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The Plea of Domestic Jurisdiction before an International Tribunal and a Political Organ of the United Nations

According to the Resolution of the Institute of International Law of April 30, 1954, domestic jurisdiction embraces all matters falling within a state's competence and not limited by international law [1]). Such a general definition may be correct as a doctrinal statement, but it does not cover the different provisions used in international practice which prevent an international organ from dealing with a matter on the ground that all disputes concerning domestic affairs are excluded from its competence.

First, let us consider the unilateral declarations under art. 36 (2) of the Statute of the International Court of Justice by which a state may accept the jurisdiction of this Court in all legal disputes. These declarations of Australia, Canada, France, Kenya, New Zealand, Pakistan, and the United Kingdom of Great Britain and Northern Ireland except from the competence of this Court "disputes with regard to questions which by international law fall exclusively [2]) within the jurisdiction" of these states. Hence they reproduce the old phrase of the Covenant of the League of Nations (art. 15 (8)), which forbade its Council to make a recommendation if it found that the dispute concerned "a matter which by international law is solely within the domestic jurisdiction" of the respondent state. Other states, like India, Israel, Liberia, Malawi, Sudan, and the United States of America, on the other hand, make use of a formula similar to the provision in art. 2 (7) of the United Nations Charter, since they do not recognize the competence of the Court over disputes "which are essentially [3]) within the domestic jurisdiction"

[1]) Annuaire de l'Institut de Droit International, vol. 45 (1954 II), p. 292: «Le domaine réservé est celui des activités étatiques où la compétence de l'Etat n'est pas liée par le droit international».

[2]) Emphasis added.

[3]) Emphasis added.

of these states. Mexico's declaration speaks of disputes which, according to its opinion, depend on international jurisdiction [4]).

Both types of phrases deal with the domestic jurisdiction of states, but they do not have the same meaning. The first group excludes from the Court's competence only those matters, which, according to international law, fall exclusively within the domestic domain, whereas the second group omits the reference to international law and speaks of disputes which are essentially within domestic jurisdiction.

The second difference between the two categories is the fact that the first recognizes the competence of the Court to decide the question as to whether the dispute concerns a matter which by international law is exclusively within the international jurisdiction of the respective state. According to the second group, with the exception of India and Israel, the state alone is entitled to decide if the matter is essentially within its domain. Whether such declarations are valid or constitute a violation of art. 36 (6) of the Statute of the Court and are therefore illegal and void, is controversial. The solution of this problem is, however, beyond the scope of this article [5]).

Now we may pass to the formula enshrined in art. 2 (7) of the Charter. It is well known that a provision based on art. 15 (8) of the Covenant was included in the Dumbarton Oaks draft. But at the San Francisco Conference the provision was modified with the intention of limiting the competence of the political organs of the United Nations still further and thus protecting the members of the new organization more effectively against its intervention [6]). The reference to international law as a criterion for what matters fall under domestic jurisdiction was expressly excluded. Furthermore the word "solely" was substituted by the word "essentially" in order to enlarge the sphere of domestic domain. This replacement

> "may be interpreted to mean that intervention of the organization and the obligation to submit the matter to settlement under the Charter is excluded even if the matter is regulated by a rule of international law, that is to say, if the state concerned is with respect to the matter under an international obligation, even an obligation established by the Charter, and hence the matter is not 'solely' within the domestic jurisdiction of the state concerned: provided

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[4]) Yearbook of the International Court of Justice 1966–1967, pp. 45–71.

[5]) See: the separate opinion of Sir Hersch Lauterpacht in the case of *Certain Norwegian Loans*, Reports 1957, pp. 34–66; and Sir Humphrey Waldock, The Plea of Domestic Jurisdiction before International Legal Tribunals, BYBIL vol. 31 (1954), pp. 96–142.

[6]) Kelsen, The Law of the United Nations (1950), pp. 769–791; Lawrence Preuss, Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, RdC vol. 74 (1949 I), pp. 547–651.

that it is 'essentially' within its domestic jurisdiction. A state may admit to be with respect to a certain matter under an obligation imposed upon it by an international treaty to which the state is a party, and nevertheless assert that this matter is 'essentially' within its domestic jurisdiction" [7]).

