifth session of the Commission.[114]

Thus, despite concerted efforts by some delegations to change

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107. For change suggested by the United Kingdom, *see* U.N. Doc. E/CN.4/397 (1950).

108. The position of the Philippines is to be found in U.N. Doc. E/CN.4/365, at 30-31 (1950).

109. The U.S. position on limitations at this session may be found in its memorandum on the subject, U.N. Doc. E/CN.4/401 (1950), and in statements of Mrs. Roosevelt, U.N. Doc. E/CN.4/SR.144, at 10-11, paras. 42-44; SR.146, at 3; and SR.147, at 7, paras. 22-23 (1950).

110. U.N. Doc. E/CN.4/401, at 2 (1950).

111. *Id.* at 1.

112. *See, e.g.*, U.N. Doc. E/CN.4/SR.144, at 14, para. 57; SR. 146, at 10, 12, paras. 32, 42; SR.147, at paras. 24-25 (1950). Those opposed to "arbitrary," on the other hand, were unable to agree that it provided any real safeguards against abuse. *See, e.g.*, statement of Whitlam (Australia), U.N. Doc. E/CN.4/SR.146, at 14, para. 54 (1950).

113. *See* U.N. Doc. E/CN.4/SR.147, at 9 (1950).

114. *Id.* at 9-10.

paragraphs 1 and 2 as adopted at the fifth session of the Commission, the sixth session rejected all proposals to delete, modify or elaborate these paragraphs and adopted instead, by substantial majority, the text of these paragraphs as recommended by the fifth session. It dealt what was, perhaps, the most decisive defeat to the "enumerationists."

While this defeat of the "enumerationists" could be explained, as has been noted previously, by the growing realization that if limitations were listed, it would be impossible to be concise and exhaustive, it must also be emphasized here that on the positive side, the word "arbitrary" seemed to many to provide against the kind of abuses that the "enumerationists" sought to prevent by the listing of limitations. It was thus clear that the fate of the limitations was inextricably tied up with the interpretation of the word "arbitrary."[115] Accordingly, when paragraph 1 was adopted, the representatives of Greece, the United States, Chile, India and France explained that they had voted for it on "the clear understanding that the word 'arbitrary' conveyed the idea of injustice."[116] It was pointed out that the word "arbitrary" had been "purposely chosen in order to cover all possible cases in which an arrest or detention should not take place."[117]

In response to the criticism that "arbitrary" was vague, and following the opinion of the representative of Uruguay that the word "essentially meant 'illegal' and did not necessarily include the idea of 'injustice',"[118] Eleanor Roosevelt, as Chairperson, suggested that the Commission formally record its opinion that " 'arbitrary' meant both 'illegal' and 'unjust'."[119] Unfortunately, this was not done and the Commission lost an excellent opportunity to resolve, unequivocally, that the word "arbitrary" meant more than "illegal." Had the Commission acted on Roosevelt's suggestion, the drafting history of the article on arrest and detention would have been much less complicated and the unending discussions regarding the vagueness of the word "arbitrary" that followed in the future could have been avoided.

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115. In this connection, *see* U.N. Doc. E/CN.4/SR.147, at 3-12 (1950). The Greek representative, for example, inquired if Lebanon would withdraw its text with limitations if the words "and unjust" were added after the word "arbitrary" in paragraph 1. Malik preferred not to withdraw his amendment but agreed that the suggestion of the Greek representative "would certainly considerably improve the original text; it would be better to say 'or unjust.' " *Id.* at 8, paras. 29-30.

116. *Id.* at 9-10, paras. 36-37, 41-42.

117. *Id.* at 11, para. 51. [Emphasis added.]

118. *Id.* at 10, para. 39.

119. *Id.* at para. 43.

4. *A Post-Mortem of the Draft Commission Article: Reactions of the International Community*

The article on arrest and detention adopted at the sixth session of the Commission was not further revised until the eighth session of the Commission. But between these two sessions, the Covenant was reviewed generally by the Council and the General Assembly.

When, during the eleventh session of the Council, its Social Committee considered the draft Covenant in detail,[120] it marked the first opportunity when the provisions of the Covenant were discussed by an international body other than the Commission. So far, the drafting of the Covenant had been the primary concern of the 18-member Commission and, although on a few occasions the Commission had sought to widen the participation in such drafting by inviting comments of governments, the Social Committee afforded the first chance for some members of the United Nations, not represented on the Commission, to comment on the various provisions of the Covenant before a United Nations committee. In addition to the governments of Australia, Belgium, Chile, China, Denmark, France, India, the United Kingdom and the United States, which were represented on the Commission, the Social Committee also had represented on it the governments of Brazil, Canada, Iran, Mexico, Pakistan and Peru. The participation in the drafting of the Covenant was, therefore, gradually widening.

In the Social Committee, while several other articles were singled out for severe criticism, Article 6 seems to have escaped much hostility. Of course, the word "arbitrary" troubled some delegates. Belgium,[121] Canada[122] and the United Kingdom[123] objected to it for lacking precise meaning and for its inability to provide any protection against abuses. To the United States, however, the word was "perfectly well understood" and was "unlikely to be misinterpreted."[124] Brohi (Pakistan) thought that it would be easy to define the expression "arbitrary arrest" by reference to national constitutions in which it was used.[125]

The justification for general articles, in view of the fact that it was sometimes impossible to arrive at complete definitions, was also

120. Meetings of the Social Committee generally relevant were: U.N. Doc. E/AC.7/SR.146-149 and SR.153, at 16-19 (Aug. 3-14, 1950).

121. U.N. Doc. E/AC.7/SR.147, at 9 (1950). The ambiguity of "arbitrary" was also referred to by the World Jewish Congress. *See* U.N. Doc. E/C.2/259/Add.1, at 4 (July 19, 1950).

122. U.N. Doc. E/AC.7/SR.148, at 13 (1950). Agreeing with the Canadian delegate was Sen of India, U.N. Doc. E/AC.7/SR.149, at 6 (1950).

123. U.N. Doc. E/AC.7/SR.148, at 4-5.

124. U.N. Doc. E/AC.7/SR.153, at 16. *See also* U.N. Doc. E/AC.17/SR.148, at 17.

125. U.N. Doc. E/AC.7/SR.148, at 10.

pointed out by France[126] and the United States.[127] Defending the substantive provisions of the Covenant as drafted by the Commission, Cates (United States) explained that the Commission

> had to reconcile at least three different legal systems; that of the European continent, based on a detailed code of law; that of the United Kingdom, which rested largely on precedent; and that of the United States of America and certain other countries which was founded on certain broad basic principles subject to interpretation. Failure to meet all the views of any particular delegation did not mean that the draft Covenant was ineffective; it was admittedly a compromise, representing the widest possible area of agreement.[128]

Thus, while even those who strongly supported "arbitrary" implied that the drafted article was not perfect but the best compromise possible, what must have gratified the drafters of Article 6 was the limited nature of the criticisms made against this article in the Social Committee.

The draft Covenant, after the rigorous drafting sessions in the Commission, in its drafting committees and subcommittees and working groups, and after this rather general study by the Council, was next presented to the larger international community represented in the General Assembly. Although the principal legal systems may have been adequately represented in the earlier drafting efforts, this was the first occasion when the provisions of the Covenant were discussed before a body representing all the countries which were, at that time, members of the United Nations. The importance of the reactions of the General Assembly, therefore, could hardly be exaggerated.[129]

When given the chance to express their views, only a handful of delegates out of the 60-member Third Committee, declared, explicitly, their displeasure with the first two paragraphs of Article 6.[130] The representatives of the United Kingdom, Lebanon, New Zealand and Yemen shared in common the anxiety over the inadequacy of the definition of "arbitrary arrest." Some representatives expressed disappointment with the first 18 articles of the Covenant on the ground

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126. *Id.* at 15-17.

127. *Id.* at 17-18.

128. *Id.* at 17.

129. For a discussion on the "general adequacy of the first eighteen articles" in the General Assembly, *see* 5 U.N. GAOR, Third Comm. 197-31 (1950). A good account of the comments on paras. 1 and 2 of art. 6 in both the eleventh session of the Council and in the fifth session of the General Assembly will be found in U.N. Doc. E/CN.4/528, at 38-40 (Apr. 2, 1950).

130. It must be pointed out that although sixty governments were represented on the Third Committee, only about thirty participated in the four-meeting discussion on the eighteen articles of the Covenant. *See generally* 5 U.N. GAOR Third Comm. 107-31 (1950).

that they were imprecise and used vague words,[131] while others pointed out that greater precision would be harmful as, with different countries with different legal systems, undue rigidity may prevent universal acceptance.[132] Savut (Turkey) spoke for the latter group when he emphasized that the Covenant should be drafted in "terms sufficiently general and pliable to render it acceptable to all nations, whatever their stage of development."[133]

Another point that need be made in connection with the fifth session of the General Assembly is that it was agreed that the draft Covenant was "not a law-making agreement but simply an agreement which declared already existing law"[134] and that in "drafting the covenant no new rights were being established; the rights concerned were already guaranteed in civilized countries."[135] Some delegates went further and expressed disappointment that the first 18 articles guaranteed *less* than what constitutions of most countries guaranteed to their peoples.[136] This is significant because it indicates that the substantive provisions of the draft Covenant, including Article 6, were accepted, generally speaking, as representing the minimum "general principles of law recognized by civilized nations."[137]

On the whole, however, the General Assembly found that the first 18 articles of the Covenant needed improvement. It, therefore, instructed the Commission to revise them by defining the rights and the limitations contained in them with the "greatest possible precision."[138]

The invitation of the seventh session of the Commission to comment on the draft Covenant, and the referral of the draft Covenant to the General Assembly by the thirteenth session of the Council provided another opportunity for the response of the international community to Article 6. But on both these occasions, Article 6 ap-

131. *See, e.g.*, comments of the Canadian delegate, *id.* at 112-113.

132. *See* remarks of the Ethiopian delegate, *id.* at 130. Other delegates who found the first eighteen articles generally satisfactory included the representatives of the United States and Egypt, *id.* at 109; Brazil, *id.* at 113; France, *id.* at 119; and El Salvador, *id.* at 129.

133. *Id.* at 130.

134. *See* remarks of the U.K. delegate, *id.* at 108.

135. *Id.*

136. *See, e.g.*, remarks of Menon (India), *id.* at 129. Earlier, in the eleventh session of the Council, Belgium had also criticized the draft Covenant on the ground that it "was well below the average level of the constitutional law of Member States." 11 U.N. ESCOR 15 (1950).

137. *See* art. 38 of the Statute of the International Court of Justice. *See also* in this connection, Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 297-298 (1965-66).

138. *See* G.A. Res. 421 B (V), Dec. 4, 1950; 5 U.N. GAOR, Supp. 20 at 42, U.N. Doc. A/1775 (1950).

pears to have been approved by default. Thus, from among the several governments[139] and specialized agencies[140] that commented on the draft Covenant, only two had specific observations on some aspects of Article 6 and even these did not concern the first two paragraphs of the article.[141] Moreover, while the general debate at the sixth session of the General Assembly was primarily concerned with other issues of the Covenant, it also included several comments on the first 18 articles. Most of these comments concerned either criticism of the article on religion or proposals for additional civil and political rights articles, and Article 6, it must be emphasized, was not singled out for criticism. Generally, however, the necessity of a precise definition of rights and limitations emphasized at the fifth session of the General Assembly, was again stressed at the sixth session of the General Assembly.[142]

5. *The Final Commission Article: The Eighth Session of the Commission*

We have noted the several opportunities made available to governments and specialized agencies to comment on the arrest and detention article drafted by the sixth session of the Commission. The observations invited by the Secretary-General and the discussions in the Council and the General Assembly had indicated that only a few governments objected to the article on the ground that the term "arbitrary arrest" was vague.[143] Particularly in view of the several opportunities offered for criticism, the lack of a more significant protest could fairly be interpreted as an implicit endorsement of the article by the majority of the international community.

If there were any doubts as to such an interpretation of the reactions of the international community, they were dispelled by the

139. *See* U.N. Doc. E/2059 and Add. 1-8 (July 26-Aug. 27, 1951).

140. *See* U.N. Doc. E/2057 and Add.1-5 (July 24-Aug. 27, 1951), and U.N. Doc. E/2085/Add. 1, at 2 (1951).

141. *See* remarks of the Danish Government, U.N. Doc. E/2059/Add. 8, and those of the Office of the High Commissioner for Refugees, U.N. Doc. E/2085/Add. 1, at 2.

142. For the general debate on the draft Covenant held in the General Assembly's Third Committee, *see* 6 U.N. GAOR, Third Comm. 77-105, 107-110, 113-150 (1951-52); *Report of the Third Committee*, U.N. Doc. A/2112 (Feb. 3, 1952), 6 U.N. GAOR, Annexes, Agenda Item 29, at 37 (1951-52). Of relevance is *id.*, Sec. III, at 39-44. Note particularly the comments on the first eighteen articles, *id.* at 41, para. 24.

143. With regard to the "general adequacy of the first eighteen articles" and, in particular, to the article on arrest and detention, drafted at the sixth session of the Commission, a comprehensive account of the reactions of various governments and specialized agencies, expressed between the sixth and eighth sessions of the Commission, will be found in U.N. Doc. E/CN.4/528, at 38-42 (Apr. 2, 1951); U.N. Doc. E/CN.4/528/Add.1, at 14-16, 27-29 (Mar. 20, 1952) and U.N. Doc. E/CN.4/660 at 9, 11 (Apr. 9, 1952). These documents include comments made at the fifth and sixth sessions of the General Assembly, at the eleventh thru thirteenth sessions of the Council and at the seventh session of the Commission.

eighth session of the Commission which adopted the article with the term "arbitrary arrest" and without the limitations,[144] and subsequently by the General Assembly which finally confirmed this decision of the Commission.[145]

For the arrest and detention article, the eighth session of the Commission is perhaps the most important for several reasons. First, the article drafted at the sixth session had, by now, been discussed in the Council and in the General Assembly. The Commission, therefore, had the first opportunity at this session to take into account, in drafting the article, the reactions of the international community. Second, this was the final drafting session of the Commission with regard to this article. Third, Article 9 of the Covenant adopted by the General Assembly in 1966 is very similar[146] to the one drafted at the 1952 session of the Commission.

During this session, when Article 6 was considered on May 28, 1952,[147] the "enumerationists" staged what was their last effort to have the limitations included in this article. Citing in their support the resolution of the fifth session of the General Assembly, which stressed the need for the "greatest possible precision" and obviously encouraged by the developments in the Council of Europe, they favored a United Kingdom proposed amendment[148] which sought to replace paragraphs 1 and 2 of Article 6 with a new paragraph 1, with limitations, similar to paragraph 1 of Article 5 of the European Convention on Human Rights. The familiar arguments for and against both "arbitrary arrest" and limitations which were raised in the Commission on several occasions before were again repeated.[149] Opposing

144. For the text of the arrest and detention article adopted at this session of the Commission, *see* art. 8, in Commission on Human Rights, *Report of the Eighth Session*, 14 U.N. ESCOR, Supp. 4 (E/2556), at 48 (1952). *See also* the relevant summary with regard to the adoption of this article, *id.* at 27-28, paras. 180-81.

145. *See Report of the Third Committee*, U.N. Doc. A/4045 (Dec. 9, 1958), 13 U.N. GAOR, Annexes, Agenda Item 32, at 6-10 (1958-59). *See also* art. 9 of the Covenant as finally adopted by the General Assembly in 1966, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316 (1966).

146. The only difference between art. 8 as adopted at the eighth session of the Commission and the final art. 9 of the Covenant is in para. 5 where "unlawful arrest or deprivation of liberty" was changed to "unlawful arrest or detention." *See* citations in *supra* notes 144 and 145.

147. U.N. Doc. E/CN.4/SR.313, at 12-13; and SR.315, at 5-14 (May 28, 1952). Documents at this session related to the "arbitrary arrest" paragraph were: U.N. Doc. E/CN.4/L.137 (May 19, 1952), U.N. Doc. E/CN.4/L.183 (May 28, 1952), and U.N. Doc. E/CN.4/668/Add.3 (May 29, 1952). *See also* U.N. Doc. E/CN.4/NGO/39, at 3-4 (May 20, 1952).

148. U.N. Doc. E/CN.4/L. 137 (1952). This U.K. amendment with limitations, was supported by Lebanon and Australia. U.N. Doc. E/CN.4/SR.314, at 8-10 (1952).

149. Of those who expressed an opinion on this subject, the following seems to be the pattern of support for, and opposition to, the limitations at this session:

the limitations, most delegates pointed out the impossibility of drawing up an acceptable and exhaustive list of lawful exceptions to the right to liberty.

A Polish amendment to the United Kingdom amendment was, however, better received. Poland took the first two paragraphs of Article 6 drafted at the sixth session of the Commission and joining them as the second and third sentences, proposed a new paragraph 1 which read:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.[150]

This paragraph accomplished the merging of paragraphs 1 and 2 into one single paragraph, something that many members had suggested earlier. But the opening sentence, taken from Article 3 of the Universal Declaration of Human Rights, attempted to introduce something new to the article and was resisted by a few members.

When voted upon, the first sentence of the Polish amendment was adopted by 7-5, with 5 abstentions, the second sentence by 10-2, with 5 abstentions and the third sentence by 10-2, with 5 abstentions. The Polish amendment to paragraph 1 and 2, as a whole, was adopted by 7-6, with 4 abstentions.[151]

With the adoption of the Polish paragraph 1, the "enumerationists" lost in their final attempt to have the limitations in the article. Having been defeated so many times, they gradually changed their strategy. When the article next went through a drafting session in the General Assembly in 1958, the attempt was no more to introduce limitations, but mostly to define and qualify the term "arbitrary arrest."[152] Already, this resignation seemed to be taking shape in 1952, for when the Report of the Eighth Session of the Commission appeared, the "enumerationists" did not take the opportunity, as they had done in the past, to register their strong protest against the term "arbitrary arrest" used in Article 8 adopted at this session.[153]

D. *The Commission Article: Relevant Developments (1952-1958)*

Although the next drafting effort with regard to the article on

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In favor: United Kingdom, Lebanon, and Australia.

Against: France, Poland, United States, Soviet Union, Chile, Yugoslavia, and India.

See U.N. Doc. E/CN.4/SR.313, at 12-13 (1952); SR. 314, at 5-14.

150. U.N. Doc. E/CN.4/L.183 (1952).

151. U.N. Doc. E/CN.4/SR.314, at 10-11 (1952).

152. *See Report of the Third Committee, supra* note 145, at 6-8.

153. *See Report of the Eighth Session, supra* note 144. Note that its Annex IV, at 63-64 has no comments on art. 8.

arrest and detention (Article 8) was not to take place until 1958, there are a few related developments between 1952 and 1958 that must be noted. First is the renumbering of this article by the Commission. It now became Article 9 in the draft Covenant completed at the tenth session of the Commission.[154] The second concerns the several comments on the draft Covenant received from various governments[155] and specialized agencies[156] in response to resolutions of the Council[157] and the General Assembly.[158] Of these, only Australia, Canada, the Netherlands and the United Kingdom had any specific comments on the first paragraph of Article 9. Australia,[159] the Netherlands[160] and the United Kingdom[161] found the term "arbitrary arrest" vague and imprecise. The Canadian Government, on the other hand, appeared reconciled with "arbitrary" but indicated that it would be helpful to define it.[162]

An event of equal importance during this period concerns the general discussion[163] on the draft Covenant during the ninth session of the General Assembly. While this discussion was dominated by such issues as the right to petition, self-determination, reservations, federal and colonial clauses and measures of implementation, it also included comments on some substantive articles. Article 9, however, did not evoke any significant criticism.[164] The lack of a general disapproval of Article 9 is also illustrated by the fact that, though a few amendments were proposed regarding some articles, none of these concerned Article 9. It could be said, therefore, that on the whole, the

154. *See* art. 9 in Commission on Human Rights, *Report of the Tenth Session*, 18 U.N. ESCOR, Supp. 7 U.N. Doc. E/2573, Annex I B, at 67 (1954). *See also* art. 9 in Commission on Human Rights, *Report of the Ninth Session*, 16 U.N. ESCOR, Supp. 8 U.N. Doc. 3/2447, Annex I B, at 43 (1953). A memorandum of the Secretary-General prepared for the ninth session of the Commission included some comments on this article. *See* U.N. Doc. E/CN.4/674, at 13 (Feb. 2, 1953).

155. U.N. Doc. E/CN.4/694 and Add. 1-7 (Dec. 2, 1953-Mar. 23, 1954); U.N. Doc. A/2910 and Add.1-6 (June 30-Oct. 13, 1955).

156. U.N. Doc. E/CN.4/702 and Add.1-6 (Feb. 2-Apr. 9, 1954); U.N. Doc. A/2907 and Add.1-2 (June 6-30, 1955).

157. ECOSOC Res. 501 (B) (XVI), Aug. 3, 1953; 16 U.N. ESCOR, Supp. 1, at 10 (1953).

158. G.A. Res. 833 (IX), Dec. 4, 1954; 9 U.N. GAOR, Supp. 21 (A/2890), at 20 (1954).

159. U.N. Doc. A/2910/Add.2, at 13-15 (1955).

160. *Id.* Add. 3, at 11-12.

161. *See* U.N. Doc. E/CN.4/694/Add. 2, at 6; and A/2910/Add.1, at 9-10 (1955).

162. U.N. Doc. E/CN.4/694/Add. 6, at 3-4 (1955); and *id.*, Annex, at 1.

163. 9 U.N. GAOR, Third Comm. 93-121, 123-57, 163-78 (1954).

164. For comments on art. 9 during this session, *see* remarks of the delegates of the United Kingdom, *id.* at 96; Brazil, *id.* at 111; United States, *id.* at 124; Czechoslovakia, *id.* at 130. The United Kingdom's objection to the term "arbitrary arrest," *id.* at 96, was, for example, matched by the approval of the article by Czechoslovakia, *id.* at 130.

ninth session of the General Assembly found Article 9 well-drafted.[165]

E. *Consideration by the Third Committee (1958)*

The importance of the consideration of Article 9, at this final stage of its drafting, by the Third Committee can hardly be overemphasized.[166] Although on previous occasions, as we observed, the General Assembly had discussed this article as part of a general discussion on the adequacy of the first 18 articles or, later, on the draft Covenants, this was the first occasion when this article was taken up separately and dealt with thoroughly by the Third Committee. It is no mean tribute to the drafting skill of the Commission that Article 9, which it completed drafting in 1952, was accepted, with a very minor change in paragraph 5, by the Third Committee in 1958.[167] Not only did the Third Committee adopt, by a vote of 70-0, with 3 abstentions, the article drafted by the Commission, but even more significantly, it agreed with the basic approach in drafting followed by the Commission and also reinforced the interpretations of the Commission on the several issues inherent in this article.[168] This is all the more remarkable in view of the substantial increase in the membership of the United Nations over the preceding four years. Since 1955, when governments had the most recent opportunity to comment on Article 9,[169] membership of the United Nations had increased from 60 states to 81 states.[170] Thus, over 20 new Member States, which never had any opportunity to comment on Article 9 during its drafting by the Commission, now explicitly endorsed the work of the Commission.

Particularly with regard to paragraph 1, this session is important for several reasons. While it is significant that this paragraph, as drafted by the Commission, was adopted by the Third Committee without a negative vote,[171] the debates of the Third Committee are

165. *See Report of the Third Committee*, U.N. Doc. A/2808 (Nov. 29, 1954), 9 U.N. GAOR, Annexes, Agenda Item 58, Sec. III, at 9-12 (1954). Note particularly, *id.* at paras. 37, 39, 45-52.

166. For the crucial importance of the discussions in the Third Committee regarding the interpretation of various articles, *see* N. ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 99-100 (1958).

167. For a summary of the discussions on art. 9 in the Third Committee, *see Report of the Third Committee*, U.N. Doc. A/4045 (Dec. 9, 1958), 13 U.N. GAOR Annexes, Agenda Item 32, at 6-10 (1958-59). Note in particular, *id.* para. 42.

168. *See generally id.*

169. The last opportunity was when observations of governments were solicited pursuant to the resolution adopted by the ninth session of the General Assembly in 1954. *See supra* note 158. These observations may be found in U.N. Doc. A/2910 and Add. 1-6 (1955).

170. For a list of the States admitted as members of the United Nations during 1955-58, *see* UNITED NATIONS, EVERYMAN'S UNITED NATIONS 12 (8th ed. 1968).

171. The vote was 64-0, with 5 abstentions. *See* 13 U.N. GAOR, Third Comm. 157 (1958).

an invaluable source regarding the interpretation of this paragraph because, in addition to the overwhelming vote on its adoption, as many as 36 delegations explicitly stated their views on this paragraph.[172] Most of the issues that had, over the years, been discussed in the Commission were now raised again and the Third Committee adopted the same attitude with regard to them as had been done by the Commission.[173]

The decision of the Commission with regard to the non-inclusion of the limitations was now beyond challenge. Although some delegates continued to feel that an article with a list of specific limitations would have been ideal, they realized the difficulties in formulating such a list. Even the greatest protagonist of the "enumerationists" for about twelve years, the United Kingdom, now finally conceded that "in practice it would be very difficult to agree on the list, and the possibility would always remain that it would be incomplete."[174] It was, perhaps, because of the realization of the inevitability of defeat that the Netherlands decided not to present formally its earlier suggestion of replacing paragraph 1 with a new paragraph which would include limitations similar to those in Article 5 of the European Convention.[175]

A yet more significant aspect of the Third Committee's deliberations was its endorsement of the Commission's work and interpretation with regard to the second sentence of paragraph 1 which provided against "arbitrary arrest or detention." We saw that in the drafting of Article 9, the single most important issue related to the controversy over the word "arbitrary." In spite of consistent and determined opposition by some members on the ground that the word was vague and imprecise, and in spite of the considerable confusion

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172. Art. 9 was discussed in seven meetings of the Third Committee. *See id.* at 128-60. The views of the 36 delegations will be found at the following paginations in these Records: Afghanistan at 159; Australia at 156; Belgium at 138; Brazil at 154; Bulgaria at 148; Burma at 153; Cambodia at 142; Chile at 128; China at 156; Czechoslovakia at 131 and 153; Ecuador at 156; France at 139; Greece at 148; Guatemala at 153; India at 141; Indonesia at 150; Iraq at 149; Ireland at 135 and 145; Israel at 135 and 159; Italy at 147; Japan at 144; Liberia at 136 and 150; New Zealand at 160; Peru at 131 and 137; the Philippines at 142 and 155; Poland at 144; Portugal at 150; Romania at 147; Saudi Arabia at 150; Spain at 154; Tunisia at 149; Soviet Union at 138; United Kingdom at 129, 142, and 156; United States at 137; Venezuela at 155; Yugoslavia at 147.

173. *See Report of the Third Committee, supra* note 161, at 6-10, paras. 32, 34, 42-49 and 66-67.

174. From the remarks on Sir Samuel Hoare, *supra* note 171 at 129. For the same view, *see also* the remarks of the delegates of Chile and Czechoslovakia, *id.* at 128 and 131.

175. *See* the remarks of the Irish delegate, *id.* at 135. The Netherlands earlier suggestion will be found in U.N. Doc. A/2910/Add. 3, at 11-12 (1955).

as to its interpretation,[176] the Commission had time and again voted against its deletion. The clear reason for the retention of this sentence was that the majority of the members of the Commission had considered that "the rule of law did not provide adequate safeguards against the possible promulgation of unjust laws"[177] and that accordingly, by using the word "arbitrary," the requirement would be added that all legislation must conform to the "principles of justice."[178]

If there were any doubts as to "arbitrary" offering protection not only against "illegal" acts but also against "unjust" acts, the Third Committee must have dismissed them. In assessing the precise significance of its discussions what is relevant is not only what the Third Committee did in fact accomplish on the final vote, but also what it could have done, but chose not to do.

Due to the long standing controversy over the interpretation of the word "arbitrary" and the repeated reminders during its debates, the Third Committee was fully aware of the possibility that "arbitrary" may be interpreted to refer to the principles of natural justice. Accordingly, if it did not agree with this interpretation, all it had to do was to act on any one of the suggestions before it: delete the second sentence, or replace "arbitrary" with "illegal," or collectively record that "arbitrary" did not mean "contrary to natural justice."

Third Committee support of the Commission's concern that the article should provide guarantees against unjust laws is confirmed by the general tenor of the discussions. A great majority of the delegates who participated in the discussion on paragraph 1 seemed to agree that its cumulative effect was to impose obligations concerning the "just" content of laws. Many of the delegates thought that this obligation resulted from the use of the word "arbitrary" in the second sentence.[179] But others, even from among those who felt that "arbitrary" meant "illegal" and could not be applied to acts committed in execution of the law,[180] found the guarantee against unjust laws to

176. For a summary of the different interpretations of the word "arbitrary" during the Commission debates, *see* the U.N. Secretariat Annotated Study, A/2929 (July 1, 1955), 10 U.N. GAOR, Annexes, Agenda Item 28 (Part II), at 35 (1955).

177. *See, e.g.*, remarks of Sir Samuel Hoare (United Kingdom), summarizing the work of the Commission, *supra* note 171, at 129.

178. *Id.* at 142-43.

179. The view that "arbitrary" was broader than "illegal" and compelled conformity with principles of justice was explicit or implicit in the remarks of the delegates of Australia, Brazil, Bulgaria, Burma, Ecuador, France, Greece, India, Indonesia, Iraq, Italy, Japan, Liberia, Philippines, Poland, Soviet Union, United Kingdom, United States, and Venezuela. *See supra* note 172 for the paginated references to the remarks of these delegates.

180. The view that "arbitrary" does or should merely mean "illegal" or "unlawful" was explicit or implicit in the remarks of the delegates of Belgium, Israel, New

be in the first sentence. It was argued that the general statement there which provides that "everyone has the right to liberty and security of person" could not be infringed by national laws.[181]

From the discussions in the Third Committee, therefore, it could be concluded that the cumulative effect of paragraph 1 is to provide not only against "illegal" acts but also against "unjust" acts. An analysis of these discussions indicates that, out of the 36 delegates that commented on paragraph 1, as many as 25 delegates expressed the opinion that this paragraph, by itself or supplemented by other provisions of the draft Covenant, did not refer to conformity with the law alone but also concerned itself with the content of the law.

Another clarification that needs to be made here is that the reference to twenty-five delegates does not imply that the remaining eleven delegates felt that paragraph 1 does not provide protection against unjust laws. The statements of some of these eleven delegates do not either deal with, or are at best ambiguous on, this issue.[182]

F. *Final Adoption by the General Assembly (1966)*

Article 9 of the 1958 Third Committee was included in the Covenant finally adopted by the twenty-first session of the General Assembly in 1966.[183] With regard to Article 9, however, the general debate at the time of the adoption of the Covenant is significant for certain specific reasons. The over forty "new" States which had joined the United Nations since 1958 when Article 9 was last considered by the Third Committee, now endorsed Article 9. Such endorsement is implicit either in their general remarks on the Covenant or in not criticizing Article 9 when several of them singled out various other articles and issues for comment. This complete immunity from hostility enjoyed by Article 9 during the twenty-first session of the General Assembly suggests that even the "new" States found it completely acceptable.[184]

Zealand, Peru, Romania and Spain. *See supra* note 172 for the paginated references to the remarks of these delegates.

181. *See, e.g.*, the remarks of the Belgian delegate, *id.* at 138.

182. The comments of the following twenty-five delegations could be construed as suggesting the requirement of "just" laws: Afghanistan, Australia, Belgium, Brazil, Bulgaria, Burma, Cambodia, Czechoslovakia, China, Ecuador, France, Greece, India, Indonesia, Iraq, Italy, Japan, Liberia, Philippines, Poland, Romania, Soviet Union, United Kingdom, United States and Venezuela. For the paginated references to the remarks of these delegates *see supra* note 172. Non-committal remarks on this subject included those of the delegates of Chile, Guatemala, Portugal, Tunisia, and Yugoslavia. *See id.* for paginated references to the remarks of these delegates.

183. 21 U.N. GAOR, Supp. 16 (A/6316), at 54 (1966).

184. The "new" States appear to have found the substantive provisions of the Covenant satisfactory. For a majority of these, the only disappointment related to measures of implementation. *See, e.g.*, remarks of the delegates of Togo, Niger, Tanzania, Mauritania, Guinea, Congo, Sierra Leone, Upper Volta, Chad, Cameroon, Mongo-

III. CONCLUSIONS ON THE DRAFTSMEN'S INTENT WITH REGARD TO "ARBITRARY"

From the above account of the origins, development and final adoption of the first paragraph of Article 9 of the Covenant, it is clear that its draftsmen had generally intended the word "arbitrary" to have a "special meaning." To most of the members who voted for its adoption in both the Commission and in the General Assembly, "arbitrary arrest or detention" implied an arrest or detention which was incompatible with the principles of justice or with the dignity of the human person irrespective of whether it had been carried out in conformity with the law.[185] Intended, thus, to provide safeguards against both "illegal" and "unjust" arrests or detention, the incorporation of "arbitrary" can be explained in the context of the desire of the draftsmen to prevent the exercise of absolute powers by governments in a despotic and tyrannical manner.[186]

Reviewing the drafting history of Article 9, one finds that the word "arbitrary" appeared in most of the articles on arrest or detention submitted at, or adopted by, the United Nations. It appeared in most of the pre-1947 texts and it is found in the very first article adopted at the United Nations by the second session of the Commission in 1947. "Arbitrary" is also present in the five earlier texts of Article 9.[187] Thus, no article on arrest or detention adopted at the United Nations was ever without the word "arbitrary." Moreover, whenever "arbitrary" was included in the article, it was made clear by most of those who favored it that they were voting for it on the understanding that it would be an effective safeguard not only

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lia, Dahomey and Algeria, 21 U.N. GAOR Third Comm. 476, 479-81, 483-86 (1966); and Jamaica and Guinea, U.N. Doc. A/PV.1496 at 3, 43 (1966). Among the "new" States applauding the Covenant without any reservations were Cyprus, U.N. Doc. A/PV.1495, at 72 (1966) and Nigeria, U.N. Doc. A/PV.1496, at 56 (1966). Madagascar was the only "new" State that singled out some substantive articles of the Covenant for criticism, but such criticism did not include art. 9. *See* 21 U.N. GAOR, Third Comm. 482 (1966).

185. *See* remarks of Van Heuven (United States), 13 GAOR Third Comm. 137 (1958). Avramov (Bulgaria), during the debates in the General Assembly in 1958, contended that there was "consensus" that "arbitrary" meant "unjust" and "unlawful." He added that it "therefore" covered not only unlawful treatment but unjust treatment under the cover of law. *Id.* at 148.

186. *See* remarks of Rossides (Greece), *id.*

187. Although art. 9 was discussed and commented upon on numerous other occasions, its earlier texts were *adopted* at the following sessions only: second session of the Commission (1947); second session of the Drafting Committee (1958); fifth (1949), sixth (1950), and eighth (1952) sessions of the Commission; and the thirteenth session of the General Assembly, Third Committee (1958). While the second session of the Drafting Committee could not agree on the adoption of one of the several texts before it, it indicated a preference for the text adopted by the second session of the Commission.

against "illegal" acts, but "unjust" acts as well.

With regard to the drafting of the article by the Commission, it was generally conceded that the "intent" of the Commission in using the word "arbitrary" was to introduce the requirement that all legislation conform to the principle of justice. Even the United Kingdom, the most persistent adversary of the word "arbitrary," admitted that the discussions in the Commission indicated that the intention in using this word was not merely to impose a requirement that the action should be in accordance with the law, but that the action should also not be "arbitrary."[188] Most of the delegates at the Third Committee in 1958 also agreed with this interpretation of the Commission's intention.[189] As far as the "intent" of the Third Committee itself is concerned, analysis of its debates indicates that it confirmed and reinforced the Commission intent.

To refute those that would still insist that "arbitrary" refers only to the legality, and not the justness, of an arrest and detention, one need only point to the several unsuccessful attempts to have the word "unlawful" or "illegal" replace "arbitrary," or to the equally futile attempts to define the word "arbitrary" in such a way so as to totally exclude the possibility of its being interpreted as "unjust." Surveying the historical development of Article 9, we notice that its first text drafted by the second session of the Commission contained the word "arbitrary," although it had been suggested during the same session that the word "unlawful" be substituted for "arbitrary." A similar proposal, for example, during the General Assembly's consideration of the article in 1958, met the same fate. Ignored in similar fashion were the numerous attempts to agree on a restricted definition of "arbitrary." Thus, the failure of the Belgian effort to define "arbitrary" at the fifth session of the Commission and of the United Kingdom attempt to have the Third Committee record, in 1958, its collective opinion that "arbitrary" did not mean "contrary to natural justice" lend support to the argument that both the Commission and the General Assembly did not want the word "arbitrary" to be interpreted narrowly.

Finally, in view of the bitter controversy and the determined opposition aroused by the word "arbitrary" for so many years, it may only be fair to ask why this word was eventually retained in Article

188. *See* U.N. Doc. E/CN.4/694/Add.2, at 6 (1958). *See also* remarks of the U.K. delegate before the Third Committee in 1958, *supra* note 185, at 129 and 142-43.

189. *See generally supra* note 185, at 128-60. Practically all the writers, including Hersh Lauterpacht, Charles Malik, James Simsarian, John Lockwood, Arthur Holcombe, and Sandford Fawcett, who commented on the various drafts of the Commission, emphasized the necessity to interpret "arbitrary" in a liberal manner. Their views have been noted during the discussion of the drafting history of art. 9.

9. First, and on the positive side, the greatest appeal of "arbitrary" lay in its hopeful potential to provide against "unjust" laws.As to its being "vague" and "undefined," it was pointed out that in an instrument like the Covenant, which is endeavouring to break new ground, the use of certain broad concepts was inevitable. Magna Carta and Bills of Rights in many countries have mostly lacked precise definitions; yet these instruments have greatly promoted the development of liberty.[190] the possible difficulties in implementation which could result from using vague language did not bother the draftsmen either. They were confident of the fact that the term "arbitrary arrest or detention" could be interpreted by reference to generally accepted principles of justice.

The second main reason for the incorporation of "arbitrary" has to do with the "limitations." The indispensability of "arbitrary" was actually assured as soon as it was realized that it would be impossible to agree on a list of limitations that would be acceptable to all the legal systems. From the very beginning, various attempts were made to formulate a comprehensive list. Where, as in the European Convention of Human Rights, the treaty members represent a smaller geographical group and subscribe to approximately similar legal standards, it has been found possible to enumerate certain exceptions to the right to personal liberty. But the Covenant reflects a much wider participation. As has been pointed out, it is well to keep in mind that the Covenant is not the product of a single mind, conceived and executed within the framework of a definite philosophy; it is the expression of many creeds and many philosophies.[191] Because of the diverse cultures, and the different levels of economic, social, legal, and political development of the various members of the United Nations, it was soon apparent that any one list of limitations would conflict with several national legal systems. The futility of these attempts at "enumeration" was, in due time, realized and they were eventually abandoned.

Article 9, as it presently stands, if properly interpreted and applied, could provide better safeguards against governmental oppression of its peoples than any article with a detailed list of limitations.

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190. *See* U.N. Doc. E/AC.7/SR.148, at 17 (1950).

191. *See* Moskowitz, *The Covenants on Human Rights: Basic Issues of Substance*, 53 AM. SOC'Y INT'L L. PROCEEDINGS 230 (1959).

TREATY ACCEPTANCE IN THE AFRICAN STATES

A. PETER MUTHARIKA*

I. INTRODUCTION

Treaty-making has become the most important norm-creating process in the contemporary international legal order. Like most new countries, the African states[1] view their participation in this process as a symbol of their equality with their erstwhile colonial masters and as the end of Western monopoly over the international legislative process.[2]

This attitude seems to suggest that once the principle of equal participation is realized, the next step, acceptance and implementation of the treaties, would follow without much ado. The African treaty record does not seem to reflect this logic, however. The fate of particular treaties has often been determined by factors unrelated to the African states' general attitude toward treaty making.

This article looks at the problems of treaty acceptance[3] and treaty implementation in these states.[4] On the basis of this examination, it proposes strategies which could be adopted to improve the African treaty record.

Differences in colonial and post-independence experiences have resulted in some basic internal differences in the constitutive and value structures of the various African states. Admittedly, their attitudes toward some international problems reflect these differences; but they nevertheless show a fairly common pattern of behavior with respect to certain basic issues, for example, freedom and independence, non-alignment, and economic development.[5] This common attitude extends to acceptance and implementation of today's vast complex of multilateral treaties.

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1. The term "African States" used in this paper does not include Rhodesia and South Africa.

2. *See generally* Detter, *The Problem of Unequal Treaties*, INT'L & COMP. L.Q. 1069-89 (1966). *See also* Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 How. L.J. 95-127 (1962); Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 Int'L & COMP. L.Q. 55-75 (1966).

3. The term "acceptance" refers in this paper to any manner by which a state expresses its consent to become a party to a treaty.

4. It should be mentioned at the outset that one problem in a study of this kind is the scarcity of relevant materials and documentation. Statements which accompany acceptance or non-acceptance of a treaty may sometimes not clearly articulate the reasons behind the particular decision.

