PART I

INTERNATIONAL LAW IN GENERAL

I.—Nature and Binding Force

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III.—Subjects of International Law

[*See also* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General; *and* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties.]

International Law—Subjects of—Sovereign Order of Malta—Sovereignty without Territory—Exemption from Jurisdiction of Municipal Courts—Distinction between Private Law and Public Law Activities.

SOVEREIGN ORDER OF MALTA *v.* SOC. AN. COMMERCIALE.

Italy, Tribunal of Rome. November 3, 1954.

THE FACTS.—The appellants were an Order of Chivalry founded in Jerusalem in 1048 A.D. The Order moved its seat to Malta in 1530 and established its own independence and sovereignty, with a number of attributes, which have continued to the present day. Its sovereign privileges and character were confirmed by a number of Popes; all the Catholic States recognized the Grand Master of the Order as a Prince; and by a series of formal acts during the nineteenth and twentieth centuries, Italy recognized, *inter alia*, the Order's right of active legation and other privileges and confirmed the title of the Sovereign Order.[1]

The respondent company sued the Order before the Pretorial Court of First Instance of Rome in respect of certain goods the

[1] For greater detail see *Nanni and Others* v. *Pace and the Sovereign Order of Malta*: *Annual Digest*, 1935–1937, Case No. 2 and Note.

subject of a transaction the details of which do not appear from the report. The Pretore held that the Order was in the circumstances of the case subject to the jurisdiction of the Italian courts. The Order appealed from this decision, contending that it had absolute immunity. The respondent company contended that the Order could enjoy no greater immunity from jurisdiction than that accorded to ordinary foreign States, which was limited to activities done in the exercise of *jus imperii*.

Held: that the appeal must fail. The Order of Malta is a subject of international law, but it is not exempt from the jurisdiction of the courts in respect of its commercial activities.

The Court said: "For the solution of the problems raised by this appeal, it is necessary first to examine a number of questions relative not only to the nature of the Sovereign Order of Malta, but also to the conception of jurisdiction with reference to the rules of the so-called 'external law of the State' or international civil procedural law. On these two questions there seems to be substantial agreement because, on the one hand, the Order has accepted Italian jurisdiction and, on the other, it is recognized that the Sovereign Military Order of Malta has the character of a sovereign State and therefore an international legal personality. Nevertheless, the judge's task is to solve *motu proprio* such questions and, therefore, the Court must briefly examine the matter without taking into consideration the contentions of the two parties. As to the first question, the Court notes that the Sovereign Military Order of Malta is a subject of international law having the characteristics of a sovereign State; to be more precise, its position is similar to that of Governments-in-exile during the Second World War: although they did not exercise actual sovereignty on their territories, which were occupied by the enemy, nevertheless they arrogated to themselves that sovereignty which they exercised through a large number of international activities—they had their own diplomatic missions, participated in international conferences and agreements, intervened on the battlefields with their own armed forces, and so on. Similarly, although with many substantial differences, the sovereign State of the Sovereign Military Order of Malta, which affirms its rights as sovereign of Malta, has its own government, which maintains twenty-four diplomatic missions in foreign States (although not in England, which it regards as an unlawful occupier and usurper of its territory); it enacts instruments which have the force of law; it confers titles, military and chivalric honours; it has an air fleet for relief purposes, and it participates in international conferences and agreements. The Sovereign Military Order of Malta has recently affirmed its sovereignty *vis-à-vis* the Grand Pontiff and the Holy See, of which, however, it recognizes the High Spiritual Sovereignty. On the basis of the foregoing observations, there is no doubt as to the character of the Sovereign Military Order of Malta as a sovereign

entity and therefore of its right to be treated by other States as *par inter pares*.

" As far as jurisdiction over the Order is concerned, it is well known that a part of the rules of the Italian municipal legal system concerns aliens, or, better, nationals and aliens at the same time, and from those norms the foreigner derives his legal personality and the capacity to sue and be sued, *i.e.*, to be a party in law suits which are brought according to the rules of our legal system.