This is not only a doctrinal interpretation. The same opinion was expressed by the Belgian delegate in the 17th meeting of Committee I/i in San Francisco [8]).

Notwithstanding these facts, the practice of the United Nations interpreted this provision from its beginning in a different way. Based on its elasticity and vagueness, it came to solutions in a sense precisely opposite to what the framers of the Charter had in mind. But I cannot accept the opinion of Alf Ross, my eminent colleague in the European Court of Human Rights, that the United Nations had rejected the plea of domestic jurisdiction as soon as it felt that "political considerations" justified taking up the case, if it affected the rights or "otherwise essential" interests of a state [9]). I must recognize, however, that the attitude of individual members varied from case to case [10]) and that the problem of whether a matter is essentially within domestic jurisdiction was often combined and confused with the other problem as to what art. 2 (7) understands under the term "intervention", since this provision only forbids "interventions" in such matters. Therefore it is not always possible to know if the United Nations recognized its competence for the one or the other reason. Finally, it is true that in some cases, the United Nations considered itself competent on the basis of an extensive interpretation of the final sentence of art. 2 (7), according to which the prohibition to intervene in matters being essentially within the domestic domain does "not preclude the application of enforcement measures under chapter VII" of the Charter. All these problems are very clearly explained by Lawrence Preuss in his excellent lectures given in 1949 in the Academy at the Hague [11]). Hence there is no need to repeat or to develop his arguments.

It seems necessary to me, however, to seek a rational interpretation of the phrase, matters "which are essentially within the domestic jurisdiction", since the historical interpretation cannot give us a clear answer. The statement of the Australian delegate, Mr. Evatt, who made the proposal for the actual draft of art. 2 (7), says only that "the

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[7]) Kelsen, *loc. cit.*, p. 778.
[8]) U.N.C.I.O. Doc. 1019, I/i/42, p. 5.
[9]) Alf Ross, The United Nations. Peace and Progress (1966), pp. 66 and 71.
[10]) *Ibid.*, p. 66.
[11]) *Loc. cit. supra* note 6. See also Rajan, United Nations and Domestic Jurisdiction (2nd ed. 1961).

field of matters which are essentially within the domestic jurisdiction is wider than matters 'solely' within this domain" [12]). Not more elucidating is Mr. Dulles' report to his President, in which he remarks that "it seemed more appropriate to look to what was the essence, the heart of the matter, rather than to be compelled to determine that a certain matter was 'solely' domestic in character" [13]).

Before attempting to find a rational interpretation of art. 2 (7) of the Charter, we must deal with an argument developed by some authors of high authority, according to which matters solely or essentially within the domestic jurisdiction of a state do not exist, since all matters can be governed by international law. There are only matters normally not regulated by a rule of international law, but there "is no reason to assume that they are 'essentially' within the domestic jurisdiction of the states" [14]).

This doctrine can be accepted in so far as it argues that there are no matters which by their nature cannot be regulated by international law. This, however, does not preclude actual international law, which is based on self-governing states, recognizing the existence of some matters which must be governed in principle by domestic law because self-governing states need a sphere of autonomy. It is impossible to suppress the whole autonomy of states without changing the character of international law itself [15]). But it is clear that this sphere may be restricted by an international treaty. So, for example, the State Treaty, concluded on May 15, 1955, for the reestablishment of an independent and democratic Austria, obliges this state to "have a democratic government based on elections by secret ballot".

Matters which, according to actual international law, are in principle (not only normally) to be regulated by domestic law, are the following: the constitution of the state, its organization, the obligations of

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[12]) Summary Report, Doc. VI, p. 512.

[13]) Report to the President, Department of State Publication 2349, Conference Series 71/1945, p. 45.

[14]) Kelsen, RdC vol. 42 (1932 IV), pp. 178, 300; *idem, op. cit. supra*, p. 776; and Principles of International Law (2nd ed. 1966), p. 296. Ullmann, Die ausschließliche Zuständigkeit der Staaten nach Völkerrecht (1932); Guggenheim, Traité de droit international public, vol. 1 (1953), p. 29.