5. Nkrumah, *African Prospect*, 37 FOREIGN AFFAIRS 46 (1958).

The relevant multilateral treaties can be roughly divided into three main categories. The first group includes the so-called constitutive treaties, for example the U.N. Charter, the Articles of Agreement of the International Bank for Reconstruction and Development, and the General Agreement on Tariffs and Trade. Strictly speaking, these treaties do not raise problems of acceptance, because accession to them automatically creates membership obligations entailing alteration of any aspect of the municipal legal system inconsistent with the treaty obligations.

Falling into the second category are treaties of a non-political, technical nature in which international co-operation is desirable to safeguard standards or procedures which are enforceable *inter partes*. This group includes treaties dealing with privileges and immunities, the Law of the Sea, and economic matters. These treaties generally create obligations of an external nature. For example, accession to the Convention on the Settlement of Investment Disputes results in international obligations which run from the adopting state to other states which are parties to the convention. Disregard of these obligations amounts to an international delinquent act, and the offended state may bring an international claim.

Treaties in the third category create obligations of a completely different nature. These require some fundamental structural change in the adopting state's internal legal order. Human rights treaties and ILO Conventions fall within this category. States party to such treaties usually undertake to create a legal regime within the municipal legal order which gives effect to the treaty obligations. Duties arising from treaties of this sort are generally owed to persons residing within the municipal legal system. Breaches of this type of treaty obligation do not, as a rule, give other parties to the treaty a right to bring an international claim; but the breach may give a local resident the right to bring a municipal cause of action.

These different types of treaties raise different problems of implementation. The decision whether to accede to or ratify a particular treaty will, therefore, be influenced by the implications accession or ratification may have for the internal legal order of the accepting state.

II. ACCEPTANCE OF TREATIES CONSTITUTING MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS

Treaties under the first category have not raised significant problems of acceptance. In a majority of cases, the decision to join a particular organization has been based on whether membership in the organization is beneficial to the national interest, and whether membership will not compromise the state's political independence. Most African states have become parties to such treaties as the U.N. Charter, the General Agreement on Tariffs and Trade, the OAU

Charter, and the Articles of Agreement of the African Development Bank. They have, however, shown reluctance to become parties to other constitutive treaties if membership would compromise or appear to compromise their political independence.[6]

The common attitude of the African states toward acceptance and implementation of constitutive treaties appears in their position on the compulsory jurisdiction clause of the International Court of Justice. As of December 31, 1971, only one-third of the members of the United Nations had made declarations recognizing the compulsory jurisdiction of the Court.[7] With the exception of Europe, the African states had the highest number of declarations.[8] The African states are committed to the judicialization of international disputes and will, therefore, support the creation of norms which define a clear legal policy in this direction. Lacking military and economic power, they have consciously worked for the transformation of traditional international law into a law of protection, that is, a law which will protect weaker states against the overwhelming might of stronger ones. This attitude was reflected in their resort to the International Court of Justice over the Namibia issue and to the United Nations Security Council over the Rhodesia issue.

III. TECHNICAL COOPERATION TREATIES OF A NON-POLITICAL NATURE

With the exception of the 1951 Convention Relating to the Status of Refugees,[9] African states have shown more willingness to accede to or ratify non-political technical cooperation treaties than those falling into the third category. Indeed, the African states' record of accepting technical treaties is slightly better than the record of the Asian or Latin American states.[10]

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6. This is the position which a majority of the former British colonies have in the past taken to their relationship with the European Economic Community. The East African countries, for example, have adopted a policy of signing periodic agreements with the E.E.C. dealing with specific aspects of international trade rather than committing themselves to associate membership. Most of the former French colonies have, however, for reasons which may have to do with their relationship with France, chosen a more formal relationship with the E.E.C.

7. United Nations, Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions 10-24, U.N. Doc. ST/LEG/SER. D/5 (1971) [hereinafter cited as Status of Multilateral Treaties].

8. *Id.*

9. 189 U.N.T.S. 137.

10. The following figures on accessions as of December 31, 1971 are illustrative of this point:

(1) 1946 Convention on the Privileges and Immunities of the United Nations; African States: 30; Asian States: 22; Latin American States: 20.

(2) 1961 Vienna Convention on Diplomatic Relations; African States: 34; Asian States: 22; Latin States: 20. Status of Multilateral Treaties, *supra* note 7, at 33-37, 47-53.

This fact leads to the central goal of this paper; to determine what are the main factors influencing the national decision-makers in the African states in deciding whether to accede to a particular treaty. More specifically, this paper seeks to discover whether the decision-making process is more influenced by the substance of the treaty or by the complexities of the procedural requirements necessary to give a particular treaty domestic legal force.

A recent United Nations Institute for Training and Research (UNITAR) study on treaty acceptance[11] suggested that one of the main factors militating against wider acceptance of U.N. multilateral treaties is the problem of procedure. The study noted that the highly technical nature of some of these treaties and the lack of legal personnel in most developing countries have slowed down the process of treaty acceptance and implementation. Although the African states suffer from this disability, some of them have been quick to accede to certain types of treaties irrespective of their technical nature. For example, the rather complex treaties dealing with economic cooperation and development have been widely accepted.[12]

The explanation frequently given this writer in his discussions with a cross-section of African treaty officers was that a state's attitude toward a particular treaty hinged upon the national interest of the acceding state. A treaty which tends to maximize a particular state's value position has a great chance of acceptance regardless of the procedural difficulties it entails. Specifically, three reasons were given for the relatively common acceptance of technical treaties. First, these treaties generally deal with matters which are of benefit and interest to the African states. Second, given the non-political nature of these treaties, acceptance usually does not compromise a particular state's political position. Third, most of these treaties do not involve extensive structural changes in the municipal legal structure, and the African states are correspondingly more willing to accede to them than to those treaties which entail extensive structural changes.[13]

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11. UNITAR, TOWARD WIDER ACCEPTANCE OF U.N. TREATIES (1971) [hereinafter cited as UNITAR STUDY].

12. As of December 31, 1971, 22 African states had acceeded to the General Agreement on Tariffs and Trade. Status of Multilateral Treaties, *supra* note 7, at 195.

13. An exception to this suggestion is, as stated elsewhere, the wide acceptance of the 1951 Convention Relating to the Status of Refugees. This has primarily been due to the role which the Organization of African Unity played with respect to this particular treaty. Under Resolution AHG/RES. 26(11) of 1965, the African Heads of State and Government requested ". . . member states of the Organization of African Unity, if they have not already done so, to ratify the United Nations Convention Relating to the Status of Refugees and to apply meanwhile the provisions of the said convention to refugees in Africa." REPORT OF THE ADMINISTRATIVE SECRETARY-GENERAL

The substantive aspects of the particular treaty and its overall impact on the state's value position substantially influence its prospects of being adopted. The acceptance pattern to the 1965 Convention on the Transit Trade of Land-locked Countries provides a good illustration of this point.[14] Of the ten African states[15] which had ratified or acceded to it as of December 31, 1971, nine were land-locked. Apparently, the decisions to ratify were made primarily because the provisions of this convention were of direct interest to those states. Contrast that record with the attitude of the same ten states toward the Law of the Sea Conventions, to which only three of the ten have acceded.[16]

IV. TREATIES NECESSITATING STRUCTURAL CHANGES IN MUNICIPAL LAW

The third category of treaties raises special problems of acceptance. In the first place, accession to treaties falling under this category create obligations of an internal nature. The state party to the convention undertakes to accord a certain standard of treatment to persons within its national jurisdiction. Such an undertaking may be seen by the national decision makers as a challenge to the concept of national sovereignty.

Secondly, acceptance of these treaties usually implies that the accepting state must alter some aspects of its municipal legal system in order to carry out its obligations under the treaty. The decision to accede to such a treaty may, therefore, be seen as a surrender of some amount of sovereignty. In most of these treaties though, especially in the human rights field, measures for giving effect to the treaty are left to the discretion of the particular state. Others, however, like the Genocide Convention, require party states to enact the necessary legislation to give effect to the provisions of the convention. Under the International Convention on the Elimination of All Forms of Racial Discrimination, for example, party states undertake to ensure, among other things, that all public authorities will act in conformity with the goals of the convention. They must further undertake to change any laws contrary to the spirit of the convention. Such treaties, therefore, create obligations whose execution may lead to political and legislative difficulties in the municipal legal order.

The African states have generally been slow to accept treaties falling under this category. With the exception of the 1951 Conven-

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FOR MEETING OF THE OAU COMMISSION ON REFUGEES HELD IN ADDIS ABABA 17-23 June 1968.

14. 597 U.N.T.S. 3.

15. Burundi, Chad, Lesotho, Malawi, Mali, Niger, Nigeria, Rwanda, Swaziland, and Zambia. Status of Multilateral Treaties, *supra* note 7, at 206.

16. Malawi has acceded to all the four conventions, Nigeria to three, Swaziland to one. *Id.* at 371-91.

tion Relating to the Status of Refugees, their acceptance record is not spectacular. The plight of refugees in Africa had been of particular concern to many African states. Most were faced with complex problems of integrating these refugees; and acceptance of the 1951 convention was seen as an inducement to create machinery to integrate the refugees and also to facilitate the flow of aid from international humanitarian agencies.

The prevalence of this national interest approach is accentuated by the fact that no single African state has signed the 1961 Convention on the Reduction of Statelessness.[18] Since the goal of the convention is to prevent the adoption of national measures which lead to loss of nationality and to oblige parties to the convention to grant nationality to certain stateless aliens, its acceptance may appear to endanger the internal value structure of the accepting state by adding to the already complicated ethnic composition of most of the African states.

V. MEASURES TO INCREASE TREATY ACCEPTANCE

Widespread acceptance of a particular treaty depends on its structure and substance, on the municipal legal order of the accepting state, and on the role of the international organization under whose auspices it is adopted.

A. *Structural and Substantive Provisions of the Treaty*

The structure of a treaty and its substantive provisions ordinarily influence the response it is accorded by national decision makers. Consequently, care should be taken during the negotiating and drafting stages of preparing a treaty to ensure that the final text is drafted to leave no doubt as to the treaty's scope and the implications of acceding to it.

Several measures to widen treaty acceptance have been suggested elsewhere and will not be repeated here.[19] In addition to these measures, it is suggested that treaties, like domestic statutes, ought to be drafted in such a manner that they can be more readily understood. A brief abstract of the main provisions of the treaty and its legislative history might be useful. In some countries, the question of treaty acceptance may lead to considerable political controversy within the municipal political order. Even where treaty acceptance does not require legislative approval, the executive may find it politically necessary to submit the treaty to the legislature for discussion. This is usually the case where the treaty calls for extensive change

17. General Assembly Resolution 2106 (XX) of December 21, 1965. Text of the convention may be found in 20 U.N. GAOR, Supp. 14, at 47, U.N. Doc. A/6014 (1965).

18. U.N. Doc. A/Conf.9/15 (1961). Status of Multilateral Treaties, *supra* note 7, at 107.

19. UNITAR STUDY, *supra* note 11, at 41-92.

in municipal law or where it creates municipal causes of action. In such a situation, the executive ought to be able to explain fully the meaning and implications of the treaty.

Moreover, a system of weighted obligations ought to be introduced in multilateral treaties, providing that obligations under a particular treaty ought to be measured against the ability of countries at various levels of administrative and economic development to carry out their treaty obligations. While it is true that most multilateral treaties have attempted to meet this problem by allowing states to make reservations to those provisions of a treaty they are unable or unwilling to carry out, these reservations generally relate to the less important provisions of a treaty.[20]

B. *National Measures to Facilitate Acceptance*

Generally speaking, the African states do not face problems of acceptance peculiar to Africa. Although the decision to accept a treaty is based on maximization of the particular country's international position, it may additionally be influenced by a realization that a reputation of constant non-acceptance of treaties can weaken a country's international position and undermine its credibility in the eyes of other members of the international community.

As the UNITAR study noted, the question of administrative arrangements in the municipal legal system, the question of implementation legislation, and the problem of the absence of specialized personnel all may determine a state's ability to arrive at an early decision on whether to accede to a treaty. This decision becomes even more difficult when acceptance of the treaty requires changes in the municipal legal order, imposes financial obligations on the state, or creates municipal causes of action.

In most former English colonies, for example Tanzania, a treaty must be given domestic legal force by means of legislative enactment.

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20. In the past the State Department has observed that:

> It is the express policy of the United States in its current FCN treaty program to follow two basic models of treaties, one designed for developed or semi-developed states and the other for states at a low level of administrative and economic development.

Hearings on Treaties of Friendship, Commerce, and Navigation with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan Before the Subcommittee of the U.S. Senate Committee on Foreign Relations, 83d Cong., 1st Sess. (1953). The State Department approach suggested here could be applied to the structuring of multilateral treaties. Such an approach would provide a high level of predictability with regard to the chances of a particular treaty gaining wide acceptance and would ensure that heavy burdens would not be imposed on states at a low level of development. A treaty regulating exploitation of ocean resources beyond the limits of national jurisdiction might, for example, allow a coastal state at a low level of economic development to appropriate a certain percentage of such resources for national development while denying a developed coastal state such a right.

In a country where there is a strong opposition element in the national legislature, this requirement may negatively effect the executive in deciding whether to accept a treaty. This writer was informed by a representative of one country that whenever there was a possibility that the executive would be unable to push implementing legislation through the national legislature, the executive in most cases decided not to accede to the treaty, since subsequent inaction would weaken the country's international standing.

One way of circumventing this problem is to include members of the opposition element in the delegation to the conference at which the treaty is negotiated and adopted. If possible, these delegates should be nominated by the government with the full approval of the various political groups they represent. Alternatively, the opposition groups themselves could be invited to nominate conference representatives. The opposition element would then attend the conference fully briefed on the provisions it would like to see in the treaty. If the government delegates took the opposition's viewpoint into account, the government should then be able to convince the oppositon leadership not to impede unnecessarily implementation of the treaty.

The executive may additionally adopt the strategy of wide publicity for the proposed treaty so that the public may express its views through the mass media. The government would then be in a position to attend the adoption conference with something resembling a national mandate. This strategy may be particularly necessary for treaties which have significant political and economic overtones, for example, those dealing with the breadth of the territorial sea or the control of ocean resources beyond the limits of national jurisdiction. If the outcome of the conference bears close resemblance to the public position on the issue, the government should be in a strong position to accept the treaty without the fear of a subsequent rebuff in the legislature.

In some African countries the legislature has delegated to the executive the authority to implement treaties, enabling the executive to accede to treaties more easily. Tanzania offers an interesting case in point. Tanzanian law provides that any treaty to which Tanzania becomes a party must be put before the National Assembly to give it domestic legal force.[21] The executive has developed the practice, however, of implementing some agreements, for example commercial and economic co-operation agreements, without legislative approval. The legislature has retained its competence to examine agreements which may give rise to municipal causes of action or which call for extensive local transactions. The legislature also enacts subsequent

21. *See generally* E. SEATON & S. MALITI, TANZANIA TREATY PRACTICE (1971).

implementing legislation for this type of treaty.[22]

In some cases, treaty acceptance has been facilitated by means of enabling legislation giving the executive power to put a treaty provision into effect without legislative approval.[23] Such legislation enables the executive to implement its international obligations expeditiously and makes it easier for the state to accede to international agreements. This practice could usefully be adopted by other African states, especially in those states where a single political party dominates the legislature.

C. *International Organizations Under Whose Auspices the Treaty is Adopted*

The international organization under whose auspices a particular treaty is adopted can play a crucial role in the fate of the treaty. The UNITAR study, referred to above, outlined several methods which the United Nations employs to facilitate wider acceptance of multilateral treaties.[24] These techniques have been applied equally to all members of the United Nations. No special method has seemed appropriate for African states. However, in view of the relatively recent appearance of the African states on the international scene and the obvious preoccupation of Africa's few expert personnel with other pressing matters of state, a strong case may be made for more emphasis on the "promotional approach" in Africa. Thus, the Department of Public Information of the U.N. Secretariat, together with the Treaty Division of the U.N. Office of Legal Affairs, could explore the possibility of establishing a strong regional center in Africa to disseminate treaty information. The center would be responsible for regularly disseminating information to African governments on the status of various treaties for which the Secretary-General acts as a depositary, as well as informing these governments of the nature of reservations to treaties and transmitting the accompanying statements on such reservations.[25]

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22. The 1967 Treaty for East African Co-operation establishing the East African Community and the Tanzania-Zambia Railway Authority Agreement were, because of their far-reaching implications for the domestic legal and political process, submitted to the National Assembly for implementation.

23. Section 12 of the East African Income Tax Management Act 1952 and Section 6 of the Customs Tariff Act 1968 empower the Tanzanian minister in charge of income tax matters and customs to exempt certain foreign persons from paying income tax and customs duties without legislative approval. The policy behind these statutes is to enable the minister to carry out certain international obligations without recourse to the legislature.

24. Among such methods are promotion, reporting, servicing, and revision of treaties; *see supra* note 11, at 15-17.

25. Although the U.N. Secretary-General publishes his annual Status of Multilateral Treaties, *supra* note 7, this report has a very limited readership and does not reach many influential opinion leaders in the African states.

Such a center could be built around the existing Information Division of the U.N. Economic Commission for Africa. The various sub-regional United Nations information centers in Africa could also be utilized for the purpose of disseminating the information. Moreover, the United Nations could also explore the possibility of cooperation or joint action with the Legal Office of the OAU Secretariat.

Another method included under the "promotional approach" could be the convening of more regional seminars of African legal officers. The UNITAR/UNESCO Seminar for Young African Specialists in Public International Law held in Dar es Salaam in 1967 and the UNITAR Regional Symposium in Internatonal Law for Africa held in Accra in 1971 were welcome innovations in this respect. At these seminars care should be taken to select fairly senior legal officers in foreign ministries or justice departments whose responsibilities include making decisions on treaties.

Finally, the training of legal personnel responsible for treaty matters and international law in general should be given high priority. The UN/UNITAR Fellowship Program in International Law, with its emphasis on a period of practical training in the legal offices of the United Nations and the other specialized agencies, is a positive development in this direction. This positive approach could be complemented by the creation of a viable African Institute of International Law,[26] and also by the creation and funding of chairs of International Law in Selected African Universities by the United Nations and UNESCO.[27] Long-term and short-term refresher courses for African legal officers could be organized by these universities.

The Organization of African Unity (OAU) and the various sub-regional organizations in Africa might also play a useful promotional role in facilitating wider acceptance of multilateral treaties. The OAU played a very important role in securing wide acceptance of the 1951 Refugees Convention, for example. The organization could play a similar role in those treaties which, like the Refugees Convention, evince a wide community of interest among African states. Wider acceptance of treaties dealing with economic matters like the 1958 Convention on the Recognition and Enforcement of Foreign Arbital Awards and the 1966 World Bank Convention on the Settlement of Investment Disputes could be stimulated by OAU activity in their behalf.

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26. In this connection, more support should be given by the U.N. and other international organizations to the African Institute of International Law established at Lagos with regard to both recruitment of teaching staff and research facilities. A rejuvenated and more active Institute could play a useful role in a number of areas including the publication of a comprehensive African Yearbook of International Law.

27. Discussion on this question has been going on for a considerable time between various African governments, universities, and UNESCO.

These two treaties, especially the latter, are of great importance to the African states. Because of the implications of the World Bank Convention, however, some African states have been slow in accepting it. The OAU Legal Office together with the Commission of African Jurists could play a useful role in researching the implications of treaties of this type on national decision-making and could also look into the possibility of a collective African approach. A state party to the World Bank Convention, because of the guarantees which the convention provides to the foreign investor, may be in a position to attract foreign investment at the expense of a state which is not party to the Convention. This would consequently appear to be one area in which the OAU and the African Development Bank together could play a useful role in promoting some kind of collective approach. It is, therefore, suggested that the OAU encourage the Commission of African Jurists to pioneer studies on all aspects of international law which are relevant to Africa. The Legal Department of the OAU should also be strengthened. These two institutions might jointly bring out certain publications, especially an African Treaty Series, which would provide more information to African governments and scholars on the status of those treaties which are of interest to African states.

Sub-regional organizations could also play a part in facilitating treaty acceptance. The various states comprising these organizations may find it useful to work collectively, or at least to consult with each other to discuss the implications on all other member states of one state becoming a party to a particular treaty. Members of the East African Community have already found it useful to adopt a common approach to certain types of treaties.[28]

VI. CONCLUSIONS

This survey of the problems of treaty acceptance in Africa and possible solutions to some of these problems indicates that the African states desire to play a positive role in the structuring of a new international legal order. This has been amply demonstrated in their less than two decades of independence in such arenas as the U.N. General Assembly, the U.N. Sixth Committee, the International Law Commission, and in major U.N. conferences on the law of treaties, trade and development, and the human environment. They will no doubt participate actively at the coming Conference on the Law of

28. Since 1967, the East African countries of Kenya, Uganda and Tanzania have collectively negotiated their agreements with the European Economic Community. Tanzania and Zambia have also found it useful to coordinate their negotiations with China over the Tanzania-Zambia Railway and with the World Bank over the Tanzania-Zambia Road. A similar approach has also been taken by some of the French speaking countries in their negotiations with the European Economic Community.

the Sea and subsequent conferences.[29] Together with the rest of the developing world, they are seeking the creation of an international law of protection and cooperation.

The extent to which they are willing to accept the new legal norms embodied in the various multilateral treaties and make efforts to implement them in their domestic legal structures depends on whether they feel that these new norms are founded on values consistent with their national aspirations. Thus, where these states feel that their aspirations are being recognized, they have been more than willing to become parties to multilateral treaties. Their acceptance record with respect to the 1951 Convention Relating to the Status of Refugees is a case in point. Consequently, the developed states may have to concede that contemporary international law reflected in these multilateral treaties must reflect values in addition to those founded on Western Christian civilization.[30] They may also have to concede that the low level of administrative, social, and economic development of theseAfrican states prevents these states from being able or willing to meet some international treaty obligations. These realities must be taken into account in treaty-making.

Pointing out these problems is not to suggest that the developed countries have a duty to go more than halfway in their dealings with the developing world. Rather, it is suggested that the international legal system, as it is presently structured, is too heavily weighted in favor of the developed countries. By making the minimum concessions suggested here, the developed countries may assist in correcting the existing imbalance.

Admittedly, the developed countries have, during the past two decades, made some concessions. They have, however, been rather slow to make meaningful concessions in basic areas. The history of the three UNCTAD conferences illustrates the point. Meaningful dialogue and proper negotiation over the whole range of international agreements comprising today's conventional law, with a view to arriving at principles and policies mutually beneficial to the developed and the developing countries, is essential. In the final analysis, the African treaty record will depend primarily on the extent to which treaty law accounts for the aspirations of the African states.

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29. For a more detailed discussion of the role which the African states have played in the development of contemporary international law, *see generally* T. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1972).

30. The reluctance of the developing states in general and African states in particular to accept international law as presently structured was one of the most controversial issues at the first U.N. Regional Symposium in International Law for Africa held in Accra, Ghana in 1971. For a detailed report of the conflicting viewpoints which emerged at that symposium, *see* Mutharika, *Report on State Succession in Matters other than Treaties,* in UNITAR REPORT ON THE UNITED NATIONS REGIONAL SYMPOSIUM IN INTERNATIONAL LAW FOR AFRICA, 1-14 (1971).

DOING BUSINESS IN THE FEDERAL REPUBLIC OF GERMANY*

GEORG KUTSCHELIS**

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* This article is the second in a series on doing business abroad. In our last issue we focused on joint ventures in the Republic of China. This issue contains, in addition to Mr. Kutschelis' article, a comment on investments in Thailand.

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I. INTRODUCTION

This article is designed as a practical guide for U.S. companies contemplating business in the Federal Republic of Germany. It represents a brief survey of the law as of September 1973.

As a reference tool it must be emphasized that it is an introduction only.[1] It does not replace specific expert advice,[2] particularly in

1. The following volumes are cited repeatedly; they provide good information in English: E. COHN, MANUAL OF GERMAN LAW, VOL. I (2d ed. 1968), VOL. II (2d ed. 1971) [hereinafter cited as COHN; citations are to textual paragraphs]; R. MUELLER, E. STIEFEL, & H. BRUECHER, DOING BUSINESS IN GERMANY (7TH ED. 1972) [hereinafter cited as MUELLER]; CURRENT LEGAL ASPECTS OF DOING BUSINESS IN EUROPE (L. Theberge ed. 1972) [hereinafter cited as Theberge]; E. STEIN & P. HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA (1963) [hereinafter cited as STEIN & HAY]; E. STEIN & P. NICHOLSON, AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET, 2 vols. (1960) [hereinafter cited as STEIN & NICHOLSON I and II]; R. SCHLESINGER, COMPARATIVE LAW (3d ed. 1970) [hereinafter cited as SCHLESINGER]; C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT (1970) [hereinafter cited as FULDA]; D. SPETHMANN, WEST GERMANY IN LEGAL ASPECTS OF FOREIGN INVESTMENT 670-90 (W. Friedmann and R. Pugh eds. 1959) [hereinafter cited as SPETHMANN]; G. ZAPHIRIOU, EUROPEAN BUSINESS LAW (1970) [hereinafter cited as ZAPHIRIOU]; INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL GUIDE TO COMPANY FORMATION (1970) (available from the United States Council of the International Chamber of Commerce, New York 10036) [hereinafter cited as ICC GUIDE]; HAMBURG CHAMBER OF COMMERCE, CARRYING ON BUSINESS IN GERMANY (1969) (manuscript available from the German American Chambers of Commerce in New York, Chicago, or San Francisco) [hereinafter cited as HAMBURG].

See also U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW (1972); INTERNATIONAL TRADE, INVESTMENT AND ORGANIZATION, (P. Hay & W. La Fave ed. 1967); W. BALEKJIAN, LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE EUROPEAN COMMUNITY (1967); INTERNATIONAL MANUAL ON THE EUROPEAN ECONOMIC COMMUNITY (H. Junckerstorff ed. 1963); Spier, *an Analysis of Legal Forms of Business Organization in West Germany and the United States*, 3 AM. BUS. L. J. 287 (1965); Shartel & Wolff, *Civil Justice in Germany*, 42 MICH. L. REV. 863 (1944).

The reader sufficiently versed in German can find concise and accurate information in C. CREIFELDS, Rechtswoerterbuch (2d ed. 1970) (C. H. Beck Verlag, Muenchen/Germany) [hereinafter cited as CREIFELDS]; O. Model & C. Creifelds, STAATSBUERGERTASCHENBUCH (12th ed. 1973) (C. H. Beck Verlag, Muenchen/Germany). A. GOERLITZ, HANDLEXIKON ZUR RECHTSWISSENSCHAFT (1972) (Wissenschaftliche Buchgesellschaft, Darmstadt/Germany) [hereinafter cited as GOERLITZ] is recommended more for its poignant criticism of the present law's weaknesses than for its informative value.

On trading with East Germany, *see* Drobnig & Waehler, *Legal Aspects of Foreign Trade in East Germany*, 2 J. WORLD TRADE L. 28 (1968); Supranowitz, *The Law of State-Owned Enterprises in a Socialist State*, 26 LAW & CONTEMP. PROB. 794 (1961); Grimes, *The Changing Structure of East Germany Industrial Enterprises*, 17 AM. J. COMP. L. 61 (1969); Drobnig, *Soviet Corporations in Eastern Germany*, 17 CENT. EUROP. AFF. 150 (1957); Wiegand, *Business and Finance in Communist Germany*, 46 ILL. L. REV. 851 (1952).

2. *Cf.* Ketcham, When to Use a European Lawyer, in Theberge, *supra* note 1, at 96; FULDA, *supra* note 1, at 773 n.1; A. Conard, *Organizing for Business*, in Stein & NICHOLSON, *supra* note 1, at 66 [hereinafter cited as Conard]; Murphy, *Investment in an Offshore Subsidiary: A West German Prototype*, 5 INT'L LAW. 690, 704 (1971) [hereinafter cited as Murphy].

such intricate areas as company law, taxation, or antitrust, to name only three subjects of obvious and extreme complexity. Therefore, the following observations will often have the character of generalizations. It is hoped, however, that they will provide some basic insight into the problems relevant to doing business in Germany.

Other shortcomings of these comments will relate directly to the difference, both in language and legal tradition, between the U.S. and German systems of law. Although it is a matter of common knowledge, it should be emphasized that few legal terms can be translated literally without losing some or all of their precise meaning.[3] The problem is further complicated by the fact that publications on the subject do not share a common terminology[4] since some publications are aimed at British readers and others at U.S. readers. Still, in order not to make language a barrier, every legal term is followed by a German translation or approximation of the English term.

II. PRELIMINARY FORMALITIES

Before considering questions directly related to setting up a foreign company in Germany, brief mention must be made of preliminary formalities such as permits and registration.[5]

A. *Residence Permit (Aufenthaltserlaubnis)*

Section 2 of the Aliens Statute[6] (Auslaendergesetz)[7] requires all

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3. *Cf.* LEGAL ASPECTS OF FOREIGN INVESTMENT ix (W. Friedman & R. Pugh eds. 1959); COHN, *supra* note 1, at 1., 2.; Conard, *supra* note 2, at 48 n.67; ICC GUIDE, *supra* note 1, at 8; Schlesinger, *supra* note 1, at 618-22.

4. One particularly discouraging illustration is furnished by the Betriebsverfassungsgesetz (*see infra* note 229) which has been translated as Shop Constitution Law by MUELLER, *supra* note 1, at 96; Enterprise Constitution Act by SPETHMANN, *supra* note 1, at 673; Law on the Organisation of Enterprises by Fabricius, *The German Law of 1972 on the Organisation of Enterprises*, 1972 J. BUS. L. 340; Works Constitution Act in COHN, *supra* note 1, at 7.246.; Labor Management Relations Act in M. PELTZER, LABOR MANAGEMENT RELATIONS ACT (1972).

5. *Cf.* MUELLER, *supra* note 1, at 48, 93; HAMBURG, *supra* note 1, at 1-4; ICC GUIDE, *supra* note 1, at 11.

6. Aliens Statute (Auslaendergesetz) of April 28, 1965, [1965] BGBl. I 353; *also* in C. SARTORIUS, VERFASSUNGS UND VERWALTUNGSGESETZE 565 (35th ed. 1972).

7. All codes and statutory material are cited by their concise unofficial title used almost exclusively in legal writing. The official titles, in the rare cases where they do not coincide with the unofficial ones, are lengthy and are, therefore, avoided.

To be sure one actually has the latest version of a statute, one has to consult the Federal Legal Gazette (Bundesgesetzblatt), abbreviated BGBl. (COHN, *supra* note 1, at 87). One has to be careful not to confuse the Federal Legal Gazette (Bundesgesetzblatt) with the Federal Gazette (Bundesanzeiger), which publishes excerpts from the commercial registers. (MUELLER, *supra* note 1, at 13, makes a clear distinction between the two, while COHN, *supra* note 1, calls both "Official Gazette," although at 81. he talks about the Federal Legal Gazette and at 7.24. and 7.204. about the Federal Gazette).

For virtually all purposes it is sufficient to consult one of the unofficial but widely used looseleaf collections of statutory law by C. H. Beck Verlag, Muenchen/Germany. These collections are updated one or more times a year. Throughout this article, four

aliens planning to enter and stay in the Federal Republic of Germany to apply for a residence permit (Aufenthaltserlaubnis). Initial contacts with the German diplomatic or consular services nearest the applicant's domicile should prove helpful, as will inquiries to one of the three German-American Chambers of Commerce in New York, Chicago, and San Francisco. The diplomatic or consular authorities will advise the applicant and obtain the residence permit from the appropriate German authority. The permit authority cooperates, in turn, with the local chamber of commerce (Industrie und Handelskammer) and the local labor authority (Arbeitsamt).

In the case of a first application, the permit is usually granted for three to twelve months. After five years of residence an unrestricted permit (Aufenthaltsbewilligung) may be granted.

Upon arrival, the alien is required to register with the local aliens authority (Auslaenderbehoerde). Its offices are either with the local police or the local administration: county administration (Kreisverwaltung) in rural areas, and the city administration (Stadtverwaltung) in urban districts. Nationals of member states of the European Economic Community and tourists are exempt from these regulations.

Evasion of the Aliens Statute may be prosecuted as illegal entry. On the other hand, administrative authorities are generally liberal in their policy of admission. Other than the residence permit, foreigners must comply with but a few additional procedures.

B. *Labor Permit (Arbeitsgenehmigung)*

Section 19 of the Labor Support Law (Arbeitsfoerderungsgesetz)[8] requires prospective employees to apply for a labor permit. Only holders of residence permits are eligible, and because of the prior checks made in connection with the residence permit, the labor permit is granted as a routine matter by the local labor authority (Ar-

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of these collections will be referred to in order to make the job of finding the law easier: H. SCHOENFELDER, DEUTSCHE GESETZE (47th ed. 1972) [hereinafter cited as SCHOENFELDER]; C. SARTORIUS, Verfassungs und Verwaltungsgesetze (35th ed. 1972) [hereinafter cited as SARTORIUS]; H. NIPPERDEY, ARBEITSRECHT (11th ed. 1972) [hereinafter cited as NIPPERDEY]; STEUERGESETZE (24th ed. 1972) [hereinafter cited as STEUERGESETZE]. *See also* COHN, *supra* note 1, at 85. on how to find the law.

English translations of statutes—if known to exist—will be pointed out, but the danger of obsolescence is obvious; see also COHN, *supra* note 1, appendix II in vol. I, at 310, (5.); *id.* at 86.-90.; J. HARTMANN, BIBLIOGRAPHY OF TRANSLATIONS OF LAWS AND REGULATIONS, GERMAN-ENGLISH-FRENCH-SPANISH (1971); Majoros, *Zur Krise der internationalen, Kodifikationspolitik*, 6 ZEITSCHRIFT FUER RECHTSPOLITIK 65 (1973); Sprudzs, *Status of Multilateral Treaties—Researcher's Mystery, Mess or Muddle?*; 66 AM. J. INT'L L. 364 (1972); SCHLESINGER, *supra* note 1, at 637-39, 656-58, 666-67.

8. Labor Support Law (Arbeitsfoerderungsgesetz) of June 25, 1969, [1969] BGBl. I 582; *also* in NIPPERDEY, *supra* note 7, of 700.

beitsamt). Numerous exemptions exist, such as for trainees not paid in Germany, alien officers of German companies, and for non-domiciled aliens servicing imported equipment for a limited period of time.[9]

C. *Registration of Business (Gewerbeanmeldung)*

Apart from the manufacture of and trade in weapons, which are prohibited to foreigners,[10] all branches of business are as open to foreigners holding an unrestricted residence permit as they are to Germans, so long as any special requirements, like professional qualifications, are met.

Registration[11] of the prospective business or trade with the local commercial or police authority is followed by the issuance of a certificate of registration (Gewerbeanmeldeschein).[12] The internal revenue service is notified of the registration, but it remains every individual's duty to comply with his obligations as a taxpayer.

Certain trades can be carried on only with a special permit. These include trades which, if exercised improperly, could endanger the general public (food, pharmaceutical and medical services, pawnbroking, and common carriers). Commercial installations which are inherently dangerous because of noise, vibration, or fumes are subject to stringent controls and supervision.[13] Other permits depend on the applicant's particular qualification or personal reliability, or both.[14]

As to domicile of company partners, German law requires the company to designate a representative domiciled in Germany who is responsible to the authorities.

D. *Registration of Foreign Corporate Bodies*

Section 12 of the Trade Regulation (GewO) provides that foreign corporate bodies, as "legal persons" (juristische Personen),[15] must apply for a permit to either set up business or to participate in one.

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9. Ordinance of March 2, 1971, [1971] BGBl. I 152. §§ 5 and 9 of the Ordinance apply in particular.

10. Section 6 (3) Federal Arms Statute (*Bundeswaffengesetz*) of September 19, 1972, [1972] BGBl. I 1797; *also* in SARTORIUS, *supra* note 7, at 820; § 6 (2) Statute on War Weapons (Kriegswaffengesetz) of April 20, 1961, [1961] BGBl. I 444; *also* in SARTORIUS, *supra* note 7, at 823.

11. On registration in the commercial register *see infra* III (B)(2). On domicile of a company *see* Winkhaus and Stratmann, *GmbH: The Close Corporation in Germany-Management and Capitalization Problems for U. S. Controlled Subsidiaries,* 29 BUS. LAWYER 1275, 1279-80 (1973) [hereinafter cited as Winkhaus].

12. Sections 14, 15 Trade Regulation (Gewerbeordnung) of July 26, 1900, [1900] RGBl. 871; *also* in SARTORIUS, *supra* note 7, at 800 [hereinafter cited as Trade Regulation/GewO].

13. Section 16 *et. seq.* Trade Regulation (GewO), *supra* note 12.

14. *Id.* at Sections 29-40.

15. On "legal persons," *see infra* III (C).

The permit must be given unless the foreign corporate body's activity is contrary to the public interest, as when reciprocal rights of establishment are not guaranteed or regulations relating to capital, applicable to German domestic companies, are not met. The authority competent to grant trade permits is the Ministry of Commerce (Wirtschaftsministerium) or its equivalent in each federal state (Bundesland).[16] Foreign corporate bodies, founded in accordance with the laws of a member state of the European Economic Community are exempted from the trade permit regulation.[17]

Although the formalities of permits and registration necessary to do business in Germany constitute a considerable amount of "red tape," the attitude of federal, state, and local authorities is liberal, so as to render many restrictions insignificant.[18]

III. LEGAL ORGANIZATION OF A BUSINESS

German law recognizes many types of legal associations and companies which differ according to the needs of society in general, or of the business community in particular. Additional variety results from the non-mandatory character of considerable portions of German law. Moreover, the principle of freedom of contract allows the parties to create their own particular form of association or company.

There is a sharp distinction in German law between companies structured like an association, the archetype of which is the personal association (Verein), and those organized as companies in the strict sense (Gesellschaft).[19] The legal problems of the two basic types of business organizations, associations and companies, are examined in

16. Section 12 (3) Trade Regulation (GewO), *supra* note 12.

17. *Id.* at Section 12 (a).

18. *Cf.* Marty-Lavauzelle, *Local Law Problems in Acquiring European Corporations*, in Theberge, *supra* note 1, at 26, 29.

19. The reader must be cautioned against some particularly confusing terminology. German company law (Gesellschaftsrecht) usually comprises companies (Gesellschaften) only and excludes associations (Vereine). Yet in describing the different companies one takes recourse to the criterion of how many characteristics of a company (Gesellschaft) or of an association (Verein) a company has. In other words, the test is whether a given company, in the general sense, is more a company in the strict legal sense, or more an association. This is not exactly a contradiction because not all companies are companies in the strict sense, whereas some "companies" strictly speaking are associations. This problem in terminology is further discussed *infra* III (C) (2) of this article.

Another misunderstanding may occur in reading SPETHMANN, *supra* note 1, at 670. In talking about "personal associations", Spethmann refers to personal companies which, since his writing, have come to be called person-companies by most writers including this author (*see infra* III (C) (4) of this article). Person-companies, of course, is the literal translation of the German "Personengesellschaften." Spethmann uses the word "association" in a very broad sense denoting any legally joint group. This writer, however, uses "company" in the general sense in translating the German (Gesellschaft).

this article;[20] three others, the personal association (Verein), the foundation (Stiftung), and the public corporation, will not be treated here since they do not lend themselves to foreign investment.

A. *Statutory Background*

Since German law consists largely of code law, the newcomer is well-advised to refer to the various codes early in his planning.[21] Sections 742-58 of the Civil Code (Buergerliches Gesetzbuch or BGB)[22] contain the general rules applicable to any group holding a legal right (Gemeinschaft),[23] unless possession of such right is expressly prohibited by law. However, since many kinds of legally joint groups have received the legislature's specific attention in different sections of the Civil Code (BGB), the Commercial Code (Handelsgesetzbuch or HGB),[24] and other particular codes,[25] Sections 742-58 enjoy only secondary importance.[26]

B. *Some Peculiarities of German Commercial Law*

Even to gain a fragmentary understanding of the available legal structures, one must understand a few characteristics of German

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20. *See infra* III (C)(2).

21. *See supra* note 7.

22. Civil Code (Buergerliches Gesetzbuch) of August 18, 1896, [1896] RGBl. 195; *also* in SCHOENFELDER, *supra* note 7, at 20 [hereinafter cited as Civil Code (BGB)].

SCHLESINGER, *supra* note 1, at 371-77, gives a detailed synopsis.

23. COHN, *supra* note 1, at 191., 355.; A. HUECK, GESELLSCHAFTSRECHT 51-55 (16th ed. 1972) [hereinafter cited as HUECK].

24. Commercial Code (Handelsgesetzbuch) of May 10, 1897, [1897] RGBl. 219; *also* in SCHOENFELDER, *supra* note 7, at 50 [hereinafter cited as Commercial Code (HGB)]. SCHLESINGER, *supra* note 1, at 377, gives a synopsis.

25. Notably, the Stock Corporation Law (Aktiengesetz) of September 6, 1965, [1965] BGBl. I 1089; *also* in SCHOENFELDER, *supra* note 7, at 51 [hereinafter cited as Stock Corporation Law (Akt G). It is available in two translations, one by R. MUELLER & E. GALBRAITH, THE GERMAN STOCK CORPORATION LAW (German-English ed. 1966), and the other by F. JUENGER & L. SCHMIDT, GERMAN STOCK CORPORATION LAW (1967); *also* the Law on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschraenkter Haftung) of April 20, 1892, [1892] RGBl. 477; *also* in SCHOENFELDER, *supra* note 7, at 52 [hereinafter cited as Law on Limited Liability Companies (GmbHG)], available in a translation by R. MULLER, GERMAN LAW CONCERNING THE COMPANIES WITH LIMITED LIABILITY (1972).