" Therefore, in principle, we find a parity between the alien and the Italian national. The alien can sue in our courts because, like the national, he has the right to commence an action; and he can be sued in so far as an alien, like a citizen, is subject to the jurisdiction of the State. All this does not exclude the possibility of exceptions for both the national and the alien (*e.g.*, jurisdictional exemption of diplomatic agents, jurisdictional exemption of the national when the subject-matter of the action is a building situated abroad). On the basis of the foregoing considerations, we find that our legal system attributes both to the national and to the alien the general capacity of suing and being sued in our courts. This can be deduced not only from the system as a whole, but also from express rules which presuppose such a capacity, such as Articles 2, 4, 37 and 800 of the Code of Civil Procedure; Article 14 of the Royal Decree No. 3282 of December 30, 1923, on free defence [legal aid]; Article 280 of the Law of War No. 1415 of July 8, 1938, under which aliens, even if nationals of enemy States, retain the right to sue and be sued in Italian courts; and, above all, Article 10, para. 2, of the Constitution, which provides that the legal status of aliens is regulated by law in conformity with international rules and treaties.

" As we shall explain later, international rules are, for the most part, formed by long continued usage, which has raised a custom to the status of law. In particular, as far as the derivation of the right of aliens to bring actions is concerned, we may assume that the relevant rule is contained in the provisions of Article 16 of the Rules of Application of the Civil Code and in Article 4 of the Code of Civil Procedure. In fact, the former recognises that an alien may enjoy the ownership of private rights, and the latter sets out the cases in which a foreigner can be summoned before an Italian court, without it making any difference whether the plaintiff is a national or an alien. From all this, and from the provision of the Constitution above cited, it follows that an alien has the right to bring actions in the Italian courts: the right is also accorded to foreign legal *personae*. Of course, the procedural capacity of the foreigner is regulated by a series of rules, most of which are contained in international treaties: therefore, in this matter there is a *jus peculiare* to which an alien litigant must conform. . . . It is a general principle of municipal law that the State exercises jurisdiction in respect of

all persons who are subject to it, without discrimination. Therefore, in order to exclude jurisdiction in a given case, it is necessary to point to an explicit and specific rule of international law accepted by our legal system. Such a rule, which was customary in its nature and which was confirmed by formal acts and declarations of various States, was in existence until the last century. This rule was connected with the absolutist principle, which, again, was related to the idea of sovereignty, and also with the difficulty of making any distinction between the activities performed by the State as the supreme authority in its own legal system and those performed by the State as a subject of this system. It was also connected with the difficulty of enforcing judgments against foreign States and with the danger of impairing good relations with the States concerned. Nevertheless, modern study and research, which have caused both authoritative writers and courts themselves to ascertain with increasing accuracy the legal nature of the activities of the State, the development of the political conscience towards forms (which have become more and more rigid) of international cooperation, and the tendency, which is now in full development, towards federalistic and supra-national forms of association, have all contributed to the formation of an opposition to the doctrine [of the jurisdictional immunity of foreign States]. On the one hand, we may affirm that the rule relative to that immunity is no longer in force; on the other hand, we may assert that, besides decisions of the courts of many States, there are specific provisions of municipal and international law which affirm the principle that foreign States are subject to the jurisdiction of other States (see, for example, the Swiss Decree of July 12, 1928; the Italian Decree Law of August 30, 1925, which has become Law No. 1263 of July 15, 1926; and the Brussels Convention[1] of April 10, 1926, etc.).

"This principle has been accepted to such an extent that, on the one hand, Italy has deemed it expedient for constitutional reasons to subordinate some judicial acts to the authorization of the Ministry of Justice (Law No. 1263 of July 15, 1926, Article 1, paragraph 1), and, on the other hand, there are international instruments on the basis of which the Italian State assumed the obligation to grant jurisdictional immunities to some international organizations. (See, for example, the Convention on the Privileges and Immunities of Specialized Agencies, approved by the General Assembly of the United Nations on November 21, 1947, and brought into operation in Italy by Law No. 1740 of July 24, 1951; the Protocol on the Privileges and Immunities of the European Community of April 18, 1951, brought into operation by Law No. 766 of June 25, 1952, but only as regards the immunities from execution and convervatory measures of property belonging to the European Coal and Steel Community, etc.)

[1 On the Immunities of State-owned Ships Engaged in Commerce.]

" On the basis of the foregoing considerations, therefore, it should be manifest that the Sovereign Military Order of Malta is subject to Italian jurisdiction, because in the present case it is clearly a subject of the Italian legal system. More specifically, by virtue of the rules of international civil procedural law generally accepted in practice, and reaffirmed in Italy by Article 4, paras. 1 and 2, of the Code of Civil Procedure, Italy has jurisdiction in respect of the Sovereign Military Order of Malta because the Order has accepted the Italian jurisdiction and because this action concerns goods situated on Italian territory. . . .

" Submission to the jurisdiction of this Court by the Sovereign Military Order of Malta has taken place both implicitly and explicitly: implicitly because no plea to the jurisdiction has been raised and explicitly because by the declaration in the Notice of appeal it is stated that ' The Sovereign Military Order of Malta spontaneously submits itself to the jurisdiction of the Italian judge '. . . ."

