PART I

INTERNATIONAL LAW IN GENERAL

II.—Sources

International law in general—Sources—Codification treaty not yet in force—Value to international tribunal—Vienna Convention on the Law of Treaties, 1969

See p. 200 *(Golder Case)*.

International law in general—Sources—Customary law—State practice—Evolution of a new rule of customary international law—Whether such a rule had evolved in respect of atmospheric nuclear tests—Nuclear Test Ban Treaty, 1963

See p. 348, especially pp. 431-434, 450-451, 505-506, 533 and 579-584 *(Nuclear Tests Case)*.

IV.—Relation to Municipal Law

International law in general—Relation to municipal law—Conflicts between international and municipal law—Validity of municipal law violating treaty obligations—Whether *Concordat* between German Reich and Holy See binding on German *Länder*—Competence of *Länder* in cultural affairs—The law of the Federal Republic of Germany

Denominational Schools Case

Federal Republic of Germany, Administrative Court of Baden-Wurtemberg

14 *February* 1967

Summary: *The facts:*—The plaintiffs were the fathers of pupils who were attending elementary school and were resident in the Administrative District of South Wurtemberg-Hohenzollern. They alleged violation of the Basic Law,[1] and of the Constitution of the state of Baden-Wurtemberg, as

[1] Constitution of the Federal Republic of Germany.

a result of the introduction by the State Ministry of Cultural Affairs of a new school development plan and of other decrees concerning school organization. All these administrative measures were aimed at the abolition of denominational schools in their Administrative District.

The plaintiffs sought an interim order from the Court preventing the fusion of the denominational schools with other schools. The plaintiffs alleged that these administrative measures violated the terms of the *Concordat* concluded between the Holy See and the German *Reich* on 20 July 1933.

Held:—The application would be dismissed. The scheme did not amount to a violation of the *Concordat*. Moreover, violations of the international law of treaties by municipal legislation did not lead *ipso jure* to the invalidity of that legislation. Violations of the *Concordat* by the Legislature did not deprive the legislation of its municipal effect. Treaties concluded by the German *Reich* prior to the enactment of the German Basic Law remained in effect but did not bind the *Land* (state) Legislature. In particular those provisions of the *Concordat* concerning the organization of schools could not bind the *Länder* because, according to the Basic Law, cultural matters lay exclusively within the legislative competence of the *Land*.

The following is the text of the judgment:

[The Court stated the facts as outlined above and continued:]

. . . The School Development Plan and related decrees are not void. A violation of the *Concordat,* and of provisions[2] concerning the organization of schools in particular, is not evident. The establishment and preservation of elementary denominational schools within the districts of the plaintiffs' domicile remain guaranteed.

Nevertheless, the *Senat*[3] can let the question rest whether or not the state of Baden-Wurtemberg, as a part of the Federal Republic, could be directly bound by the terms of the *Concordat,* and whether or not the state of Baden-Wurtemberg would thus have violated any obligations upon it.

It is a generally recognized principle of constitutional law that violation of the international law of treaties does not *ipso jure* lead to the invalidity of the municipal legislative Act responsible for the alleged violation. Equally contraventions by the Legislature of treaties with the Church do not prevent the particular legislative Act from coming into effect.

Furthermore the state of Baden-Wurtemberg has violated neither municipal nor constitutional law by disregarding the provisions of the *Concordat* concerning school organization. In its *Concordat*

[2 Article 23.]
[3 This chamber of the Court.]

Judgment[4] the Federal Constitutional Court took the following view:—

Article 123 (2) of the Basic Law[5] does not oblige the state Legislature to respect provisions of the *Concordat* concerning organization of schools, and it does not prevent the state from passing Acts which might contradict the *Concordat*. Article 123 merely states that in so far as the *Concordat* is concerned, following the introduction of the Basic Law it remains effective even though its subject-matter has thereafter fallen within the competence of the *Länder*.