26. In this connection, a similar technique of referring the reader back from specific codes to more general codes whenever general rules are applicable must be pointed out. Taking for an illustration the limited partnership [*see infra* III (D) (3)], a derivative of the partnership [*see infra* III (D)(2)], which in its turn is a derivative of the private law company [*see infra* III (D)(1)], we find that due to the reference in Section 161 (2) Commercial Code (HGB), the rules applicable to the partnership also apply to the limited partnership except in those respects in which the code specifically provides otherwise in Sections 161-77 Commercial Code (HGB). Questions not treated in Sections 161-77 are answered alike for both the partnership and the limited partnership. Correspondingly, gaps left by Sections 105-60 Commercial Code (HGB) regulating the partnership are to be filled [Section 105 (2)] by Section 705-40 Civil Code (BGB) regulating the private law company.

commercial law, including a number of criteria which serve to distinguish the different kinds of companies. These criteria as we shall see later, have some bearing upon liability, agency, taxation, and other important matters. Additionally, in examining these criteria, we also examine the range of company types suitable to varying conditions.

1. *Kinds of Merchants*

Sections 1-7 of the Commercial Code (HGB) distinguish between several kinds of merchants (Kaufleute)[27] in order to define their duties of registration and bookkeeping, and to make applicable specific rules different from, and stricter than, those found in the Civil Code (BGB).[28] Usually it is sufficient that one party to a contract be a merchant, as defined in those sections, for the diverging or supplementary rules to apply.[29] In rare cases, both parties must have the status of merchant in order to submit the contract to the stricter Commercial Code (HGB).[30]

The consequence of this categorization is the application of specific regulations under certain circumstances. The transaction in question must be one typically effected in the ordinary course of business. In short, it must constitute a transaction directly or indirectly promoting business. A direct promotion of business can be seen in contracts typical for the particular kind of business (e.g., sale of goods and shipping). An indirect promotion can be a contract which either renders possible or promotes the typical business transaction (e.g., employment contracts, leases and purchase of office supplies), or is a typical transaction entered into in the ordinary course of business, or similar to those entered into in the ordinary course of business.

Generally speaking, the specific rules are stricter because they make escape from legally binding relationships and transactions more difficult; the merchant is assumed to know the law. Thus, he can bind himself orally in cases where a writing is required for non-merchants. Stricter rules also apply to: (1) bail and commercial letters of confirmation (a valid contract unless the letter of confirmation

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27. *See* COHN, *supra* note 1, at 7.9. -7.15.; ZAPHIRIOU, *supra* note 1, at 41.

28. On the peculiar quality of commercial law as a branch of private law, *see* FULDA, *supra* note 1, at 775; SCHLESINGER, *supra* note 1, at 404; COHN, *supra* note 1, at 92., 7.1. - 7.8.

29. COHN, *supra* note 1, at 7.19.; SCHLESINGER, *supra* note 1, at 408.

This and all the following citations to code material in section III (B) of this article are to the Commercial Code (HGB) unless otherwise noted.

30. *E.g.*, section 346 requiring the merchant to respect commercial customs (*see* COHN, *supra* note 1, at 7.8.); sections 377-79 forcing the merchant-buyer to inspect delivered goods immediately and to notify the merchant-seller of any alleged defects; otherwise the buyer will forfeit his rights (*see* COHN, *supra* note 1, at 7.132.).

is duly revoked);[31] (2) the extent of commercial obligations; (3) the availability of the absence of contract; and (4) the provision of five percent, rather than four percent, interest as the basic rule.[32] Likewise, acquisition of title in good faith is easier at commercial law than at civil law, as is acquisition of a lien in personam, the merchant's right of retention.[33]

One who conducts a commercial business (Handelsgewerbe) is a merchant (Kaufmann) in the legal sense of the word. The law distinguishes among the "must-merchant," a merchant by virtue of the kind of business he conducts,[34] the "shall-merchant" who shall register in the commercial register[35] because of his business volume and thus acquires the status of merchant, the "may-merchant" who may become a merchant through registration if he so desires, and the "form-merchant," a merchant by virtue of his form of legal organization.[36]

Usually, all these are "full-status merchants" (Vollkaufleute), meaning that all particularities of commercial law, including mandatory registration and bookkeeping, apply to them. But, as the antiquated scheme also comprises a number of small traders such as street peddlers, Section 4 of the Commercial Code (HGB) exempts some of the "minor-status-merchants" (Minderkaufleute) from the regulations covering bookkeeping, commercial name (Firma),[37] commercial agency (Prokura),[38] and other matters.[39]

2. *Commercial Register*

The commercial register (Handelsregister)[40] contains a list of all full-status merchants and certain facts and legal relationships pertaining to them. It is kept by the local court of small claims (Amtsgericht) as the court of register (Registergericht). Only certain facts are admissible for publication while others must be published under all circumstances.[41]

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31. COHN, *supra* note 1, at 7.86. - 7.96.

32. *Id.* at 7.108. - 7.111.

33. *Id.* at 362., 7.113. [regarding section 366 Commercial Code (HGB) and section 932 Civil Code (BGB)]; *id.* at 210., 7.113. [regarding section 369 Commercial Code (HGB) and section 273 Civil Code (BGB)].

34. Enumeration of the kinds of commercial businesses in section 1 (2) Commercial Code (HGB).

35. *See infra* III (B)(2).

36. *See infra* III (B)(5) and note 104.

37. *See infra* III (B)(3).

38. *See infra* III (B)(4).

39. *See supra* III (B)(1) and note 32.

40. SCHLESINGER, *supra* note 1, at 407; COHN, *supra* note 1, at 7.20. - 7.27.; FULDA, *supra* note 1, at 775; MUELLER, *supra* note 1, at 12.

41. *E.g.*, all of the following companies have to be registered: partnership [section

The purpose of the register is to inform the public; therefore, changes are published not only in the Federal Gazette (Bundesanzeiger), but also in local newspapers. The task of keeping the commercial register updated belongs to the courts, the district attorney's office, the police, the local administration, the lawyers and the chamber of commerce. An entry into the commercial register always carries a presumption of admissibility and accuracy because it is made with an investigation, albeit a summary one. The registration may have confirmatory character, or it may have merely declaratory character, as when it makes visible a legally relevant fact.[42]

One very significant aspect of the register is the provision for so-called "negative publicity" (negative Publizitaet) which allows third parties to rely on the register's silence. Thus, an unregistered fact, which should have been registered, is no defense against a third party unless there is positive proof of the third party's knowledge. There is also the less important rule of "positive publicity" (positive Publizitaet). A registered and published fact is a valid defense unless the transaction takes place within 15 days after publication or the third party proves that he lacked knowledge of the published fact through no negligence of his own. This is an allegation the courts are reluctant to accept as proof because all merchants are presumed to know the contents of the commercial register at all times. A final provision allows a third party to invoke facts correctly published if he had no knowledge of their incorrectness.

Defenses based on the commercial register are known in German law as "public faith" defenses (oeffentlicher Glaube), a concept of clothing certain public registers with a rebuttable presumption of correctness.[43] This principle is even more prominent in the register of land (Grundbuch) which reflects transfers of title in real property.[44] This principle of public faith exists in several branches of the law. However, customary, uncodified commercial law supplements the restricted public faith in the commercial register by holding that a

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106 Commercial Code (HGB)], limited partnership [sections 161 (2), 162, 106 Commercial Code (HGB)], stock corporation [sections 36 *et seq.* Stock Corporation Law (AktG)], partnership limited by shares [sections 278 (2), (3), 282 Stock Corporation Law (AktG)], limited liability company [section 10 Law on Limited Liability Companies (GmbHG)].

42. This provision has been revised by the Law of August 15, 1969, [1969] BGBl. I 1146. Therefore, COHN, *supra* note 1, at 7.27. and SCHLESINGER, *supra* note 1, at 475 are slightly outdated. *See* CREIFELDS *supra* note 1, heading "Handelsregister" at 518-19; GOERLITZ, *supra* note 1, at 184, left column.

43. COHN, *supra* note 1, at 381., 7.27.; SCHLESINGER, *supra* note 1, at 466-75; CREIFELDS, *supra* note 1, heading "oeffentlicher Glaube" at 776-77.

44. SCHLESINGER, *supra* note 1, at 466-74; COHN, *supra* note 1, at 371. *et seq.* A model of a register of land (Grundbuch) is reproduced in German by COHN, *id.* appendix I in vol. I, at 303-07.

person who causes an incorrect entry or fails to have one cancelled is liable to those persons having relied "in good faith" on those incorrect facts.[45]

3. *Commercial Name (Firma)*

Section 17 (1) defines the commercial name (Firma) as the name under which a merchant signs and conducts his business.[46] It identifies and projects his image by distinguishing his person, his business, his products, and his services from others.

There are five legal principles which characterize commercial names: (1) uniqueness; (2) duty to register; (3) truthfulness in indicating the true owner or legal form of organization; (4) continuity; and (5) exclusivity. Exclusive use of a commercial name is an absolute right protected as strongly as privacy or property. Anyone impinging upon that right is subject to a penalty by the court of register, permanent injunction and damages.

4. *Commercial Agency*

In addition to the different kinds of agencies regulated in the Civil Code (BGB),[47] there are two others in commercial law. These are the power of procuration (Prokura)[48] and commercial authority (Handlungsvollmacht).[49]

Power of procuration (Prokura) is the broadest form of agency in German law. A Prokurist may engage in any business transaction, including litigation. Appointment as a Prokurist must be entered into the commercial register. A restriction of the Prokura, although valid between the Prokurist and his principal, is not binding upon third parties. The only exception may be in restrictions on the purchase of land, if expressly stated in the power of procuration.

Under the much more restrictive commercial authority (Handlungsvollmacht), the Handlungsbevollmaechtigte, may carry on only those transactions typical for the specific type or sector of business.

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45. CREIFELDS, *supra* note 1, heading "Handelsregister" at 519, left column.

46. SCHLESINGER, *supra* note 1, at 475 (asterisk); COHN, *supra* note 1, at 7.28. 7.32.; MUELLER, *supra* note 1, at 51, 72-73; Winkhaus, *supra* note 11, at 1278-79.

47. MUELLER, *supra* note 1, at 31-34; COHN, *supra* note 1, at 165.-172.; SCHLESINGER, *supra* note 1, at 537-42; *id.* 732 (citing four articles by Mueller Freienfels).

On power of agency and authority of management, *see* III (C)(3) and note 63, III (D)(1) and note 86, III(D)(2) and note 96, III(D)(3), first textual paragraph, III (D)(5), III(D)(7) and note 118.

48. COHN, *supra* note 1, at 7.39.-7.44.; SCHLESINGER, *supra* note 1, at 543 * (asterisk); MUELLER, *supra* note 1, at 34; CREIFELDS, *supra* note 1, heading "Prokura" at 837-38.

49. COHN, *supra* note 1, at 7.45. - 7.47.; MUELLER, *supra* note 1, at 34-35; CREIFELDS, *supra* note 1, heading "Handlungsvollmacht" at 522.

C. *Criteria of Companies*

To distinguish the different kinds of companies[50] one must rely on the following criteria.[51]

1. *Capacity to Hold Legal Rights (Rechtsfaehigkeit)*

Under German law, all natural persons and some corporate entities, so-called "legal persons" (juristische Personen),[52] have the capacity to hold legal rights (Rechtsfaehigkeit).[53] Under certain forms of organization, some associations or companies in the legal sense,[54] do not have the capacity.

To provide legal protection for both individual and collective interests, the law offers two basic schemes of organization, the principle of plurality (Vielheitsprinzip) and the principle of uniformity (Einheitsprinzip).[55] A company formed under the principle of plurality does not, in itself, become an independent legal person having its own legal rights. Such a company administers the sum of the individual rights of the partners as exercised by a plurality of the partners. This kind of organization requires a considerable degree of agreement among the partners and may be difficult for long-term projects, or where there is fluctuation of membership, or for activities that require an uncomplicated decision-making process.

When fast and efficient management is desired, an organization may be structured according to the principle of uniformity. Such a company becomes an independent legal person. Thus, it is possible to carry on legal activities without having in each case to consult the individual partners. The partners owe the company certain rights and obligations but the company leads a legal life of its own. Frequently the personal rights of the partners and rights of the company coincide with each other.

The type of organization controls the degree to which a partner can be held liable. Partners of a company without capacity to hold

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50. As mentioned *supra* note 19, this term in its general meaning comprises both associations and companies in the legal sense, only the latter of which will be discussed here [*infra* III (D)].

51. The following analysis III (C) relies heavily on HUECK, *supra* note 23, at 4-15.

52. COHN, *supra* note 1, at 111.-117.

53. Capacity to hold legal rights (Rechtsfaehigkeit) [sections 1 *et seq.* Civil Code (BGB)] must not be confused with capacity to act, *i.e.* capacity to evoke legal consequences (Handlungsfaehigkeit). The capacity to act can be divided into the capacity to enter into legal transactions (Geschaeftsfaehigkeit) [sections 104 *et seq.* Civil Code (BGB)] and the capacity to be responsible for delictual behavior (deliktsfaehigkeit, Zurechnungsfaehigkeit or Verschuldensfaehigkeit) [sections 827 *et seq.* Civil Code (BGB)]. *See* COHN, *supra* note 1, at 105., 135.-138., 321.; SCHLESINGER, *supra* note 1, at 621.

54. *See supra* note 19.

55. HUECK, *supra* note 23, at 5.

legal rights are held personally liable for company debts, while partners of a company with capacity to hold legal rights are not. These are the extremes, however, and between the two exist many variations. For example, the partnership, although not a legal person, by special provision in Section 124 of the Commercial Code (HGB), has legal standing. The partnership follows the principle of plurality, more typical of companies without capacity to hold legal rights than the private law company. In contrast, the limited liability company, more oriented towards the principle of uniformity, shows some elements of plurality whereas the stock corporation does not. The private law company and the stock corporation represent opposite ends on the scale of possible business organizations.

2. *The Dichotomy Between Company and Association*

Another distinction of considerable importance is whether a legal organization is an association (Verein), or a company in the strict sense (Gesellschaft).[56] This becomes a problem whenever a specific code regulating a particular legal organization leaves a question unanswered. When this occurs, the general rules in the Civil Code (BGB) in regard to either associations (Vereine) or companies (Gesellschaften) will prevail. These general rules are found in Sections 21-79 and 705-40, respectively.[57] If these sections fail to give an answer, then Sections 741-58 of the Civil Code (BGB) become applicable. These constitute the most general rules regulating groups jointly holding legal rights (Gemeinschaften).[58]

In general, associations have to be organized as a corporate entity. In an association, personal engagement and continuity of partners seem to enjoy only minor significance in contrast to a company in the strict legal sense, although this may not be so true in individual cases. The stock corporation (Aktiengesellschaft), the partnership limited by shares (Kommanditgesellschaft auf Aktien), and the limited liability company (Gesellschaft mit beschraenkter Haftung) are associations, although all of these legal terms contain the component "company" (Gesellschaft).[59] On the other hand, the private law company (Gesellschaft buergerlichen Rechts), the partnership (offene Handelsgesellschaft), and the limited partnership (Kommanditgesellschaft) are companies in the strict sense.[60]

3. *Internal and External Companies*

Company law labels the relationships between the partners of a

56. *Id.* 5-7; *see also supra* note 19.

57. They should not be confused with section 741 Civil Code (BGB). *See supra* III (A).

58. *See supra* note 23.

59. HUECK, *supra* note 23, at 7; *cf. supra* note 19.

60. HUECK, *supra* note 23, at 7.

company as the internal relations (Innenverhaeltnis) and those between the company and third parties as the external relations (Aussenverhaeltnis). This distinction exists in other areas, such as agency law. Correspondingly, there are internal companies (Innengesellschaften) and external companies (Aussengesellschaften).[61]

Companies which have the capacity to hold legal rights necessarily have external legal relations with third parties because only the corporate entity can exercise the company's rights and obligations. In contrast, companies not having the capacity to hold legal rights do not necessarily have external relations. A company may be created where the partners do not carry on any business under the company's name. They do not act in the company's name and no external company exists as a matter of law. Nevertheless, these individuals may be bound by a contract establishing an internal company subject to those rules of company law of general applicability. A prime example of an internal company is the so-called "silent partnership" (stille Gesellschaft).[62] Internally the silent partnership is subject to the general rules of company law, while externally the company is subject to no legal external rules.

Apart from reasons of business policy, the distinction between internal and external companies is legally important. Only external companies can have a commercial name. Similar restrictions apply to agency and the authority of management.[63]

4. *Person-Companies and Capital-Companies*

Another distinction on a different level is made between person-companies (Personengesellschaften) and capital-companies (Kapitalgesellschaften).[64] Person-companies (an obsolete term is personal companies),[65] which include the partnership, the private law company, the limited partnership and the silent partnership, are strongly shaped by the individual partners. Usually the partners themselves are responsible for, and actively engaged in, the company's business. There is personal liability, and with some exceptions, the membership is neither transferable nor inheritable.

Capital-companies, on the other hand, emphasize capital as the prime constituent element, thus assuming an investment character. Only the stock capital (Grundkapital), consisting of a fixed amount, is subject to liability. Membership in the company is not individually shaped; shares are transferable and the management is in the hands

61. *Id.* 7-8.
62. *See infra* III (D)(4).
63. *See supra* note 47.
64. HUECK, *supra* note 23, at 8-11; SPETHMANN, *supra* note 1, at 670.
65. *See supra* note 19.

of third persons. Examples of capital-companies are the stock corporation, the limited liability company and the partnership limited by shares.

In deciding whether to form a person-company or a capital-company, tax law is often the deciding factor. Person-companies are not subject to corporation income tax (only the partners' personal income is taxable), while capital-companies suffer the double burden of corporation and personal income tax. Naturally, there are offsetting benefits to capital-companies.[66]

5. *Ownership of Company Assets*

While companies exist which need no assets or which concentrate their assets in one place,[67] the majority of companies have distinct assets. Depending on the legal structure of the company, they will be held in one of three forms of ownership.[68]

a. *Fractional Ownership (Bruchteilseigentum)*

Under the principle of fractional ownership (Bruchteilseigentum) every member of the so-called fractional group (Bruchteilsgemeinschaft) is entitled to a fraction of every item of property of other asset. This of course is on paper, and is called an imaginary share (ideeller Anteil) in German law.

Fractional ownership is possible in regard to any legal right. The law regulating fractional groups is found in Sections 741-58 of the Commercial Code (HGB) with particular regulations applying to real property found in Sections 1008-11 of the Civil Code (BGB). Real property fractional ownership is called co-ownership (Miteigentum).[69] Fractional ownership of non-corporeal assets is described as common privilege (Mitberechtigung).

As a matter of principle, every member of the fractional group is free to use his fraction subject only to the other members' interests. Any transaction of a member contrary to the others' interests is legally valid although subject to an action for breach of contract.

Fractional ownership exists mainly in the ownership of real property (Miteigentum). For most kinds of companies this kind of ownership makes assets too readily transferable. Thus, fractional ownership of company assets is rare and requires express agreement. Fractional ownership in a company is typically found where fractional ownership of real property existed prior to the company's foundation, for example, where a loose group jointly holding a legal right (Ge-

66. *See infra* III (D) (8), IV (B)(8) and note 180.

67. *See infra* III (D) (4).

68. HUECK, *supra* note 23, at 16-19.

69. *Id.* 16-17; COHN, *supra* note 1, at 355.

meinschaft)[70] is upgraded to a company. On occasion, groups which set a significant number of rules may have inadvertently changed their legal status from that of a group jointly holding a legal right (Gemeinschaft) to that of some kind of company, most likely a private law company.[71]

Another example of fractional ownership is found in so-called incidental companies (Gelegenheitsgesellschaften). These are companies which exist for a limited time or purpose only, the most common of which are groups of banks issuing corporate bonds or securities (Emissionskonsortium). Unlike the group of real property owners who, in setting up rules of behavior, may unknowingly form a company, a group of issuing banks may create fractional ownership only by express agreement.[72] This is one of the few cases where fractional ownership is not the exception.

b. *Joint Ownership (Gesamthandseigentum)*

The most common form of ownership in German company law is joint ownership ("ownership to the joint hand" or Gesamthandseigentum).[73] Under this form no partner can unilaterally transfer his share of the company assets. Typical examples of joint ownership include the private law company, described in Sections 718-19 of the Civil Code (BGB), the partnership, governed by Section 105 (2) of the Commercial Code (HGB),[74] and the limited partnership of Section 161 (2) of the Commercial Code (HGB).[75] In other areas of law common examples are joint ownership between spouses requiring express agreement, and joint ownership between common heirs before settlement or liquidation.

Although there is some controversy as to whether shares in company assets exist at all,[76] the question is moot because in any case shares are never tangible. Every joint owner (Gesamthandseigentuemer) has a claim to the whole of the assets, but this claim is restricted by the other owners' claims. Title can only be transferred by all the owners jointly, although one or several owners can act as agents for the company. Transfer of the position of partner in a company is only possible under certain conditions. The principle that all the partners together, as a "joint hand", own the company assets

70. *See supra* III (A) and note 23 and III (C)(2) and note 58.

71. *See infra* III (D) (1).

72. HUECK, *supra* note 23, at 16.

73. *Id.* 17-18; COHN, *supra* note 1, at 355.

74. Section 105 (2) Commercial Code (HGB) refers back to sections 705-40 Civil Code (BGB).

75. Section 161 (2) Commercial Code (HGB) refers back to section 105 Commercial Code (HGB) which in its subsection (2) refers back to sections 705-40 Civil Code (BGB).

76. HUECK, *supra* note 23, at 17.

ensures that the assets are accessible in the company's interest only. They are safely out of reach of individual partners, and yet this construction does not require the company to have the capacity to hold legal rights.

c. *Ownership By the Legal Person*

If a company has the capacity to hold legal rights, its assets are owned by the company itself, as a legal person.[77] To an even greater degree than joint ownership, ownership by the legal person prevents possible undesirable use of the company assets by individual partners. A clear line is drawn between the partners' and the company's assets. The law gives control of the company's assets to the management and the partners have no way of directly interfering. The partners' rights and obligations are set out in the company's contract of formation.[78] It usually regulates contribution of capital, payment of dues, voting rights, and distribution of profits. The legal person is the only creditor for company debts and likewise it is the legal person, not individual partners, which, through its officers and agents,[79] conducts business with third parties.

The most common forms of companies having distinct legal personality and ownership of company assets by the legal person are the association (although not a company in the strict sense),[80] the stock corporation, the limited liability company, and the limited partnership.

D. *Kinds of Companies*

Against this background of significant principles of commercial and company law, the major forms of companies are now considered.[81]

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77. *Id.* 18-19.

78. While American law distinguishes between charter and by-laws and English law distinguishes between memorandum and articles of association, German law recognizes one document only, referred to as the "company contract" (Gesellschaftsvertrag). With regard to stock corporations, it is always called "*Satzung*"; with regard to limited liability companies, both terms "Satzung" and "Gesellschaftsvertrag" are used. *See* Conard, *supra* note 2, at 73 n.139; MUELLER, *supra* note 1, at 50; ZAPHIRIOU, *supra* note 1, at 107 n.14; ICC GUIDE, *supra* note 1, at 8; HAMBURG, *supra* note 1, at 12; SPETHMANN, *supra* note 1, at 685 n.6; CREIFELDS, *supra* note 1, headings "Aktiengesellschaft" at 24, right column, and "Gesellschaft mit beschraenkter Haftung" at 457, right column, and "Satzung" at 916, right column. Use of counsel in setting up the "company contract" is always recommended; *see infra* III (D) (7) and note 117.

79. *See supra* note 47.

80. *See supra* note 19.

81. COHN, *supra* note 1, at 111.-117., 7.216.-7.284.; MUELLER, *supra* note 1, at 45-62; SPETHMANN, *supra* note 1, at 670-85; ZAPHIRIOU, *supra* note 1, at 85-113; HAMBURG, *supra* note 1, at 10-17.

Leading authorities in German are HUECK, *supra* note 23, at 22-266; H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER PERSONENGESELLSCHAFTEN (4th ed. 1973) (treating part-

1. *Private Law Company (Gesellschaft Buergerlichen Rechts)*

According to Section 705 Civil Code (BGB), a private law company can be formed by at least two partners pursuing a common purpose, as defined in the underlying company contract.[82] In many respects it is comparable to a joint adventure.

The private law company[83] has no capacity to hold legal rights, and its assets are governed by the principle of joint ownership (gesamthandseigentum).[84] Its partners are joint and several debtors.[85] With regard to powers exercised by partners of companies, external relations are known as "power of agency" (Vertretungsmacht), and international relations as "authority of management" (Geschaeftsfuehrungsbefugnis).[86] Valid external and internal agreements of a private law company must be made by joint action of all partners or majority decisions. This arrangement is slow, but safe. It is desirable when partners are non-merchants or inexperienced in the law.

Private law companies exemplify the typical person-company. Its partners may sometimes even be unaware of their status, for ample, members of a car pool. Examples of private law companies include professional "partnerships,"[87] groups of businessmen who are not merchants in the legal sense, groups of underwriting banks or of issuing consortia, cartels, and holding companies. Temporary ventures and construction projects are often carried out by a so-called "work-team" (Arbeitsgemeinschaft or ARGE).[88] This consists of inde-

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nership, limited partnership, private law company, silent partnership); H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER GMBH (3d ed. 1973) (treating limited liability company); H. SUDHOFF, DER GESELLSCHAFTSVERTRAG DER GMBH & Co KG (2d ed. 1971) (treating limited liability company and partner [limited partnership]; *see infra* III (D)(8).

82. *See supra* note 78.

83. COHN, *supra* note 1, at 115., 191., 7.216. - 7.217.; SPETHMANN, *supra* note 1, at 670; MUELLER, *supra* note 1, at 46-47; HUECK, *supra* note 23, at 22-54. The private law company has no common abbreviation in German.

84. *See supra* III (C)(5)(b).

85. COHN, *supra* note 1, at 247.

86. *See supra* note 47.

87. Lawyers and other members of the professions cannot form "partnerships" in the legal sense (*see* infra III (D)(2) and note 94) because partnerships presuppose a commercial business (Handelsgewerbe), which, under German law, is incompatible with a profession.

However a bill was introduced in 1971 calling for the creation of a particular partnership for members of the professions which would be called Partnerschaft. Although liability would be limited, this form of partnership would legally be treated as a person-company in order to retain certain tax privilages (*cf. supra* III (c)(4) and *infra* III (D) (8), IV (B) (8) and note 180). Since the 1971 bill was tabled, a similar bill may soon be reintroduced. *See* Frankfurter Allgemeine Zeitung (Frankfurt/Germany), August 17, 1973, at 13, col. 4-5.

88. MUELLER, *supra* note 1, at 46-47.

pendent partners, usually legal persons, who join to form a private law company. Each partner is unrestrictedly liable, but the work-team (ARGE) cannot register under a commercial name since it is a private law company.[89]

2. *Partnership (Offense Handelsgesellschaft)*

A partnership[90] conducts a commercial business under a commercial name;[91] all of its partners are personally liable without limitation. If one partner enjoys limited liability it becomes a limited partnership.[92]

In terms of legal categories, the partnership is a company rather than an association; there is little emphasis on corporate structure. It is a person-company, that is, management is in the hands of the partners themselves.

Although as a matter of doctrine, the partnership is not a legal person, it can by special provision in Section 124 of the Commercial Code (HGB) sue, be sued, and acquire rights and obligations. As a result, the partnership holds an intermediary position in terms of legal capacity. Its assets are subject to the principle of joint ownership (Gesamthandseigentum),[93] while its legal structure is modeled after the private law company, with a few qualifications. The first one is that a partnership has to pursue a commercial business.[94] This provision ensures that small businessmen who do not conduct a commercial business in the legal sense are protected from the dangerous unlimited liability; such companies remain private law companies. Secondly, the partnership must not limit its liability toward third parties. Thirdly, any single partner can represent the partnership as an agent unless otherwise provided in the company contract and registered in the commercial register. And finally, the power of agency and authority of management cannot be limited, and may be exercised by any individual partner, subject to modification by the company contract.[96]

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89. On commercial name, *see supra* III (B) (3).

90. COHN, *supra* note 1, at 7.218. - 7.225.; SPETHMANN, *supra* note 1, at 670-72; MUELLER, *supra* note 1, at 46; HAMBURG, *supra* note 1, at 14-16; ZAPHIRIOU, *supra* note 1, at 87-91; HUECK, *supra* note 23, at 55-94. A. HUECK, DAS RECHT DER OFFENEN HANDELSGESELLSCHAFT (4th ed. 1971). The partnership is abbreviated as oHG in German.

91. On commercial name, *see supra* III (B)(3).

92. *See infra* III (D)(3).

93. *See supra* III (C)(5)(b).

94. This requirement of commercial business (Handelsgewerbe) bars members of the professions from forming partnerships in the legal sense; they can only form private law companies (*see supra* III (D) (1) and note 87).

95. On commercial name, *see supra* III (B)(3).

96. *See supra* note 78.

The partnership is the most widely used form of company. It serves the purposes of small and medium-size businesses, whereas limited liability companies and stock corporations are more common for larger businesses.

3. *Limited Partnership (Kommanditgesellschaft)*

The limited partnership[97] is one which has both general partners (fully liable partners called Komplementaere) and limited partners (Kommanditisten). Creditors are protected only to the amount of the general partners' assets plus the limited partners' contributions, an amount which is limited by the company contract[98] and published in the commercial register. The limited partners cannot be managing directors unless specifically authorized by provision in the company contract.

Like the partnership, the limited partnership carries characteristics of a company, not an association, and of a person-company (even though it strongly resembles a capital-company because of the position of the limited partners). The limited partners, because of the capital they bring into the company, often exercise considerable control by contract over the general partners who usually are internally responsible for management. This incorporation in the company contract of far-reaching responsibility is often balanced by a claim for compensation for financial losses suffered through the general partners' precarious position. If this concept is carried through, such a company is known as the capitalist limited partnership (kapitalistische KG).[99] Its internal arrangements are not far from an employer-employee relationship.

4. *Silent Partnership (Stille Gesellschaft)*

The silent partnership[100] normally consists of two partners only. The silent partner transfers assets to the active partner in return for a corresponding share in the company's profits. Although the silent partnership legally is a company because both partners jointly pursue a common purpose, the company itself holds no assets, only the active partner does. Legal relations between the partners exist only internally; externally the silent partner may remain unknown.[101] Ex-

97. COHN, *supra* note 1, at 7.226.-7.229.; SPETHMANN, *supra* note 1, at 671; MUELLER, *supra* note 1, at 46; ZAPHIRIOU, *supra* note 1, at 91; HAMBURG, *supra* note 1, at 16-17; HUECK, *supra* note 23, at 94-104. The limited partnership is abbreviated as KG in German.

98. *See supra* note 78.

99. HUECK, *supra* note 23, at 102-04; CREIFELDS, *supra* note 1, heading "Kommanditgesellschaft" at 613, right column.

100. COHN, *supra* note 1, at 7.230.; MUELLER, *supra* note 1, at 46; HUECK, *supra* note 23, at 104-12.

101. *See supra* III (C) (3) and note 62.

cept for the undisclosed existence of the silent partner, the silent partnership bears some resemblance to the limited partnership.

5. *Stock Corporation (Aktiengesellschaft)*

The stock corporation,[102] having the capacity to hold legal rights, is structured as an association and therefore has fluctuating membership (share holders). Its basic capital (Grundkapital) is divided into shares[103] and the sum of all the assets constitutes the maximum liability. The stock corporation is a typical capital-company and, through its structure, is always a merchant in the legal sense by operation of law.[104] It is the rough equivalent to the English joint stock corporation and the French *société anonyme.*

The stock corporation is regulated in detail in the 1965 Stock Corporation Law[105] which is an enlarged and revised version of earlier regulations originally contained in the Commercial Code (HGB).[106] Minimum requirements for the foundation of a stock corporation include at least five partners controlling all the shares, at least 100,000 DM basic capital, and preliminary proceedings.[107] During these proceedings the original members write the corporate charter (Satzung)[108] and appoint the supervisory board (Aufsichtsrat) which in turn appoints the management board (Vorstand). The compulsory inscription into the commercial register is not granted by the court of register until a so-called formation report (Gruendungsbericht) has been reviewed by members of the management and supervisory boards, and, under certain circumstances, by auditors appointed by the court. The functioning of a stock corporation requires three very distinct bodies: the management board (Vorstand), the supervisory board (Aufsichtsrat), and the general meeting (Hauptversammlung).[109] The supervisory board appoints and controls the man-

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102. COHN, *supra* note 1, at 7.244. - 7.282.; Steefel & von Falkenhausen, *The New German Stock Corporation Law,* 52 CORNELL L. Q. 518 (1967) [hereinafter cited as Steefel]; SPETHMANN, *supra* note 1, at 672-73; Fabricius, *The German Companies Act of 1965,* 1965 J. BUS. L. 274; MUELLER, *supra* note 1, at 54-62; HAMBURG, *supra* note 1, at 11-12; FULDA, *supra* note 1, at 780-82; Kohler, *New Corporation Laws in Germany (1966) and in France (1967) and the Trend Towards a Uniform Corporation Law for the Common Market,* 43 TUL. L. REV. 58 (1968); ZAPHIRIOU, *supra* note 1, at 86-87; HUECK, *supra* note 23, at 113-135. The stock corporation is abbreviated as AG in German.

103. Stock Corporation Law (AktG), *supra* note 25. Citations to code material within section III (D) (5) of this article are to that law unless otherwise noted.

104. *See supra* III (B)(1) and note 36.

105. *See supra* note 103.

106. SCHLESINGER, *supra* note 1, at 381 n.11.

107. Steefel, *supra* note 102, at 520-26.

108. *See supra* note 78.

109. Steefel, *supra* note 102, at 526 *et seq.*; Bruecher, *West Germany's Trade and Commerce,* 1 J. WORLD TRADE L. 511 (1967) [hereinafter cited as Bruecher]; Conard, *supra* note 2, at 100 *et seq. See also infra* III (D)(7) and notes 118, 119.

agement board which is the policy-making body representing the company in the business community and courts. The general meeting elects the supervisory board, subject to qualifications dealt with in the section on labor law of this paper.[110] The shareholders can exercise their rights in the general meeting.[111] Either they or the management board approve the yearly financial report (Jahresabschluss) and the business report (Geschaeftsbericht). The general meeting also decides how to distribute profits. The corporate charter can be changed by a three-quarters majority. This may apply to change of capital or liquidation due to bankruptcy, merger (Fusion) or consolidation (Verschmelzung).[112]

6. *Partnership Limited by Shares (Kommanditgesellschaft Auf Aktien)*

In the partnership limited by shares,[113] elements exist of both a limited partnership and a stock corporation. It is a corporate entity with its own capacity to hold legal rights, composed of at least one general partner and of limited partners not personally liable for the company's obligations. As far as the general partner is concerned, the law in Section 278 (2) and (3) of the Stock Corporation Law (AktG) refers back to Sections 161-77 of the Commercial Code (HGB), whereas the law of stock corporations is applicable in all remaining matters. The partnership limited by shares is not very common because it offers limited liability but requires minimum capital of 100,000 DM.

7. *Limited Liability Company (Gesellschaft Mit Beschraenkter Haftung)*

The limited liability company[114] was created by the legislature in

110. *See infra* VI (B) (2).

111. Steefel, *supra* note 102, at 539; FULDA, *supra* note 1, at 780-82.

112. *See infra* III (D) (7) but do not confuse with connected enterprises, *infra* III (E).

113. COHN, *supra* note 1, at 7.283. - 7.284.; MUELLER, *supra* note 1, at 47; ZAPHIRIOU, *supra* note 1, at 106; SCHLESINGER, *supra* note 1, at 569; HUECK, *supra* note 23, at 235-38. The partnership limited by shares is abbreviated as KGaA in German.

114. A most informative analysis has recently become available; Winkhaus, *supra* note 11. *See also,* COHN, *supra* note 1, at 7.231. - 7.243.; MUELLER, *supra* note 1, at 50-54; SPETHMANN, *supra* note 1, at 673-74; ZAPHIRIOU, *supra* note 1, at 95-97; HAMBURG, *supra* note 1, at 13-15; SCHLESINGER, *supra* note 1, at 567, 591-93; Haskell, *The American Close Corporation and Its West German Counterpart: A comparative Study,* 21 ALA. L. REV. 287 (1969); De Vries & Juenger, *Limited Liability Contract: The GmbH,* 64 COLUM. L. REV. 866 (1964); Schneider, *The American Close Corporation and Its German Equivalent,* 14 BUS. LAWYER 228 (1958); Fabricius, *The Private Company in German Law,* 1970 J. BUS. L. 229; McFadyean, Schneider, Houwink, Reverdin, & Homburger, *The American Close Corporation and Its European Equivalent,* 14 BUS. LAWYER 214 (1958); HUECK, *supra* note 23, at 238-53. The limited liability company is abbreviated as *GmbH* in German.

1892 to provide a form of business organization suitable for medium-size business which is less complicated and less costly than the stock corporation, while still retaining limited liability. This was done in the Law on Limited Liability Companies.[115] The limited liability company is the form of company most widely used by foreigners.[116]

While the stock corporation needs harsh controls to prevent the abuse of the wide powers granted to the management board, smaller companies are often closely-held corporations and do not present the risk of abuse to the same degree. Yet, partnerships or limited partnership are not always desirable for these people because at least one partner has to remain personally liable.

The limited liability company is a capital-company with certain traits of a person-company. It is always a merchant under Section 13 (3) of the Law on Limited Liability Companies (GmbHG), and Section 6 of the Commercial Code (HGB) and has the capacity to hold legal rights. It must be founded by at least two partners in a certified charter[117] with a minimum of 20,000 DM basic capital, the lowest possible share being 500DM. The limited liability company's name must carry the appendix "mbH" (with limited liability) and entry into the commercial register is mandatory. There must be at least one managing director (Geschaeftsfuehrer),[118] and the meeting of the partners is necessary to conduct serious business.[119] The managing director occupies the position of the company's agent (Vertreter) who is wholly responsible for the company's transactions. The appointment to the position of managing director can be revoked at any time unless the charter specifically provides otherwise. An additional supervisory board is required for limited liability companies employing over 500 people.

The partners' meeting enjoys wide powers, including auditing and the control of management. Change of the charter requires a

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115. Law on Limited Liability Companies (GmbHG), *supra* note 25.

116. Winkhaus, *supra* note 11, at 1275-76; MUELLER, *supra* note 1, at 50; LEGAL ASPECTS OF FOREIGN INVESTMENT 759 (W. Friedman & R. Pugh eds. 1959); BRUECHER, *supra* note 109, at 531; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), April 14, 1973, at 17, col. 1-2; Murphy, *supra* note 2, at 705.

117. Many legal acts require public certification oeffentliche Beurkundung which is done by a lawyer-notary (Notar) or, in a few cases, by a court. In Germany only a fully-fledged lawyer can become a notary who is also responsible to his client for thorough counselling. *See* Conard, *supra* note 2, at 69; FULDA, *supra* note 1, at 775; SCHLESINGER, *supra* note 1, at 15-20, 622-24; MUELLER, *supra* note 1, at 14; COHN, *supra* note 1, at 72; Cohn, *The German Attorney — Experiences With a Unified Profession*, 9 INT. & COMP. L. Q. 580 (1960) and 10 INT. & COMP. L. Q. 103 (1961). On the terminology of charter *see supra* note 78. On details of the procedure of incorporation *see* Winkhaus, *supra* note 11, at 1277-78.

118. Winkhaus, *supra* note 11, at 1281-83; STEIN & HAY, *supra* note 1, at 760.

119. Winkhaus, *supra* note 11, at 1283-87; *see also supra* III (D)(5) and note 109.

three-quarters majority and calls for renewed certification by a lawyer-notary.[120] A partner may leave the company by transferring, in certified form, his share in the company, in case of substantial cause (wichtiger Grund), or by withdrawal or expulsion.

Liquidation is possible for several reasons specified in Sections 60-62 of the Law on Limited Liability Companies (GmbHG), among which are declaratory judgment, frustration, illegal decisions or acts, or bankruptcy. A limited liability company can, without prior liquidation, be changed in many ways, for example by merger (Fusion) or consolidation (Verschmelzung).[121] A change into a stock corporation is also possible in the reverse direction.

The German Federal Reserve Bank (Deutsche Bundesbank) in a recent report[122] emphasized the growing significance of the limited liability company which it said deserved the increased attention of entrepreneurs, legislators, and bankers alike. It regretted the insufficient disclosure of financial information due to lenient legislation. Only about 100 exceptionally large limited liability companies are obliged to publish substantial financial information.[123]

This form of company has become increasingly popular with foreign investors. From 1962 to 1972 the number of limited liability companies has more than doubled to 100,690 while stock corporations have diminished 11 percent to 2,271.[124] In late 1970, 25 percent of the basic capital of all limited liability companies was foreign-owned compared to only 15 percent of stock corporations' basic capital. It is presumed that limited liability companies tend to be created to set off profits of the foreign mother-company or to carry out operations burdened with a substantial risk. This is confirmed by the fact that

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120. *See supra* note 117.