[Report: *Giurisprudenza Italiana*, 1955, 1, p. 737.]

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law and Municipal Law—Treaties—Absence of Municipal Legislation—General Armistice Agreement between Israel and Jordan—Interpretation of—Effect on Private Rights.

CUSTODIAN OF ABSENTEE PROPERTY *v.* SAMRA.

Israel, District Court of Tel-Aviv. January 6, 1955.

Supreme Court of Tel-Aviv (*sitting as the Court of Civil Appeals*).

(Cheshin, Deputy President; Sussman and Berinson JJ.)

December 12, 1956.

THE FACTS.—This was a consolidated appeal in three cases concerning the question of the domestic effect in Israel of an international treaty. By the General Armistice Agreement between Israel and Jordan signed at Rhodes on April 3, 1949 (*U.N.T.S.*, vol. 42, p. 303), certain territory was transferred from Jordan to Israel. Article VI (6) of that General Armistice Agreement provided that wherever villages might be affected by that transfer their inhabitants " shall be entitled to maintain, and shall be protected in their full rights of residence, property and freedom. " The respondent in the present case was an Arab who lived in territory which was transferred by that Agreement. Before the outbreak of the hostilities between Israel and Jordan in May 1948, his lands had extended into what subsequently became Israel, and the front

dividing the Israel and Jordan forces had severed his lines in two. In that period the Custodian for Absentee Property had assumed possession of the lands on the Israel side of the line, the respondent being an absentee. The respondent argued that after the entry into force of the General Armistice Agreement he was no longer an absentee, a question regulated exclusively by Israel law, and that in any event Article VI (6) of the General Armistice Agreement entitled him to the return of his property. In the District Court of Tel-Aviv (*sub nom. Samra* v. *Custodian for Absentee Property*) this plea was upheld in this and two other cases. On appeal,

Held (by the Supreme Court of Tel-Aviv): that international agreements are not part of the domestic law of Israel in the absence of legislation to that effect and, therefore, that the General Armistice Agreement did not operate to restore to the respondent property which had been appropriated by the Custodian during the time of hostilities. The General Armistice Agreement protected the respondent in the exercise of rights of property which he actually enjoyed in the transferred area when the Armistice Agreement entered into force.

The Court said (*per* Berinson J.): " The first legal question here is to what extent, if at all, the Rhodes Armistice Agreement influences the Absentee Property Regulations, 1948, or the Absentee Property Law, 1950, and consequently the status of the respondents and their lands which were in the State of Israel before the transfer of territory, from the point of view of their being absentee persons. The Rhodes Agreement is a bilateral undertaking between the Hashemite Kingdom of Jordan and the State of Israel. [After citing Article VI (6) of the Agreement the Court continued:] This Article raises two questions. The first is: Does this provision apply only to the property in the transferred area of the inhabitants of the villages transferred to Israel, or does it apply to all the property of those villagers, even property which before the transfer was in the State of Israel? A clear answer to this question was given in *El-Yussef* v. *Kfar Ara District Military Governor and Others*,[1] where it is stated:

' That provision was intended to preserve the rights of the inhabitants of the area which was ceded to Israel by the Rhodes Agreement over property situated in that very area. It in no way applies to land—such as the land here being discussed—which was in Israel even before the entry into force of the Rhodes Agreement, nor does it relate to the rights of access to such lands of a person resident in the ceded area.'

" The Judges in the lower courts did not regard themselves as being bound by this rule. They saw in that quotation an expression of opinion *obiter dictum*, on the ground that it said more than was necessary to decide the issue then before the Court and, therefore, was not binding on them in other circumstances."

[1 See below, p. 8, Note.]

After explaining the difference between the two cases, the Court pointed out that nevertheless the interpretation of Article VI (6) of the General Armistice Agreement was common to both, so that an earlier interpretation of that Article by the Supreme Court would be binding in a later case even though the precise subject-matter of the later case might be different. The Court concluded this part of its judgment by explaining that Article VI (6) had as its purpose to prevent the inhabitants of the transferred area being deprived of their existing rights and not to grant them rights which they did not have before the transfer.

The second question which was raised in argument, and which the Court called a fundamental question, was a preliminary issue of whether the respondents were entitled to rely in a court of law on the Rhodes Agreement, whether as citizens of the State or as potential beneficiaries under the Agreement, and to use it as a source for their own rights. Counsel for the appellant argued that even if the Agreement was subject to the jurisdiction of the Court the respondents could not use it as a basis for their own rights because the Agreement was not part of the law of the land and the courts were not responsible for its implementation and were not entitled to rely upon it even as a subsidiary means for the interpretation of the statute law.