[15]) See the writer's observations on Charles Rousseau's report presented to the Institute of International Law, La compétence nationale des Etats, Annuaire de l'Institut de Droit International, vol. 44 (1952 I), p. 176; and Die ausschließliche Zuständigkeit der Staaten nach der Satzung der Vereinten Nationen, in Scritti di diritto internazionale in onore di Tomaso Perassi, vol. 2 (1957), pp. 381–387. See also, Verzijl, Le domaine réservé de la compétence nationale exclusive, *ibid.*, pp. 391–403; Mosler-Bräutigam, »Staatliche Zuständigkeit« in Strupp-Schlochauer Wörterbuch, vol. 3 (1962), p. 320.

its citizens, questions of nationality, and all other questions having an exclusively internal attachment.

This statement does not overlook the dynamic character of international law. As the Permanent Court of International Justice held in its advisory opinion on February 7, 1923, concerning the nationality decrees in Tunis and Morocco, "the question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question; it depends upon the development of international relations" [16]). But this very fact does not exclude – as this Court continues to state – that, in the present state of international law, questions of nationality are "in principle[17]) within this reserved domain". The same is true for the other matters mentioned above. They are presumed to be in the domestic jurisdiction. But it is always possible to transfer a part of these matters by an international treaty into the international sphere.

Such a transfer may be made in two ways. A treaty may create substantial rules of international law and so restrict the liberty of states in such matters, or it may only authorize an international political organ to make recommendations to the states in a particular field, thus bringing it only in principle into the international domain. These two quite different ways of transferring a matter from the domestic into the international domain must be clearly distinguished.

The most important international norms dealing with a transfer of the second category are included in chapters IX and X of the Charter, where the United Nations are charged to promote by recommendations and submissions of draft conventions (art. 55):

> "a. higher standards of living, full employment, and conditions of economic and social progress and development;
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> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
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> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

All these matters were, previous to the Charter, regulated by domestic law, with the exception of some treaties dealing with such questions. Even now they are generally not regulated by valid substantial rules of international law. Members of the United Nations are obliged under art. 56 of the Charter only "to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Art. 55". We may add that all these purposes are really included in the universal pro-

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[16]) P.G.I.J., Series B no. 4, p. 24.
[17]) Emphasis added.

tection of human rights, since the activities under a. and b. have the task to create conditions corresponding to the inherent dignity of all members of the human family. As a consequence of the authorization of the United Nations to make recommendations in this direction, human rights assume the character of a matter in principle in the international sphere. The most important recommendation of this type is the Declaration of human rights, adopted by the General Assembly on December 10, 1948.

The distinction between the two different types of transferring a matter from the domestic into the international domain seems to me very important in the interpretation of art. 2 (7) of the Charter, as it appears in the practice of the United Nations. A striking example is the Resolution of the General Assembly in the case of the prevention of the departure (from Russia) of Russian wives of foreign nationals. In this case, the Soviet representative stated in his letter of June 21, 1948, to the Secretary General that the "raising of these questions in the General Assembly and their discussion would represent interference by the United Nations in matters which are within the internal jurisdiction of states" [18]). Nevertheless, the General Assembly adopted a resolution on April 25, 1949, declaring on the basis of art. 13 (2) of the Declaration of human rights ("everyone has the right to leave any country, including his own ...") that "the measures, which prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad, are not in conformity with the Charter". It also recommended that the Soviet government "withdraw the measures of such a nature which have been adopted" [19]).

There is no doubt that, had this affair been submitted to the International Court of Justice or another judicial organ whose function is to decide disputes in accordance with international law, these organs would have had the duty to recognize the Soviet plea of domestic jurisdiction, for no rule of international law, valid at the time, obligates the states to give such a permission, since the Declaration of human rights of December 10, 1948, has no legal force. The situation will be different after the International Covenant on Civil and Political Rights, adopted by the General Assembly on December 16, 1966 (Resolution 2200 [XXI]), comes in force; its art. 12 (2) reads as follows: "Everyone shall be free to leave any country, including his own". But this provision is limited by the following paragraph: "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national

[18]) U.N. Doc. A/562.
[19]) U.N. General Assembly, Official Records, Resolutions, pp. 34–35.