121. On merger (Fusion or Umwandlung), *see* Merger Law (Umwandlungsgesetz) of November 12, 1956, [1956] BGBl. I 2081; *also* in Schoenfelder, *supra* note 7, at 52 a; sections 362-93 Stock Corporation Law (AktG); Merger Tax Law Umwandlungsteuergesetz of August 14, 1969, [1969] BGBl. I 1163; also in STEUERGESETZE, *supra* note 7, at 730; MUELLER, *supra* note 1, at 48, 114-15; COHN, *supra* note 1, at 7.279. - 7.281.; HUECK, *supra* note 23, at 267-74.

On consolidation (Verschmelzung), *see* sections 339-61 Stock Corporation Law (AktG); COHN, *supra* note 1, at 7.279. - 7.281. (It is to be noted that Cohn, like some other authors, understands the German "Fusion" as a consolidation, whereas this writer translates "Fusion" as merger); ZAPHIRIOU, *supra* note 1, at 124.

122. Contents reproduced in Frankfurter Allegemeine Zeitung (Frankfurt/Germany), April 14, 1973, at 17, col. 1-2.

123. Disclosure Law (Publizitaetsgesetz) of August 15, 1969, [1969] BGBl. I 1189. Disclosure is required if two out of three criteria apply: 1) balance sheet total over 125 million DM, 2) sales over 250 million DM, 3) over 5,000 employees. For details, *see* Winkhaus, *supra* note 11, at 1289-93.

124. *See supra* note 122. *Cf.* FULDA, *supra* note 1, at 770 n.14 who quotes 1963 figures.

during 1966-70 average profits of limited liability companies before taxes were considerably lower than those of other person-companies or stock corporations.[125]

There are discrepancies in the law because the 1892 Law on Limited Liability Companies, designed to modify the law of stock corporations, has undergone little change, while the law of stock corporations has often been revised. A proposed reform of the 1892 Law is legislatively quite advanced and may become law within a year or so.[126] This reform aims to strengthen the positions of minorities within the limited liability company, and creditors of the company. Minorities are to enjoy increased rights of information. Creditors should be benefited by four planned alterations of the law: (1) the requirement to bring in the basic capital completely, rather than at the present rate of 5,000 out of the required 20,000 DM; (2) mandatory evaluation of non-monetary capital by court-appointed auditors in case of dispute or doubt; (3) stricter control of the information given about the company prior to registration; (4) substantial responsibility of the founders for correct procedures of foundation. The eventual reform of connected enterprises[127] will also touch upon limited liability companies.

8. *Limited Liability Company and Partner (Limited Partnership)*

One particular kind of limited liability company is called a limited liability company and partner (limited partnership). This is an approximate translation of the German name Gesellschaft mit beschraenkter Haftung und Kompagnon Kommanditgesellschaft, almost exclusively referred to as a GmbH & Co. KG.[128]

The GmbH & Co KG is a complex legal structure owing its existence to the different rules of taxation for person-companies and capital-companies. Partners in a person-company pay personal income tax on their share in the profits, whether distributed or not; the person-company as such pays no taxes on profits. Capital-companies, on the other hand, are subject to corporation income tax. In addition, their partners are taxed for their share of the distributed profits.

A GmbH & Co KG can be formed by a limited liability company becoming the general partner of the new limited partnership and the

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125. *See supra* note 122.

126. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), March 23, 1973, at 17, col. 4-5.

127. On connected enterprises, *see infra* III (E). These must not be confused with merged or consolidated enterprises / companies, *see supra* III (D) (5) and note 112 and III (D) (7) and note 121.

128. Winkhaus, *supra* note 11, at 1276; *see also,* COHN, *supra* note 1, at 7.229., 7.243.; MUELLER, *supra* note 1, at 47, 106, 121; FULDA, *supra* note 1, at 772 n.17; SCHLESINGER, *supra* note 1, at 569 n.16; HUECK, *supra* note 23, at 10-11.

individual partners of the limited liability company becoming the new limited partnership's limited partners. Thus, advantageous taxation and limited responsibility are coupled together in an ingenious way. The GmbH & Co KG had been held to comply with civil law and to be consistent with tax law.[129] The danger is that for tax reasons this form of company may be chosen while providing an unsatisfactory vehicle for the company's aims. For this and other reasons the GmbH & Co KG may be done away with in the upcoming law. Its usefulness for the foreign investor or partner is doubtful because the favorable rate of 23.4 percent for corporation income tax on distributed earnings is forfeited and replaced by the regular rate of 51 percent plus surtaxes.[130] Yet, it is reported[131] that the GmbH & Co KG has found some followers in the American business community in Germany.

9. *Single Merchant and One Man Company*

Under certain circumstances a single person can conduct a business or even exist as a quasi-company. No particular rules apply to a single merchant who runs a business by himself.[132] He never can be a company, and his liability is always unrestricted. In his person all partners, agents, or similar persons coincide; the single merchant is like a partnership reduced to one person.

The situation is quite different with regard to one man companies.[133] While it is impossible for all person-companies to exist if the number of partners sinks below two, the stock corporation and the limited liability company can continue to exist in one person. As long as a stock corporation or a limited liability company once existed, these companies do not necessarily fold if all shares ultimately fall into one hand.

10. *Capital Investment Company (Kapitalanlagegesellschaft)*

A capital investment company[134] must be organized either as a

129. MUELLER, *supra* note 1, at 47, 106, 121; HUECK, *supra* note 23, at 10-11.

130. On surtaxes, *see infra* IV (B) (3); MUELLER, *supra* note 1, at 121.

131. FULDA, *supra* note 1, at 772 n.17; M. Laundry, *The GmbH & Co Kommanditgesellschaft: German Partnership Vehicle for Joint Ventures,* 23 BUS. LAWYER 213 (1967/68).

132. MUELLER, *supra* note 1, at 46.

133. COHN, *supra* note 1, at 7.252.; Fabricius, *The Private Company in German Law,* 1970 J. BUS. L. 229, 233; HUECK, *supra* note 23, at 48, 226-28, 243; CREIFELDS, *supra* note 1, heading "Einmanngesellschaft" at 306; J. BAERMANN, EUROPAEISCHE INTEGRATION IM GESELLSCHAFTSRECHT (1970) 201 n.35 [hereinafter cited as BAERMANN]; *cf.* ZAPHIRIOU, *supra* note 1, at 86.

134. CREIFELDS, *supra* note 1, heading "Kapitalanlagegesellschaft" at 587-88. *Cf.* SPETHMANN, *supra* note 1, at 677 *et seq.*; MUELLER, *supra* note 1, at 62-67; Butler and Thoma, *The Role of the Depotbank for a Mutual Fund Doing Business in Germany,* 26 BUS. LAWYER 1601 (1970/71); Mott, *Foreign Bond Issues on European Markets,* 24 BUS. LAWYER 1285 (1968/69).

stock corporation or a limited liability company, and must have a supervisory board.[135] Its purpose is to invest the investors' capital in stock or real estate, in accordance with the principle of spreading the risk (Risikomischung), and to issue shares to the investors. It must have a minimum capital of 500,000 DM. Its transactions are subject to the detailed provisions of the Law About Credit Banking.[136]

The sale and taxation of foreign investment shares are regulated by the Law on Foreign Investments.[137] It is mandatory to register with the Federal Reserve Bank (Deutsche Bundesbank), have an inland representative, make deposits with an inland depository bank, regularly publish returns, and regulate the sale of shares. Both domestic and foreign capital investment shares may be returned within two weeks if the prospectus was incorrect or if the shares were bought outside the seller's regular office.

E. *Connected Enterprises*

The problems relevant to mergers and consolidations in German law[138] must be distinguished from those of connected enterprises (verbundene Unternehmen), also treated under the heading of law of combines (Konzernrecht).[139] Belatedly recognizing the fact that today 70 to 80 percent of industrial capital is owned by connected enterprises,[140] in 1965 the lawmakers for the first time tackled many problems through Sections 15-22 and 291 et seq. of the 1965 Stock Corporation Law.[141] Naturally, this first legislative effort to deal with these very complex questions did not solve all the problems. The multinational enterprise[142] and the legal consequences of economic concentra-

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135. Law About Capital Investment Companies (Gesetz ueber Kapitalanlagegesellschaften) of April 16, 1957, [1957] BGBl. I 378, as amended January 14, 1970, [1970] BGBl. I 127; *also* in STEUERGESETZE, *supra* note 7, at 80.

136. Law About Credit Banking (Gesetz ueber das Kreditwesen) of July 10, 1961, [1961] BGBl. I 881.

137. Law on Foreign Investments (Auslandsinvestmentgesetz) of July 28, 1969, [1969] BGBl. I 986, *also* in STEUERGESETZE, *supra* note 7, at 85. A translation exists by H. BRUECHER & D. PULCH, THE GERMAN LAW CONCERNING THE DISTRIBUTION OF FOREIGN INVESTMENT SHARES (1970); Mueller, *supra* note 1, at 64-65.

138. *See supra* III (D)(5) and note 112 and III (D)(7) and note 121. On mergers under EEC law, *see* FULDA, *supra* note 1, at 643 *et seq.*

139. Bringezu, *Parent-Subsidiary Relations Under German Law*, 7 INT'L LAWYER 138 (1973); Haskell, *The New West German Law of "Related Business Units"*, 24 BUS. LAWYER 421 (1968/69); Bruno, *German Law of Affiliated Enterprises*, 8 AM. BUS. L. J. 157 (1970/71); ZAPHIRIOU, *supra* note 1, at 118-24; ICC GUIDE, *supra* note 1, at 36-37; MUELLER, *supra* note 1, at 58-61.

140. *Cf.* GOERLITZ, *supra* note 1, at 138, right column.

141. For citation of statute, *see supra* note 25.

142. *See* Vagts, Book Review, 67 AM. J. INT'L L. 185 (1973); Miller, *The Multinational Corporation and the Nation-State*, 7 J. WORLD TRADE L. 267 (1973); Troeller, *Multinational Corporations in a Changing Europe*, 7 J. WORLD TRADE L. 293 (1973); Farrell *et. al.*, *Mounting Attacks on Multi-National Corporations*, 28 BUS. LAWYER 241

tion[143] present continuing difficulties.

Sections 15 et seq. of the Stock Corporation Law (AktG) define connected enterprises as legally independent enterprises which in relation to each other are: majority-owned and dominated, dependent and dominating, combines, mutually participating at a rate of over 25 percent, or partners of contracts between enterprises. The most significant legal consequence of mutual participation between enterprises is the duty to disclose both participation and prohibition of the exercise of any rights beyond the point corresponding to 25 percent ownership of the shares.

Seven kinds of contracts between enterprises are described in Sections 291 and 292: contract of domination (Beherrschungsver-

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(March 1973); Kahn, *International Companies*, 3 J. WORLD TRADE L. 498 (1969); Litvak and Maule, *The Multinational Corporation*, 5 J. WORLD TRADE L. 631 (1971); Caves, *Industrial Economics of Foreign Investment: The Case of the International Corporation*, 5 J. WORLD TRADE L. 303 (1971); Tsurumi, *Japanese Multinational Firms*, 7 J. WORLD TRADE L. 74 (1973); W. FRIEDMANN & J. BEGUIN, JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES (1971); Miranda, *Problems of Joint International Business Ventures*, 4 INT'L LAWYER 550 (1970); Vagts, *The Multi-National Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970); Eisenberg, *Megasubsidiaries: The Effect of Corporate Structure on Corporate Control*, 84 HARV. L. REV. 1577 (1971); Tunc, *Multi-National Companies in French Law*, in LAW AND INTERNATIONAL TRADE 375 (F. Fabricius ed. 1973); J. BEHRMAN, NATIONAL INTERESTS AND THE MULTINATIONAL ENTERPRISE: TENSIONS AMONG THE NORTH ATLANTIC COUNTRIES (1970); Schmitthoff, *Multi-National Companies*, 1970 J. BUS. L. 177; Schmitthoff, *Multinationals in Court*, 1972 J. Bus. L. 103; C. SCHMITTHOFF, THE ROLE OF THE MULTINATIONAL ENTERPRISE IN AN ENLARGED EUROPEAN COMMUNITY (1972); H. KOPPENSTEINER, INTERNATIONALE UNTERNEHMEN IM DEUTSCHEN GESELLSCHAFTSRECHT (1971); M. LUTTER, RECHT UND STEUERN DER INTERNATIONALEN UNTERNEHMENSVERBINDUNGEN (1972); Arndt, *Jagdruende fuer Elefanten. Gefaehrden die multinationalen Unternehmen den Wettbewerb und den freien Welthandel ?*, Die Zeit (Hamburg/Germany), March 2, 1973, at 35; Kaps, *Multinationale Unternehmen: Die neuen Pruegelknaben*, Die Zeit (Hamburg/Germany), March 30, at 38, col. 3-5.

On international *public* enterprises, *see* C. FLIGLER, MULTINATIONAL PUBLIC ENTERPRISES (1967); further references by G. KEGEL, INTERNATIONALES PRIVATRECHT 236 (3d ed. 1971) [hereinafter cited as KEGEL]; BAERMANN, *supra* note 133, at 22 n.1.

143. Mestmuecker, *Concentration and Competition in the EEC*, 6 J. WORLD TRADE L. 615 (1972); 7 J. WORLD TRADE L. 36 (1973); D. MCLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY (1967); Arndt, *Basic Problems of Concentration Policy*, 17 ANTITRUST BULL. 1107, 1122 (1972); Brown, *Recent Developments, Tendencies and Experiences in Antitrust and Related Government Policy Regulating Private Enterprises*, 17 ANTITRUST BULL. 597, 616-21 (1972); R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION (1970); J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST, OVERLAP AND CONFLICT (1970); FULDA, *supra* note 1, at 652-53; Geitner, *Die Kontrolle von Unternehmenskonzentrationen im Recht der EWG-Mitgliedstaaten*, 19 WETTBEWERB IN RECHT UND PRAXIS 1 (1973).

On taxes and voting arrangements, *see* MUELLER, *supra* note 1, at 108-23; M. LUTTER, RECHT UND STEUERN DER INTERNATIONALEN UNTERNEHMENSVERBINDUNGEN (1972); Lutter, *Zu einigen Grundsatzfragen der Besteuerung verbundener Unternehmen*, 27 JURISTENZEITUNG 482 (1972); *see also infra* V (A) and note 188 and V (B)(3) and note 212.

trag), contract of transfer of profits (Gewinnabfuehrungsvertrag), contract of management (Geschaeftsfuehrungsvertrag), contract to share profits (Gewinngemeinschaft), contract of partial transfer of profits (Teilgewinnabfuehrungsvertrag), lease and other use of enterprise installations (Betriebspachtvertrag and Betriebsueberlassungsvertrag). All of these require approval by at least three-quarters of the share-holders and entry into the commercial register. Contracts of transfer or partial transfer of profits also need the consent of the dominated enterprise.

Since the position of the dominating enterprise largely excludes a distinct economic existence of the dominated enterprise, the law provides regulations protecting the rights of those share-holders and creditors with regard to liquidation, compensation, organization and responsibility of management, and integration of enterprises.

The law further provides that a section or department of a large integrated enterprise which may internally be completely integrated may also have a separate legal identity. This procedure usually involves a combination of domination and transfer of profits by contract and is referred to as a contract of integrated organs (Organschaftsvertrag).[144]

F. *Branch, Subsidiary or Association*

The decision whether to establish a company abroad as a branch, a subsidiary, or an associated company depends upon two major factors—legal framework and taxation.[145]

Branches are generally subject to comparatively high taxes. They are therefore advisable if a parent-company wants to set off domestic profits against the branch's losses. Also, some large enterprises find themselves opening foreign branches to boost prestige and good will in advertising and public relations.[146]

For the most part, subsidiary or associated companies carry less

144. HUECK, *supra* note 23, at 281; Karplus, *The German Integration Agreement as Corporate Guarantee*, 19 BUS. LAWYER 295 (1963).

145. Winkhaus, *supra* note 11, at 1275-76, 1293-1300; STEIN & HAY, *supra* note 1, at 737 *et seq.*; ICC GUIDE, *supra* note 1, at 9, 36-38; HAMBURG, *supra* note 1, at 17; MUELLER, *supra* note 1, at 49, 58, 126-28; C. SCHMITTHOFF, THE EXPORT TRADE 154 (5th ed. 1969); King, *Special Tax Problems Related to the Selection and Acquisition of Investments in European Countries*, in Theberge, *supra* note 1, at 38-39, 52; Wallace, *The Formation and Operation of Foreign Subsidiaries and Branches*, 16 BUS. LAWYER 403-516 (1961); Bruno, *German Law of Affiliated Enterprises*, 8 AM. BUS. L. J. 157 (1970/71); Bruno, *Checklist for Formation of a Foreign Subsidiary*, 24 BUS. LAWYER 493 (1968/69); Berens, *Foreign Ventures — A Legal Anatomy*, 26 BUS. LAWYER 1527 (1970/71); ZAPHIRIOU, *supra* note 1, at 132-37.

146. *Cf.* STEIN & HAY, *supra* note 1, at 743.

significant tax loads.[147] The advantage of the latter is that the shareholders' or partners' liability is limited. For entrepreneurs not depending on public financing, the limited liability company has been a very popular form.[148]

IV. TAXATION

Foreign investors must, of course, be well acquainted with their own tax regulations,[149] as well as with German tax law.[150] A major revision of German tax law is anticipated, although probably not in the immediate future.

Currently, taxes are regulated by several bodies of written law. There are also separate tax courts (Finanzgerichte) and the Federal Tax Court (Bundesfinanzhof).[151] These tax courts deal with taxes and tariffs, but certain matters of tax law may incidentally be heard before administrative or constitutional courts.

A. *Sources of Tax Law*

The most obvious sources of tax law are several federal codes, the most important of which are the Levies Regulation (Reichsabgadenordnung), the Tax Adjustment Law (Steueranpassungsgesetz), and the Valuation Law (Bewertungsgesetz).[152]

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147. MUELLER, *supra* note 1, at 126-28 calculates the tax burden of a company of an assumed net income of one million DM before taxes. For a subsidiary with full distribution but without reinvestment, 45 percent taxes are computed; for a subsidiary with full distribution and reinvestment, 51 percent; for a subsidiary with full retention of profit, 59 percent; for a subsidiary with hidden distribution of profit, 83 percent; and for a branch, 57 percent. This apparently does not take into consideration the surtaxes presently in force, *see infra* IV (B)(3).

148. *See supra* note 116.

149. On U. S. taxation of foreign income and related problems, *see* STEIN & HAY, *supra* note 1, at 762 *et seq.*; van Hoorn and Wright, *Taxation,* in STEIN & NICHOLSON II, *supra* note 1, at 343, 421 *et seq.*; SCHLESINGER, *supra* note 1, at 625; Slowinski & Haderlein, *U. S. Taxation of Foreign Income: The Increasing Role of the Foreign Tax Credit,* in INTERNATIONAL TRADE, INVESTMENT AND ORGANIZATION 137, 140 *et seq.* (P. Hay and W. LaFave eds. 1967); Harris, *Compensation Planning for the Europe-Bound Executive,* in Theberge, *supra* note 1, at 106; Voegelin, *Estate Planning for the Europe-Bound Executive,* in Theberge, *supra* note 1, at 114; FULDA, *supra* note 1, at 733 *et seq.*; B. SPITZ, SPITZ ON INTERNATIONAL TAX PLANNING (1972); van Hoorn, *Foreign Tax and Investment Incentives,* 1965 U. ILL. L. F. 488. *See also infra* note 157.

150. Winkhaus, *supra* note 11, at 1275-76, 1293-1300; MUELLER, *supra* note 1, at 100; BRUECHER, *supra* note 109, at 535; J. van Hoorn & L. Wright, *Taxation,* in STEIN & NICHOLSON II, *supra* note 1, at 343, 377 *et seq.*; HAMBURG, *supra* note 1, at 4-10; further references by SCHLESINGER, *supra* note 1, at 805 *et seq.*; H. GUMPEL, TAXATION IN THE FEDERAL REPUBLIC OF GERMANY (2d ed. 1969).

German literature: GOERLITZ, *supra* note 1, at 447-56; W. HARTZ, HANDWOERTERBUCH DES STEUERRECHTS, 2 vols. (1972); H. KRUSE, STEUERRECHT, (3d ed. 1973). *See also supra* note 143, last paragraph.

151. Hillhouse & Coperman, *Tax Courts in Western Germany,* 8 PUBLIC FINANCE 259 (1953); COHN, *supra* note 1, at 58.

152. Levies Regulation (Abgabenordung or Reichsabgabenordnung) of May 22,

Substantial portions of tax law are also found in Articles 104 (a) et seq. of the Constitution which is called the Basic Law (Grundgesetz).[153] Of the codes, the Levies Regulation (AO) provides rules of procedures and sanctions, the Tax Adjustment Law (StAnpG) provides definitions and standards of interpretation, and the Valuation Law (BewG) provides standards of valuation of objects relevant for tax purposes. The Basic Law (GG) contains the elements of budgeting and of the distribution of revenue for local, state, and federal spending. Thus the highest court in the country, the Federal Constitutional Court (Bundesverfassungsgericht),[154] often deals with tax law. The Court has the authority to declare tax laws unconstitutional. It is also often called upon to apply the test of Article 3 of the Basic Law (GG) which makes the principle of equal treatment before the law a basic right (Grundrecht).[155]

In addition, various other codes exist which deal with taxation in specific areas. The very number of tax laws has been a matter of complaint for years.

A second source of German tax law is contained in Articles 95 et seq. of the Treaty of Rome. They provide for far-reaching harmonization of indirect taxes within the European Economic Community. One example in recent years has been the substitution of the turnover tax by the value-added tax. For political and technical legal reasons, however, the process of harmonization is quite slow.[156] Beyond the Treaty of Rome there exist a number of international treaties dealing specifically with taxation, most of which are to avoid double taxation.[157]

1931, [1931] RGBl. I 161; *also* in STEUERGESETZE, *supra* note 7, at 800 [hereinafter cited as Levies Regulation AO)]; Tax Adjustment Law (Steueranpassungsgesetz) of October 16, 1934, [1934] RGBl. I 161; *also* in STEUERGESETZE, *supra* note 7, at 810 [hereinafter cited as Tax Adjustment Law (StAnpG)]; Valuation Law (Bewertungsgesetz) of December 10, 1965, [1965] BGBl. I 1861; *also* in STEUERGESETZE, *supra* note 7, at 200 [hereinafter cited as Valuation Law (BewG)].

153. Basic Law (Grundgesetz) of May 23, 1949, [1949] BGBl. 1, *as amended* July 28, 1972, [1972] BGBl. I 1305; also in SCHOENFELDER, *supra* note 7, at 1, and in SARTORIUS, *supra* note 7, at 1 [hereinafter cited as Basic Law (GG)]; *see also* STEIN & HAY, *supra* note 1, at 37; COHN, *supra* note 1, at 15, 48; Lenhoff, *The German (Bonn) Constitution with Comparative Glances at the French and Italian Constitutions,* 24 TUL. L. REV. 1 (1949).

154. STEIN & HAY, *supra* note 1, at 49; SCHLESINGER, *supra* note 1, at 332 nn. 36-37, 362-63 nn. 65-67 and 411 n.7; Rupp, *Federal Constitutional Court and the Constitution of the Federal Republic of Germany,* 16 ST. LOUIS L. J. 359 (1971/72). *See also* SCHLESINGER, *supra* note 1, at 759-62 for further references and *infra* XII and note 248.

155. *See infra* VII.

156. *See infra* IX.

157. Hadari, *Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise,* 20 AM. J. COMP. L. 111 (1972); Carroll, *International Tax Law: Benefits for American Investors and Enterprises Abroad, Evolution of U.S. Treaties*

B. *Kinds of Taxes*

One way to differentiate between taxes under German law is to distinguish between taxes on economic operations, so-called transfer taxes (Verkehrsteuern)[158] and taxes on income (Einkommensteuern). Transfer taxes include the turnover tax (Umsatzsteuer), capital investment tax (Kapitalverkehrsteuer), stock exchange turnover tax (Boersenumsatzsteuer), bills of exchange tax (Wechselsteuer), and real estate acquisition tax (Grunderwerbsteuer). Income taxes include the corporation income tax (Koerperschaftsteuer), personal income tax (Einkommensteuer) and trade tax (Gewerbesteuer).

1. *Personal Income Tax*

Persons who take up permanent residence in Germany are subject to unrestricted taxation unless otherwise provided by international treaty. The tax authorities determine whether there is permanent residence. While a period of six months residence can be taken as a general guideline, more specific advice must be sought from a CPA (Wirtschaftspruefer) or a tax counsellor (Steuerberater or Steuerbevollmaechtigter).[159]

No person earning less than 24,000 DM a year is subject to personal income tax.[160] However, they pay a wage tax (Lohnsteuer) which is automatically withheld by the employer.

Only income from seven specific sources is taxed; however, in the very unlikely case that a person acquires income from another source, he must still pay an estimated tax. Different regulations may apply to foreigners. There can be lump sum taxation (Pauschbesteuerung) under Section 31 of the Personal Income Tax Law (EStG) and Section 10 of the Law on Net Worth Tax (VStG) if a foreign person having particular skills (such as university professors, scientists, art-

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to Avoid Double Taxation of Income, 2 INT'L LAWYER 692 (1968), 3 *id.* at 129 (1969); Kalish, *Treatment of Intercompany Transactions When Doing Business Abroad (Avoiding Double Taxation): Section 482*, 27 N.Y.U. INST. FED. TAXATION 1032 (1969).

158. German tax law arrogantly disregards rules of spelling by leaving out the additional 's' normally required to connect two words into one. Thus transfer taxes (Verkehrssteuern) become (Verkehrsteuern), and this "rule" is likewise applied to all other taxes (Steuern).

159. MUELLER, *supra* note 1, at 129; HAMBURG, *supra* note 1, at 5.

160. On personal income tax generally, *see* Personal Income Tax Law (Einkommensteuergesetz) of December 1, 1971, [1971] BGBl. I 137; *also* in STEUERGESETZE, *supra* note 7, at 1 [hereinafter cited as Personal Income Tax Law (EStG)]; MUELLER, *supra* note 1, at 129; HAMBURG, *supra* note 1, at 5-6; CREIFELDS, *supra* note 1, heading "Einkommensteuer" at 303-05.

On inheritance tax, *see* Inheritance Tax Law (Erbschaftsteuergesetz) of August 22, 1925, [1925] RGBl. I 320 *as amended* December 23, 1970, [1970] BGBl. I 1856; *also* in STEUERGESETZE, *supra* note 7, at 250; Killius, *German Inheritance and Income Taxation of United States Estates*, 24 TAX. L. REV. 127 (1968).

ists, but not usually businessmen) so requests.[161]

Personal income taxation is based upon the personal income after allowances have been deducted. There are blanket deductions for professional people, special deductions such as interest on credits,[162] insurance fees, church taxes, charitable contributions, payments on savings to build private homes, and deductions for private homes recently built.[163] More deductions are made for dependent children, and old age before the taxable income found in the tax schedule is determined. Individuals and spouses filing separate returns are taxed upon the general schedule (Grundtabelle), spouses filing joint returns and widows upon the so-called splitting schedule. These schedules are found in Section 32 of the Personal Income Tax Law (EStG). Taxation of yearly income varies between 19 percent (incomes between 1,680 and 8,000 DM) and 53 percent (over 110,000 DM).

2. *Corporation Income Tax*

Corporation income tax[164] is based upon corporate income as calculated according to Personal Income Tax Law (EStG) and Sections 7-16 of the Corporation Income Tax Law (Koerperschaftsteuergesetz).[165] One starts with balance sheet profits, then adds certain non-deductible expenses (personal income tax, net worth tax,[166] gratuities of members of supervisory boards, etc.) and hidden distributed profits. Deductions are taken for expenses such as rehabilitation gains, charitable contributions, and intercorporate dividends. After deductions, the loss carry-forward is subtracted according to Section 10(d) of the Personal Income Tax (EStG) to form the income from which 30 percent capital yields are subtracted to arrive at taxable income. The tax rates for the different kinds of companies vary between 15 and 51 percent.

3. *Surtaxes on Income Taxes*

In 1967, a surtax on income taxes at the rate of three percent of

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161. Section 10 Law on Net Worth Tax (Vermoegensteuergesetz) of June 10, 1954, [1954] BGBl. I 137; *also* in STEUERGESETZE, *supra* note 7, at 220 [hereinafter cited as Law on Net Worth Tax/VStG]; Section 31 Personal Income Tax Law (EStG), *supra* note 160; MUELLER, *supra* note 1, at 132; CREIFELDS, *supra* note 1, heading "Pauschbesteuerung" at 801.

162. This will be abolished in 1974. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 19, 1973, at 19, col. 3-5; June 16, 1973, at 5, col. 1-2.

163. This will be suspended from May 1973 to April 1974. *Id.*

164. On corporation income tax generally *see* Corporation Income Tax Law (Koerperschaftsteuergesetz) of October 13, 1969, [1969] BGBl. I 1869; *also* in STEUERGESETZE, *supra* note 7, at 100 [hereinafter cited as Corporation Income Tax Law (KStG)]; BRUECHER, *supra* note 109, at 539; MUELLER, *supra* note 1, at 108-28; HAMBURG, *supra* note 1, at 6-7.

165. For citation of statute *see supra* notes 160 and 164.

166. *See supra* note 161.

the income taxes was introduced.[167] An additional surtax called stability surtax (Stabilitaetsabgabe) is tacked on all personal incomes over 24,000 DM (single) or 48,000DM (joint return) at the rate of 10 percent of the regular income tax. Similar rules apply to corporation income tax. Although this second surtax is to operate for about a year only, starting on July 1, 1973, as an effort to stop inflationary tendencies, it gives an idea of how similar measures might look in the future. Numerous other legislative efforts of May 10, 1973 are designed to stabilize the economy. This so-called stability program includes a tax of 11 percent on industrial investments for a period of two years and reform of the law of restrictive trade practices.[168]

4. *Trade Tax*

The trade tax covers stationary and migratory domestic trades. It is federally and uniformly regulated,[169] and accrues to the local communities where it constitutes the most significant source of revenue. It is designed to contribute to the costs of utilities and roads.

The applicable statutes include the Trade Tax Law (GewStg) with its enacting ordinances (Durchfuehrungsverordnungen) and directions (Richtlinien). The trade tax is five percent of the trade earnings (Gewerbeertrag) which are calculated by adding to the profits (after personal and corporation income taxes) certain sums such as payment of interests on debts and subtracting other sums such as tax-exempt donations. Trade capital (Gewerbekapital) is taxed in a similarly complicated computation.

Additionally, numerous communities impose a payroll tax (Lohnsummensteuer). Each community may set its own index which is applied to the rate of two percent of the total of the payrolls.[170]

At times there have been "arrangements" or reductions of these taxes in an effort to attract new industries. These manipulations have been declared illegal under most circumstances by the courts, but are still attempted from time to time.[171]

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167. Law of December 21, 1967, [1967] BGBl. I 1254.

168. Frankfurter Allgemeine Zeitung (Frankfurt/Germany) May 11, 1973, at 1, col. 2-4, at 4, col. 4-6, at 5, col. 1-2; May 19, 1973, at 19, col. 3-5; June 16, 1973, at 1, col. 2-4, at 5, col. 1-2.

The reform of the Law Against Restraints of Trade is about to be settled; *see infra* V(B)(3) and note 213.

169. Trade Tax Law (Gewerbesteuergesetz) of October 20, 1969, [1969] BGBl. I 2021; *also* in STEUERGESETZE, *supra* note 7, at 450 [hereinafter cited as Trade Tax Law (GewStG)]; MUELLER, *supra* note 1, at 123-25; HAMBURG, *supra* note 1, at 8-9.

170. MUELLER, *supra* note 1, at 131.

171. Judgment of December 1, 1964, *Oberverwaltungsgericht Muenster*, 21 ENTSCHEIDUNGEN DER OBERVERWALTUNGSGERICHTE 18 (1967/68); Judgment of December 1, 1969, *Oberverwaltungsgericht Rheinland-Pfalz*, 19 KOMMUNALE STEUER-ZEITSCHRIFT 96 (1970); H. WOLFF, II VERWALTUNGSRECHT 200 (3d ed. 1970).

5. *Value-Added Tax*

In compliance with the Treaty of Rome, on January 1, 1968, Germany changed from gross turnover tax to its present value-added tax.[172] Under the old system, each step in the production and marketing process involving a change of hands was separately and comprehensively taxed. This cumulative taxation technique led to distortions of competition whenever an enterprise concentrated several steps within its own production, and thus escaped repeated taxation.

The new system, by contrast, taxes the increase in value and not the increase in price. The difference in value between the incoming and outgoing product or service is taxed rather than the whole product or service. Thus gross prices which invisibly included turnover tax have been replaced by net prices to which the turnover tax is added. The value-added tax avoids taxing previously imposed tax.

6. *Real Property Taxes*

The real property tax,[173] like the trade tax, is regulated on the federal level, but collected by the communities. With the exception of real property belonging to charitable organizations, all real property is taxed on its value. The computation normally applies the tax index (Steuermesszahl) which is about one percent and the locally varying levying index (Hebesatz) to the unit value of the real property. The resulting tax rate is between 0.5 and 2.5 percent. The unit value (Einheitswert) is set at intervals of a decade or more, and is therefore hopelessly outdated. The last levying index dates from 1935 but is to be updated in 1973.[174]

Real property acquisition tax becomes applicable when domestic real property is sold.[175] It also applies where the possessor enjoys the economic and financial use of the land without being the owner. The present tax rate is seven percent, but it is likely that it may be raised substantially to curb sensational gains made by land owners in urban centers and other areas which have witnessed rapid multiplications in value.

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172. Turnover Tax Law (Umsatzsteuergesetz) of May 29, 1967, [1967] BGBl. I 545; *also* in STEUERGESETZE, *supra* note 7, at 500; MUELLER, *supra* note 1, at 102-05; King, *Special Tax Problems Related to the Selection and Acquisition of Investments in European Countries*, in Theberge, *supra* note 1, at 38, 48. *See also infra* IX and note 271.

173. Real Property Tax Law (Grundsteuergesetz) of December 1, 1936, [1936] RGBl. I 986 *as amended* August 10, 1951, [1951] BGBl. I 519, corrected *id.* 790; *also* in STEUERGESETZE, *supra* note 7, at 420.

174. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 12, 1973, at 1, col. 1-2; May 17, 1973, at 15, col. 1-4; June 15, 1973, at 17, col. 4-5.

175. Real Property Acquisition Tax Law (Grunderwerbsteuergesetz) of March 29, 1940, [1940] RGBl. I 585; *also* in STEUERGESETZE, *supra* note 7, at 600; MUELLER, *supra* note 1, at 107.

7. *Tax Incentives*

Federal legislation has been enacted to counterbalance the geographic and economic isolation of West Berlin by providing substantial tax relief and investment incentives. The Berlin Relief Law (Berlinfoerderungsgesetz)[176] reduces the value-added tax for transports to or from West Berlin, and allows for higher depreciations, tax reductions on long-term building contracts and reductions of 20 to 30 percent on corporation and personal income taxes respectively.

Similarly the Law on Investment Subsidies offers tax incentives of 7.5 percent of capital invested to establish or improve enterprises situated along the eastern border of the country.[177] Additional incentives or premiums exist to boost marginal industries such as coal,[178] ship-building, or investments in developing countries.[179]

8. *Additional Considerations*

Tax law is so complicated that only the most basic outline can be given here. This is particularly true with regard to taxation of corporate income. Such considerations as inter-corporate dividends, hidden profit distributions and the like can only be briefly mentioned.[180]

Uncer certain conditions tax credit may be given either for personal or corporation income tax paid abroad.[181] The new Tax Evasion Law is noteworthy for its introduction of the indirect foreign tax credit for profit distributions by controlled foreign subsidiaries.[182]

Some additional kinds of taxes should be mentioned. Three kinds of capital investment taxes (Kapitalverkehrsteuern) exist. Company tax (Gesellschaftsteuer) is imposed when capital-companies are formed or financially strengthened.[183] Negotiable in-

176. Berlin Relief Law (Berlinfoerderungsgesetz) of October 1, 1968, [1968] BGBl. I 1049, as amended October 29, 1970, [1970] BGBl. I 1482; *also* in STEUERGESETZE, *supra* note 7, at 711.

177. Law on Investment Subsidies (Investitionszulagengesetz) of August 18, 1969, [1969] BGBl. I 1211; *also* in STEUERGESETZE, *supra* note 7, at 740.

178. Coal Adjustment Law (Steinkohlenanpassungsgesetz) of May 5, 1968, [1968] BGBl. I 365.

179. *See* Section 82 (f) Personal Income Tax Law (EStG), *supra* note 160; Section 2 (3) Law on Net Worth Tax (VStG), *supra* note 161; Section 4 (4). Turnover Tax Law (Umsatzsteuergesetz), *supra* note 172; Section 9 (a) Law on Net Worth Tax (VStG), *supra* note 161; von Boetticher, *A New Approach to Taxation of Investments in Less Developed Countries*, 17 AM. J. COMP. L. 529 (1969).

180. MUELLER, *supra* note 1, at 108-28.

181. FULDA, *supra* note 1, at 733-55; Carroll, *IFA's Growth with International Tax Law*, 5 INT'L LAWYER 558 (1971).

182. Tax Evasion Law (Aussensteuergesetz) of September 8, 1972, [1972] BGBl. I 1713; *also* in STEUERGESETZE, *supra* note 7, at 725; MUELLER, *supra* note 1, at 111, 140.

183. Sections 2-10 Capital Transfer Tax Law (Kapitalverkehrsteuergesetz) of July 24, 1959, [1959] BGBl. I 530; *also* in STEUERGESETZE, *supra* note 7, at 610; MUELLER, *supra* note 1, at 105-06, 116.

struments tax (Wertpapiersteuer) is no longer applicable.[184] And stock exchange turnover tax concerns the sale of most kinds of shares.[185] This last type is a follow-up to the company tax after company formation and covers subsequent transfers. It ranges between 0.1 and 0.2 percent and is reduced by half if the agreement is concluded abroad and if one party is foreign.

Proposed tax reform would raise taxes on higher incomes and introduce measures to curb unusual profits.[186]

V. ANTITRUST LAW

A. *U.S. and German Approaches Compared*

Many commentators dealing with antitrust law[187] on both sides of the Atlantic allege a significant difference between U.S. antitrust laws (which prohibit almost any kind of restrictive trade practices) and European laws (which allow cartels in an "anything-goes-attitude"). To assume this to be true without reservations would be a misunderstanding.

In fact, results on both sides of the Atlantic are often identical in result, although the legal setting is quite different.[188] Most U.S. companies are eager not to attract too much attention from the Federal Trade Commission, and most German companies wish to avoid

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184. Law of March 25, 1965, [1965] BGBl. I 147 abolishing section 11, 13-16 Capital Transfer Tax Law (Kapitalverkehrsteuergesetz).

However, there is a 0.15 percent tax on bills of exchange which is reduced by one half if either the bill is drawn in Germany on a foreign drawee and payable abroad or drawn abroad on a domestic drawee and payable in Germany: Bills of Exchange Tax Law (Wechselsteuergesetz) of September 2, 1935, [1935] RGBl. I 1124 as amended July 24, 1959, [1959] BGBl. I 537; *also* in STEUERGESETZE, *supra* note 7, at 640.

185. Sections 17-25 Capital Transfer Tax Law, *supra* note 183.

186. *See supra* IV(B)(6).

187. On industrial property, *see* MUELLER, *supra* note 1, at 68-72, 85-92; COHN, *supra* note 1, at 7.182.-7.215.; S. Ladas, *Industrial Property*, in I STEIN & NICHOLSON, *supra* note 1, at 235; Lieberknecht, *Industrial Property Rights and the Rules on Competition in the Rome Treaty*, 27 BUS. LAWYER 811 (1972); Deringer, *A Practitioner Looks at the German and EEC Rules as Applied to Acquisitions, Mergers, and Joint Ventures*, in Theberge, *supra* note 1, at 64, 66-68 [hereinafter cited as Deringer]; Newes, *The EEC Treaty as Applied to Distribution Arrangements and Industrial Property Rights*, in Theberge at 72; Timberg, *Drafting Licensing Arrangements in the Seventies*, in Theberge at 134; Becher, *Law and Practice of Defensive Marks in Germany*, 48 TRADEMARK REP. 797 (1958); Jones, *Fundamentals of International Licensing and Their Application in the European Community*, 7 INT'L LAWYER 78 (1973); Galloway, *Trademark and Competition in the EEC*, 6 J. WORLD TRADE L. 550 (1972).

188. STEIN & HAY, *supra* note 1, at 524 *et seq.*; MUELLER, *supra* note 1, at 73-85; Deringer, *supra* note 187; FULDA, *supra* note 1, at 105; COHN, *supra* note 1, at 7.155.-7.181.; Schapiro, *The German Law Against Restraints of Competition*, 62 COLUM. L. REV. 1, 201 (1962); H. KRONSTEIN, THE LAW OF INTERNATIONAL CARTELS (1972); Riesenfeld, *The Protection of Competition*, in STEIN & NICHOLSON II, *supra* note 1, at 197 [hereinafter cited as Riesenfeld]; *see also supra* notes 143 and 187.

the German Federal Cartel Authority (Bundeskartellamt),[189] or the Commission of the European Economic Community. Certain large companies, on the other hand, which enjoy positions of oligopoly or near-monopoly are bold enough to almost defy the spirit if not the letter of the law. Car manufacturers in both countries have assumed a policy of raising prices in uncommon harmony, which in other industries would immediately stimulate a government investigation for alleged practice-fixing.