On this the Court said: " This argument is in principle correct. The Rhodes Agreement is a Treaty between Israel and another State. Whatever its force and validity according to international law, it is not law which the Israel courts will or can enforce. The rights which it grants and the duties which it imposes are the rights and duties of the States which concluded the Treaty and its implementation is a matter for them alone to secure by those special means which are usual to ensure the implementation of international treaties. Such a Treaty is not given to the jurisdiction of the courts of this country except and to the extent that it, or the rights and duties which flow from it, have been embodied in the law of the land and have acquired the force of binding law. In such circumstances, it must be pointed out, the Court would then have reference not to the Treaty as such but to the law which alone gives it validity for domestic purposes. Furthermore, from this it follows that if it should happen that the law and the Treaty should not be identical, even though it is clear that the purpose of the law was to implement the Treaty and to carry it into effect, then the courts will give preference to the law, which alone binds them and by which alone justice can be done. What is more, even when an inter-State or international agreement provides that certain individuals should have defined rights, such an obligation remains an international obligation binding upon the State, and nothing more. The individuals concerned obtain no substantive right on the basis of the agreement and have nothing which they can secure in a court of law,

whether on the ground that they are beneficiaries under the agreement or on some other basis. These rules in principle have been established in a long and consistent line of judicial precedents in England. [Here the Court quoted from the speech of Lord Dunedin in *Vajesingji Joravarsingji* v. *Secretary of State for India*, (1924) L.R. 51 I.A. 357, as cited in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308,[1] and continued:]

" Similar opinions have been expressed in other countries and it is possible to say that these principles are in their fundamentals of universal application. [The Court here cited from the Canadian case of *Arrow River & Tributaries, Slide & Boom Co., Ltd.* v. *Pigeon Timber Co. Ltd.* (1932) Can.L.R. 495,[2] as well as from Italian, Greek and Australian decisions reported in various volumes of the *Annual Digest*, and continued:]

" At first sight it may be said that the United States—and other States having a similar Constitution—act differently, but this is not so in fact. The Constitution of the United States contains a specific provision which elevates to the status of the supreme law of the land all treaties properly made in the name of the United States. For this reason the Federal and the State Courts do have recourse to treaties and even give them preference over domestic law in the event that the provisions of the latter are not compatible with the provisions of the treaty. This is a direct consequence of the constitutional provision. More fundamentally, therefore, it may be said that the United States courts, too, act in accordance with those universal principles previously mentioned. They, too, enforce treaties for the benefit of individuals, to the extent that they give those individuals rights which can be substantiated in a court of law only in accordance with their own law, but here, owing to the overriding general provision of the Constitution of the United States, there is no need for a specific provision for each individual treaty. See *Edye* v. *Robertson* (1884) 112 U.S. 580. As to the Rhodes Agreement, there is in Israel no law incorporating it, or any part of it, in the domestic law of Israel and, therefore, it is impossible to rely upon it in the courts as a source of rights of the individual or the duties of the State or any of its organs."

[The remainder of the judgment deals with questions of municipal law.]

[Reports: *Pesakim Mehoziim*, 10 (1955) p. 335; *Piskei-Din*, 10 (1956) p. 1825; *Pesakim Elyonim*, 26 (1957), p. 209.]

NOTE.—The above decision of the Supreme Court thus settles authoritatively a matter upon which there has been some confusion of thought. In *El-Yussef* v. *Kfar Ara District Military Governor and Others* (*Piskei-Din*, 8 (1954), p. 342; *Pesakim Elyonim*, 15 (1954), p. 4) the Supreme Court, sitting as the High Court of Justice, in making the above-quoted

[1] See *Annual Digest*, 1938–1940, Case No. 184.
[2] *Ibid.*, 1931–1932, Case No. 2.