The assumption of an obligation by the *Länder* towards the *Bund* (Federal Administration) to incorporate the provisions of the *Concordat* into the organization of their school system contravenes the principles of the Basic Law. These principles are provided in Articles 7, 30 and 70 of the Basic Law. Contrary to the Constitution of the Weimar Republic they provide for an exclusive legislative competence of the *Länder* in cultural matters.

Thus the Federal Constitutional Court passed judgment on a much disputed constitutional issue. With the enactment of the German Basic Law the provisions of the *Reich*'s *Concordat* have been translated from Federal law into *state* law. There is no constitutional regulation preventing the *Länder* from either amending or repealing their own laws.[6]

In this case the judgment of the Federal Constitutional Court is binding upon the *Senat,* as it deals with the same constitutional question.

[Reports: *Fontes Iuris Gentium, Series* A, *Sectio* II, *Tomus* 6, 1966-70, p. 197; *ESVGH* 17, 141. (In German)]

[4 *BVerfGE* 6, 309; 24 *I.L.R.* 592.]
[5 Article 123:
Those treaties of the German *Reich* which concern matters which, under the Basic Law, fall within the competence of the state legislature, remain in effect until new treaties have been concluded or until old treaties have been otherwise terminated.]
[6 *BVerfGE* 6, 346.]

International law in general—Relation to municipal law—Judicial review of treaties by Constitutional Courts—Standards for protection against violation of basic constitutional principles by treaties—Whether withdrawal of certain pension rights available under German Social Insurance System by the Danish-German Cession Treaty compatible with German Basic Law—The law of the Federal Republic of Germany

DANISH ACQUISITION OF GERMAN SOCIAL SECURITY INSURANCE SCHEME CASE

Federal Republic of Germany, Federal Social Court of Justice

28 *February* 1967

SUMMARY: *The facts:*—Before World War I the plaintiff's[1] husband, a German national domiciled and working in Germany, had contributed to a German Social Security Insurance Scheme. As a result of the cession of northern parts of Schleswig-Holstein to Denmark under the Treaty of Versailles, the plaintiff's husband was employed in Denmark while, it was claimed, retaining his German nationality. In 1947 he was expelled from Denmark and re-established his domicile in Germany where he was employed and paid his social security premium for only 24 weeks. He died in 1957.

The plaintiff instituted proceedings before the Federal Social Court of Justice to secure her entitlement to a pension as the widow of the deceased. The defendant[2] contested the claim on the ground that the deceased had not contributed to the pension scheme for a sufficient time, having done so for only 35 weeks (11 weeks after the cession of the territory in 1922,[3] and 24 weeks after World War II). The defendant refused to consider contributions by the deceased prior to the cession since the Treaty had provided for the transfer of the German Social Security Insurance scheme to the Danish authorities.

The plaintiff argued that the German-Danish Treaty constituted a violation of the constitutional principles of equality and protection of private property.[4]

Held:—The plaintiff was not eligible for the grant of a widow's pension. The minimum legal requirement that contributions to the German scheme should have been made for a period of at least 60 months had not been met. Constitutional rights might be restricted in favour of the conclusion of bilateral treaties, provided the purpose of the treaty justified such restriction.

[1] The plaintiff's name is not mentioned in the original text of the German judgment.

[2] The original text does not identify the defendant. One may assume the proceedings were directed against the *Land* authorities of the plaintiff's domicile.

[3] Under the German-Danish Treaty concerning the Cession of Northern Schleswig-Holstein to Denmark, 10 April 1922, together with Article 3, 14th Convention Implementing Article 312 of the Versailles Treaty.

[4] Articles 3 and 14 of the German Basic Law.

The transfer of the German scheme to Denmark did not interfere with the constitutional principle of equality.

The German-Danish Treaty was merely a legal consequence of Article 312 of the Versailles Treaty which was binding on the German legislature.[5] Therefore the German legislature could not be accused of deliberately taking discriminatory action against the individuals concerned.