Most experts agree that even the stricter control of horizontal and vertical mergers envisaged both in German[190] and European Community law will not eliminate all loopholes, because prevailing considerations of the common good and compelling interests of the national economy will probably be a valid defense under the new law. The steel industry quite recently has set stupifying examples of mergers that would not be possible in the United States and have caused critics to contend that the new law will have little more bite than the old one. In this respect, mergers are not as suspect in Europe as they are in the United States.

Returning to the questionable observation, that the U.S. and German laws of restrictive trade practices are inconsistent, it should be noted that the U.S. military powers after World War II ordered the de-cartelization of the German industry.[191] Before the Law Against Restraints of Trade[192] came into being, military ordinances regulated the German economic scene. Thus, while legal methodologies are different, the results are not inconsistent with each other. Both systems have significant irregularities.

B. *Law Against Restraints of Trade*

The German antitrust law is embodied in the Law Against Restraints of Trade (GWB)[193] often called Cartel Law (Kartellgesetz).

1. *Theoretical Foundation*

German antitrust law is based on a system of "social market economy" (soziale Marktwirtschaft), an antithesis to laissez-faire.[194]

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189. MUELLER, *supra* note 1, at 11, 74; COHN, *supra* note 1, at 7.156., 7.167.

190. *See infra* V(B)(3) and (4).

191. Riesenfeld, *supra* note 188, at 213.

192. Law Against Restraints of Trade (Gesetz gegen Wettbewerbsbeschraenkungen) of July 27, 1957, [1957] BGBl. I 1087, *as amended* January 3, 1966, [1966] BGBl. I 37; *also* in SCHOENFELDER, *supra* note 7, at 74 [hereinafter cited as Law Against Restraints of Trade (GWB)]; Riesenfeld, *supra* note 188, at 207; MUELLER, *supra* note 1, at 73-85; COHN, *supra* note 1, at 7.155.-7.181.; FULDA, *supra* note 1, at 150-51; *see also supra* note 188. *But see supra* V(B)(4).

193. For citation of statute *see supra* note 192.

194. STEIN & HAY, *supra* note 1, at 606; Riesenfeld, *supra* note 188, at 216; *see also infra* VI(B)(1) and note 232.

Under this system, the legislature provides the legal framework designed to guarantee the functioning of the economy on the basis of the principle of free competition, but including certain protective and slightly directive measures. Direct interference with the economy is banned, as is certain discriminatory market behavior.

The system is based on a combination of liberalism and centralized planning. When interests of free competition conflict with the interests of a fair market and a sound economy, the latter will govern. The present neo-liberal system of a social market economy is not the only conceivable order in harmony with the Basic Law (GG).[195] The constitution remains neutral as far as the economic order is concerned, and the legislature is able to pursue whatever policy it deems appropriate. In recent years this has included indirect overall guidance to ensure a stable and well-balanced national economy.. The 1967 Stability Law (Stabilitaetsgesetz)[196] provides for coordinated budgeting and credit policies on the federal, state, and local levels, regular collection and evaluation of statistical data of the national economy, and the establishment of various advisory councils.

2. *Gist of the Law Against Restraints of Trade*

After these introductory remarks, the Law Against Restraints of Trade and some very recent amendments will be scrutinized in more detail.[197]

Sections 1-37 contain the substantive antitrust law. Of these, the first 14 deal with cartels which, as a matter of principle, are prohibited; but the law now enumerates a significant number of exceptions. Sections 15-21 deal with other agreements such as price-fixing, licensing, and protection of techniques. Restrictive practices in those areas are illegal, although "exceptions" are quite frequent. In contrast, a dominant position is not illegal per se, but according to Sections 22-24, abuse of dominance is illegal.

Sections 25-27 prohibit discriminatory behavior, boycotts and the like, while Sections 28-33 regulate codes of ethics which trade associations or professional organizations may develop in the interest of fair competition. Finally, Section 34 requires that cartels be in writing, and Section 35 contains the law's remedies available to private plaintiffs: actual or compensatory damages (regular—not treble), or injunctive relief. Sections 38-43 provide fines in analogy to those incurred for misdemeanors.

Section 1 declares that agreements are illegal which are likely to

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195. Judgment of July 20, 1954, 4 BVERFG 7, 17.

196. Stability Law (Stabilitaetsgesetz) of June 8, 1967, [1967] BGBl. I 582; *also* in STEUERGESETZE, *supra* note 7, at 910.

197. Riesenfeld, *supra* note 188, at 216; MUELLER, *supra* note 1, at 73-85; COHN, *supra* note 1, at 7.155.-7.181.; *see also supra* note 188. *But see infra* V(B)(4).

influence production or interfere with the functioning of the market by means of restrictive practices. The following are the kinds of cartels which are permitted:[198]

(1) Condition cartels (Konditionenkartelle), thus named for their use of standardized sales contracts with the terms of the agreement regulating mode of delivery, payment, etc.;

(2) Rebate cartels (Rabattkartelle), rebates with the delivery of goods; however, rebates to the final consumer are not concerned as those are exclusively subject to the Rebates Statute (Rabattgesetz);[199]

(3) Crisis cartels (Strukturkrisenkartelle), cartels to reduce production capacity in industrial branches that have been hit by economic decline (but not by a general recession);

(4) Standardization cartels (Rationalisierungskartelle), uniform use of standardized measures and patterns;

(5) Specialization cartels (Spezialisierungskartelle), standardization by specialization;

(6) Export cartels (Exportkartelle);

(7) Import Cartels (Importkartelle);

(8) Special cartels (Sonderkartelle), also known as Ministerkartelle because these are permitted only by express order of the Minister of Economics.

All of these are lawful only under certain circumstances. The Ministerkartell has been granted only twice[200] because it is meant as an ultima ratio.

"Other contracts" (sonstige Vertraege) in the language of Sections 15-21, if they restrain price setting or other terms regulating sale of goods or services, are void, subject to exceptions in Sections 16-21 relating to vertically fixed resale prices. Price recommendations are not automatically unlawful, but there is a strong presumption of illegality. Similarly, licensing agreements are prohibited (with certain reservations) if the restraint imposed on the licensee is greater than required by the scope of the license.[201]

The Federal Cartel Authority[202] acts as a supervisory body to prevent abuses by dominant companies and consolidated enterprises. Any consolidation of enterprises having more than 20 percent market share or more than 10,000 employees or more than 500 million DM

198. Riesenfeld, *supra* note 188, at 218; MUELLER, *supra* note 1, at 75-76.

199. Rebates Statute (Rabattgesetz) of November 25, 1933, [1933] RGBl. I 1011; *also* in SCHOENFELDER, *supra* note 7, at 78.

200. MUELLER, *supra* note 1, at 77.

201. FULDA, *supra* note 1, at 670 *et seq.*; *see also supra* note 187.

202. *See supra* note 189.

turnover or a balance sheet total of more than one billion DM must be reported to the Federal Cartel Authority.[203] Not surprisingly, many problems appear which are familiar to the American antitrust lawyer: determining the dominant position in the market (market power), relevant market, and interchangeability of products.

Non-contractual behavior restraining competition is covered in Sections 25-27. There must be no compulsion, threat, incitement, boycott, or other activity to accuse another of committing infractions of the Cartel Law. No enterprise may refuse to deal with or supply goods or services to another for the purpose of restraining competition, nor can trade associations or professional organizations refuse admission to applicants without justification. Section 28 et seq. concern less essential details previously mentioned.[204] Sections 44-109 contain numerous rules of procedure.

Special attention should be paid to Section 38(2). Its first clause forbids complicity in restrictive practices, the second prohibits instigation of practices by recommendations which have led in the past to evasion of the law by parallel behavior, and the third clause makes an exception for small and medium size enterprises which follow price recommendations in order to further competition against large enterprises.

3. *Weaknesses and Reform of the Law Against Restraints of Trade*

From the moment the Cartel Law became effective on January 1, 1958, much criticism has been voiced from many sources. One illustration is instructive. Although the "Tar-Dyes Judgment"[205] was decided only in 1972, it already has become an ill-famed case. The antitrust section of the highest court, the Federal Supreme Court (Bundesgerichtshof) refused to recognize blatant parallel behavior. It did not give proper attention to the defendants' behavior which, under German law, should conclusively infer an illegal meeting of the minds. The court's decision, called mechanistic and shallow by most observers, has lead to a significant reform of Section 25 dealing with discriminatory behavior.[206] This step has brought German antitrust law into closer harmony with Article 85 of the Treaty of Rome.

In addition, the abolishment of vertically fixed retail prices has long been proposed[207] and recently accomplished.[208] German enter-

203. FULDA, *supra* note 1, at 652. *But see infra* V(B)(4)(a).

204. *See supra* V(B)(2) first textual paragraph.

205. Judgment of December 17, 1970, 24 BGHSt 54; *cf.* Lieberknecht, *Antitrust Law in West Germany*, 27 BUS. LAWYER 803, n. 1 (1972). *But see infra* V(B)(4)(c).

206. Sandrock, *Die zweite Kartellnovelle*, 28 DER BETRIEBSBERATER 101 (1973) [hereinafter cited as Sandrock]. *But see infra* V(B)(4)(c).

207. Sandrock, *supra* note 206, at 105.

208. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17,

prises have found it difficult to maintain fixed prices because reimports from other EEC member countries have upset the system and cannot be prevented under the law of the European Communities.[209] The definition of dominant position in the market is another point recently reformed.[210] Meanwhile, the far-reaching effects unfavorable to competition by licensing agreements have been attacked as undesirable.[211] But the most significant reform to be faced was that of economic concentration.[212]

4. *Recent Amendments to the Law Against Restraints of Trade*

The reform of German antitrust law became reality through a very recent amendment to the Law Against Restraints of Trade.[213] Its main features are the following:

a. *Preventive Merger Control*

The old Section 23 essentially corresponds to the new section

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col. 3; *id.* May 19, 1973, at 21, col. 1. *But see infra* V(B)(4)(e).

209. Sandrock, *supra* note 206, at 106. Consten & Grundig v. E.E.C. Commission, CCH Comm. Mkt. Rep. ¶ 8046 (1966); Deutsche Grammophon v. Metro, *cited in* Jones, *infra* note 215, at 613.

The rule in the Consten case has been somewhat undercut, if not undermined, by two exceptions granted by the Commission to Omega watches in 1970 and to French luxury perfume producers Lancome, Dior, Rochas, and Guerlain in 1973. In both instances the Commission authorized selective distribution to exclusive dealers only, the rationale in the watch case being that a high quality system of guarantee and repair required the singling out of the best retailers. While one may go along with that reasoning and accept it as a justification for actions which could be called quasi-price fixing and which result in eliminating competition to a substantial degree, the situation is even more doubtful with regard to luxury perfumes. The only service in question is to guarantee that because perfumes do not keep for an unlimited time, they will be replaced by new products of the same kind if necessary. A measure which would not lead to such a drastic decrease in competition would have been to have expiration dates imprinted as is the case already with many drugs, films, and food articles. However, this was refused by the producers for reasons of prestige; the Commission as a whole, against the opposition of the Commissioner for Competition, succumbed to the perfume producers arguments. [This attitude of the Commission stands in contrast to that of the German Cartel Authority which seems determined to take on a tough stand, especially since the enactment of the reform of German antitrust on August 4, 1973; *see infra* V(B)(4)]. Frankfurter Allegemeine Zeitung (Frankfurt/Germany), September 5, 1973, at 17, col. 1-2 and 3-5.

210. Sandrock, *supra* note 206, at 106. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17, col. 3 reports that the future law will consider 33 percent market share as a dominant position. For the content of that new law, *see infra* V(B)(4)(b).

211. *Cf.* FULDA, *supra* note 1, at 676 *et seq.*

212. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), May 16, 1973, at 17, col. 3; *see also supra* III(E) and note 143; *but see infra* V(B)(4).

213. The Law Amending the Law Against Restraints of Trade of August 3, 1973, [1973] BGBl. I 917. The law became effective on August 4, 1973. The new sections 22, 23, and 24 were given retroactive effect as of June 7, 1973 to the degree that they deal with merger control; vertically fixed retail prices are legal until December 31, 1973.

which, now in some more detail, defines merger for the purposes of antitrust and provides for registration of mergers of companies together enjoying a market share of 20 percent or having at least 10,000 employees or turning over at least 500 million DM.

The old Section 24 somewhat resembles the new Section 24(a). It declares illegal a merger as defined in Section 23 unless there is proof that competition is advanced to a degree which outweighs the disadvantages of dominant position. In Section 24(3) one finds an exceptional tolerance of such a merger to be possible by permission of the Minister of Economics if the restraint of trade is balanced by advantages to the national economy or if the merger is justified by a paramount public interest (ueberragendes Interesse der Allgemainheit); this judgment is to take into account the competitiveness of the enterprises on extraterritorial markets. Permission can be granted only under the condition that the principle of a free market economy (marktwirtschaftliche Ordnug) remain untampered.

Section 24(7) gives ample powers to the Federal Cartel Authority (Bundeskartellamt) to enforce its orders by levying one or several fines between 10,000 and 1 million DM.

Section 24(a) requires registration of proposed mergers if two or more enterprises each had a turnover exceeding 1 billion DM during the previous year.

Section 24(b) for the first time establishes a so-called monopoly committee (Monopolkommission) which is to regularly supervise and comment on the development of mergers.

b. *Increased Supervision of Dominant Enterprises*

Section 22(1) defines a dominant enterprise as one which encounters no substantial competition or which has a superior (ueberragend) position vis-a-vis its competitors. The latter judgment is based upon market share, financial resources, access to supplying and sales markets, combinations with other enterprises, and legal or factual barriers to market-entry of newcomers.

Section 22(3) establishes a presumption of dominant position of an enterprise turning over 250 million DM if it holds one-third of the market. Up to three enterprises turning over 100 million DM are presumed dominant when holding one-half, and up to five enterprises of the same size when holding two-thirds of the market.

c. *Prohibition of Concerted Behavior*

Section 25(1) prohibits concerted behavior among enterprises or groups of enterprises which would be illegal if committed in accordance with an agreement, the so-called breakfast-cartels (Fruehstueckskartelle). This provision eliminates the problems created by

the Tar-Dyes Case[214] which left defendants-respondents untouched because the court failed to see an agreement despite supporting evidence of a tacit agreement clearly demonstrated by parallel behavior.

d. *Improved Conditions of Competition for Small and Medium Size Enterprises*

An attempt to protect small and medium size enterprises from the ever-growing industrial giants is made in Section 5(b). The regulation exempts agreements bringing about standardization (Rationalisierung) by some means of cooperation other than specialization (Spezialisierung), which are declared legal, from the general prohibition of Section 1 if competition is not substantially impaired and if the agreement is to promote small and medium size enterprises.

e. *Abolishment of Vertically Fixed Retail Prices*

Section 16 abolishes vertically fixed retail prices as of January 1, 1974, with the exception of products of publishing companies. In the remaining branches price recommendations will be permitted; however, no pressure on retailers is allowed. Two-fold abuse of price recommendations to coerce retailers will entail action prohibiting the enterprise from setting any recommendations at all. This provision is intended to do away with both artificially high recommendations called "moon prices" (Mondpreise) and loss leaders (Lockvogelangebote).

C. *European Antitrust Law*

Any analysis of German antitrust law is incomplete without reference to the European Community law.[215] As the Community law is more accessible to U.S. lawyers than the German law, it is sufficient to say it roughly follows the lines of German antitrust law. The European law of competition is codified in Articles 85 and 86 of the Treaty of Rome and in ordinances relating to them.[216]

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214. *See supra* note 205.

215. STEIN & HAY, *supra* note 1 at 612 *et seq.*; C. RUNGE, EINFUEHRUNG IN DAS RECHT DER EUROPAEISCHEN GEMEINSCHAFTEN 78-90 (1972) [hereinafter cited as RUNGE]; *see also*, Adeler & Belman, *Antimerger Enforcement in Europe—Trends and Prospects*, 8 J. INT'L L. & ECON. 31 (1973).

216. For an English language edition of the treaties, *see* EUROPEAN COMMUNITY TREATIES (Sweet & Maxwell's Legal Editorial Staff ed. 1972). A. CAMPBELL, COMMON MARKET LAW, 2 vols. (1969) provides both the text and annotations and reference material. *See also* Riesenfeld, *supra* note 188, at 200 *et seq.* (arts. 85 and 86 are translated at 200 and 201); FULDA, *supra* note 1, at 105 *et seq.* (arts. 85 and 86 at 108-09); J. HEATH, INTERNATIONAL CONFERENCE ON MONOPOLIES, MERGERS AND RESTRICTIVE PRACTICES (1971); W. ALEXANDER, THE E.E.C. RULES OF COMPETITION (1973); Jones, *A Primer on Production and Dominant Positions Under E.E.C. Competition Law*, 7 INT'L LAWYER 612 (1973); Canenbley, *Price Discrimination and EEC Cartel Law: A Review of the Kodak Decision of the Commission of the European Communities*, 17 ANTITRUST BULL. 269 (1972); Rahl, *Relationship of U.S. to EEC Antitrust Law*, in Theberge, *supra*

As to the relationship between national and Community law, the European Court of Justice attributes supremacy to Community law.[217] It does not hesitate to allow proceedings in the national courts while EEC proceedings are pending, and likewise it refuses to take into consideration fines already imposed by national courts when it sets fines under Community law.[218]

Many of the questions being discussed in German law were broached in the much publicized Continental Can Case, decided in February 1973.[219] In it, the European Court of Justice rules that Article 86 may apply to mergers if there is an abuse of dominant position. This is concluded by the legal uniformity of Articles 85 and 86. The aim of these articles is to assure the functioning of the market according to the principle of free competition, which can be achieved only by interpreting the law extensively so as to engulf all potentially harmful behavior.

VI. LABOR LAW

A. *General Survey*

Labor law[220] applies to employees who, under a labor contract, hold jobs which require subordination and execution of orders.[221] This

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note 1, at 79, 83-86 (with valuable further references at 86-88) [hereinafter cited as Rahl]. *See also supra* note 188.

217. STEIN & HAY, *supra* note 1, at 200 *et seq.*; Deringer, *supra* note 187, at 65; M. ZULEEG, DAS RECHT DER EUROPAEISCHEN GEMEINSCHAFTEN IM INNERSTAATLICHEN BEREICH (1969) (Heymanns Verlag, Koeln/Germany); RUNGE, *supra* note 214, at 108-12; *cf.* Zaphiriou, Note, 1971 J. BUS. L. 252, and 1973 J. BUS. L. 89.

218. Rahl, *supra* note 215, at 79; MUELLER, *supra* note 1, at 83; *see also infra* VIII and note 272.

219. Judgment of February 21, 1973, BGH in 26 NEUE JURISTISCHE WOCHENSCHRIFT 966 (1973); *see* Continental Can Co. v. E.E.C. Commission, 12 INT'L LEGAL MATERIALS 603 (1973); *cf.* on the Commission's decision 11 INT'L LEGAL MATERIALS 316 (1972), and Note, 1972 J. BUS. L. 263. *See also* Deringer, *supra* note 187, at 70; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), February 23, 1973, at 19, col. 4-6.

220. *Generally see* Kahn-Freund, *Labor Law and Social Security*, in I STEIN & NICHOLSON, *supra* note 1, at 297 *et seq.*; MUELLER, *supra* note 1, at 92-100.

221. German law distinguishes between what may be described as ordinary workers or laborers (Arbeiter); employees, meaning white collar or at least gray collar workers (Angestellte); and civil servants (Beamte) who traditionally enjoy specific privileges (*e.g.*, permanent employment except in cases of severe crime, old age pension) and have certain duties (*e.g.*, loyalty towards the state as the employer). These principles are known as the "traditional principles of the professional civil service" (hergebrachte Grundsaetze des Berufsbeamtentums) and are anchored in art. 33 (5) Basic Law (GG.).

The civil service as an organizational and institutional principle is under attack for alleged inflexibility and lack of competitiveness (promotion by seniority rather than merit cannot lure qualified people from private employers), and substantial revisions are possible in the future.

The distinction between workers (Arbeiter) and employees (Angestellte) is fading away rapidly as many companies have promoted their workers to "honorary employ-

body of law has been developing since the late nineteenth century and is scattered in numerous codes, statutes and case law.[222] The First Labor Compilation Law of 1969[223] is a first step towards a comprehensive Labor Code (Arbeitsgesetzbuch). To interpret these laws, a separate system of labor courts exists (Arbeitsgerichtsbarkeit).[224]

For purposes of information, several legal rules will be mentioned without further comment on the legal problems involved.[225] Particular statutory provisions are designed to protect minors, pregnant women, and the disabled. Children are not allowed to work before the age of 14; pregnant women are excused from work six weeks before and eight weeks after childbirth; and private enterprises with more than 16 employees have to offer one job out of every 16 to a disabled person. Mass dismissals (more than ten percent of the employees) require notification to the enterprise council (Betriebsrat)[226] and clearance by the state labor authority (Landesarbeitsamt).[227]

B. *Co-Determination (Mitbestimmung)*

A characteristic of German labor law is the so-called co-determination (Mitbestimmung) of labor in the management of enterprises.[228] Any enterprise having five or more regularly employed workers or employees (arbeitnehmer)[229] must have an enterprise

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ees" (Ehrenangestellte) or plain employees for reasons of prestige.

When referring to either workers or employees, the law usually describes an individual as an "Arbeitnehmer" (one who takes work). Correspondingly, an employer because an "Arbeitgeber" (one who gives work).

222. For a collection of statutory law *see* NIPPERDEY, *supra* note 7. An excellent compendium is G. SCHAUB, ARBEITSRECHTSHANDBUCH (1972) [hereinafter cited as SCHAUB].

223. First Labor Compilation Law (Erstes Arbeitsrechtsbereinigungsgesetz) of August 14, 1969, [1969] BGBl. I 1106; *also* in NIPPERDEY, *supra* note 7, at 2001.

224. Cole, *The Role of the Labor Courts in Western Germany*, 18 J. OF POL. 479 (1956); COHN, *supra* note 1, at 59.; MUELLER, *supra* note 1, at 93.

225. A good compendium in German is SCHAUB, *supra* note 221.

226. On the enterprise council, *see infra* VI(B) and note 229.

227. Sections 17, 18 Law on Protection Against Dismissal (Kuendigungsschutzgesetz) of August 25, 1969, [1969] BGBl. I 1317; *also* in NIPPERDEY, *supra* note 7, at 152.

228. On co-determination *see* Winkhaus, *supra* note 11, at 1287-89; Beal, *Co-determination in German Industry: Origins of Co-determination*, 8 IND. & LAB. REL. REV. 483 (1955); Conard, *supra* note 2, at 102 *et seq.*; Steefel, *supra* note 102, at 537 *et seq.*; Winkhaus, *Co-determination of Employees in West German Companies*, 27 BUS. LAWYER 879 (1971/72); W. GARCIN, COGESTION ET PARTICIPATION DANS LES ENTREPRISES DES PAYS DU MARCHE COMMUN 15-267 (1968) (Editions Jupiter, Paris); Biedenkopf, *Mitbestimmung am Scheideweg*, Frankfurter Allgemeine Zeitung (Frankfurt/Germany), December 9, 1972, at 17; Ballerstedt, *Zurueck zue Klassenwahl?*, Die Zeit (Hamburg/Germany), March 23, 1973, at 42; Bucerius, *Der Krieg vom letzten Mal*, Die Zeit (Hamburg/Germany), May 4, 1973, at 48; BAERMANN, *supra* note 133, at 190-95, 257-59.

229. *See supra* note 220, last paragraph.

council (Betriebsrat).[230] This council plays a vital role in negotiating with the employer.

1. *Historical Background*

The roots of co-determination are found in canonical and constitutional law and efforts by papal or feudal subjects to take an active part in making political decisions.[231] Surprisingly, the German codifications implementing co-determination were enacted after World War II under strong influence and pressure by the Allied Powers in order to divest the coal mining and steel industries of their former power.

It is noteworthy to emphasize that the initiators of co-determination were opposed to the German postwar concept of the "social market economy" (soziale Marktwirtschaft).[232] Quite strangely, both of these concepts, supposedly irreconcilable with each other, have been co-existing since then.

2. *Present Law*

Co-determination is extensively regulated in the 1972 Labor Management Relations Act (Betriebsverfassungsgesetz).[233] This is an elaborate version of the 1951 Co-determination Law[234] and the 1952 Labor Management Relations Act.[235] The Co-determination Law provided that all capital-companies in the coal and steel industries with at least 1,000 employees create a supervisory council[236] composed of five share-owners, five employees, and one neutral member to be chosen jointly by the other ten representatives.[237] This is the so-called qualified co-determination (qualifizierte Mitbestimmung) whereas

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230. Labor Management Relations Act (Betriebsverfassungsgesetz) of January 15, 1972, [1972] BGBl. I 13; also in NIPPERDEY, *supra* note 7, at 570. The Act is commented on and translated by M. PELTZER, LABOR MANAGEMENT RELATIONS ACT (1972). On the Act's predecessors, *see infra* VI(B)(2) and notes 234, 235, 237.

See also Fabricius, *The German Law of 1972 on the Organisation of Enterprises*, 1972 J. BUS. L. 340; Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156, 168-69; MUELLER, *supra* note 1, at 96-99.

231. Section VI(B)(1) of this article relies on BAERMANN, *supra* note 133, at 191-95.

232. *See supra* V(B)(1) and note 194.

233. For citation of the Act *see supra* note 229.

234. Co-determination Law (Mitbestimmungsgesetz) of May 21, 1951, [1951] BGBl. I 347; *also* in NIPPERDEY, *supra* note 7, at 573.

235. Labor Management Relations Act (Betriebsverfassungsgesetz) of October 11, 1952, [1952] BGBl. I 681. No translation of this first Act is known, however, the translation mentioned *supra* note 229 also casts some light on the 1952 Act.

236. On supervisory council, *see supra* III(D)(5) and notes 109, 110.

237. The regulation of the Co-determination Law of 1951 was extended to holding companies by the Co-determination Supplementing Law (Mitbestimmungsergaenzungsgesetz) of August 7, 1956, [1956] BGBl. I 707; also in NIPPERDEY, *supra* note 7, at 574. *See* Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156, 169 n.14.

ordinary co-determination under the 1952 Labor Management Relations Act applied to enterprises in any industry of at least 500 employees where a third, rather than half, of the members of the supervisory board were labor representatives.

The 1972 law vastly strengthens the position of the labor unions in general and of the enterprise council in particular. Any enterprise of at least five employees must have such a council. The initiative to form one, however, is left to labor. The council enjoys extended rights in social, personnel, and economic matters. Co-determination in social matters covers working-hours and breaks, manner of payment, vacations and control of workers' performance. In personnel matters, the enterprise council must be informed about selection, training, evaluation, transfer, and dismissal of employees. Economic co-determination further manifests itself in the employer's duty to establish a so-called social plan (Sozialplan) which, in case of substantial changes in production methods or number of employees, is to protect the individual worker's financial and personal interests. Enterprises with 100 or more employees must form an economic committee (Wirtschaftsausschuss) which enjoys informative and consultative rights. In all matters there are compulsory arbitrational proceedings in case agreement between the employer and the enterprise council cannot be reached.

3. *Outlook*

Questions surrounding the future of co-determination take on an ever-growing significance with the emerging harmonization of law within the EEC member countries.[238] Thus, it will be helpful to look at some of the justifications and alterations that are suggested for co-determination of labor.

A good survey of the German legal scene is presented in a compendium prepared by a committee known as the Co-determination Committee (Mitbestimmungskommission or Biedenkopf-kommission, after its reporter Professor Biedenkopf).[239] The report,

238. *See infra* IX.

239. The reader is referred back to BAERMANN, *supra* note 133, at 191-95 where the voluminous report is condensed.

Professor Biedenkopf has lately put forward a slightly modified suggestion of his own. Out of twelve members of the supervisory board, six would represent the shareholders and six the employees; however, one of the latter would especially represent the executives [called "leading employees" (leitende Angestellte) in German law] and another one of the latter six would be assigned the financial interests of the employees. These interests typically concern the problems of employees' shares, pension funds, and other funds created for the purpose of accumulating assets to be put at the disposition of employees [the technical term is "accumulation of financial assets" (Vermoegensbildung)]. In proposing this 6:4:1:1 model, Biedenkopf also provides for procedures in case of a deadlock vote in the supervisory board which are basically designed

presented to the public in 1970, made an analysis of past developments and suggested solutions for the future. The principle of co-determination is well accepted; the discussions only center around the composition of the supervisory board. According to the committee's proposal, six representatives of the share-holders and four representatives of labor would jointly select two additional members of the supervisory board. The proposed preponderance of the influence of the capital is justified by the principle of the entrepreneurial risk.

Labor protection branches out into numerous areas: enterprise protection (Betriebsschutz) comprising safety standards on the job, protection of working-hours (Arbeitszeitschutz), protection of payment (Lohnschutz), protection against dismissals (Kuendigungsschutz), protection for women (Frauenarbeitsschutz), for juveniles (Jugendarbeitsschutz), for home workers (Heimarbeitsschutz), and for the disabled (Schwerbeschaedigtenschutz).[240]

Democratization is fundamentally incompatible with present company law because it is not the supervisory board but the general meeting which has the original power to control the managing board by its elective decisions. Those arguing in favor of extended co-determination in the supervisory board in order to curb the power of super-companies have been proven wrong by experience, at least up to the present. The concentration of economic power in ever fewer hands has not been prevented or even impaired by labor. Quite to the contrary, the German Federation of Labor (Deutscher Gewerkschaftsbund) owns some of the most influential oligopolistic enterprises, for example, the Bank for Common Economy (Bank fuer Gemeinwirtschaft), the New Home (Neue Heimat) home builders,[241] food chains, and travel agencies.

It is probably safe to suggest that the real justification of co-determination lies in the new understanding of the relationship be-

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to assure that the smooth functioning of the enterprise not be jeopardized by the principle of co-determination. Not surprisingly, this model has been criticized from both camps. Biedenkopf would stress the partnership character of the relations between employers and employees, enforce the protection of private property, integrate the law of companies and the law of labor management relations into one law of enterprises, and incorporate the principle of the free market policy into company law; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), September 1, 1973, at 1, col. 2-4 and at 6, col. 5-6.

240. For further information, *see* the two volumes quoted *supra* note 221.

241. Eglau, "Koenig Alberts" *Allmacht, An der "Neuen Heimat" wird jetzt auch intern Kritik laut,* Die Zeit (Hamburg/Germany), May 4, 1973, at 33, col. 2-5; Broichhausen, *Der unersaettliche Bau-Loewe, "Neue Heimat" - ein Mammut-Unternehmen im Gewerkschafts-Auftrag,* Frankfurter Allgemeine Zeitung (Frankfurt/Germany), June 30, 1973, at 15. *See also* Der Spiegel (Hamburg/Germany), July 2, 1973, at 34 on labor problems of the Deutscher Gewerkschaftsbund in its own school of training.

tween employer and employees. Increasingly these groups are seen as partners rather than opponents in the production process.[242]

It must be made clear that any change in the present law of co-determination will require reforms of the law of stock corporations, of limited liability companies, and of company law in general. Almost all of the proposals in one way or another touch upon the number of members in the supervisory board, the duty of board members to keep secrets, the representation of executives (leitende Angestellte) and numerous other questions of the law of industrial enterprises.

The labor unions and many Social Democrats demand "co-determination on a par" (paritaetische Mitbestimmung), i.e. equal representation of labor and capital. In this regard they are opposed by their coalition partners, the Free Democrats, who advocate a 4 : 2 : 4 model, with two seats going to the executives.[243] Apart from the familiar problem of where to draw the line (between a regular employee and one with executive status)[244] this scheme is questionable because of its difficult applicability to limited liability companies and person-companies.

A similar critique would apply to a proposal to adopt a board-system comparable to Anglo-American law. This indeed would constitute a complete alienation from German company law which sharply distinguishes between the supervisory board (Aufsichtsrat), the managing board (Vorstand), and the general meeting (Hauptversammlung).[245]

Still another proposal[246] suggests a supervisory board made up in equal parts by representatives of capital, labor and of the representatives of the "enterprise interest." The latter would be outsiders chosen jointly by the representatives of capital and labor. Management would continue to work to make profit, while distribution or other use of profits would be decided by the supervisory board.

This brief survey shows that the race is still open to anybody with new ideas. Undeniably, mass-production has brought serious problems. Unusually high rates of illness, unexplained absence, and bad performance call for a reconsideration not only of production techniques, but also of labor law.

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242. *See* Engels, *Kompetenz und Verantwortung*, Die Zeit (Hamburg/Germany), October 13, 1972, at 46-47.

243. The government, consisting of a coalition between the Social Democrats and the Free Democrats, may soon be able to reach a compromise and suggest a 6:1:5 (share-holders: "leading employees": employees) model; Frankfurter Allgemeine Zeitung (Frankfurt/Germany), September 4, 1973, at 1, col. 2-4.

244. Steefel, *supra* note 102, at 537 n.149.

245. *See supra* III(D)(5) and note 109.

246. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), April 9, 1973, at 13, col. 3.

A number of private entrepreneurs are trying incentive programs which may one day become workable alternatives. Different models are being tested currently, mostly by medium sized companies owned by individuals or families. Payment is often partially in shares, or other devices are used by which the individual's and the enterprise's financial interests are interrelated. The experience so far has been favorable.[247]

VII. CONSTITUTIONAL PRIVILEGES AND ACCESS TO THE COURTS

The first part of the Basic Law (GG) contains what could be called a bill of rights.[248] Certain rights are declared basic rights (Grundrecht), and these rights enjoy constitutional status making them privileged over conflicting legal positions. They were originally designed to protect the individual citizen from interference by the government but have gradually taken on an affirmatory character by assuring, under certain conditions, positive rights both against the government and individuals. These basic rights play an extremely important part in German administrative and constitutional law.

A certain number of the basic rights may become relevant for foreign parties, especially Article 3 incorporating the principle of equal treatment before the law, and Article 14 guaranteeing private property. However, although many basic rights are granted regardless of nationality, on paper there remains some doubt as to exactly how far foreign parties can go in court in invoking basic rights. Article 19 (3) of the Basic Law (GG) attributes basic rights to domestic legal persons, but remains silent on foreign legal persons. Nevertheless, it is safe to suggest that German courts will give virtually identical legal protection to domestic and foreign parties regardless of capacity to hold legal rights. This analysis should be on safe ground because Article 25 of the Basic Law (GG) incorporates the generally recognized rules of international law into German law.[249]

Another significant constitutional provision is Article 19 (4) which allows recourse to the courts to anybody who has been denied his rights by public executive authorities. This rule is essentially a

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247. *Cf.* Braun, *German Legislation to Encourage Capital Accumulation by Employees*, 17 LAB. L. J. 371 (1966); G. SCHWERDTFEGER, MITBESTIMMUNG IM PRIVATEN UNTERNEHMEN (1972); M. JUNGBLUT, NICHT VOM LOHN ALLEIN (1973).

248. COHN, *supra* note 1, at 48; Barnet, *The Protection of Constitutional Rights in Germany*, 45 VA. L. REV. 1139 (1959); Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT'L & COMP. L. Q. 571 (1968); *cf.* Doehring, *Non-Discrimination and Equal Treatment Under the European Rights Convention and the West German Constitution with Particular Reference to Discrimination Against Aliens*, 18 AM. J. COMP. L. 305 (1970). For citation of the Basic Law (GG), *see supra* note 153.

249. COHN, *supra* note 1, at 49. *But see* Mann, *The U. S. Treaty of Commerce with Germany and the German Constitution*, 65 AM. J. COMP. L. 793 (1971).

last resort which comes into play only after all other legal remedies have failed.[250]

In commenting on the problem of the "nationality" or "domicile" of a company under German law, the principal place of business is the point of domicile with regard to virtually all questions: capacity to hold legal rights, legal organization of a company, rights and duties of its partners and managing directors, and access to the courts.[251]

Recognizing a foreign corporation in German law means acknowledging the fact that the corporation or company is capable of holding legal rights under that foreign law.[252]

VIII. Control of Foreign Exchange

Until some years ago, control of foreign exchange in the Federal Republic of Germany was negligible.[253] But, since the international monetary crisis repeatedly caused a severe problem in recent years, Germany's foreign exchange has shifted from almost absolute freedom to some protection of the national economy and even international trade from speculation in national currencies.

Since 1961 the Law on Foreign Trade (Aussenwirtschaftsgesetz)[254] has given far-reaching powers to the government to regulate foreign trade. Restrictions may generally be imposed if Germany's obligations under international treaties or foreign restrictive activities so require—an extremely rare case so far. A list of specific transactions which may be restricted is similarly limited; at present it includes agricultural exports to countries outside the EEC.

Substantial restrictions do exist today in the import and export of capital. Of particular significance is Article 23 of the Law on Foreign Trade (Aussenwirtschaftsgesetz) which authorizes the government to prohibit the sale of real property by residents to nonresidents, the purchase of bonds, securities and shares by foreigners, and

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250. T. MAUNZ, G. DUERIG & R. HERZOG, GRUNDGESETZ, KOMMENTAR (1971) notes 52-61 on art. 19 (4) Basic Law (GG).

251. SCHLESINGER, *supra* note 1, at 288; FULDA, *supra* note 1, at 767 n.6; BRUECHER, *supra* note 109, at 533; ZAPHIRIOU, *supra* note 1, at 127; Conard, *supra* note 2, at 61 *et seq.*; MUELLER, *supra* note 1, at 24; Kronstein, *The Nationality of International Enterprises*, 52 COLUM. L. REV. 983 (1962); Van Hecke, *Nationalities of Companies Analyzed*, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 223 (1961); KEGEL, *supra* note 142, at 229-35.

252. KEGEL, *supra* note 142, at 233; ZAPHIRIOU, *supra* note 1, at 129-30.

253. *Cf.* Dagon, *Regulation of Capital Influx: Recent Developments in France, Germany, and Switzerland*, 14 AM. J. COMP. L. 38 (1965); STEIN & HAY, *supra* note 1, at 235 *et seq.*, 284 *et seq.*, 788 *et seq.*

254. Law on Foreign Trade (Aussenwirtschaftsgesetz) of April 28, 1961, [1961] BGBl. I 481, last amended by the so-called Cash Deposit Law; *see infra* note 258. *Cf.* M. PELTZER AND K. NEBENDORF, BANKING IN GERMANY (1973).

the payment of interest on foreign bank accounts.[255] Many restrictions are quite short-lived. A brief sketch of the restrictions in force in August 1973 is instructive. Foreigners cannot buy German bonds, securities, shares in stock corporations,[256] (shares in limited liability companies are exempt); foreign investments require clearance by the Federal Reserve Bank (Deutsche Bundesbank) and Germans cannot take out credits abroad totalling more than 50,000 DM. The last provision has been replaced, however, by the Cash Deposit Law (Bardenpotgesetz) which reaches the same result in a different way.[257] Since March 1972, the Cash Deposit Law has been stiffened several times;[258] at present, German residents, including German branches and subsidiaries of foreign enterprises, must deposit 100 percent of the amount of foreign borrowing exceeding 50,000 DM. The rate to be deposited changed from 40 to 100 percent, and the maximum amount allowed from 2 million to 50,000 DM. These developments clearly demonstrate that these restrictions are a reflection of the international monetary crisis. At present, regular reading of reliable newspapers[259] is mandatory to keep up with foreign exchange control.

IX. PERSPECTIVES FOR LEGAL HARMONIZATION

The Treaty of Rome[260] is to ensure within the member states the free circulation of goods,[261] persons,[262] services,[263] and capital.[264] Also,

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255. Art. 23 is translated by BRUECHER, *supra* note 109, at 523.

256. Frankfurter Allgemeine Zeitung (Frankfurt/Germany), February 28, 1973, at 15, col. 4-5; June 14, 1973, at 13, col. 4-5; July 20, 1973, at 13, col. 4-5; *cf. infra* note 258.

257. Law of February 23, 1973, [1973] BGBl. I 109 (100 percent deposit over 50,000 DM).

258. The so-called Cash Deposit Law (Bardepotgesetz) of March 1, 1972, [1972] BGBl. 217 (40 percent deposit of the amount exceeding 2,000,000 DM) and numerous amending laws, *e.g.*, of June 29, 1972, [1972] BGBl. I 999 (50 percent deposit of the amount exceeding 500,000 DM). The current law is quoted at *supra* note 257. *Cf.* Winkhaus, *supra* note 1, at 1296, but note that the law is given as of June 29, 1972. Another effort to keep speculation out of Germany is being made by imposing on nonresident holders of German bonds a so-called coupon tax; *cf.* MUELLER, *supra* note 1, at 138.

259. The Frankfurter Allgemeine Zeitung (Frankfurt/Germany) is suggested as a reliable source of information. It is available in many foreign libraries and newsstands.

260. For English language editions of the Treaty *see supra* note 215.

261. FULDA, *supra* note 1, at 107.

262. STEIN & HAY, *supra* note 1, at 715 *et seq.*; FULDA, *supra* note 1, at 107; U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET (1964); RUNGE, *supra* note 214, at 65-69.