interpretation of Article VI (6) (see *supra*, p. 6) of the General Armistice Agreement, had left the impression that the General Armistice Agreement could be relied upon as a source of rights and of obligations in the domestic courts. When the *Samra* and other cases consolidated in the above appeal were before the lower Courts, different opinions were expressed regarding this aspect, but they inclined to the view that the earlier remark was *obiter*. In *El-Raabi* v. *Custodian of Absentee Property*, decided by the Tel-Aviv District Court on May 12, 1955 (*Pezakim Mehoziim*, 10 (1955), p. 344), Judge B. Cohen agreed with the manner in which the *El-Yussef* case had been distinguished (in the *Samra* case), and also with the view that Article VI (6) was intended to give expression to the principle of respect for private rights. He went on to discuss the question of the effect of the Rhodes Agreement upon the relations between an individual and the Custodian of Absentee Property when that question falls to be decided by a municipal court. On that question the Judge said: "I appreciate that it is not desirable that in foreign affairs more than one voice should speak for the State. If the Government is empowered to assume obligations upon the State by a treaty with another State, it is not desirable that another authority should frustrate its aims. Frustration of a subsisting international treaty is liable, at least in law, to confront the State, in its foreign relations, with a difficult situation and possibly even with war. From this angle there is much to be said for the point of view according to which the provisions of a valid and subsisting international treaty are *ipso facto* the law of the land. But if I recognize the provisions of a treaty as law, then I recognize the authority of the Government to enact legislation, and thereby I would be infringing the sovereignty of Parliament as the legislative body. Several solutions to this problem can be envisaged. For instance, a Constitution may provide that the Government has no power to bind the State by a treaty with another State except with the sanction of Parliament, and then the provisions of the treaty will be law. In another instance, the Government may be empowered to accept binding obligations by international treaty, but these obligations will not be law and if the Government is unable, without legislation, to comply with that treaty, it will have to persuade the Parliament to enact the necessary legislation. Such a Constitution, in fact, imposes upon the two authorities the duty of harmonious co-operation while leaving intact the absolute liberty of action of each within its own sphere. In Israel the constitutional régime, as far as I am aware, permits the Government to undertake valid international obligations by treaty without the necessity for parliamentary sanction. But I know of no provision of law which accords to the terms of such a treaty the force of law merely because of their being incorporated in the treaty. For reasons already given, however, I accept the view expressed in the *Elmahmadi* case (*infra*), according to which it is to be assumed that the legislator did not intend to enact laws incompatible with a valid and subsisting international treaty."

In *Elmahmadi* v. *Custodian of Absentee Property*, decided by the Tel-Aviv District Court on December 6, 1954 (*ibid.*, p. 335), the Court made the following comment on the status of the Armistice Agreement in the domestic law: "Although the Rhodes Agreement is, as an armistice agreement, a '*modus vivendi*', its juridical status is the same as that of any regular international agreement and it is subject to international law.

. . . The obvious intention of paragraph 6 was to state that the inhabitants of the area who chose to come over to Israel would be under no disability as regards their rights of property . . . Although international law as such is not an organic part of the law of Israel, the courts tend always to proceed on the assumption that, in interpreting obscure or ambiguous passages of a statute, the legislature intended to confirm and apply the provisions of international law and not contradict them."

The decision of the Supreme Court in the *Samra* case also confirms the general views held by the Government as to the general effect of a valid and subsisting international treaty. See the Note dated March 11, 1951, to the Secretary-General of the United Nations, published in *Laws and Practices concerning the Conclusion of Treaties* (U.N. Legislative Series, Doc. ST/LEG/SER. B/3, at page 71). This document was not cited to or by the Courts.

International Law—Relation to Municipal Law—Overriding Effect of Statute Inconsistent with Previous Treaty—The Law of the United States of America.

See p. 460 (*Ballester* v. *United States*).

International Law—Relation to Municipal Law—Application in Arbitration of International Law to Exclusion of Municipal Law of Either Party.

See p. 820 (*In the Matter of the Diverted Cargoes*).

International Law—Relation to Municipal Law—Effect of Treaties Which Have Not Been Made Part of Municipal Law—Jay Treaty, 1794—The Law of Canada.

See p. 591 (*Francis* v. *The Queen*).

International Law—Relation to Municipal Law—Treaties—Question of International Public Policy in Treaty—Interpretation by Executive—Whether Interpretation Retroactive—The Law of France.

See p. 623 (*C.* v. *Intendant Militaire de la 3e Région*).

International Law—Relation to Municipal Law—Extradition—Treaty Providing for Exercise of Discretion in respect of Time-Barred Offences—Municipal Law Prohibiting Extradition in respect of Time-Barred Offences—Whether Treaty or Municipal Law Takes Precedence—The Law of France.

See p. 514 (*Re Plevani*).

International Law—Relation to Municipal Law—European Convention for Protection of Human Rights—Rules of Procedure Contained in the Convention—Whether those Rules of Procedure Binding on Municipal Courts—The Law of Germany.

See p. 608 (*European Human Rights Convention Case*).