security, public order *(ordre public)*, public health or morals or the rights and freedoms of others ...". If the General Assembly adopted the above-mentioned resolution in the case of the prevention of departure of Russian wives, notwithstanding the fact that the Soviet Union had not violated any rule of international law, it is evident that the United Nations started from the idea that human rights are no longer essentially within the domestic jurisdiction of states. This example also refutes the opinion that the United Nations made recommendations in such matters only in "flagrant, widespread and systematic disregard of human rights" [20]). In this point, I agree with Mr. Evatt [21]) and Mr. Alfaro [22]), who maintained that, according to the Charter, human rights ceased to be within the domestic domain [23]), if we understand this statement as meaning that it is not sufficient to distinguish between domestic and international affairs but instead is necessary to recognize the existence of three groups of matters, namely

1. matters regulated by substantial rules of international law;
2. matters in principle under domestic jurisdiction, as far as they are not limited by international treaties; and
3. matters in principle in the international domain, although substantial rules of international law are lacking [24]).

On this basis it seems to me possible to reach a rational interpretation of art. 2 (7) of the Charter. If we admit, corresponding to United Nations practice, that it cannot deal alone with disputes regulated by substantial rules of international law, but must also deal with matters which are within the international sphere only in principle, it is evident that matters essentially within domestic jurisdiction are those and those alone which are governed by domestic law in principle, such as the constitution of a state,

[20]) Preuss, *loc. cit. supra* note 6, p. 642.

[21]) Speaking as representative of Australia in the case of *Observance of human rights in Bulgaria and Hungary*, U.N. General Assembly, General Committee, Doc. AIBUR/GR. 58, p. 12.

[22]) Speaking as representative of Panama in the *India-South Africa* case, U.N. Plenary Meetings (December 8, 1946), p. 1026.

[23]) See also H. Lauterpacht, The International Protection of Human Rights, RdC vol. 70 (1947 I), pp. 5–107; Guggenheim, *loc. cit. supra* note 14, pp. 257 and 302; and Ingo v. Münch, Internationale und nationale Zuständigkeit im Völkerrecht der Gegenwart, Berichte der deutschen Gesellschaft für Völkerrecht, H. 7 (1967), p. 51.

[24]) See this writer's article: La compétence nationale dans le cadre des Nations Unies et l'indépendance des Etats, Revue Générale de droit international public, vol. 36 (1965), pp. 314–325; and: Les affaires qui relèvent essentiellement de la compétence nationale d'un Etat d'après la Charte des Nations Unies, University of Thessalonica, in Memoriam Petros S. Vallindas (1966), pp. 44–55. The existence of three groups of matters is also recognized by Henri Rolin, Annuaire de l'Institut de Droit international, vol. 45 (1954 II), p. 143; and Verzijl, *loc. cit. supra* note 15.

its organization, the obligations of its citizens, questions of nationality, and other questions having an exclusively internal attachment. But these matters cease to be within the domestic domain as far as they become governed by an international treaty, since the interpretation of the terms of every treaty constitutes "a question of international law" [25]).

This interpretation of art. 2 (7) of the Charter, deduced from the practice of the United Nations, is, however, not binding upon a state which has reserved for itself the right to interpret its declaration under art. 36 (2) of the Statute of the International Court, since this interpretation does not correspond to the intentions of the framers of the Charter, as we have already observed.

After the two International Covenants on Human Rights, adopted by the General Assembly on December 16, 1966, come into force, the matter of human rights will be governed by substantial rules of international law for those states which ratify them. Similar is the situation of states which adopted the European convention on human rights. For the others the questions of human rights will remain a matter only in principle within the international domain.

It is now time to come to a conclusion. It seems to me that it has to be the following: It is not possible to give a general definition of the phrase, "matters within domestic jurisdiction". The definition depends on the interpretation of concrete provisions in which such a phrase or similar phrases are included.

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[25]) Advisory opinion of the International Court of Justice in the case of *Peace Treaties* with Bulgaria, Hungary, and Rumania, Reports 1950, p. 65. Further, the judgment of this Court in the *Interhandel* case, Reports 1959, p. 24.