EDITORIAL COMMENT

JUS DISPOSITIVUM AND JUS COGENS IN INTERNATIONAL LAW: IN THE LIGHT OF A RECENT DECISION OF THE GERMAN SUPREME CONSTITUTIONAL COURT

The Draft Articles on the Law of Treaties prepared by the International Law Commission, with Sir Humphrey Waldock as the special reporter, contain rules governing the conflict between a treaty and a peremptory norm of international law (*jus cogens*). Article 37 of the Draft Articles, as adopted during the Commission's meeting at Monaco, January 3–28, 1966,[1] provides:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 45 specifies in addition:

> If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.[2]

These provisions, because of their far-reaching implications for the nature and structure of customary international law, have evoked widespread attention and discussion, and recently have been the object of a provocative defense by Professor Verdross, an eminent member of the Commission, in the pages of this JOURNAL.[3]

It may be of general interest in that connection to note that the German Supreme Constitutional Court last year had to deal with that problem in a case where the application of a treaty between the Federal Republic of Germany and Switzerland was challenged as being in conflict with a general norm of international law, and therefore unconstitutional.[4]

In that case petitioner, a Swiss corporation which owned real estate in Hamburg, challenged the legality of a tax assessment levied upon it pursuant to the German Law on the Equalization of Burdens of August 14, 1952.[5] The statute in question imposes various taxes for the purpose of raising revenue to be used for the payment of compensation for losses suffered by the expellees from the former German territories in the East and by war victims belonging to designated categories.[6] One of the taxable assets

[1] A/CN.4/184, Annex, p. 3 (1966). [2] *Ibid.*, p. 6.

[3] Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," 60 A.J.I.L. 55 (1966).

[4] In the matter of petition for review of the constitutionality of three decisions of the Federal Supreme Tax Court by . . . , a corporation at Zurich (Switzerland), 18 Decisions of the Federal Supreme Constitutional Court (hereafter cited as BVerfGE) 441 (April 7, 1965).

[5] Bundesgesetzblatt (hereafter cited as BGBl.) 1952, Pt. I, pp. 446–553.

[6] Equalization of Burdens Act, Secs. 1, 4, 11–15, 228–304.

is labeled as mortgagors' profits and involves pecuniary advantages obtained by mortgagors and owners of otherwise encumbered real estate as a result of the currency reform in 1948.[7] The statute does not differentiate between German nationals and foreign property owners. The application of the statute in question to Swiss nationals is regulated by a convention between the Federal Republic of Germany and Switzerland of August 26, 1952,[8] which, after due ratification and promulgation, went into force on March 19, 1953.[9] Section 1 of that convention stipulates that the Law on the Equalization of Burdens shall apply to Swiss nationals, including corporations incorporated in Switzerland, to the extent that it applies to nationals of the most-favored nations. The principal treaty which accords preferential treatment with respect to some of the taxes covered by the Law on the Equalization of Burdens is the Convention of May 26, 1952, between France, the United Kingdom, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising out of the War and the Occupation,[10] as revised by the protocol of October 23, 1954.[11] The convention consists of several chapters and an Annex establishing an Arbitral Commission on Property, Rights and Interests in Germany.[12] Chapters V and X as well as the Annex were open to accession by other Powers, and seven nations (Belgium, Denmark, Greece, Italy, Luxembourg, The Netherlands and Norway) have exercised this option.[13] Chapter X, Article 6, paragraph 2,[14] grants an exemption from certain of the taxes imposed by the Law on the Equalization of Burdens to nationals of any of the United Nations and to corporations owned by such nationals, but in a test case it was held by the Arbitral Commission on Property, Rights and Interests in Germany that the dispensation did not include the mortgagors' profits tax.[15] The Federal Supreme Tax Court followed this interpretation of the treaty between the Three Powers and the Federal Republic of Germany in the instant case.[16]

In challenging the decision of the Federal Supreme Tax Court in the Federal Supreme Constitutional Court on constitutional grounds, petitioner

[7] *Ibid.*, Secs. 3 and 91–160.

[8] The text is published in BGBl. 1953, Pt. II, p. 24.

[9] Notification of April 15, 1953, BGBl. 1953, Pt. II, p. 127.

[10] The revised text is reproduced in 6 U. S. Treaties, Pt. 4, p. 5652 (1955); and 49 A.J.I.L. Supp. 69 (1955).

[11] The protocol and the schedule revising the convention are reproduced in 6 U. S. Treaties, Pt. 4, pp. 4117 and 4149 (1955).

[12] The annex containing the Charter of the Arbitral Commission on Property, Rights and Interests in Germany is reproduced in 6 U. S. Treaties, Pt. 4, p. 5679, and 49 A.J.I.L. Supp. 113 (1955).

[13] See the information in U. S. Dept. of State, Treaties in Force 247 (1965).

[14] 6 U. S. Treaties, Pt. 4, at p. 5673 (1955).

[15] Decision of the Arbitral Commission on Property, Rights and Interests in Germany, Second Chamber, of March 23, 1963, In the matter of Gilis, 5 Entscheidungen der Schiedskommission für Güter, Rechte und Interessen in Deutschland 40; 18 Betriebsberater 130 (1963).