263. STEIN & HAY, *supra* note 1, at 765 *et seq.*; RUNGE, *supra* note 214, at 69-70; FULDA, *supra* note 1, at 107.

264. STEIN & HAY, *supra* note 1, at 788 *et seq.*; RUNGE, *supra* note 214, at 70-71; FULDA, *supra* note 1, at 107.

common principles are envisaged in agriculture;[265] coal, steel, and atomic energy;[266] traffic and transportation;[267] and foreign and domestic trade.[268]

The legislative bodies of the European Economic Communities are entitled to make new law or to harmonize or coordinate existing law. While few clear-cut definitions of harmonization or coordination exist, it is sufficient here to agree with the experts who suggest that harmonization is identical to coordination, approximation, or assimilation.[269] Substantial accomplishments in harmonization already exist or are about to materialize.[270] Examples are the introduction of the value-added tax,[271] the developments in the law of restrictive trade practices, company law, inter-community sales, and creditor-protection.

The present situation in the law of restrictive trade practices is still unsatisfactory because of double, or even multiple, barriers.[272] Enterprises may have to comply with one or several national and EEC antitrust laws; their actions may be legal under one system, illegal under another, and the companies may incur separate fines. This area of the law desperately needs harmonization which, unfortunately, will not come about in the near future. U.S. enterprises, of course, face the additional threat of U.S. antitrust laws.[273]

In company law, draft directives and other legislative projects produce quite an intelligible outline of the future law.[274] The First

265. STEIN & HAY, *supra* note 1, at 364 *et seq.*; RUNGE, *supra* note 214, at 90-96. For some of the more everyday consequences of a common agricultural policy *see* TIME, (European Edition), April 30, 1973, at 8-9.

266. RUNGE, *supra* note 214, at 96-101.

267. RUNGE, *supra* note 214, at 101-04; STEIN & HAY, *supra* note 1, at 913.

268. STEIN & HAY, *supra* note 1, at 378 *et seq.*; RUNGE, *supra* note 214, at 30-34; Kim, *The Common Commercial Policy of the EEC*, 4 J. WORLD TRADE L. 20 (1970).

269. BAERMANN, *supra* note 133, at 61; STEIN & HAY, *supra* note 1, at 776 *et seq.*; RUNGE, *supra* note 214, at 34-41; Chloros, *English Law and European Law: The Problem of Harmonisation*, 36 RABELS ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 601 (1972).

270. *Cf.* Sprudzs, *Status of Multilateral Treaties-Researcher's Mystery, Mess or Muddle?* 66 AM. J. INT'L L. 364 (1972); Majoros, *Zur Krise der internationalen Kodifikationspolitik*, 6 ZEITSCHRIFT FUER RECHTSPOLITIK 65 (1973).

271. C. SHOUP, FISCAL HARMONIZATION IN COMMON MARKETS, 2 vols. (1967); RUNGE, *supra* note 214, at 37-39; Massel, *Future Business Trends in Europe*, in Theberge, *supra* note 1, at 143, 145-46; Hall, Note, *"Value Added Tax,"* 1971 J. BUS. L. 326-28.

272. Schmitthoff, Editorial, 1973 J. BUS. L. 1 [hereinafter cited as Schmitthoff]; Rahl, *supra* note 215, at 79.

273. Rahl, *supra* note 215, at 79.

274. Schmitthoff, *supra* 272, at 2-4; E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION (1971); BAERMANN, *supra* note 133; Massel, *Future Business Trends in Europe*, in Theberge, *supra* note 1, at 144-45.

Council Directive of March 9, 1970 on the capacity of the company and its directors has become Community law. Six other draft directives[275] and a proposal of a draft statute of the European Company based on Article 235[276] together with recent and future reforms of company law in member states[277] constitute further elements of harmonization. Interestingly, the European Company has adopted many traits of German law such as co-determination and the creation of two separate boards.[278] Likewise, in the law of inter-community sales and creditor protection, uniform laws, draft conventions, and conventions represent first steps on the long road to harmonized law.[279]

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275. *See* Schmitthoff, *supra* note 272, at 2-3 (draft directives on formation of the company and maintenance of the capital, on mergers, on the accounts of the company, on the organization of the company, on groups of companies, and on prospectuses of securities). *See also* Zaphiriou, *European Community Law*, 1973 J. BUS. L. 199.

276. On the European company, *see* Ficker, *A Project for a European Corporation*, 1970 J. BUS. L. 156; 1971 *id.* at 167; Mann, *The European Company*, 19 INT'L & COMP. L. Q. 468 (1970); *Baermann*, *supra* note 133, at 4, 50, 60, 143, 145; KEGEL, *supra* note 142, at 230-31; FULDA, *supra* note 1, at 767-69.

277. Schmitthoff, *supra* note 272, at 3-4; Schmitthoff, Editorial, 1973 J. BUS. L. 93; Sanders, *The Reform of Dutch Company Law*, 1973 J. BUS. L. 194.

278. Ficker, *A Project for a European Corporation*, 1971 J. BUS. L. 167, 174-80; RUNGE, *supra* note 214, at 41.

279. Schmitthoff, *supra* note 272, at 4; Zaphiriou, *European Community Law*, 1973 J. BUS. L. 199.

NATIONAL MINORITIES IN INTERNATIONAL LAW

JOSEPH B. KELLY*

I. Introduction

In international law there are a wide variety of legal beings. At one end of the spectrum is the individual, an increasingly important subject of international jurisprudence, and at the other is the state itself, the archtype of the international legal person. Between the two lie a number of entities, one of which is the national or ethnic minority group. This somewhat unfamiliar legal entity is composed of people who wish to retain their distinctive culture, but cannot find expression through an independent state of their own.

Historically, the protection of minority group rights has been a significant issue of international law. As early as 1696, the legal scholar, Victoria, wrote of the rights of the Indian peoples of the Western world in their dealings with Spain, rights which were not grounded on statehood.[1] Throughout the eighteenth and nineteenth centuries the concept of minority rights slowly developed, almost exclusively manifested by bilateral treaties guaranteeing religious freedom to various national groups.[2] By the early twentieth century protection of minorities was a major question of international law.

The concept gained its widest acceptance in the Minorities System of the League of Nations. The resulting shortlived institutional protection was brought to an abrupt halt by World War II. Since then the issue has remained relatively dormant. Only a few remnants exist today, e.g. debates over the legal status of the Palestinian organizations.

Nevertheless, there is reason to believe that the 25 years of neglect may soon come to an end. Three basic factors support this conclusion: (1) the various conditions which directly caused this neglect have either disappeared or are changing; (2) minority groups are increasingly asserting their right to existence and protection; and (3) the basic international machinery is once more available to respond to their problems.

Before these factors are considered, however, it is necessary to explore the development of minority groups as subjects of interna-

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1. FRANCISI DE VICTORIA, DE INDIS ET DE IVRE BILLI RELECTIONS, 115-87 of the reprinted 1696 translation in CLASSICS OF INTERNATIONAL LAW (1964).

2. J.A. LAPONCE, THE PROTECTION OF MINORITIES 23-9 (1960); *see also* INIS CLAUDE, NATIONAL MINORITIES 6-9 (1955).

tional law, including the role of the League of Nations and the United Nations, and to consider what legal rights, if any, minority groups possess under current international law.

II. Minority Groups as Subjects of International Law

The existence of minority groups as subjects of international law stems from the development of the nation-state system. Until this century, the struggle for human rights was not principally waged by the individual against the state, but by an identifiable group (a nation) against a state in which it was not the predominant nationality. This resulted from the unique development of the European political system both before and after the Treaty of Westphalia of 1648. The system's evolution was marked by a tendency to align the state with the nation, thereby creating not a state system, but a nation-state system.[3] The idea of the nation-state system limits the demographic extent of the state to that of the nation.

One difficulty with the nation-state is that racial minorities are either rejected by the state or forced to lose their identity and become part of the dominant group. Language, customs or religion of the minority must be changed to that of the predominant nationality within the state before full citizenship is complete.[4] Casualties of this tendency to equate the nation with the state, included the integral land empires of Austria, Turkey and the tiny states of Germany and Italy.

It is natural for a nation to seek independent statehood. The nation forms the state in order to further its self-interest, to insure its survival, and to protect it from exploitation by a foreign nation-state. Initially, the resulting union of nation and state, if achieved, seldom precipitated an expansionist drive, the more immediate goal being freedom from foreign domination. Later, as will be seen, this was not always so.

Instances of abuse of minorities by the nation-state were widely publicized in the nineteenth century. This publicity sparked public approval of collective action against such abuses. One of many examples was popular support for European action against Turkey to protect the Armenians shortly after World War I.[5]

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3. *See* P. POTTER, INTRODUCTION TO THE STUDY OF INTERNATIONAL ORGANIZATION, at Ch. IV (1922) for a concise discussion of the rise of the present system of nation-states.

4. Max Lerner, in his introduction to MACHIAVELLI, THE PRINCE AND THE DISCOURSES xxxiv (1940) concisely stated this tendency of the new nation-state to force internal uniformity: "two elements were historically to enter into the composition of the Western nation-state. One was national unity and the idea of a common tongue, common culture and common economic limits. The second was a realistic concentration of power at the center in order to break down divisive barriers."

5. For a brief synopsis of the Armenian massacres during World War I *see* A. MOOREHEAD, GALLIPOLI 98-101 (1956).

A parallel development of importance was the emergence of the colonial system. The African and Asian continents were being carved up into various units controlled by European powers. This arbitrary division led, in virtually every case, to the creation of national and ethnic groups who were denied basic civil and political rights. While the abuses of the European minorities would later be the base of the Minorities System of the League of Nations,[6] the oppression of colonial peoples would lead to the development of the Mandate System which would deal, in substance, with many of the same problems.

In large part, the tensions of colonial expansion, combined with the abuses of European minorities and their blossoming national consciousness, served as a catalyst for World War I.[7] It is not surprising, then, that 1919 was a crucial year in the development of minority rights.

At that point, looking back at the experience of the nineteenth century, two goals appeared in the area of national minority rights. One was the need to protect national minorities living within the various nation-states by either giving them their own nation-state or by insuring, through supervision by an international body, equality of treatment with that of the national majority with which they resided.[8] The second was the desire to protect colonial peoples by either promoting their independence or insuring against their exploitation by the colonial power. This desire to solve these national minority problems inherited from the nineteenth century is clearly seen in the League of Nations' efforts to protect the rights of minorities, and to a much lesser extent in similar United Nations' efforts. The framers of the League Covenant and the U.N. Charter, and the delegates who later implemented these documents, may not have been specifically aware that they were adding some substance to the shadowy legal existence of collective groups, where the emphasis is on group rights rather than on individual human rights. Certain real problems left over from the nineteenth century were there and the League merely attempted to solve them.

III. The League of Nations and the Minorities System

It was natural that the League of Nations should interest itself in the national minorities problem. History and recent events had shown that such groups needed protection from a nation-state. Woodrow Wilson had attempted to write international protection of minorities into the League Covenant itself, but was frustrated in his ef-

6. *See* Section III *infra.*

7. P. DE AZCARATE, PROTECTION OF NATIONAL MINORITIES 1 (1967); *see also* CLAUDE, *supra* note 2, at 10.

8. *See* Sectino III *infra.*

forts.[9] The notion of minority group rights ran contrary to concepts of individualism and state sovereignty on which the League was based.[10] Nevertheless, through various treaties, declarations, institutions, and actions associated with the League, there developed a systematic approach to the problem which became known as the Minorities System.

As far as possible the Treaty of Versailles and related treaties drew or confirmed the boundaries of states along nationalistic lines.[11] The dominant theme of self-determination meant the liberation of minorities from real or fancied abuses. These abuses ran the gamut from outright physical persecution to the denial of certain social or economic rights. If a minority could protect itself by forming its own state then all "rights" of the minority would be secured.

It was, however, impossible to follow nationalistic lines completely in the formation of the new states. Therefore, to afford protection when a new nation-state contained a minority, several different steps were taken:

(a) Special minorities treaties, each containing a guarantee clause allowing direct access by minorities to the League, were concluded between the Principal Allied and Associated Powers and Czechoslovakia, Poland, Rumania, and Yugoslavia;[12]

(b) Provisions on the rights of minorities were included in the peace treaties with Austria, Bulgaria, Hungary, and Turkey;[13]

(c) Declarations pledging minority protection were made before the Council of the League by Albania, Estonia, Finland, Iraq, Latvia, and Lithuania on or after their admission to the League;[14]

(d) Special provisions were included in the convention regarding Memel concluded by the Allied Powers and Lithuania,[15] and in the

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9. P. DE AZCARATE, PROTECTION OF NATIONAL MINORITIES 1 (1967); *see also* CLAUDE, *supra* note 2, at 10.

10. CLAUDE, *supra* note 2, at 14-15.

11. *Id.* at 14.

12. *Id.* at 19-20.

11. Parts II and III of the Versailles Treaty with Germany; Parts II and III of the Treaty of Trianon with Hungary; and Parts II and III of the Treaty of Saint-Germain-in-Lay with Austria. Found in 3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PRACTICES AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1910-1923, at 3346, 3553, 3136 (1923).

12. Treaty of St. Germain, arts. 2, 7, 8, and 9; Treaty of Peace with Poland, arts. 2-8; Treaty with the Serb-Croat-Slovene States, arts. 2-10. *Id.* at 3699, 3714, 3731.

13. Treaty of Peace with Hungary, arts. 54-60; Treaty of Saint Germain-in-Lay with Austria, arts. 62-69. *Id.* at 3529, 3141. Treaty of Peace with Bulgaria, arts. 49-57; Treaty of Peace with Turkey. 2 TREATIES OF PEACE 1919-1923, at 658, 789 (1924).

14. Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/221/43v.1 (1967).

15. *Discussed in* Green, *The United Nations and Human Rights*, in THE UNITED NATIONS AND THE PROMOTION OF THE GENERAL WELFARE (R. Osher ed. 1957).

convention concerning Upper Silesia concluded by Germany and Poland.[16]

These instruments guaranteed *mutatis mutandis* protection of life and liberty and freedom of religious worship for *all* inhabitants of each country. In addition, they guaranteed the following "rights" to minorities: (1) equality of legal, civil and political rights, especially for admission to public employment; (2) free use of the mother tongue in private intercourse, commerce, religion, the press, and at public meetings and before courts; (3) a right, equal to that of other nationals, to maintain at their own expense charitable, social, or educational institutions; and (4) in districts where a considerable proportion of the population belong to the minority, instruction in the state elementary schools in the language of the minority.

Without enforcement clauses, these treaties, offering minorities recourse to the League of Nations, and the declarations, spelling out the rights to be protected, would probably have been ineffective.[17] Realizing this, the League Council took two dramatic steps. First, and most importantly, it allowed direct petitioning to the Council by the minorities themselves. Secondly, it created Minorities Committees to consider petitions and make inquiries into facts. Then, to modify these major inroads on national sovereignty, the Council chose to establish a strict screening procedure. The Secretary-General was authorized to eliminate petitions that (1) requested severance of political relations between the minority and the state of which it was a part, (2) emanated from an anonymous or unauthenticated source, or (3) contained violent language.[18]

The net result of these treaties and actions was the essence of the Minorities System. The system was administered in large part by the Minorities Section of the League Secretariat.[19] Clearly, this was the high-water mark in international concern with minority rights.

The League acted, often successfully, as moderator in the relations between minorities and the various nation-states involved. Thus, at least superficially, a distinct limitation was placed on the internal sovereignty of these states which had received international recognition. The actual enforcement of this limitation depended, as everything ultimately depends in an international organization, upon the cooperation of the member states. The weakness of the system

16. Convention relating to Upper Silesia, May 15, 1922, 9 L.N.T.S. 465 (1922). *Discussed in* I.F. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 152-158 (1958).

17. CLAUDE, *supra* note 2, at 15.

18. LEAGUE OF NATIONS ASSOCIATION, TEN YEAR REVIEW OF THE LEAGUE OF NATIONS 119 (1930); C. WEBSTER, THE LEAGUE OF NATIONS IN THEORY AND PRACTICE 212 (1933).

19. P. DE AZCARATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 123-30 (1945).

was thus reflective of the reluctance of the states concerned to fully cooperate.[20]

A. *The League's Actions to Safeguard Minority Rights*

From its very inception, the League Council's effort to assist minorities ran into opposition from all sides.[21] The small states were especially concerned. They thought the provisions were not only derogatory to their sovereign rights and an interference in their domestic affairs, but also discriminatory.[22] As only small powers were affected by the treaties[23] they thought that the Great Powers were imposing on other states obligations they were not prepared to accept in regard to their own minorities.[24] As a result, they "usually did everything in their power to forestall petitions by imposing obstacles to intimidate and discourage potential complainants."[25]

The Council was also under continuous attack from the minorities themselves on the ground that the Council did not give them an equal chance to present their case.[26] The German minorities outside Germany were particularly vocal. Under the inspiration of the League of Germans Abroad, a Congress of Minorities, which met annually from 1925 to 1938, was formed to pressure the Council into the strongest forms of intervention.[27] The German minorities were quick to petition the Council, even in trivial matters.

A third, and ultimately fatal, source of difficulty came from states who had national groups outside their borders. These states attempted to use the minority question as an excuse to regain lost territory. Germany and Hungary especially found it in the best interest of their territorial ambitions to keep the unhappy state of their minorities in other countries constantly before the public eye. This was a dangerous game played with the peace of Europe.

As Germany's territorial ambitions increased so did its alleged humanitarian interest in the protection of minorities.[28] It encouraged German minorities to petition the League. Between 1920 and 1929 of the eighteen different minority groups petitioning the League, German minority groups filed 18 percent of the total; in the next nine

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20. Robinson, *International Protection of Minorities and the Right of Self Determination*, ISRAEL YEARBOOK ON HUMAN RIGHTS 70 (1971).

21. CLAUDE, *supra* note 2, at 15.

22. *Id.* at 26.

23. Poland, Czechslovakia, Rumania, Yugoslavia, Greece, Albania, Austria, Hungary, Bulgaria, Lithuania, Finland, Latvia, Estonia, Turkey and Iraq. Germany, a major power, was affected in respect to Upper Silesia.

24. WEBSTER, *supra* note 18, at 210.

25. J. ROBINSON, WERE THE MINORITIES TREATIES A FAILURE? 175 (1943).

26. CLAUDE, *supra* note 2, at 25-35.

27. WALTERS, *supra* note 16, at 405, 406.

28. J.B. SCHECHTMAN, EUROPEAN POPULATION TRANSFERS 1939-45, at 31 (1946).

years that percentage was 38 percent.[29] Germany's use of the minority issue was obviously prompted by self-interest.

The situation came to a head in the League in 1929. The Polish Foreign Minister, on December 15, 1929, charged before the Council that Germany was "using" her minorities in Poland as a pretext for extending the German frontier. Other states bound by the Minorities Treaties began to fear for the safety of their own frontiers, particularly those bordering Hungary. They felt that they had accepted the Minority Treaties in return for a frontier guarantee which no one was now willing to give them.

At the same time, the weaker, non-German minorities became discouraged. Petitions to the League Council peaked in 1930-31 at 204, and then declined rapidly to only four in 1938-39.[30] The fall-off was due to the frustrations of the weaker groups and the self-perception of the stronger groups (notably German) that they were potential majorities and thus no longer interested in minority status.[31]

The prestige of the Council was the principal force keeping the treaties in effect as long as they were against this three-sided attack.[32] Despite the difficulties, the Council was successful in the settlement of many actual cases. It received 400 petitions (excluding those from the special area of Upper Silesia), rejected about half, settled 15, and referred the rest to committees for settlement out of the glare of publicity.[33] On three occasions the Council applied to the Permanent Court of International Justice for an advisory opinion on points of law.[34]

The Council, in the final analysis, pleased no one in its handling of the Minority problems. At best it had a difficult task. The Minorities Committees of the Council are perhaps the only institution of the League of which no trace appears in the structure of the United Nations.[35] Nevertheless, the Minorities System was not a failure in the development of the concept of individual human rights. It

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29. *Id.*; *also* CLAUDE, *supra* note 2, at 45.

30. ROBINSON, *supra* note 25, at 252.

31. *Id.* at 251.

32. *See* WALTERS, *supra* note 16, at 402-11 for a full account of the 1928-29 crises in the Minorities System. *See also* L. MAIR, THE PROTECTION OF MINORITIES (1928) for a complete reporting of minority petitions to the League.

33. WEBSTER, *supra* note 18, at 215; PALMER & PERKINS, *supra* note 5, at 343.

34. Advisory Opinions No. 7, Sept. 14, 1923 on Acquisition of Polish Nationality, P.C.I.J. (ser. B) No. 7; Advisory Opinion No. 19, May 15, 1931 on Access to German Minority Schools in Upper Silesia, P.C.I.J. (ser. A/b) No. 40; Advisory Opinion No. 26, Apr. 6, 1935 on Minority Schools in Albania, P.C.I.J. (ser. A/B) No. 64; Judgment of Apr. 26, 1928 on Minority Schools in Supper Silesia, P.C.I.J. (ser. A) No. 15.

35. WALTERS, *supra* note 16, at 175.

was here that the rights of a group of people within a state became an international, rather than national, concern.[36] It was here that enumerated rights of a group as against their state were put into international treaties supervised by an international organization. It was here also that individuals had an explicit right to by-pass their state and to appeal directly to an international organization. Groups of individuals were actually placed against their own states in the international arena. The international politics involved may have been faulty because these groups eventually became pawns of various states in a political power struggle,[37] nevertheless, the principles which evolved were distinct inroads into the rigid rule that international law was concerned only with the relationship of states with each other and with foreign individuals.[38] A new legal personality, recognized in international law, was emerging. The minority group, asserting its right to maintain its group characteristics and to participate fully and equally with others in the life of the state, became a *bona fide* subject of international law.

The League attempted to protect the rights of people who for some reason needed more protection than their state was able or willing to give them. As a consequence, human rights began taking on international significance, not because the world suddenly discovered minorities had rights, but because it realized that a new basis of protection was necessary, on the international, rather than national level.[39]

B. *The Mandates System and Minorities*

Closely related to the question of minorities within a nation-state was the question of colonial nations under the domination of foreign states. By the end of World War I colonialism had come to be looked upon as an evil.[40] With this attitude in mind the framers of the

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36. WEBSTER, *supra* note 18, at 217.

37. The political overtones which minorities, along with mandates, had assumed is reflected in the following observation on committee work in the League: "The Fifth [committee] devoted itself to social and humanitarian questions and the Sixth to 'political' questions such as mandates, minorities and the admission of non members." A. ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW, 1918-1935, at 461 (1936).

38. In Upper Silesia alone, a local international body functioning under the supervision of the League of Nations heard 2300 cases where minorities were authorized to proceed against their own state before an international commission. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 534 (1956).

39. For example, art. 12 of the minorities treaty between the Principal Allied and Associated Powers and Rumania signed at Paris on Dec. 9, 1919 stated that:

> Roumania agrees that the stipulation in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, *constitute obligations of international concern* and shall be placed under the guarantee of the League of Nations. [*Emphasis supplied.*]

3 TREATIES, *supra* note 11, at 3728.A "moral" objection to a continuation of colonialism

League were faced with the task of providing new governments not modeled on old colonial structures for the former German and Turkish colonies in the Pacific, Africa and the Middle East. The Mandates System, which the League adopted, was a farsighted solution to part of the problem of colonialism.

The Covenant made the following specific provisions for the international supervision of the advancement and protection of a portion of colonial peoples:

> Article 22. (Former Colonies of the Central Powers)[41]
>
> 1. For peoples not yet able to stand by themselves, under strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization.
>
> 2. The tutelage of such peoples should be entrusted to advance nations and should be exercised by them as Mandatories on behalf of the League.

Three different classes of Mandates were created with varying degrees of control and quarantees.

The League approach to mandated colonies was surprisingly similar to that of minorities, despite the fact that minorities were handled only within the League System and not within the covenant itself.[42] Such a similarity can be seen in the Council supervision of minorities and mandates. In the former, it worked through the Minorities Committee and in the latter through the Permanent Mandates Commission.[43] Petitions could come to the Council from the mandates as well as the minorities. In both cases abusive petitions were screened. All petitions were either routed to the state containing the minority or to the Mandatory for its comments.

An interesting interplay of the mandate and minority systems occurred in the case of Iraq. Iraq was a Class A Mandate protected by Article 22. In 1932 Britain offered to withdraw as the mandatory power and to recommend Iraq for admission into the League. The Mandates Commission agreed to terminate the mandatory regime in Iraq when Iraq entered into undertakings designed to secure the protection of minorities and freedom of conscience within its territory.

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by the allied powers in the German and Ottoman colonies was evident in the pre-League debates on the proposed mandate system. WALTERS, *supra* note 16, at 58.

41. The "Council of Ten," consisting of two representatives each of the five great powers, drafted art. 22 which was adopted by the League Committee. For a summary of the compromises necessary to reach agreement *see* WALTERS, *supra* note 16, at 57, 58 and WEBSTER, *supra* note 18, at 44, 45.

42. WALTERS, *supra* note 16, at 173.

43. Provided for by para. 9, art. 22, Covenant of the League of Nations. For a brief discussion of its functions and manner of operation *see* WEBSTER, *supra* note 18, at 285-90.

For colonies not under mandate, Article 23(b) of the Covenant required that the inhabitants be treated "justly." No international machinery was, however, set up to supervise the treatment accorded such colonials by the state controlling them. Nevertheless, an international duty was recognized, which was to be further implemented under the United Nations.

The Permanent Mandates Commission found itself at first encouraged by the Assembly and treated cooly by the Council. No minority power sat on the Council, but four of the seven Council members had mandates. The Assembly, therefore, had more confidence in the Council on minorities matters than it had in colonial questions. Consequently, the Assembly became the vocal spokesman for the equitable treatment of persons residing in mandates.

In five instances the various organs of the League were particularly effective in preventing or correcting abuses in mandated territories. The Union of South Africa was called upon in 1922 in the Assembly by Haiti and India to defend its suppression of the rebellion of the Bondelzwarts tribe in South West Africa over the imposition of a dog tax.[44] Over 100 natives had been killed by air bombings. The Mandates Commission, after investigation, reported to the Council that the suppression was too drastic. The next rebellion in this area was dealt with by the Union of South Africa without a single loss of life.[45]

In 1925, a rebellion broke out in Syria, led by tribal chiefs who were resisting French policies, particularly the French effort to transform their feudal society. To end the rebellion the French bombed Damascus in October 1925. The Mandates Commission met in emergency session and made it clear that it disapproved of many features of the French administration. The French made extensive changes in officials and reform was effected. By 1927, all revolts in Syria had ceased.[46]

In Tanganyika, the British, as Mandatory Power, sought to correct abuses by prohibiting the sale of alcohol to natives. They also entered upon a comprehensive campaign against the tsetse fly which prevented animal husbandry in a large area. The Mandates Commission, while noting these gains, was still concerned with slavery in the mandates. It, therefore, called upon the British to justify the existence of household slavery, and the forced requisition of labor on Lake Victoria and in the distribution of government cotton seed. The British made a detailed reply, explaining their efforts to abolish slavery

44. WALTERS, *supra* note 16, at 212.

45. LEAGUE OF NATIONS ASSOCIATION, *supra* note 18, at 116.

46. *Id.* at 117.

and the circumstances under which forced labor was used.[47]

The Mandates Commission, at the request of Belgium, urged an adjustment of the boundaries between Tanganyika and Ruanda-Urundi because the agreed boundary involved a loss to King Musinga of a considerable part of his territory. The British agreed and a new boundary was adopted to the satisfaction and advantage of the populations concerned.[48]

The Permanent Court of International Justice, in addition to the Assembly, the Mandates Commission, and the Council, contributed to the protection of the mandated people by outlining the international obligations and position of the Mandatory power in their opinion in the Mavrommatis Palestine Concessions case.[49]

For those colonies not under mandate, the system had a favorable effect in formulating a concept of collective rights, not only applicable to all colonies, but to all minority groups as well. First, it established the principle that peoples not able to govern themselves were the sacred trust of civilization, not to be left at the mercy of an individual state. Second, it fixed a standard in colonial administration which tended to be applied in territories beyond the scope of the Mandatory System.

IV. The Protection of Minorities and the United Nations

One of the most striking features of the 1946 peace discussions in Paris was the total lack of discussion about protection of minorities.[50] This was also the case in San Francisco where minority problems were virtually ignored.[51] The reasons were many.

Solicitude for the protection of minority groups, so strong at the time of the formation of the League of Nations, had begun to wane before the outbreak of World War II. As previously suggested, this change was caused in large part by the German government's use of German minorities in neighboring countries to expedite a program of national expansion.

The cases of Czechoslovakia, Poland, Memel and Danzig offer prime examples of this technique. In Czechoslovakia, the Sudenten Germans were soon controlled by the Sudeten Nazi Party, which took its instructions from Berlin. This minority began with demands for more vigorous enforcement of the minorities treaty, shifted to pleas for full autonomy, and by 1938 would settle for nothing less than

47. *Id.* at 117, 118.

48. WEBSTER, *supra* note 18, at 287.

49. The Mavrommatis Palestine Concessions, Aug. 30, 1924, 1 WORLD COURT REPORTS 293 (1934).

50. CLAUDE, *supra* note 2, at 143.

51. *Id.* at 112.

annexation to Germany. In Munich, under the impact of these demands, England and France, vocal exponents of self-determination in 1919, were left in a dilemma.[52] Berlin followed similar procedures to effect the Lithuanian cession of Memel to Germany and to annex Danzig.[53]

These Nazi activities raised among the Allies doubts about the wisdom of continuing interwar policy into the postwar period. By the end of the war, several incidents had further changed the international outlook toward minority problems.[54]

The first was the misuse of minorities already discussed. This misuse not only undermined public support for minorities, it also resulted in the forcible expulsion of Germans from Eastern Europe, eliminating one minority problem by population transfer.

The second was the large population transfer of ethnic groups as they fled incorporation of their areas into the Communist orbit. This resulted in a refugee, rather than minority problem, to which the United Nations was forced to turn its attention. The third was the territorial changes in Eastern Europe which eliminated the Russian minorities in Rumania, Czechoslovakia, and Poland.

And finally, the treatment of minorities in World War II by Germany struck not at the right of the members to retain their characteristics as a separate ethnic group, but at their right to be treated as human beings. This had the effect of turning international concern from protection of group rights, some of which are often superficial, to the more fundamental individual rights of man.

A. *Assimilation and the Post-War Period*

Minority protection and assimilation are manifestly incompatable. Thus, it is most significant that the concept of assimilation was predominant in the development of the post-war international system. In this regard the role of the United States is of the utmost importance.

The League Minorities System had, of course, developed without any input from the United States. In 1945, however, the United States was not only present, but dominant. As with most countries of immigration,[55] the concept of assimilation was very popular in both the United States and in Great Britain.[56] While assimilationist attitudes were by no means universal,[57] they were clearly predominant

52. E. WISKEMAN, CZECHS AND GERMANS (1938).
53. M. BALL & H. KILLOUGH, INTERNATIONAL RELATIONS 268 (1956).
54. *Id.* at 267-70.
55. CLAUDE, *supra* note 2, at 166.
56. *Id.* at 81-3.
57. *Id.* at 74-5.

at San Francisco.[58]

The Western attitude was hardened in this respect by the pro-minorities view expounded by the Soviet Union.[59] Thus on the brink of the Cold War, the minorities question became further distorted by political considerations. Similar political reasoning caused the anti-colonial blocs to seek separation of the issue of self-determination from the issue of minority rights.[60]

As a result there are few vestiges of the interwar approach to the minorities problem either inside or outside the United Nations. The Charter, like the Covenant, contains no specific reference to minorities. While such exclusion did not prevent the League from incorporating a minorities system into its functions, this was not the case with the United Nations.

During the creation of the United Nations organization, only token consideration was given to the question of minorities. In 1947, under the Human Rights Commission of the Economic and Social Council (ECOSOC), a Sub-Commission was formed on the Prevention of Discrimination and the Protection of Minorities[61] (hereinafter the Sub-Commission). The Sub-Commission was originally intended to be two separate commissions, one for discrimination, the other for minorities. Still functioning, it has devoted virtually all its energies to the study of discrimination of individuals, effectively ignoring minority protection.[62]

This situation, however, is not a manifestation of the Sub-Commission's lack of concern. Indeed, the Sub-Commission has made frequent attempts to take some action in the area of minority protection.[63] The chief obstacle has been the parent Human Rights Commission which "has endlessly found such interest in minorities to be 'premature' or 'untimely.' "[64]

Initially the Human Rights Commission authorized a study which concluded that the League Minority System was not still valid and enforceable by the United Nations.[65] In spite of this setback, the

58. Hauser, *International Protection of Minorities and the Right of Self-Determination*, ISRAEL YEARBOOK ON HUMAN RIGHTS 92 (1971).

59. CLAUDE, *supra* note 2, at 170.

60. *Id.* at 173.

61. *See* Claude, *The Nature and Status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 5 INT'L ORGANIZATION 300-12 (1951) for a review of the early work of this Sub-Commission.

62. *See*, Review of Further Developments in Fields in Which the Sub-Commission Has Been Concerned, U.N. Doc. E/CN.4/sub.2/327 (1972).

63. CLAUDE, *supra* note 2, at 147.

64. Hauser, *supra* note 58, at 100.

65. Study of the Legal Validity of the Undertakings Concerning Minorities, U.N. Doc. E/CN.4/376 (1950).

Sub-Commission continued to raise the issue. For example, it strongly recommended that the draft Convention on Human Rights include specific reference to the rights of minority groups to maintain their own culture and language.[66] The proposal was not adopted.[67]

More recently, however, the Sub-Commission has begun to function, if only slightly, in the area of minority rights. After more than 20 years, the ECOSOC Council finally agreed to a Sub-Commission request to conduct a study on protection of minorities.[68] That study, still in progress, was first presented in the 1972 annual meeting of the Sub-Commission.[69] The Sub-Commission authorized the study to continue and resources to be made available to the special rapporteur.[70] While such activity seems slight, in the perspective of the total inactivity of the 1950's and 1960's it becomes significant. More importantly, however, such activity serves to keep the international machinery lubricated and ready to be used when the world community so demands.

V. The Current Legal Status of Minorities

At this point it is necessary to step back and attempt to view the precise status of minorities in international law. The basic question is: Do minority groups have a *right* to exist under international law? If such a right does exist, there are three traditional solutions. These are (1) frontier revision, (2) population transfer, and (3) the development of the non-national state.[71] If the right to remain a minority is not a basic human right, then the only solution would be a supervised gradual assimilation of the minority into the larger ethnic group with emphasis on the protection of the individual rather than on group rights.[72]

By far the most persuasive contemporary codification of an international right to exist as a minority is Article 27 of the International Covenant on Civil and Political Rights which reads:

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66. EVERYMAN'S UNITED NATIONS 194 (3d ed. 1952).

67. PALMER & PERKINS, *supra* note 5, at 414.

68. ECOSOC Res. 1418 (XLVI), U.N. Doc. E/4714 at 16-17 (1969).

69. Summary Records of the Sub-Commission Meeting 1972, U.N. Doc. E/CN.4/sub.2/SR.647 at 150.

70. Sub-Commission Res. 1 (XXV), U.N. Doc. E/CN.4/sub.2/332 at 45.

71. These three solutions are discussed in C. MACARTNEY, HUNGARY AND HER SUCCESSORS: THE TREATY OF TRIANON AND ITS CONSEQUENCES (1937).

72. For example, an individual has a right to participate in the educational system of the state, but not necessarily the basic right to receive his education in a certain language. Also, an individual has the right to a certain period of rest from labor, but not necessarily the basic right to rest on a particular day. Alfred Zimmern's comment on the ideal international order could well be applied as the ideal treatment by a state of its minorities: "In things necessary, Unity; in things indifferent, Liberty; in all things, Charity." *Supra* note 37, at 496.

> In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[73]

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which is composed of a group of highly qualified international experts on the subject, has interpreted Article 27 as being not only a sound conventional rule for the protection of minorities, but also a source of principles that could be applied regardless of the entry into force of the Covenant.[74]

Two other contemporary multilateral instruments affirm the rights of minority groups to maintain their culture and language. The first is the 1960 Convention Against Discrimination in Education sponsored by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Article 5(c) states that:

> . . .it is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language.[75]

The other is the 1950 European Convention for the Protection of Human Rights, which, in Article 14, includes "association with a national minority" as one of a series of bases on which discrimination is prohibited.[76]

In two cases since World War II there appears to have been a peace treaty provision made for a minority guarantee on the interwar pattern. The first was with respect to the South Tyrol, an area in which Italy had pursued a policy of assimilation in the interwar period.[77] Later, the Trieste Settlement of 1954 between Italy and Yugoslavia contained similar express minority guarantees.[78] There was, however, no provision for international implementation in either of these agreements.

Even in the assimilationist minded United States, national minorities have achieved a special status. In the United States, American Indian tribes are in a class by themselves, treated since the land-

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73. International Covenant on Civil and Political Rights, 61 AM. J. INT'L L. 861 (1967).

74. Summary Records, *supra* note 69, at 150.

75. Convention Against Discrimination in Education (UNESCO), Dec. 14, 1960, 429 U.N.T.S. 93 (1962).

76. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955).

77. Treaty of Peace with Italy, 61 Stat. 1369, 1427 (1947).

78. *See,* Schwelb, *The Trieste Settlement and Human Rights,* 49 AM. J. INT'L L. 240-48 (1955) for a discussion of the protection of minorities by this agreement.

ing of the first European settlers not as independent states, but still as groups with enough independent legal existence to enter into treaties and to maintain tribal organizations recognized by Great Britain and the United States down to the present day.[79] The separate legal status of these tribes and the rights they possess are separate from other American citizens. This was evident in the negotiations in the spring of 1973 at Wounded Knee, and in the recent opinion of the United States Supreme Court wherein the court stated:

> It is settled that whatever title [in mineral leases] the Indians have is in the tribe [here the Navajo] and not in individuals, although held by the tribe for the common use and equal benefit of all the members [cases cited].[80]

Even Title VII of the 1964 Civil Rights Act exempts Indian Tribes from its non-discriminatory employment regulations.[81]

On the whole, however, the approach of protecting group rights of minorities by a system of international guarantees have been replaced by guarantees of protection for the individuals who comprise these groups. The peace treaties with Italy, Rumania, Hungary, and Finland all provide that each state was to "take all measures necessary to secure to all persons the enjoyment of human rights and fundamental freedoms. . ." In addition, the Hungarian and Rumanian treaties also contain a provision (Article 2) forbidding "any discrimination between persons of Hungarian (Rumanian) nationality on the grounds of race, sex, language or religion."[82]

It can be argued that the collective enjoyment of these individual rights implicitly grants minority groups the right to exist. Such an analysis ignores the fact, however, that these bilateral treaty provisions and their multilateral equivalent, the Universal Declaration of Human Rights, use the same approach as the U.S. Constitution in which rights guaranteed are those of "persons" or "citizens" and in which there is no reference to minority groups.[83] This type of approach clearly represents the assimilationist ideal. Any analysis

79. It has been stated categorically that a tribe is not a legal unit of international law. *See* Cayuga Indian Claims Arbitration (Great Britain v. United States), NIELSON REP. 203, 307 (1926); *also,* Marshall, C.J., in Johnson v. McIntosh, 21 U.S. (8 Wheat) 543, 578 (1823). But such attempts emphasize more their lack of statehood or their lack of allegiance to and right of protection by a foreign power. The tribes stand alone in their dealings with the United States or Canada. But that does not mean that they have no legal existence any more than it could be said that an individual has no legal existence.

80. United States v. Jim, 409 U.S. 80 (1972). In this same case the Navajo Tribe was granted leave to file a brief as Amicus Curiae.

81. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1970).

82. Treaty of Peace with Roumania, Feb. 10, 1947, art. 3, 61 Stat. 1799, 1801 (1947); Treaty of Peace with Hungary, Feb. 10, 1947, art. 2, 61 Stat. 2109, 2112 (1947).

83. Particularly, the Fifth and Fourteenth Amendments to the U.S. Constitution.

which reads a great deal into these instruments must be tempered by a recognition of this element.

Another international instrument which may prove deceptive on its face is the Convention on the Preventon and Punishment of the Crime of Genocide.[84] The Convention certainly aims at the protection of minorities, at least against physical and biological destruction. The Ad Hoc Committee drafting the convention had specifically wanted to include *cultural* genocide as a species to be prohibited,[85] but strong opposition by the United States and France defeated the idea and as a result the convention avoids all mention of cultural and political genocide.[86]

Thus, if read literally, the Genocide Convention may be interpreted as guaranteeing the right to exist as a minority group. In practice, however, the convention has been interpreted as guaranteeing *members* of minorities the right to exist, and not necessarily as assuring the existence of the group itself.[87]

One of the most striking aspects of relatively recent international agreements is the absence of reference to minority protection where such reference would seem appropriate. Most notable is the lack of provisions in the various treaties granting autonomy to former colonies with large minority populations[88] and in the Universal Declaration of Human Rights.[89] These intentional omissions tend to dampen the already weak provisions in the few treaties which deal with the subject matter.

Yet, on the whole, it appears that the various international protective measures can reasonably be interpreted as according minority groups the right to exist. An exceedingly helpful United Nations study[90] breaks down those areas in which protective measures have been taken. The following shows the number of protective measures taken in international treaties and instruments both before World War II and afterwards:

(1) Grants of Local Autonomy—four prewar/two postwar;[91]
(2) Guarantees of political representation of minorities—none prewar/eight postwar;[92]

84. Convention for the Prevention and Elimination of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951).

85. CLAUDE, *supra* note 2, at 154-5.

86. Kung, *The Present Status of the International Law for the Protection of Minorities*, 48 AM. J. INT'L L. 285 (1954).

87. LAPONCE, *supra* note 2, at 34.

88. Hauser, *supra* note 58, at 100.

89. CLAUDE, *supra* note 2, at 154-55.

90. Protection of Minorities, *supra* note 14.

91. *Id.* at 47.