The following is the text of the relevant parts of the judgment:

[The Court stated the facts as outlined above and continued:]

. . . The contributions made by the plaintiff's husband to the German Social Security Insurance Scheme prior to 15 June 1920 are not to be taken into account. As he lived in an area which under the Treaty of Versailles was to become part of Denmark, pension claims for the period before this date are to be made to the Danish Authorities. This follows from Article 3 of the German-Danish Treaty of 10 April 1922. The plaintiff may proceed with her claims against the Danish government regardless of whether or not her husband remained a German national after 1920.

There is no reason to assume that the bilateral Treaty between Denmark and Germany constitutes a violation of the constitutional rights of equality and protection of private property (Articles 3 and 14 of the German Basic Law). Even if the Treaty had constituted an interference with German constitutional principles there is reason to doubt whether the proceedings instituted by the plaintiff would have succeeded. The Court is not authorized to ignore Article 3 of the Treaty and subsequently to include the contributions in its calculations. By doing so the Court would be replacing a legislative decision with a decision of its own; and that does not lie within its competence.

This question aside, the Treaty does not interfere with higher-ranking constitutional norms. The transfer of the social insurance rights from the German to the Danish Social Security Insurance system is compatible with the rule of equality contained in the Basic Law (Article 3). The special arrangements necessary in order for the Treaty to be realised were an unavoidable consequence of the territorial cession. Furthermore these arrangements were practical.

This notwithstanding, it must be noted that whatever regulations were implemented by the German-Danish Treaty, they were established in strict accordance with Article 112 of the Treaty of Versailles.

The German Government was obliged to submit to the binding

[5] Article 112 (1), Treaty of Versailles (25 June 1919) provided:
All the inhabitants of the territory which is returned to Denmark will acquire Danish nationality *ipso facto* and will lose their German nationality.

force of the Versailles Treaty. Thus the German Legislature may not be accused of deliberately discriminating against its own nationals. Obviously due to the change in their legal position the individuals directly affected had to accept, regarding the calculation of their pension claims under the new system, the possibility of certain disadvantages.

For similar reasons the alleged violation of Article 14 of the Basic Law (protection of private property) is denied. This already follows from the fact that the Treaty was concluded long before the enactment of the German Basic Law. Therefore the Treaty could only be judged in accordance with the provisions of the Constitution of the Weimar Republic which was valid at the time the Treaty was concluded. If one assumes the applicability of the Weimar Constitution, it remains to be seen whether or not the mere expectation of a pension was subject to constitutional protection.

An application of the then predominant interpretation of Article 153[6] of the Weimar Constitution reveals that "subjective public rights" such as the grant of a widow's pension, were not included in the constitutional guarantee of protection of property. A restriction of such rights, if taken in the interest of the State, did not give rise to a duty upon the State to indemnify the individual concerned.

Moreover one must bear in mind that the provisions of Article 3 of the Treaty represented the most which could be achieved in the given political situation. The transfer of the German Social Security Insurance system to the Danish system included sufficient guarantees against the loss of social security rights.

Therefore, under the given circumstances and with the provision of sufficient protection to the individuals concerned, the German *Reich* was entitled to restrict basic constitutional principles in favour of the conclusion of a Treaty.[7]

[Reports: *Fontes Iuris Gentium, Series* A, *Sectio* II, *Tomus* 6, 1966-70, p. 199; *BSG* 26, 141. (In German)]

International law in general—Relation to municipal law—Interpretation of municipal law with regard to the general rules of international law—The law of the Federal Republic of Germany

See p. 306 *(Acquisition of German Nationality Case).*

[6 Protection of private property.]
[7 *BVerfGE* 4, 157, 168 ff; 22 *I.L.R.* 630.]