92. *Id.* at 48.

(3) Protection of nationality—eleven prewar/two postwar;[93]
(4) Protection of family law or personal status—four prewar/three postwar;[94]
(5) Use of language:
a. in general intercourse—thirteen prewar/ten postwar,[95]
b. in courts—thirteen prewar/five postwar,[96]
c. in social ad charitable institutions, religious and educational establishments—13 prewar/seven postwar,[97]
d. in various information media—none prewar/seven postwar;[98]
(6) Social, charitable and religious institutions and educational establishments:
a. religious and charitable—thirteen prewar/two postwar,[99]
b. educational establishments—thirteen prewar/five postwar,[100]
c. sacred places—four prewar/one postwar.[101]

From this breakdown it is clear that there has been substantial international legislation to protect minorities. Additionally, on the customary law level, in some parts of the world, notably Eastern and Central Europe, the right *not* to be assimilated is considered a basic human right.[102] Yet not too much can be made of the combination of these factors. There are essentially two levels of protection of minorities—toleration and encouragement.[103] At the most, international law currently gives minority groups the right to be tolerated. Any progress in the protection of minorities will be directed either towards strengthening provisions relating to toleration of minorities, or towards creating means actually to encourage their existance. The latter course is highly unlikely and open to serious inquiry as to its desirability where it leads to chronic political instability. The former course, that is the strengthening of the basic right to be tolerated, could very well be followed in the near future. The various factors which led to 25 years of virtual inactivity are changing significantly. Furthermore, new factors exist which may increasingly push the international community towards new activity.

VI. MINORITIES TODAY

As previously discussed, the minorities vogue in the League was replaced by a concern for individual human rights in the United Nations. It is clear, however, that the minorities problem, a strict and

93. *Id.* at 49.
94. *Id.* at 49-50.
95. *Id.* at 50-52.
96. *Id.* at 52-53.
97. *Id.* at 53-54.
98. *Id.* at 55.
99. *Id.* at 55-56.
100. *Id.* at 56-57.
101. *Id.* at 57-58.
102. CLAUDE, *supra* note 2, at 165.
103. Robinson, *supra* note 20, at 91.

logical corollary of the principle of self determination of nations, did not disappear.[104]

With the rapid decline of colonialism following World War II and the concurrent emergence of nation-states all over the world, the world's minorities, locked within the borders of states, have increased rather than decreased. Violence and terrorism have marked the path of minorities as they have had to fend for themselves in the absence of any international commission or treaty system.[105] For example, the Tibetans, the Indians of Uganda,[106] the Kurds of Iraq, the Nagas of northwestern India, the Biafrians, the tribes of Upper Burma, the Huks and Mohammedan tribes of the Philippines, the Nubiana of southern Sudan, the Baltic nations, and to a lesser extent the Ukranians, the Croats of Yugoslavia, the French Canadians and the Basque of northwestern Spain have all been unsuccessful in their efforts.

The Bengalis have been more fortunate.[107] However, paradoxically, their success has created two new minorities within Pakistan and Bangladesh. The reported proposed solution is a mass transfer of the Biharis (260,000) from Bangaladesh to Pakistan.[108]

The Irish Catholic of Northern Ireland and the Palestinian Arabs are in the throes of a violent struggle for political identity, with partial success to date by the former.[109]

There has been some limited postwar international legal recognition of this struggle of minorities. Europe, through the Human Rights Convention sponsored by the Council of Europe, has given some help to minorities in that sector of the world. Two cases are illustrative. The first concerned the Austrians living on the Italian side of the Alps where their treatment by the Italian government was a sensitive issue in Austria. In 1961, the Austrian government charged the Italian officials with improper conduct in the trial of several Italian citizens

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104. Kung, *supra* note 86, at 282.

105. Three recent texts outlining various aspects of this struggle are C. ENLOE, ETHNIC CONFLICT AND POLITICAL DEVELOPMENT (1973); A. RABUSHKA & K. SHEPALE, POLITICS IN PLURAL SOCIETIES (1972); and E. NORDLINGER, CONFLICT REGULATION IN DIVIDED SOCIETIES (1973).

106. *See* The East African Asians Human Rights Case (United Kingdom) heard by the European Human Rights Commission on Sept. 27, 1971 for the right of East African Asians to enter Great Britain. *Press Communique*, Council of Europe, c(71)22, Oct. 1, 1971. If fully adhered to by all nations the International Convention on the Elimination of all Forms of Racial Discrimination would be of assistance to minorities.

107. Nanda, *A Critique of the United Nations Inaction in the Bangladesh Crisis*, 49 DEN. L. J. 53 (1972).

108. N.Y. Times, Apr. 18, 1973, at 1, col. 1; *id.*, Apr. 27, 1973 at 36, col. 2.

109. On March 20, 1973, Great Britain proposed, among other things, a greater political sharing of power by the Catholic minority with the Protestant majority in Ulster. N.Y. Times, March 21, 1973, at 16, col. 1.

of Austrian nationality for attacks on an Italian policeman.[110] The Italian government finally arranged for a certain degree of local autonomy for the area.

The second was the "Belgium Linguistic Case" between the French speaking Belgians and the Belgian government over the latter's denial of the former's right to be educated in their own language.[111] The court held in part for the French speaking children on the basis of Article 14 of the European Human Rights Convention which guarantees the enjoyment of language without discrimination.

On a higher level, the International Court of Justice has continued the concept of a legal existence for a group not yet a state in its 1962 opinion on the mandated territory of South West Africa:

> The Administrative supervision by the League constituted the normal security to pursue full performance by the Mandatory of the sacred trust toward the inhabitants of the territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.[112]

These actions constitute only a small response to a most serious problem. Yet the chances for more meaningful international responses are increasing. One reason for multilateral inaction has been the ideology of assimilation propounded in the United Nations by the United States. This factor is necessarily diminished as the U.S. hegemony in the United Nations declines. Moreover, the doctrine of assimilation is no longer such a sacred ideal within the United States itself, as clearly evidenced by the separatist movement and strong activism by many Black Americans,[112] Indians, Chicanos, Puerto Ricans and others, and the philosophical support minority group rights are receiving from diverse sectors of the society.

Other factors responsible for the world policy in the late 1940's are either weakened or have disappeared altogether. Whatever Cold War factors were important are not nearly as strong today. The colonial problems which received so much attention, to the detriment of minority rights, are for the most part solved. Finally, the bitter memories of the abuses of the League System have long since faded.

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110. 4 YEARBOOK OF THE CONVENTION ON HUMAN RIGHTS—1961, at 116-83 (1962).

111. *Legal News*, Council of Europe c(68)27, July 23, 1968; 8 INT'L LEGAL MATERIALS 825 (1969).

112. Judgment in the South West African Cases (Ethiopia v. South Africa; Liberia v. South Africa, Dec. 21, 1962, [1962-1963] I.C.J.Y.B. 84; for further developments *see*, South West African Cases (2d Phase), July 18, 1966 wherein Liberian and Ethiopian claims against South Africa were rejected, [1965-66] I.C.J.Y.B. 83; *also*, Advisory Opinion of the Legal Consequences for Status of the Continued Presence of South Africa in Namibia, June 21, 1971, [1970-1971] I.C.J.Y.B. 100.

Thus, the way is more open for international cooperation for protection of minorities than at any point in the past 25 years. How much action will be taken no doubt depends on how vocal national minorities become and to what degree their problems will affect international peace and security.

VII. CONCLUSION

There has been in this century a rise and fall of minority rights in international law. After World War II, the League and its minority consciousness passed quickly into history. While international concern for minorities is temporarily at a low point, at the very least, minority groups remain established subjects of international law. More importantly, they are still with us, increasingly vocal, and demanding their place in the national and international sun.[114]

It appears that the future of minorities may lie, where independence is not possible, in a form of autonomy within the particular nation-state concerned, where its members may both maintain their cultural heritage and participate fully in the benefits of the larger society. Yet their preservation now rests with the individual state, a future that, in many cases, brooks of conflict and either assimilation or extinction. It is, therefore, apparent that international cooperation to secure even tolerance of minorities may become necessary and desirable in the not so distant future. This diversity within the family of man is not something to be lightly lost. It enriches both the national and international scene. Its value has been summarized by the French historian-philosopher, Jean Danielou:

> The existence of civilizations altogether unlike our own is thus by no means something to be resented, or extinguished. . . . The full beauty of mankind would be diminished by the loss of China's distinctive contribution, or that of the Arabs or the Negroes. Every race and every tongue gives expression to some irreplaceable aspect of humanity. Each language, in particular, has its own genius, its special capacity for handling certain ideas.[115]

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113. Hauser, *supra* note 58 at 95.

114. A recent edition of the COLUMBIA UNIVERSITY JOURNAL OF INTERNATIONAL AFFAIRS is devoted exclusively to this current interest in minorities in the nation-state. *See, Symposium, Political Integration in Multinational States,* 27 J. INT'L AFFAIRS 1-141 (1973).

115. J. DANIELOU, THE LORD OF HISTORY 58 (1958).

PROCEEDINGS OF THE REGIONAL CONFERENCE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

On April 28, 1973, the Regional Conference of the American Society of International Law was held in Denver, Colorado. Two topics were presented for discussion: Transnational Control of Narcotics, and The Prevention and Control of International Terrorism.

The conference convened at 9:00 a.m. in the auditorium of the Law Center of the University of Denver. A welcome was extended by Co-Chairmen Professor Ved P. Nanda of the University of Denver and student representative Michael L. Corrigan.

I. TRANSNATIONAL CONTROL OF NARCOTICS

The morning session was chaired by John A. Moore. Chairman Moore introduced the speaker, Gerhard O.W. Mueller of New York University School of Law, and the panelists for the morning session: Mr. James Burke, Deputy Regional Director, Bureau of Narcotics and Dangerous Drugs; His Excellency Mothusi Mashologu, Ambassador to the United States from Lesotho; Mr. Luis Kutner, Chairman, World Habeas Corpus; Mr. John DeGara, Visiting Professor, University of Denver, Graduate School of International Studies; and Ms. Cathy Lewis, a student at the University of Denver College of Law.

Summary of Mr. Mueller's Remarks

There are four primary types of drugs in the world today: opiates, cocaine, marijuana, and psycho-tropical substances. The following discussion will be restricted to opiates and cocaine for these two types of drugs create the greatest problem since they affect the life style of the users through their addictive properties. Marijuana and the psycho-tropical drugs are relatively inexpensive and do not necessarily dominate the life style of their users.

Today there are an estimated 100,000 to 600,000 hard drug addicts in the United States. Of this number, 50 percent are believed to be in New York City.

The social costs associated with opiate addiction are very high. Three persons die every day from drug related causes in New York City. The average addict has a 50 dollar per day habit. Most male addicts steal to support their habit. Nationwide, the addict must steal four to five times the value of his habit in order to acquire the money necessary to purchase his drugs. Therefore, the cost per addict will range between 150 and 250 dollars worth of goods stolen each day.

Using estimates for New York City, the total annual cost to society from property offenses due to opiate addiction appears to be 9.125 billion dollars per year. The budget for all police forces in the United States is 3 billion dollars per year. However, this estimate is

probably high for two reasons. First, many female addicts support their habit through prostitution. Second, many addicts are also pushers and sell hard drugs to support their habits.

The problem of drug addiction is an international one. In the past, many countries of the world considered addiction only a problem for the United States. However, these countries are now recognizing that they also have a drug problem. In 1971, Prime Minister Pompidou realized that France had an addict problem. In the past, Marseilles was only a processing place for drugs; now it also harbors addicts. In Italy, one of every four persons has tried either hashish, L.S.D. or methedrine. In Hamburg, Germany, 25 percent of the high school students are either using or have experimented with marijuana. Even the Iron Curtain countries recognize the international scope of the addiction problem. Traditionally, alcohol was the drug used by the workers of Eastern Europe. However, the fact that these countries have agreed to participate in an international conference on narcotics indicates that drugs are now finding their way behind the Iron Curtain too.

Historically, the drug problem begins in a country as a soft drug problem. Without any causal link implications, the hard drugs tend to follow the soft drugs. Many countries are currently experiencing a soft drug problem now and are fearful of a hard drug problem in the future.

The majority of the opiates come from poppy gum, but some are produced from the stem of the plant. The largest grower today is India, which has an estimated 100,000 acres of opium poppy under cultivation. The second largest area is the "Golden Triangle," an area composed of Burma, Thailand, and Laos, with an estimated 100,000 acres under cultivation. Turkey has an estimated 35,000 acres under production. Iran dropped out of opium production for several years, but now has an estimated 50,000 acres under cultivation.

Growing opium is profitable for the farmers in these regions. For this reason, it is difficult to control the supply of opiates. The average farmer is very poor. Opium brings the highest price of all the crops he can grow. The farmer earns approximately 100 dollars more per acre annually by growing opium poppies than by growing other crops.

The total amount of opium produced in the world is 2,500 tons per year. Of this amount, 1,000 tons is illegally produced. Of the illicit production, 100 tons is produced in India. This is largely consumed locally. The largest illicit production is in the Golden Triangle, which produces 700 tons annually. Until recently, 70 percent of this was consumed locally. There is now a growing concern that increasing amounts of this production will find their way into other parts of the world. Turkey produces approximately eight percent of the illicit world supply, or 35 to 80 tons per year. Almost all of this is exported to the United States.

The traditional location for processing of opium has been France, and in particular, Marseilles. West Germany has become a major processor. Immense profits involved in the processing and sale of opium have resulted in the increased traffic. The initial buyer pays the farmer 22 dollars per kilo for the raw opium. After processing and transportation, the same kilo sells on the street for 88,000 dollars. This immense profit margin makes it very difficult to eliminate the problem.

The problem of controlling narcotics requires an international approach. In 1961, a relatively effective convention on narcotic drugs was held. Out of this convention came several recommendations. First, voluntary restraints on the production of drugs was urged. Second, it was proposed that the United Nations International Control Board be the supervisory agency. Finally, an International Commission on Drugs was to be formed. The United States applied pressure to have some action taken. However, the other countries were less concerned with the overall problem and, instead, urged the United States to take some action against their major pharmaceutical houses.

A major step forward was taken with the United Nations Protocol of 1972. The Protocol gave the International Narcotics Control Board (INCB) greater inspection and supervisory powers and some enforcement capability. In addition, money was pledged for local control. The INCB was authorized to send international teams to study individual countries, extradition provisions were increased, and greater promotion, education, study and treatment programs were proposed.

The 1972 Protocol is a very strong international convention and strong control and enforcement provisions were included. More importantly, the increased scope of the INCB will provide a much stronger data base on international narcotics control. This data can be used to place increasing leverage on international organizations and individual states to more effectively control the flow of narcotics.

There are other sources of international enforcement of narcotics control. The United Nations Commission on Narcotic Drugs set limits on the production of narcotics and arbitration procedures. At the present time, however, the Commission is probably not powerful enough to be effective. The 1971 Fund for International Drug Research and Education provides funds to help in the control effort. The World Health Organization, NATO, and UNESCO are all involved in the international control effort to some extent.

To a large extent, the problem of international narcotics control enforcement is one of knowledge. Therefore, the first step which must be taken is the marshalling of world opinion. Publicizing who the "bad guys" are and what they are doing will be necessary. However,

this should not be done too forcefully to avoid polarizing the different states.

The second step should be the education of the world's states, coupled with the propagation of a standard of enforcement. This will create leverage at the international level and help achieve world cooperation. It is at this level that the work of WHO, UNESCO and other regional and international organizations is so important. They can help provide the education, or propaganda, necessary to scare countries into compliance.

There must also be periodic reporting of information on the international narcotics problem, and the data reported must be sufficiently specific to get the compliance of obdurate states. Such data is also a check on other states and should be published to show the degree of world compliance.

Ultimately, a new world jurisdiction may have to be created. This would be the ideal. The jurisdiction could be either international or regional in scope. The 1953 International Criminal Court draft resolution should be revived and the court made an important part of the international narcotics control mechanism.

The entire world is threatened by the scope of the international narcotics problem. Control of the sources of natural narcotics is only the first step. We must continue to move forward if we are to stop production; if we simply control the opiates, new international problems involving chemical narcotics, like methadone, will arise. Without production controls, we will not have solved the problem, but only substituted one problem for another.

DISCUSSION

Mr. Burke discussed the expansion of the Bureau of Narcotics and Dangerous Drugs in the last few years. The Bureau has consolidated U.S. efforts in international control and has begun working closely with the police forces of other countries. The Bureau's activities have resulted in an increasing awareness within the government of the importance of international cooperation for narcotics control. The Bureau was instrumental in the U.S. encouragement and support of Turkey's decision to reduce or eliminate opium growing through subsidization of farmers who agree to grow other crops. Although this subsidy program costs the United States 40 million dollars annually, it has significantly decreased the supply of heroin flowing into the United States.

Ambassador Mashologu noted that ten years ago the African countries felt that hard narcotics trafficking was a U.S. problem. More recently, however, these countries have become actively concerned. They fear that as more pressure is placed on the traditional narcotics growing countries to curb large scale trafficking, the prob-

lem will be exported to other countries. This would compound the general spread of narcotics traffic which is already affecting most countries of the world. Lesotho is one example; since 1967 there has been a disturbing increase in production of marijuana.

Mr. Kutner said that while it was desirable to discuss the problem, there is little world consensus on how to extinguish the source. The problem is not really difficult. It is a simple matter of fundamental economic and social values. The system can only exist where there are corrupt government officials. It will not be possible to eliminate the "narco-agronomy" without a sense of honor, political responsibility, and concern for the individual. What is needed is a combined economic, psychological and sociological approach to the problem. Subsidizing the production of other crops as a substitute for opium is a constructive first step.

Mr. DeGara noted that while the narcotics problem is growing faster than the solutions, there are certain hopeful factors to be considered. First, an increasingly large amount of data is being collected. This is highly useful for international efforts of control. Secondly, there has been a beginning of international cooperation in the area, exemplified by the 1961 U.N. Convention on Narcotic Drugs and the 1972 U.N. Protocol. On the other hand, more financing is needed to implement effective programs. The U.N. Fund for Drug Abuse Control is simply inadequate. Across the board more money is needed both to promote crop substitution and to help integrate former drug users into society. Such a two-sided approach is necessary to solve the problem.

II. THE PREVENTION AND CONTROL OF INTERNATIONAL TERRORISM

The afternoon session of the Conference was opened by Chairman Ved P. Nanda. Putting the discussion in perspective, he noted the lack of world consensus on defining the nature of acts which constitute terrorism and thus the inability of the world community to effectively cooperate. There is, he observed, a spectrum of world opinion. At one extreme is the belief that terrorists should have no human rights and be treated as criminals. At the other is the position that terrorists must be treated in non-criminal ways. Dialogue, such as the Regional Conference, is, therefore, important to help bring divergent world views on terrorism closer together.

The Chairman then introduced the two principal speakers at the afternoon session, His Excellency Mothusi Mashologu and Mr. Luis Kutner, and panelists at the afternoon session: Captain Bard O'Neill of the United States Air Force Academy; Captain R. Lenihan of United Airlines; Gerhard Mueller; Charles Brower, Acting Legal Adviser for the Department of State; and Mr. Patrick Vandello, a student at the University of Denver College of Law.

Summary of Ambassador Mashologu's Remarks

International violence begets counterviolence; terrorism occurring anywhere is, therefore, a concern of the entire international community. While it is preferable to approach such a problem through a rule of law, the pace of legal action has been too slow. It is likely that other approaches will have to be used if we hope to control terrorism.

Although it is theoretically possible to achieve agreement among the majority of states on some measures to control international terrorism, no such agreement appears to be imminent. There are at least four major proposals and many amendments before the U.N. General Assembly to deal with international terrorism. As one of the most actively concerned, Lesotho has proposed several comprehensive amendments to draft resolutions on terrorism which have been introduced in the General Assembly. But, if any resolution is to achieve support of a majority of nations, there will have to be tough political bargaining coupled with political accommodation among the member states.

In general, the proposals currently before the United Nations are too restrictive to obtain majority support. To gain acceptance, all forms of terrorism, regardless of the parties, must be condemned. For example, state-sponsored terrorism in South Africa should be prohibited. Yet the restrictive proposals currently on the floor elevate this form of violence to a higher status and do not call it terrorism. Thus, any successful resolution will have to be more comprehensive in scope.

Additionally, several new elements should be included. First, any accord on terrorism must recognize elements of political change. This is aimed at colonial and neo-colonial governments who deny their people the right of self-determination. Second, the special status of liberation movements must be recognized by the world community. Usually, liberation movements are made up of people who have been terrorized themselves. Equity demands that terrorist agreements not be enforced against these people. Third, a U.N. sponsored terrorist resolution should come out against state sponsored or directed terrorism such as exists in South Africa. Finally, the question of extradition and asylum must be clarified in any agreement on terrorism, within the scope of what is to be considered terrorist acts.

The new states of the world today take a different view of terrorism than the older states. The new states see a value in some forms of terrorist-type activity as a means of achieving independence, even though they are against terrorism in other circumstances. Political realities must be taken into account. Terrorism is a last resort which arises when other channels of communication are closed. Therefore, the basic requirement in achieving any resolution on terrorism is to open up the channels of political communication among parties hitherto involved in incidents of international terrorism.

Summary of Mr. Kutner's Remarks

Terrorism, in the form which we know today, began at the end of World War II with aircraft hijacking. Hijacking poses a serious threat to the international community. There is a need for international sanctions and for cooperation between states if we are to deal effectively with the problem. However, as of yet, there has been no concerted effort on the part of the states of the world to responsibly attack the problem.

Certain basic principles have been agreed upon by the community of nations. The Tokyo, Hague, and Montreal Conventions all contain some principles of hijack prevention. This agreement, even though largely tacit in nature, indicates a global awareness of the problem. However, the international community is as yet unwilling, for various economic and social reasons, to strongly attack the problem for fear of upsetting a delicate international politico-economic relationship.

The concern over the international aspects of hijacking has led to concern over other forms of terrorism. The individual has been recognized as a subject of international law since the London Agreement of August 1945. Also, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights recognized the rights of an individual solely because he is a member of the family of man and entitled to human dignity.

To complete these conventions, as an additional tool in the fight against international terrorism, the common law principle of "constructive notice" needs to be added. This principle presupposes information or knowledge of a fact by a person through imputation of law because the person could have discovered the fact by proper diligence. It is clear that individual heads of state are responsible for activities that take place within their territorial borders. This becomes clear when one includes the international legal principle of territoriality which accords to the state the responsibility for persons and activities which emanate from within the territorial jurisdiction of that state.

The concept of constructive notice, as tempered by a standard of reasonableness, will help the world to recognize individual criminal liability. Also, it will help to focus world opinion on those responsible for harboring the terrorists. Appropriately, where international laws have been violated both individual heads of state and the states themselves, as members of the world community by virtue of international agreement and the Charter of the United Nations, shall be subject to appropriate international sanctions.

DISCUSSION

Captain O'Neill discussed the political barriers in dealing with terrorism and national liberation movements. Terrorism is generally

only used by the weak. For this reason, the Soviet Union and the People's Republic of China will not support any general international prohibition on terrorism, because such an agreement would jeopardize their relationship with revolutionary groups and the governments harboring these groups. Also, international accord would probably not be effective at the present time since world opinion seems to be supporting retaliatory terrorism against the Arabs by Israel. Unless we distinguish between terrorism and other forms of violence, no international agreement can be effective.

Captain Lenihan was the pilot of a hijacked airplane and briefly described the incident. He expressed the belief that the only solution to hijacking is to boycott countries which will not prosecute hijackers and impose stiff penalties on those hijackers. However, the United States has perpetuated a double standard since it does not prosecute Cubans for hijacking planes to the United States, but is all too willing to condemn those who hijack U.S. planes to Cuba. The United States must pursue a more consistent policy.

Mr. Mueller argued that stiffer penalties are not the answer to the problem. Such penalties only create martyrs. In addition, most countries are ambivalent to terrorism because they owe their origin to it. In general, it might be more useful to use non-political methods. Also, the use of municipal criminal laws might be helpful. Any of the following proposals might be considered: first, terrorists could be tried by the country which holds them; second, terrorists could be extradicted to a requesting country; or third, terrorists could be turned over to an international tribunal. Whichever method is chosen, there must be substantial agreement for it to work.

Mr. Brower took a pragmatic approach. It is not possible to get all forms of terrorism condemned since political realities will thwart any such attempt. The U.S. proposal is an attempt to take some action against terrorism which is broad enough to garner world support without being so broad as to prevent its acceptance. The article only applies to the exportation of terrorism, but its primary intent is to cover situations where innocent victims are the main target. This is an incrementalist approach; start with small steps and try not to do everything at once.

Responding to Captain Lenihan, Mr. Brower observed that boycotts against countries harboring terrorists may be a violation of U.S. domestic law. However, this action, as an alternative, does exist in the international sphere.

Mr. Vandello expressed the belief that international control was meaningless, since we are not able to track the origin of terrorism, and urged municipal control instead. He further noted that Mr. Kutner's principle of constructive notice could be a useful tool in these circumstances, as it would place a burden on national leaders to ferret out terrorists within their countries.

III. OTHER ACTIVITIES AT THE REGIONAL CONFERENCE

Between the morning and afternoon sessions, a luncheon was held at the Denver Hilton Hotel. The luncheon guests were greeted by Maurice B. Mitchell, Chancellor, University of Denver. Following the afternoon session, the Conference was closed with a reception and banquet at the Brown Palace Hotel in honor of the participants.

INTERNATIONAL LAW AS AN INSTRUMENT OF NATIONAL POLICY

CHARLES N. BROWER*

I am disturbed by the pronounced tendency of our international law fraternity to bemoan the moribund state of international law. There appears to be a widespread presumption that in practice international rules of law are largely irrelevant to high level decision-making in governments around the world, and, therefore, that we have failed. Since our historical puritan ethic, at least by implication, equates failure with sinfulness, analysis quickly becomes apologia and our discussions assume the character of an expiatory ritual.

I for one, however, believe that our profession need not act like a timid supplicant whose very demeanor defies confidence in his creed. I suggest that international law today, rather than falling into disuse, is becoming a more vital force than ever before in the development of our international relations. In order better to explain the basis for this positive outlook I think it necessary first to expose the false assumptions on which our self-deprecating tendencies have been premised.

In decrying the inefficacy of international law we have concentrated too much on its adjudicatory aspect, and, finding an absence of effective international machinery, have concluded that international law must be in sad straits. Speaking conceptually, however, institutionalized adjudicatory machinery has a quite different place in international law than it does in municipal law. Nations, more so than private litigants within a single country, have informal, nonjudicial means of enforcement by virtue of the fact that their bilateral and multilateral relations with one another provide a dynamic process for the adjustment of their respective interests, including the satisfaction of legal rights. As our experience of some hundreds of years has proven, the absence of a comprehensive and dispositive system of adjudication does not necessarily lead to international anarchy. States comply with law among other reasons because it is politic to do so. Furthermore, domestic enforcement is heavily devoted to adjustment of legal disputes between the sovereign and the governed, rather than between private litigants, and it is precisely these adjustments of legal relations which encompass a vast majority of the decisions of the U.S. Supreme Court. There being no international sovereign, however, there is no international need of corresponding magnitude for formalized means of redress.

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* Acting Legal Adviser, Department of State. Mr. Brower's address was delivered during the luncheon meeting of the Regional Conference of the American Society of International Law on April 28, 1973.

I might say, parenthetically, that a factor which tends to compound the gloomy view of international law is the high rate of unemployment in our chosen field. Very few of those who style themselves as international lawyers ever have more than a modest, if even a fleeting, chance to practice public international law. The American Society of International Law, under whose co-sponsorship we are assembled today, has over 5,500 members, yet I doubt that there are even 550 lawyers in the country today substantially engaged in the practice of public international law, and the vast majority of them are employees of government or international organizations. It is precisely the lack of a widespread system of adjudication in this field which accounts in large part for the dearth of opportunity, particularly private practice opportunity; fewer lawsuits require fewer lawyers. It is natural that a profession high in numbers relative to opportunities should exhibit signs of dissatisfaction. If the priesthood consistently exceeded by tenfold the number of parishes available to be served one would be inclined to conclude that religion was out of style.

Lest there be misunderstanding I wish to emphasize that we at the Department of State shall always be among the first to promote wider acceptance for the impartial adjudication of international disputes. Secretary of State Rogers clearly expressed our support for the International Court of Justice in his address three years ago this week (April 25, 1970) on "The Rule of Law and the Settlement of International Disputes" before the American Society of International Law, and we continue to pursue with vigor the policies outlined in that address. We reject the thesis recently advanced by two notable Canadian authorities[1] to the effect that the absence of any prospect of international adjudication actually aids the development of international law. I only make the point that we must consider adjudication in perspective, and not conclude from its relative absence that international law itself is dead or even suffering reduced vitality.

It is worth remarking also that utilization of international litigation and the situation of the World Court in particular have in some ways improved during the last few years. The Court's advisory opinion in the Namibia case has restored some of its previous luster, and it appears that judges of the Court are about to be involved simultaneously in a total of five cases. The fact that two such disputants as India and Pakistan can engage in successive litigation, first the Rann of Kutch Arbitration, then the ICJ Appeal Relating to the Jurisdiction of the ICAO Council, is encouraging. The action of Belgium, France, Switzerland, the United Kingdom, and the United States in

1. Gotlieb & Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law*, 67 AM. J. INT'L L. 229 (1973).

submitting to the Arbitral Tribunal for German External Debts disputes with the Federal Republic of Germany concerning the amounts of payments due on the Young Loan — a matter that has been estimated to involve up to fourteen million dollars for the dollar tranche alone — is another hopeful sign. Only time will tell, of course, whether these straws in the wind foreshadow a greater harvest.

If we indeed can turn away from our historical preoccupation with the question of adjudication, we see that in recent years the role of international law itself has been changing, and its importance in international events has swelled. It has graduated from being a somewhat esoteric discipline, incident to the conduct of international affairs, to become an important instrument of national policy in the United States and around the world. This world-wide expansion is abetted by a growing realization within most governments that many of the common problems affecting States can only be solved by international cooperation. In a number of fields we in the State Department have found that the development of international law can be one of the primary weapons used to develop an international climate favorable to the accomplishment of our national aims, and we are happily participating in this considerable expansion of the role of international law.

For example, as your program reflects, the enormity and the seriousness of drug abuse is well recognized as one of the most critical national social problems we are facing at the present time. Because of the international character of drug production and commerce, it is clearly impossible to end such abuse through national measures alone. We have attempted to deal with this national crisis, at least in part, through a substantial effort to broaden and strengthen international legal provisions regulating production and traffic in those drugs. We have proceeded on the multilateral level, for example, through amendments to the 1961 Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances, and on the bilateral level through a series of specific agreements particularly with States which have been the sources of raw materials for drugs. We have been able to conclude these agreements, embodied in solemn legal documents, because other States are also increasingly aware of the dangers which spreading drug abuse poses to all countries. These international legal arrangements have already proved valuable, and hopefully will be of continuing significance in reducing the supply of drugs reaching this country.

Your program also includes a discussion on terrorism and I should emphasize here two projects which are in the forefront of the international legal struggle against terrorism, namely the Draft Articles on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons prepared by the

International Law Commission under the leadership of its American President, Mr. Richard D. Kearney, and the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism prepared by the U.S. government and introduced at the 27th General Assembly of the United Nations by Secretary of State Rogers. The forerunner of both of these, of course, was the convention on this subject prepared by the Organization of American States, which represents a regional approach to this universal problem.

Several other examples are, I think, pertinent to drive home the point that international law is thriving and active as a national policy instrument. A problem of profound national, as well as international, concern is that of environmental protection. For example, during the past four years we have responded to the serious problem of marine pollution with a series of multilateral agreements, including: (1) the 1969 International Convention on Civil Liability for Oil Pollution, and the 1971 Convention for the Establishment of an International Fund for Compensation, which together provide an international system for compensating victims of damage from vessel oil spills; (2) the 1969 Convention Relating to Intervention on the High Seas, which provides for actions on the high seas by coastal States to protect their coastlines from grave oil pollution damage resulting from serious maritime accidents; (3) several amendments in 1969 and 1971 to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil designed to strengthen controls over vessel oil discharges and oil tanker construction; and (4) the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which regulates the disposal at sea of toxic land-generated wastes. We hope that this work will be advanced further through the adoption later this year of a comprehensive International Convention for the Prevention of Pollution from Ships, which will regulate the intentional or accidental discharge of all types of harmful substances from ships, including oil, toxic chemicals, sewage and garbage.

Outside of the marine pollution area, a number of other important legal steps have been taken to protect the world environment following the 1972 Stockholm Conference, including: (1) the 1972 World Heritage Convention, which provided international funding and machinery to assist governments in the restoration and protection of areas of cultural and natural significance; (2) the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, which established controls on trade in endangered species and their products; and (3) a series of bilateral environmental agreements, including the agreement with Canada for the protection of the Great Lakes from pollution and with the Soviet Union for cooperation and exchange of information on environmental questions.

We have been able to conclude these agreements largely because

we and other States have realized that our common interests are far better served by restricting certain of our own activities, and persuading others to do likewise, than by continuing to behave in the free, but costly, manner with regard to our environment that we had been pursuing. States increasingly realize that broad international problems can be solved at least in part by broadly based legal agreements. We have every reason to believe that even though the operation of these various agreements may not solve all of our problems completely, they will make a most significant contribution to their reduction.

In the field of hijacking and aircraft sabotage, the United States, together with other countries, has spearheaded strenuous efforts within the International Civil Aviation Organization (ICAO) which over the past ten years have resulted in the conclusion of the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage Convention). I had the pleasure of serving as Chairman of the U.S. Delegation at the diplomatic conference which approved the third of these conventions and I can testify to the fact that in this very important field the development of international law has been a major instrument for the realization of our own national policy as well as the shared interests of many other States. The bilateral agreement has a role to play here also as illustrated by the recent hijacking agreement with Cuba, which undoubtedly has been an important factor in the recent total absence of hijackings to that country. At the present time strong efforts are concentrated on the hoped for conclusion of an Air Security Enforcement Convention which, together with related instruments, will be the subject of a combined diplomatic conference and Extraordinary Assembly of ICAO to be held this summer in Rome. In this field even the mere existence of strong and widely publicized international law serves to help eliminate the scourge which for so long has threatened the safety of international civil aviation.

For several years the United States and 90 other nations have been engaged in the United Nations Seabeds Committee's effort to achieve international agreement on a comprehensive new legal regime for the oceans. This is one of the most extensive and ambitious international law making projects ever undertaken. It proposes nothing less than a new legal regime for the 70 percent of our world covered by oceans. In doing so it addresses questions of the breadth of the territorial sea, international straits, scientific research, pollution and exploitation of the living and non-living resources of the oceans. Hopefully, these efforts will produce results at the diplomatic conference which is scheduled to convene in New York late this year.

While this effort is motivated in part by the traditional needs for international regulation, there is no doubt that now, as compared to the Geneva Conferences of 1958 and 1960, the nations involved regard development of the law of the sea as an important way of implementing their national policies with respect to fundamental economic and defense interests.

Perhaps the most striking proof of the new political importance of international law was presented by the Moscow Summit of last May, where my indefatigable colleague, the Assistant Legal Adviser for Treaty Affairs, Mr. Charles I. Bevans, presided over the execution of nine documents in six days including agreements on strategic arms limitation, prevention of naval incidents, scientific cooperation, environmental matters and joint space ventures, signed by President Nixon, Chairman Brezhnev, Secretary of State Rogers and other senior officials. Those of you who have had international legal experience in the government will know that the bulk of such work is created by relationships with friendly countries. Countries with whom relations are not so friendly, and with whom we therefore do not have substantial dealings, present comparatively few legal problems. Many governments, including ours, feel increasingly that the development of a complex array of legal relationships should be conducive to a general atmosphere in which military conflict is less likely. As this theory is applied, an ever increasing wealth of international legal relationships results. The result is a deeper and broader network of structured communications among States, an expanded range of institutional bases for cooperation, leading to greater reliability and predictability of State action, a greater number of formalized standards and channels for cooperation among States, and in time hopefully a greater tendency to try to solve problems through international cooperation rather than conflict.

A special word regarding international conflict is appropriate at this point. As a profession we have tended to believe that international lawyers are too little consulted in connection with the great crises of war and peace. Naturally this is the area in which the most difficulties will be confronted. Here, too, however, we may rightfully take heart from recent experience. As is abundantly clear from the documents and correspondence printed in recent issues of the *American Journal of International Law*[2] the Legal Adviser was consulted in a timely fashion with respect to the mining of North Vietnamese ports announced by President Nixon on May 8, 1972, and the President's speech on that occasion clearly bore the imprint of those consultations. The various Protocols to the Agreement on Ending the

2. *See* Nelson, *Contemporary Practice of the United States Relating to International Law*, 66 AM. J. INT'L L. 836-40 (1972); also Letters from Thomas Ehrlich and Carl B. Spaeth to John R. Stevenson, Legal Adviser, Department of State, May 31 and July 12, 1972, 67 AM. J. INT'L L. 325-27 (1973).

War and Restoring Peace in Vietnam signed January 27, 1973, as well as the succeeding Act of Paris, were negotiated with the constant personal assistance of my principal deputy, Mr. George H. Aldrich, and we continue to be very much involved in decisions related to lingering conflict in that area. In recent years, personnel of my office have contributed significantly not only in this area, but in contentious matters involving Berlin, the Middle East, and indeed every region of the world. The broader concern of the Government for the role of international law in armed conflicts is evidenced by our heavy commitment to ongoing efforts to revise the humanitarian international laws related to war. Quite clearly the role of the international lawyer as action-adviser to his or her government in times of conflict is growing along with a role in building the structure of laws and agreements designed to reduce conflict.

As might be expected, the forces which have expanded the role of international law tend to bring change to the profession as well. In the past, the traditional international lawyer has been a government employee functioning primarily as a professional specialist or technician of a high order. Legal committees of international organizations have regarded themselves as technical bodies into which politics should not intrude. As international law has begun to play an increasingly important role as an instrument of national policy, however those responsible for its creation and application have become more politically astute. While government representatives in international legal meetings still, for the most part, are highly competent jurists, they increasingly manifest political sensitivity and talents as well. This is a development which doubtless will prove troubling to some who have grown to professional maturity in a more traditionalist environment, and one which should give us all pause for thought. We must take care that in the process of making international law not become too politicized, that we do not, through political overexposure, impair the essential character of our chosen instrument.

With this single caveat I believe we may view the future with justifiable optimism. International law and its practitioners now occupy an increasingly significant role in the formulation and application of national policy and each day brings new opportunities. Private practice lawyers, too, benefit from this expansion, reducing the problem of our professional underemployment. Of the specific fields previously mentioned at least three—environmental control, law of the sea, and civil aviation security—impact directly on commercial interests, which increasingly will look to their legal counsel for advice on international law. Just as the growth of domestic law has been the hallmark of U.S. internal political development over the past decades, so may international law development be a dominant characteristic of our foreign policy in this and future decades.

COMMENT

FOREIGN INVESTMENT IN THAILAND: THE EFFECT OF RECENT LEGISLATION*

I. INTRODUCTION

Behind the exotic culture and visual delights of the Kingdom of Thailand is one of Asia's more successful economies. Thailand's 35 million people have witnessed encouraging economic growth in their country in recent years. The real per capita Gross Domestic Product (GDP) increased from 2810 baht in 1967 to 3310 baht in 1972.[1] The Kingdom has enjoyed a generally favorable, although fluctuating, balance of payments (3970 million baht in 1972),[2] but an unfavorable balance of trade. The trade deficit has decreased since 1970, moving from a negative 12,258 million baht in 1970 to a negative 8,508 million baht in 1972. The country assiduously attempts to limit imports (there is a 150 percent tax on many luxury imported goods) and enjoys steadily increasing exports.

Traditionally, Thailand has attracted a considerable amount of foreign investment which has continued unabated in recent years. There is no system of registration of foreign investments, and hence no totally reliable data as to their number and size. However, some clue as to the relative amounts of foreign investment can be derived from the statistics for industries which were promoted by the Thai government under the investment incentives legislation prior to 1972. During the period from April 1959 to June 1971, Thai investors provided 66.77 percent of the total capital in promoted industries; Japanese investors[3] provided 11.35 percent; U.S. investors provided 6.23

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* The author is much indebted to Mr. Chira Panupong, Senior Economist, Board of Investment, for granting a helpful interview in Bangkok, March 15, 1973. It should be noted that this comment was written before the change of governments in Thailand in October, 1973. The author believes that the new government will, initially, continue the economic policies of the Thanom-Prapass regime. The long term situation, however, can only be seen as uncertain.

1. BUSINESS INTERNATIONAL CORPORATION, *The Business Outlook: Thailand*, 4 BUSINESS ASIA 201 (1973). The exchange rate is 20.8 baht to 1 dollar.

2. BANK OF THAILAND, 13 MONTHLY BULLETIN 69 (1973).

3. The exact amount of Japanese direct investment is unknown, but is thought to be much greater than that of the United States. Japanese investment has increased in recent years as Japan has faced restrictons on its operations in Europe and elsewhere. The use of the Board of Investment's data, therefore, which covers a 12 year period, probably understates the relative extent of Japanese participation in the Thai economy.

percent; and Taiwanese investors provided 5.3 percent.[4] The estimated amount of U.S. investment is 150 million dollars,[5] which is distributed among some 200 firms doing business in the country.

During the year 1972, however, the Thai government enacted three pieces of legislation which could have a significant impact on foreign participation in the country's economic life, and which have created an atmosphere of uncertainty regarding continued foreign investment. Briefly, the Investment Promotion Act[6] increased the incentives offered to selected investors. Paradoxically, the Alien Business Act[7] seems to sharply restrict the participation of foreigners in certain industries and the Alien Occupation Act[8] closed some occupations to non-Thai nationals. The purpose of this comment is to present and analyze these pieces of legislation, and to discuss their effect on foreign investors.

II. THE INVESTMENT PROMOTION ACT

The Investment Promotion Act, announced on October 18, 1972, generally provides more generous incentives to the investor than the previous comparable legislation, which had existed since 1962.[9] It should initially be noted that the benefits of both acts apply to all investors, not merely foreigners. In the past, most investments promoted by the government have been made with local capital by Thai nationals.

To be eligible for the incentives of the Act, an investor must be awarded a promotion certificate by the Board of Investment (BOI), which is responsible for administering the Act. The certificate, ob-

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4. BOARD OF INVESTMENT, INVESTING IN THE DYNAMIC GROWTH OF THAILAND 64 (1972).

5. U.S. DEP'T OF COMMERCE, *Establishing a Business in Thailand*, OVERSEAS BUSINESS REPORTS, OBR 72-038 (August, 1972) at 5. This compares with $900 million in Indonesia, $710 million in the Philippines, $310 million in Singapore, $200 million in Malaysia, and virtually none in South Vietnam, Cambodia and Laos. U.S. DEP'T OF COMMERCE, *Market Profile for the Far East*, OVERSEAS BUSINESS REPORTS, OBR 72-054 (September, 1972).

6. National Executive Council Announcement No. 227, Investment Promotion Act (October 18, 1972); COLLECTION OF LAWS PERTAINING TO INVESTMENT PROMOTION compiled by Investment Services Division, Office of the Board of Investment, Thailand (March 1973) [hereinafter cited as Investment Promotion Act].

7. National Executive Council Announcement No. 281, Alien Business Act (November 26, 1972); COLLECTION OF LAWS PERTAINING TO INVESTMENT PROMOTION compiled by Investment Services Division, Office of the Board of Investment, Thailand (March 1973) [hereinafter cited as Alien Business Act].

8. National Executive Council Announcement No. 322, Alien Occupations Act (December 13, 1972); COLLECTION OF LAWS PERTAINING TO INVESTMENT PROMOTION compiled by Investment Services Division, Office of the Board of Investment, Thailand (March 1973) [hereinafter cited as Alien Occupations Act].

9. Promotion of Industrial Investment Act (1962), *as amended* in 1965 and 1969.

tained by filing an application[10] with the BOI, qualifies one as a "promoted person." A promoted person must be a limited company (corporation) or a cooperative.[11] Investors currently receiving the incentives of the 1962 legislation may request any of the benefits which they do not presently receive by applying for a new certificate under the 1972 Act.[12] The ultimate decision with respect to the issuance of the promotion certificate and the extent of the benefits awarded lies with the BOI.[13] Some of the criteria which it considers important are employment, the potential production of foreign exchange, the location of the industry and the time of the application.[14]

The general incentives available under the Investment Promotion Act are classified as guarantees, permissions, tax reductions and exemptions, and protections. Additional incentives are available if the promoted person locates the activity in specified areas of the Kingdom, or if the business is export oriented.

A. *Guarantees*

The government will not engage in an activity which is competitive with that of the promoted person,[15] although the Thai government has traditionally been rather active in both the agricultural and the industrial sectors.[16] This guarantee, which was also included in the 1962 Act, appears to have largely been the result of a World Bank Mission which recommended in 1959 that private investment be encouraged, and the Thai government's perception that its high degree of activity might frighten away potential foreign investors.[17] The government still provided an average of 31 percent of the total gross domestic fixed investment during the period of 1959-1969,[18] and continues to operate a number of businesses with notorious inefficiency. The guarantee against competition from the government can, there-

10. Board of Investment form 9.1.

11. Investment Promotion Act, *supra* note 6, art. 12.

12. *Id.* art. 37.

13. At unspecified intervals BOI issues lists of specific activities eligible for promotion. A 1973 BOI announcement listed such activities as mining, metals, ceramics, chemicals and chemical products, mechanical and electrical equipment, construction materials, textiles, service and miscellaneous industries. Announcement of the Board of Investment Number 1/2516, List No. 1/2516, January 9, 1973.

14. Interview with Mr. Chira Panupong, Senior Economist, Board of Investment, Bangkok, Thailand, March 15, 1973 [hereinafter cited as Interview].

15. Investment Promotion Act, *supra* note 6, art. 15.

16. *See generally*, J. INGRAM, ECONOMIC CHANGE IN THAILAND 1850-1970, at 139-44, (1971) [hereinafter cited as INGRAM]. Despite assertions by conservative Thai political leaders that Dr. Pridi Phanomyong's Economic Plan of 1933 was "Bolshevism" [D. WILSON, POLITICS IN THAILAND 17 (1962)], the debate over government operation of industry has seldom been ideological.

17. INGRAM, *supra* note 16, at 231.

18. *Id.* at 230.

fore, be of some value to the foreign investor.

The enterprise of a promoted person will not be nationalized.[19] However, this has never been a threat to the foreign investor in Thailand. Additionally, exportation of the goods produced by a promoted person is permitted.[20]

Foreign currency may be remitted abroad if it represents investment capital from a foreign country, a foreign loan or interest thereon, or profit from the promoted activity on obligations assumed as a result of the promoted activity. These remittances may, however, be restricted during periods of adverse balance of payments to a yearly rate no lower than 20 percent for capital and 15 percent for earnings after the promoted person has engaged in business for two years.[21] Being elevated to a guarantee from its former status as a "right," this provision presumably implies a higher degree of protection. Although there is no absolute right to repatriate all funds, the investor can rely on Thailand's healthy balance of payments position.[22] Also, most foreign firms have in the past had little problem with remittances.[23] This felicitous circumstance should continue as the Kingdom's economy develops.

B. *Permissions*

The promoted person may own land in the Kingdom.[24] This provision seems to be directly aimed at foreign investors, since aliens, in general, are not permitted to own real property in the absence of a treaty. While Thailand has such treaties with most industrial countries, none exist between Thailand and the United States.[25]

Alien Skilled Workers and experts may be brought into the country in excess of ordinary immigration quotas.[26] The Thai immigration law stipulates that no more than 200 immigrants per year from any single country may enter Thailand. As might be expected, applications from nationals of the countries which export large amounts of capital to Thailand greatly exceed this annual quota.

C. *Tax reductions and exemptions*

The promoted person is granted an exemption from import du-

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19. Investment Promotion Act, *supra* note 6, art. 15 (2).

20. *Id.* art. 15(4).

21. *Id.* art. 15(3).

22. Thailand's balance of payments was 1.21 billion dollars in total reserves at the end of February 1973, as compared with 0.99 billion dollars a year earlier; STATISTICAL OFFICE OF THE UNITED NATIONS, 27 MONTHLY BULLETIN OF STATISTICS 237 (May, 1973).

23. 3 BUSINESS ASIA 344 (1972).

24. Investment Promotion Act, *supra* note 6, art. 16.

25. CHARLES KIRKWOOD AND ASSOCIATES, THAILAND BUSINESS—LEGAL HANDBOOK 64 (1969).

26. Investment Promotion Act, *supra* note 6, art. 17.

ties and business taxes on machinery required for the promoted activity, provided that such machinery is not produced in Thailand.[27] The Thai business tax is a gross receipts tax payable by the manufacturer or importer. It should be noted that the machinery which has been exempted from import duties and business taxes cannot be used for purposes other than the conduct of the promoted person's business,[28] unless permission is granted by the BOI.[29]

Additionally, the promoted person is exempted from payment of income tax for a period of three to eight years from the date net income is derived from the business.[30] This provision places a great amount of discretion in the BOI and the criteria are the same as those used in the decision to grant a certificate or promotion. This exemption, however, is a benefit which may be omitted from the package of incentives at the discretion of the BOI.[31]

D. *Protections*

The importation of products competitive with those produced by the promoted person may be prohibited,[32] or the import duty on competitive products may be increased.[33] As an alternative, "special fees" up to 50 percent of an item's cost may be imposed on imported goods competing with products of the promoted person.[34] These protective provisions enable the BOI to award a virtual monopoly position if it so chooses.

E. *Additional incentives*

Thailand has arrived at a point in its development at which it can enjoy a degree of selectivity with respect to foreign investments. This desire to select foreign investments is manifested in the Investment Promotion Act by special incentives given to industries located outside the Bangkok metropolitan area or industries that are export-related.

In addition to the incentives granted to all promoted persons for enterprises located in "investment promotion areas,"[35] the BOI may, at its discretion, grant any or all of the following benefits:

(1) A reduction of import duty and business tax of up to 50 percent of the collectable rate on imported raw materials to be used

27. *Id.* art. 18.
28. *Id.* art. 21(1).
29. *Id.* art. 22.
30. *Id.* art. 20.
31. *Id.* art. 26.
32. *Id.* art. 24(1).
33. *Id.* art. 24(2).
34. *Id.* art. 27.
35. These areas have not yet been delineated, but it is thought that they will include most of the country, except the capital city of Bangkok.

by the promoted activity.[36]

(2) A reduction of the business tax of up to 90 percent of the collectable rate on the sale of goods produced by the promoted person for a period of up to five years.[37]

(3) A deduction of twice the costs of the transportation, electricity and water from gross income in the determination of the income tax.[38]

(4) A deduction from net income of 25 percent of the costs of construction and installation of facilities used in the promoted business. This deduction is in excess of normal depreciation. It may be used in one year, or may be allocated over a period of up to ten years commencing from the date net income is first derived from the enterprise.[39]

(5) A reduction of 50 percent of the normal corporate tax rate for a period of five years commencing from the date at which the normal tax holiday, which is granted as an ordinary incentive, expires.[40] A business locating in an "investment promotion area" may, therefore, receive favored income tax treatment for a period of up to 13 years from the year at which a profit is made.

At the discretion of the BOI, export-related businesses may be granted the following special incentives:

(1) Exemption from import duty and business tax on raw materials which are used in the promoted activity;[41]

(2) Exemption from import duty and business tax on items which the promoted person imports for re-export;[42]

(3) Exemption from export duty and business tax on items which the promoted person exports;[43]

(4) A 2 percent reduction of that part of net income attributable to an increase over the previous year's net income which is a result of export.[44]

F. *Distinguishing features of the old and the new*

Although most of the incentives offered under the current legisla-

36. Investment Promotion Act, *supra* note 6, art. 23(1).

37. *Id.* art. 23(2).

38. *Id.* art. 23(3). This is a classic infrastructure-building device and is needed in a country in which transportation, electricity and water are either inadequate or lacking in many places.

39. *Id.* art. 23(4).

40. *Id.* art. 23(5).

41. *Id.* art. 25(1).

42. *Id.* art. 25(2).

43. *Id.* art. 25(3).

44. *Id.* art. 25(4).

tion were present in the 1962 Act, there are some important changes. One of the more significant differences between the new act and the former one is that under the new legislation there is no express classification of industries with respect to their importance. The Act merely states that the BOI may designate an investment as promoted if it is "of economic and social importance to the nation."[45] Article 11 of the Act also specifically excludes certain activities from eligibility for promotion.[46]

The provision relating to the repatriation of earnings has been raised from the "rights and benefits" section of the former law to a "guarantee" in the new act. This move has been well received by foreign investors since it eliminates some of the "uncertainty" of the prior legislation.[47] The income tax provisions are more favorable. The maximum tax holiday available under the 1962 act was five years compared with eight years under the present legislation.

The provisions which allow extra incentives for businesses in rural areas and those which are designed to increase Thailand's exports are all new. The special incentives to export industries are designed to improve the country's trade balance. It is submitted, however, that both these moves are propitious. Too much has been made of the limited Communist insurgency[48] in Thailand's rural areas, but, despite the exaggeration, positive action by the Thai government to develop the country outside Bangkok is a welcome move.

A significant aspect of the new legislation is the substantial increase in authority which it gives the BOI. The former Act divided promoted industries into three groups which were ordered in decreasing importance to the development of the country and which received decreasing benefits. The new Act eliminates this classification and allows the BOI to specify the extent to which the discretionary benefits, for example, the length of the income tax holiday, will be awarded. The new authority has admittedly placed an initial strain on the BOI's resources.[49] It is submitted, however, that placing more authority in the hands of the BOI indicates a flexibility and a potential for selectivity which is desirable as Thailand's development continues.

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45. *Id.* art. 11. Examples of important areas are transportation, fishery, agriculture, animal husbandry, industry, production of goods for export, export trade, tourism, organization and improvement of land for industrial purposes, and repair and maintenance of machinery used in the above activities.

46. *Id.* Those activities excluded from eligibility for promotion are banking, financial institutions, and "normal" trading businesses.

47. 3 BUSINESS ASIA 343 (1972).

48. *See, e.g.*, L. LOMAX, THAILAND, THE WAR THAT IS, THE WAR THAT WILL BE (1967).

49. Interview, *supra* note 13.

The new Act shows that, in addition to the desire for domestic investment, Thailand continues to desire helpful foreign investment. The Act has many of the same provisions as incentive legislation of the country's neighbors,[50] which generally offer the same economic advantages to the foreigner as does Thailand.

III. THE ALIEN BUSINESS ACT

The Alien Business Act, announced on November 24, 1972, restricts the participation of aliens in certain industries. It is a piece of legislation which, at first glance, seems to contradict the attitude of the Thai government as expressed in the Investment Promotion Act. On its face, it merely prohibits majority ownership of a rather short list of businesses by aliens. The dilemma for the foreign investor, however, is not this limitation, but rather the confusion which the Act has caused with respect to the continued welcome reception of foreign investment in the Kingdom. The term "alien" is defined by the Act as a natural person,[51] or a juristic person whose ownership is more than 50 percent alien.[52]

In general, the Act divides the restricted businesses into three categories. Those businesses which appear on List A of the Annex to the Act may be operated for a period of two years following the date of the Announcement.[53] At that time the firm must either cease operations or become 51 percent owned by Thai nationals. The businesses on List A are generally very basic enterprises carried on in any country.[54]

The Act provides that businesses on List B may continue to be operated indefinitely by aliens, but that no new businesses may be initiated.[55] Those businesses which are allowed to continue operation may not increase production or distribution at a rate in excess of 30 percent annually,[56] nor may they open new branch offices without the

50. *See, e.g.*, Malaysia, Investment Incentives Act, 1967, *as amended*, 1969, 1971, in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT LAWS OF THE WORLD, Section 5:2A-1.1 (1972); Republic of Vietnam, Law No. 4/72 in 11 INT'L LEGAL MATERIALS 883 (1972); Philippines, R.A. 5186, in Bengzoan, *National Treatment of Americans in the Philippines: Parity Rights, Retail Trade, and Investments*, 3 INT'L LAW 339 (1969); Indonesia, Law Concerning Investment of Foreign Capital, Act No. 1, year 1967, in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, INVESTMENT LAWS OF THE WORLD, Chapter 5 (1973).

51. Alien Business Act, *supra* note 7, art. 3.

52. *Id.*

53. *Id.* art. 30(2).

54. Alien Business Act, Annex, List A. The complete List A is as follows: rice, farming, salt farming, trade in native agricultural products, trade in real estate, accountacy, law, architecture, advertising, brokerage, auctioneering, barbering and building construction.

55. Alien Business Act, *supra* note 7, arts. 4, 30(2).

56. *Id.* art. 30(2).

consent of the Director General of the Department of Commercial Registration.[57] The businesses on List B are somewhat more numerous than those on List A,[58] but still not so numerous as to have more than a very mild effect on the amount of foreign investment which the country is willing to receive.

Businesses on List C[59] are also subject to the 30 percent annual limitation on production or distribution increases,[60] but new businesses within this category can, at least, begin operation upon obtaining a license from the Department of Commercial Registration.[61] This license is granted automatically to businesses which have received a Certificate of Promotion from the BOI.[62] The Department of Commercial Registration may, however, impose any or all of the following conditions upon granting the license:

(1) specification of the debt/equity ratio to be used in the capitalization of the business;[63]

(2) specification of the amount of capital which is to be imported for the operation of the business;[64]

(3) specification of the amount of capital contributed by Thai nationals which must be in the business' capital structure;[65]

(4) specification of the ratio between Thai and foreign workers to be employed by the business.[66]

Aliens who operate businesses in violation of the Act are punishable by a fine of between 30,000 and 500,000 baht, and will receive a court order to discontinue the business.[67] Additionally, shareholders or partners of alien juristic persons who fraudulently evade the requirements of the Act are punishable to the same extent.[68]

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57. *Id.*

58. Alien Business Act, Annex, List B. The more important businesses on List B are as follows:

> agricultural production; production of sugar, beverages, medicine, cement and plywood; most retail trade; hotels; the sale of foods and beverages; and trade in natural ores.

59. Alien Business Act, Annex, Lict C. The List C includes:

> all wholesale trade, except that in List A; all export trade; retail trade in machinery, engines and tools; production of animal feed, vegetable oils, textiles, glass containers and paper; mining; all services, except those on Lists A and B; and all construction, except building construction.

60. Alien Business Act, *supra* note 7, art. 30(2).

61. *Id.* art. 5.

62. *Id.* art. 6.

63. *Id.* art. 8(1).

64. *Id.* art. 8(2).

65. *Id.* art. 8(3).

66. *Id.* art. 8(4).

67. *Id.* art. 26.

68. *Id.* art. 28.

The problem for the foreign investor, particularly the U.S. investor, is not the prohibitions of the Act, but the fact that it has created so much confusion. At this stage, no one knows whether the Act is an indication of a trend towards increased economic nationalism or merely a rational preservation of certain basic industries for Thai nationals. The extent to which the law will be enforced is still a matter of doubt. Corruption is something which this comment cannot even begin to discuss. The 30 percent growth limitation for businesses in Lists B and C also presents a subject of confusion, since it gives an obvious advantage to a new business which receives a license over an old business whose growth is restricted.

The U.S. investor faces an even more confusing problem. Thailand and the United States have a treaty[69] under which U.S. businesses are to receive the same treatment as Thai businesses in the Kingdom. The status of the Act, vis-a-vis the treaty, is unclear as to what will happen to the U.S. businesses when the treaty expires in 1978.

It appears that the Alien Business Act was announced as a response to the large and burgeoning Japanese ownership of business in Thailand.[70] There is no doubt that prior to the legislation there had been public expression of resentment against the substantial Japanese involvement in the Thai economy. In 1972, there was a demonstration in front of a large Japanese department store and an abortive attempt to boycott Japanese products.[71] There was also a strike by Thai workers at a Japanese construction company protesting the strict Japanese work rules.[72] These actions are uncharacteristic of Thais, and indicate the extent of the fear of Japanese domination of the economy.

The foregoing suggests that the Act will not be as strictly enforced against U.S. businesses as against those of Japanese aliens. Nonetheless, U.S. investment has decreased substantially since the announcement of the Act.[73] Necessary changes and clarification of the Act will, almost certainly, be forthcoming.

In all, the Act is best seen as only a slight closing of the door to foreign investment, and one which is probably not intended to have a significant effect on the participation of U.S. investors in the Thai economy. Thailand is a country which still needs the infusion of foreign capital and which stands to benefit from the rapidly increas-

69. Treaty of Amity and Economic Relations with Thailand, May 29, 1966, [1968] 19 U.S.T. 5843; T.I.A.S. No. 6540.

70. BUSINESS WEEK, Dec. 9, 1972, at 44.

71. The New York Times, Nov. 25, 1972, at 41, col. 1.

72. BUSINESS WEEK, Dec. 9, 1972, at 44.

73. The Wall Street Journal, July 27, 1973, at 30, col. 1.

ing growth of Southeast Asia. It is difficult to imagine that xenophobia in the country will cause it to reject foreign investment.

IV. THE ALIEN OCCUPATIONS ACT

The Alien Occupations Act, which was announced on December 13, 1972 and became effective on March 14, 1973, prohibits aliens from working in any of 39 occupations, and requires all aliens to obtain a license from the Department of Labor. Like the Alien Business Act, it has contributed to the atmosphere of uncertainty concerning foreign investment in the Kingdom. However, the Act's importance is not nearly as great, nor is it intended to be, as that of the Alien Business Act.

The licensing provisions, which caused some confusion shortly after the Act became effective (some 370,000 aliens had to obtain licenses), were primarily administrative, and of little importance to the foreign investor. However, some of the proscribed occupations listed in the Act are currently being held by foreigners, and the prohibition against employing new aliens in these tasks could have an effect on foreign investors.

It should be noted that aliens already employed in one of the 39 prohibited jobs on March 14th were allowed to continue working in them. The list of proscribed occupations includes such unlikely tasks as the making of Thai musical instruments, cigarette making by hand and alms-bowl making.[74] Those prohibited occupations in which a foreign investor might find it necessary to employ aliens are construction and civil engineering, architecture, law, accounting and "brokerage." Aliens who work illegally in one of the 39 banned jobs are subject to five years imprisonment.[75] Foreign diplomats and their employees are exempted from the Act,[76] as are people performing temporary tasks and those who are "allowed by the Royal Thai Government to perform [duties] or execute [tasks] in the Kingdom."[77]

The banning of foreign participation in certain occupations is not a new event in Thailand, nor is it a new situation that most of the prohibited jobs are not highly paid. The interpretation given the Act by the Ministry of the Interior, which has the task of enforcing it, is still unsettled, as is the degree to which the law will be enforced. It is clear, however, that foreign investment has declined substantially since the inception of the Alien Business Act and the Alien Occupations Act.[78] The latter legislation must, therefore, be seen as a con-

74. The Bangkok Post, March 15, 1973, at 1, col. 3.

75. Alien Occupations Act, *supra* note 8, art. 28.

76. *Id.* art. 2.

77. *Id.* art. 3.

78. Numerous projects have been either suspended or cancelled. The Wall Street Journal, July 27, 1973, at 30, col. 1.

tributing factor to the general atmosphere of uncertainty which exists in the Kingdom, although its real importance is not especially significant.

V. CONCLUSION

Taken together, the three pieces of legislation present the foreign investor with a situation which is confusing and uncertain. The Investment Promotion Act encourages private investment, while the Alien Business Act concurrently restricts foreign ownership of businesses in certain industries. The apparent contradiction is, however, not a contradiction at all, but rather an indication that, although Thailand still welcomes foreign investment, the government now believes that a more selective investment policy is in the country's best interest. Most of the businesses in which foreign control is prohibited are the kinds of basic activities which are properly reserved to local nationals. In any event, the extent of foreign participation in most of the restricted areas is minimal.

The problem is that while the government still desires an inflow of foreign capital, it has created an atmosphere of uncertainty which, until clarified, will dissuade new foreign investment. It is unfortunate that the Alien Business Act has caused this situation, and a speedy resolution of the uncertainty should be effected by the Thai government.

It is suggested that the legislation will not, ultimately, have a deleterious effect on either the status of the foreign investor in Thailand or upon the country's growth. In the future, the Thai government will probably continue to encourage private investment, including that of foreigners, and display a greater degree of selectivity with respect to both the existence of foreign investments and the extent to which they will be promoted. This selectivity will be manifested by the extent of foreign ownership granted under the Alien Business Act and by the more flexible incentives utilized under the new Investment Promotion Act. The latter Act will, almost certainly, be modified as time passes.

Ralph B. Lake

CASE NOTE

SOVEREIGN IMMUNITY—Anaconda Co. v. Corporación del Cobre, 55 F.R.D. 16 (S.D.N.Y. 1972), *cert. denied*, 93 S. Ct. 2735 (1973).

In the latter part of 1969, the Chilean Exploration Company (CHILEX) and the Andean Copper Mining Company (ANDES) transferred all of their assets and liabilities to two separate Chilean corporations. Together with the Anaconda Company, each sold 51 percent of the stock in their various Chilean mining interests to one defendant, Corporación del Cobre (CODELCO), which made payment by promissory notes guaranteed by another defendant, Corporación de Fomento de la Producción (CORFO). In July of 1971, the Allende government, by constitutional amendment,[1] nationalized the Chilean mining industry. Involved in the nationalization were the CODELCO and CORFO interests, as well as the remaining 49 percent interest of each of the three plaintiffs. CODELCO, now a state agency, is responsible for operating and managing the mines.[2]

Although Chilean nationalizations have been the subject of much comment and litigation, the three plaintiff mining companies involved in this case did not challenge the legality of the action. Instead, they brought suit in the U.S. District Court to recover on the promissory notes and attached two million dollars the defendants had on deposit in U.S. banks.

The defendants moved to vacate the order of attachment giving three arguments in support of their motion. First, they contended that sovereign immunity prevented suit against them without their consent, since the corporations were "organic parts of the Chilean state that . . . were created to, and do, carry out governmental func-

1. Chile: Constitutional Amendment Concerning Natural Resources and Their Nationalization (July 15, 1971), Law 17,450, conveniently found in 10 INT'L LEGAL MATERIALS 1067 (1971) [hereinafter cited as the Nationalization Amendment].

2. For a closer examination of incidents leading to and occurring throughout this nationalization period in Chile, see generally *Expropriation Symposium: Proceedings of the 1972 Regional Conference of the American Society of International Law at the University of Denver College of Law*, 2 DENVER J. INT'L L. & POLICY 125 (1972); Landau, *Economic and Political Nationalism and Private Foreign Investment*, 2 DENVER J. INT'L L. & POLICY 169 (1972); Schlesser, *Recent Developments in Latin-American Foreign Investment Laws*, 6 INT'L LAWYER 64 (1972); Thome, *Expropriation in Chile under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489 (1971); Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures*, 46 TOL. L. REV. 232 (1971); Santa Maria, *Perspectives on Spanish American Legal Norms Governing Mining Concessions, "Chileanization," and the Concensus of Viña del Mar*, 11 VA. J. INT'L L. 177 (1971); Doman, *New Developments in the Field of Nationalization*, 3 N.Y.U. J. INT'L L. & POLITICS (1970).

tions (*jure imperii*)."[3] Second, since the plaintiffs had already submitted their claim to a special Chilean tribunal,[4] attachment should not have been granted while the matter was *sub judice* there.[5] Finally, they urged vacation as an exercise of judicial discretion.

Judge Metzner, trying the case, initially held that the case could be decided on procedural grounds alone, without addressing the contentions of the defendants, since, under New York law,[6] an attachment may be vacated only after the defendant has made an appearance and these defendants had not done so. The judge did not stop there, however, and his holdings with respect to the contentions of the defendants form the most interesting aspect of the opinion.

The basic question confronting the court was whether the attached property was that of a foreign government and, therefore, subject to sovereign immunity,[7] or a foreign government engaged in commercial activities,[8] or a foreign corporation subject to the laws of

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3. 55 F.R.D. 16, 17 (S.D.N.Y. 1972).

4. Nationalization Amendment, *supra* note 1, at 1069. The Amendment provides for the establishment of a "Tribunal for hearing appeals on the amount of compensation determined by the Comptroller General utilizing a specific formula provided in the amendment, to be paid to corporations whose interest was expropriated. The Amendment also states that there is "no appeal available against its (the Tribunal's) decision."

5. The case referred to has since been resolved by the Tribunal. Copper Tribunal Decision, Diario Oficial (Aug. 1972), conveniently found at *Special Copper Tribunal Decision on the Question of Excess Profits of Nationalized Copper Companies*, 11 INT'L LEGAL MATERIALS 1013 (1972) [hereinafter cited as Copper Tribunal Decision].

6. New York CPLR § 6223 Vacating or Modifying Attachments:

> . . . If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

New York law is applied here in accordance with Rule 64, Federal Rules of Civil Procedure providing that attachment for the purpose of jurisdiction and execution "are available under the circumstances and in the manner provided by the law of the state in which the district court is held."

7. New York and Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). Plaintiff sought to recover damages sustained by its vessel by attaching funds of the Republic of Korea on deposit in various New York banks. Inasmuch as the Department of State filed a statement, recognizing that "under international law property of a foreign government is immune from attachment and seizure," the Court complied with the request and granted the motion to vacate the attachment.

8. Harris and Co. Advertising Inc. v. Republic of Cuba, 127 So.2d 687 (Fla. Dist. Ct. App. 1961). Here, attachment of government funds deposited in various local banks was upheld:

> It would not be compatible with the principle of judicial powers of a sovereign nation if funds deposited as private funds . . . used in business type activities here, would be clothed in a vail radiating foreign sovereignty.

See also Pacific Molasses Co. v. Conrite de Ventas de Mulîn de la República Domini-

the United States.[9] This distinction between activity which is governmentally oriented and that which is commercially oriented forms the essence of a sovereign immunity defense.[10]

There are two ways to raise the question of sovereign immunity once the merits of the controversy have been placed in issue. Either the State Department may assert such immunity, or the claim may be made by an accredited diplomatic representative of the foreign state.[11] An assertion by the State Department is usually determinative of the issue,[12] as courts will generally not exercise their jurisdiction so as to embarrass the executive branch.[13] This procedure is not an "abrogation" of judicial power.[14] However, in the instant case there was no intervention by the State Department. The issue was raised only by the affidavit of the Chilean Ambassador. The court was thus left to its own discretion in determining the merits of the claim.[15]

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cana, 219 N.Y.S.2d 1018, 30 Misc. 2d 560 (Sup. Ct. N.Y. County 1961); National City Bank v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). *See generally* S. SUCHARITHUL, STATE IMMUNITIES AND TRADE ACTIVITIES IN INTERNATIONAL LAW, 347-50 (1959); T. QUITLARA, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 254-309 (1970).

9. The distinction between public acts (*acta jure imperii*) and private acts (*acta jure gestionii*) is the foundation for the holding in the present case and will be discussed in greater depth, *infra*.

10. The issue is often solved by treaty provisions which preclude the assertion of sovereign immunity in the commercial disputes. Some examples are:

> Treaty of Friendship, Commerce, and Navigation between the United States and the Federal Republic of Germany (signed Oct. 29, 1954), art. 18, para. 27 U.S.T. 1839, 1859, T.I.A.S. No. 3593, 273 U.N.T.S. 3,26; Treaty of Friendship, Commerce, and Navigation between the United States and Italy (signed Feb. 2, 1948) art. 24, para. 6, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce, and Navigation between the United States and Iceland (signed Jan. 21, 1950) art. XV, para. 3, 1 U.S.T. 785, 796, 797, T.I.A.S. No. 2155, 206 U.N.T.S. 296, 288.

11. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 71(1)(b) [hereinafter cited as RESTATEMENT].

12. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); Compañia Española de Navegarian Martina, S.A.V. The Navemar, 303 U.S. 64 (1938).

13. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943). *See also* United States v. Lee, 106 U.S. 196, 209 (1882).

> In such cases the judicial department of this government follows the action of the political branch, and will not embarass the latter by assuming an antagonistic jurisdiction.

14. New York and Cuba Mail S.S., *supra* note 7, at 685,

> . . . This course entails no abrogation of judicial power, it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs.

15. Victory Transport, Inc. v. Comisara General de Abastecimiéntos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) [hereinafter cited as Victory Transport]; Republic of Mexico v. Hoffman, *supra* note 12, at 34; *Ex parte* Republic of Peru, *supra* note 13, at 587; *Ex parte* Muir, 254 U.S. 522, 533 (1920).

In reaching his decision, Judge Metzner relied upon the distinction between *jure imperii* and *jure gestionis*.[16] This distinction is the basis of the restrictive theory of sovereign immunity,[17] and the policy followed by the State Department since 1952.[18] In its determination, the court attempted to find the characteristics of a corporation which would qualify, or disqualify, it for immunity. It looked to the Restatement (Second) of Foreign Relations Law which states that the immunity of a foreign state "extends to . . . a corporation created under its laws and exercising functions comparable to those of an agency of the state."[19] Adopting the Restatement comment, the court agreed that the term "agency" means "a body having the nature of a govern-

16. Victory Transport, *supra* note 15, at 360. *See also* National City Bank v. Republic of China, *supra* note 8; Hannes v. Kingdom of Roumania Monopolies Instit., 260 App. Div. 189, 20 N.Y.S. 2d 825 (1st Dept. 1940), Et Ve Blik Kuruna v.B.N.S. Int'l Sales Corp., 240 N.Y.S.2d 971 (Sup. Ct. 1960).

17. In contrast to the restrictive theory generally used today, is the classical theory espoused by Chief Justice Marshall in The Schooner Exchange, *supra* note 10. The usual point of reference for the change from the classical to the restrictive is the eloquent dissent of Justice Mach in The Pesaro, 277 F.472 (S.D.N.Y. 1921), where he differentiates between commercial and war vessels of governments. Recently, legal scholars have moved toward a third theory which would virtually remove sovereign immunity as a defense. Schmitthoff, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading*, 2 DENVER J. INT'L L. & POLICY 199 (1972).

18. Letter of Acting Legal Adviser, Jack B. Tate to Department of Justice, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952):

> . . . the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

For comment on the "Tate letter" *see* Dubrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953); Comment, *Restrictive Sovereign Immunity, the State Department and the Court*, 62 N.W.U. L.J. 397 (1967).

19. RESTATEMENT, *supra* note 10, at § 66. Additionally, the RESTATEMENT provides immunity to the following areas of a foreign state:

> (a) the state itself;
> (b) its head of state and any person designated by him as a member of his official party;
> (c) its government or any governmental agency;
> (d) its head of government and any person designated by him as a member of his official party;
> (e) its foreign minister and any person designated by him as a member of his official party;
> (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state . . .

ment department or ministry,"[20] and that "great weight must be given to the fact that the foreign state considers the corporation to be performing the functions of a governmental agency."[21]

On the other hand, the court noted, if a corporation is permitted to be sued in its own country, in the same manner as a private corporation, immunity becomes highly questionable.[22] Additionally, when a foreign government engages in commercial activities outside the traditional areas of government functions, the corporation, or separate governmental entity, should be reachable.[23]

Relying upon the opposing affidavits, Judge Metzner found several points against the claim of sovereign immunity. First, if the corporations were indeed immune, then it would not have been necessary for the government of Chile to join them as a party in the proceedings in the Chilean courts.[24] Secondly, the terms for delivery of the notes were in accordance with the laws of the State of New York and the parties to the notes considered the New York office of CODELCO as the domicile of the corporation. This led to the conclusion that the defendants were not entitled to sovereign immunity.

The defendants urged application of the *Victory Transport* case, where legislative acts, such as nationalization, were found to be public acts, and sovereign immunity was granted even in the absence of State Department suggestion.[25] However, Judge Metzner pointed out

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20. *Id.* Comment. Reiterated in the Comment is the previous discussion stating that:

> In determining whether the agency is in fact a part of the government, the views of the government creating the agency are given great weight, but are not necessarily conclusive.

See also Hannes v. Kingdom of Roumania Monopolier Instil., *supra* note 16; United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929) [hereinafter cited as United States v. Deutsches].

21. *Id.* Reporter's Notes. Judge Metzner points out that this argument is favorable to the defendants' point of view.

22. *Id.* Reporter's Notes. Judge Metzner points out that this argument is favorable to the plaintiffs' point of view.

23. United States v. Deutsches, *supra* note 21; Coale v. Société Co-operative Suisse dis Charbona Basle, 21 F.2d 180 (S.D.N.Y. 1921). *See also The Harvard Research in International Law Art. 23*, 29 AM. J. INT'L L. Supp. 451, 700 (1935):

> A State may permit orders or judgments of its courts to be enforced against the property of another State not used for diplomatic or consular purposes: (a) When the property is immovable property; or (b) When the property is used in connection with the conduct of an enterprise . . .

24. Copper Tribunal Decision, *supra* note 4.

25. Victory Transport, *supra* note 15, at 360. It is stated that public acts are generally limited to the following areas:

> (1) internal administrative acts, such as expulsion of an alien;
> (2) legislative acts, such as nationalization;
> (3) acts concerning the armed forces;

that the nationalization occurred in July of 1971,[26] whereas the sale, for which the notes were issued, occurred in 1969. This prior obligation of CODELCO, therefore, was not affected by the nationalization.

The second argument urged by the defendants was that since the plaintiffs had submitted their claims to a special Chilean court, the matter was *sub judice* and the attachment should have been vacated. This was handled rather summarily. The Special Copper Tribunal[27] was established to hear appeals from those affected by nationalization on the amount of compensation decided upon by the Comptroller General.[28] In making the decision, the Comptroller General arrived at a negative sum.[29] This negative sum provides a unique area of set-off for any claims against the Chilean government by those, such as the plaintiffs, who have claims arising outside the nationalization scheme. After joining CODELCO as a party in the appeal before the Special Copper Tribunal, the government further asserted that any obligation on the notes should be paid out of that compensation. The court found it incomprehensible that the defendants could assert that this matter was being seriously contended in Chile.

The defendants final argument urged the exercise of judicial discretion to vacate the order. The defendants raised three grounds which they thought rendered the exercise of judicial discretion appropriate. First, since the claim was for one hundred million dollars and the attachment was on a mere two million dollars, which would not afford the plaintiffs much relief, the attachment should have been removed. Secondly, the attachment would have damaged trade between Chile and the United States and, therefore, have adversely affected the U.S. balance of payments. Finally, the attachment would have had a deleterious effect on the economy of Chile. Judge Metzner found the arguments ludicrous, difficult to believe, and properly within the sphere of the State Department. The court then

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(4) acts concerning diplomatic activity;

(5) public loans.

26. Nationalization Amendment, *supra* note 1.

27. Nationalization Amendment, *supra* note 1, at 1069 (*see* note 3.). For further information on the structure of the Tribunal *see Regulations of the Special Copper Tribunal*, 11 INT'L LEGAL MATERIALS 147 (1971).

28. *Id.*, *see also* note 3. As pointed out by Judge Metzner compensation was determined by the Comptroller using the formula of the value of the mines less "excess profits," rights to mineral deposits, and the value of property in poor condition. According to the Amendment, the "President of the Republic" is "empowered to order the Comptroller General . . . to deduct all or part of the excess profits earned by the nationalized companies" as determined by the President. Nationalization Amendment, *supra* note 1, at 1069.

29. *Decree Concerning Excess Profits of Copper Companies* (Sept. 28, 1971), 11 INT'L LEGAL MATERIALS 1235 (1971).

denied the motion and vacated the temporary stay granted to the defendants.

William B. Moody

BOOK REVIEW

INVESTMENT LAWS OF THE WORLD: THE DEVELOPING COUNTRIES

Compiled and edited by the International Centre for the Settlement of Investment Disputes. Dobbs Ferry, New York: Oceana Publications.

1973

5 volumes, $75 per volume, including loose-leaf maintenance for the first year.

Every once in a while a solid accomplishment shows up in the painfully slow process of international institution building, and this is one of them. The International Centre for the Settlement of Investment Disputes (ICSID), an arm of the World Bank, has put together a systematic, computerized collection of the investment laws of the developing countries which is unique, practical and well-executed. Lawyers, scholars and government representatives concerned with international investment should find this publication very useful.

The first two volumes appearing in 1973 cover ten countries each. Three more volumes are in progress. All are in loose-leaf form, and ICSID is forming a network of competent authorities in each country to keep the material current. The publication covers only countries that are members of ICSID, which, unfortunately, excludes most of Latin America. The system should eventually be expanded to include non-member countries as well.

The laws (along with the relevant portions of constitutions, regulations, and treaties) are systematically arranged, making it possible to find material on a particular aspect of investment law under the same section number for each country. There is also a detailed concordance, but there is no editorial or interpretive material; all of it is primary source material in English or, in some cases (as with some African countries), in French.

This material has, until now, been unavailable in complete and reliable form to prospective investors, government representatives, and scholars. In developing countries, the typical process for finding current legal materials has been to visit the country and make the rounds of the ministries asking for copies of current legislation. They are often not available in English, and rarely compiled in retrievable form in official volumes. With this new ICSID service, governments can scrutinize the regulatory policies and methods of other countries, investors can make an initial analysis of their legal situation with much greater certainty from their home office, and scholars will have materials for comparative study which would otherwise be nearly impossible to obtain.

At first glance the system seems complex and ponderous. There is a mass of headings and decimalized section numbers which take considerable study and skill to manipulate. But this should not be a problem for anyone with a serious purpose. As is, it is a valuable tool. Its ultimate value, however, depends on how well it is maintained.

Although good publications do exist which include editorial comment as well as a discussion of economic and business factors (e.g., Business International's services), only this collection publishes the complete texts of primary legal materials. One useful improvement, however, would be the addition of typical contracts used in various kinds of investments in each country.

It is encouraging to see this spark of creative leadership from the World Bank. It would be easy to administer ICSID as an inert chamber prepared and waiting for the use of disputing parties, should they be so inclined. But, the best way to settle investment disputes is to minimize ignorance and misunderstanding about the ground rules for investment. There is no more logical a center for creative initiatives than ICSID. Respect for the activities of the World Bank is growing steadily and this sound publication from ICSID is a further example of the Bank's valuable contributions.

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