International law in general—Relation to municipal law—Treaty —NATO Status of Forces Agreement, 1951—Treaty requiring arbitration of dispute over whether serviceman acting in course of his duty—Receiving State declining to submit questions to arbitrator and relying on agreement with sending State—Whether municipal courts able to enforce requirement of arbitration—The law of France

See p. 345 *(Agent Judiciaire du Trésor* v. *Gaulet).*

International law in general—Relation to municipal law—Antitrust action—Defendant companies allegedly inducing boundary dispute between foreign States—Dispute adversely affecting plaintiff company to benefit of defendants—Whether action involving United States court in judging acts of foreign States—Act of State doctrine—Whether action involving United States court in adjudicating upon international boundary dispute—The law of the United States

See p. 13 *(Occidental Petroleum Corporation* v. *Buttes Gas and Oil Company).*

International law in general—Relation to municipal law—Treaties —Presumption that Parliament does not intend to legislate contrary to treaty obligations—Universal Declaration of Human Rights, 1948—European Convention for the Protection of Human Rights and Freedoms, 1950—The law of England

See p. 175 *(Waddington* v. *Miah).*

International law in general—Relation to municipal law—Power of President to conclude and enforce treaty—Extradition—Power of President to order return of United States serviceman to stand trial in Philippines—Agreement Concerning Military Bases between United States and Philippines, 1947—Whether power to order return of serviceman in order to comply with Agreement implicit in power to conclude Agreement—The law of the United States

See p. 315 *(Williams* v. *Rogers).*

International law in general—Relation to municipal law—Treaties and international agreements—Consular Convention between United States and U.S.S.R., 1968—Whether Treaty exemption of diplomatic premises from taxation prevails over inchoate tax lien in existence before Treaty took effect—Rights created by treaty as part of law of each state—The law of the United States

See p. 332 *(United States* v. *City of Glen Cove).*

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

iii.—Conduct of Foreign Relations

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—International technical co-operation agreement—Protection of property of nationals—Whether failure to give protection justiciable by municipal courts—The law of France

See p. 311 *(Époux Martin)*.

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—Division of power between courts and Executive—Act of State doctrine—The law of the United States

See p. 13 *(Occidental Petroleum Corporation* v. *Buttes Gas and Oil Company)*.

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—Conclusiveness of statements of the Executive—Department of State letter—Diplomatic and sovereign immunity—The law of the United States

See p. 328 *(Premier Steamship Corp.* v. *Embassy of Algeria)*.

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—Conclusiveness of statements of the Executive—Consular Convention between United States and U.S.S.R., 1968—Treaty exemption of diplomatic premises from taxation—Whether Federal Government in exercise

of its responsibility for conduct of foreign affairs has *locus standi* to prevent local government action which would violate United States treaty obligation—Statement by Department of State concerning status of property—The law of the United States

See p. 332 *(United States* v. *City of Glen Cove).*

States as international persons—In general—Sovereignty and independence—Conduct of foreign relations—Conclusiveness of statements of the Executive—Department of State recommendation as to sovereign immunity—Whether Court will find a foreign sovereign has waived immunity—The law of the United States

See p. 148 *(Isbrandtsen Tankers* v. *President of India).*

States as international persons—In general—Conduct of foreign relations—Statements by Head of State and members of Government—Whether capable of binding State in international law

See p. 398 *(Nuclear Tests Case—Judgment).*

IV.—Recognition of Acts of Foreign States and Governments

States as international persons—In general—Recognition of acts of foreign States and governments—*Ordre public*—Application of foreign laws—Whether foreign laws compatible with German constitutional law—Whether Iranian laws on mixed marriages contrary to German public policy — The law of the Federal Republic of Germany

IRANIAN MIXED MARRIAGE CASE

Federal Republic of Germany, Oldenburg Provincial Court

11 *April* 1967

SUMMARY: *The facts:*—The plaintiff,[1] an Iranian national of Muslim faith, was engaged to a German belonging to the Lutheran Church. They had one illegitimate child. In order to marry in Germany the plaintiff was

[1] Not named in the original text of the judgment.