[16] Bundessteuerblatt 1963, III, p. 300 (1963).

argued, *inter alia,* that the convention with Switzerland was inconsistent with the general rule of international law to the effect that foreigners could not be compelled to contribute to the raising of revenues collected for the purpose of defraying expenditures resulting from war. As a result, petitioner claimed, any application of the convention in question contravened Article 25 of the Bonn Constitution, which declares general rules of international law to be part of the German federal law. The Supreme Court rejected this contention in the following passage [17] which, because of its general interest, is translated in full:

> b) Petitioner invokes a general rule of customary international law to the effect that the resort to aliens for the purpose of defraying expenditures resulting from consequences of a war is not permissible. The contractual arrangements in the convention with Switzerland with respect to the German equalization of burdens were, however, apt to displace this rule of international law—assuming its validity —and to preclude its application.
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> Pursuant to the Bonn Constitution, Art. 25, general rules of international law become part of the federal law only with their current content and in their current scope.[18] The Bonn Constitution, Art. 25 opens the German legal order to them only in the state of their international validity,[19] which is measured also by the extent to which they, in their relation to the individual states, are displaced by contractual arrangements. Bonn Constitution Art. 25 does not preclude that contractual agreements that are permitted by international law obtain, by statute, the force of German internal law although they do not fully completely correspond to the general rules of international law.[20]
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> Customary international law is essentially jus dispositivum. A proposition to the effect that the general rules of customary international law as a matter of principle enjoy priority over contractual stipulations is foreign to general international law. International treaty law, to the extent that the parties to the agreement are concerned, possesses as a rule priority over customary law since it is the later and the more special law. Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.[21] The rule that no resort may be had to aliens for the defrayal of ex-

[17] 18 BVerfGE 441 at 448 (1965). Footnotes 18 *et seq.* are citations of the Court.

[18] BVerfGE Vol. 15 p. 25; Vol. 16 p. 27.

[19] Cf. Mosler, Das Völkerrecht in der Praxis der deutschen Gerichte p. 40, 44.

[20] Cf. BVerfGE Vol. 16 p. 276, and Wengler, Völkerrecht, Vol. I p. 483 ftn. 2 (1964); Dahm, Völkerrecht, Vol. I p. 67 (1958); Bertram in the report by Partsch, Die Anwendung des Völkerrechts im innerstaatlichen Recht, Berichte der Deutschen Gesellschaft für Völkerrecht, Issue 6, p. 68 ftn. 63 a (1964).

[21] See Wengler, op. cit. *supra* note 20, at p. 412; Verdross, Völkerrecht (5. ed) p. 130; Menzel, Völkerrecht (1962) p. 106; Dahm, op. cit. *supra* note 20, at p. 16; Guggenheim in Strupp-Schlochauer, Wörterbuch des Völkerrechts Vol. 3 p. 528; Jaenicke, *id.* at p. 766.

penditures resulting from war consequences certainly does not fall into this class of peremptory rules of international law.[22]

Therefore, we need not pass on the question of whether the fact that the Federal Republic and a substantial number of other states have entered into or have agreements, the contents of which correspond to the German-Swiss Convention, justifies the conclusion that the rule of international law invoked by petitioner, at any rate, would not have the character of a *general* rule of international law.[23]

c) If therefore the convention with Switzerland concerning the equalization of burdens was capable of excluding the applicability of the general rule of international law invoked by petitioner, the latter rule would have been material for the decision of the Federal Supreme Tax Court only if the convention would have accorded petitioner the option of refusing to be called upon to contribute to the equalization of burdens and of relying instead upon the more favorable rules of general international law.

. . .

The Convention [however] contains no clause to the effect that the general rules of international law shall remain unaffected (in contrast, *e.g.*, to Art. 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Basic Liberties of March 20, 1952.[24]) Treaty law normally has precedence over customary international law. A rule which prohibits resort to aliens for the defrayal of expenditures resulting from consequences of war would not fall in the class of peremptory rules of international law.

The foregoing passage indicates that the German Federal Supreme Constitutional Court accepts the existence of peremptory rules of customary international law, although it accords them only a limited scope and rejects the contention that the immunity of aliens from taxation for the payment of war debts is based upon a rule of such character. The opinion of the Court is also significant because it alludes to the logical difficulties inherent in the continuing existence of such peremptory rules, although some states by agreement attempt to depart therefrom. Is it ever possible to transmute a peremptory rule, once it has become recognized as such, into a rule which is merely "dispositive" in character? In principle this should be possible, at any rate when there is widespread international consensus to such a change. For that reason the second part of the provision of Article 37 of the Draft on Treaties ("which can be modified only by a subsequent norm of general international law *having the same character*") seems to overshoot the mark. Certainly a peremptory norm might be subject to replacement by a non-peremptory norm. The rule accomplishing

[22] See BVerfGE, Vol. 16, p. 276; Judgment of the First Chamber of the Arbitral Commission on Property, Rights and Interests in Germany of June 2, 1959, Entscheidungen der Scheidskommission, Vol. 2 p. 79; Judgment of March 23, 1962, Entscheidungen Vol. 5 p. 40, the 3. headnote of which states that the stipulation governing the contributions to the equalization of burdens in Chapter Ten of the Agreement on the Settlement of Matters Arising out of the War and the Occupation possesses precedence over all other rules of international law.

[23] See Wengler, op. cit. *supra* note 20, at p. 395 and Entscheidungen der Schiedskommission, Vol. 5 p. 40, et seq., especially at p. 67.

[24] Law of Dec. 20, 1956, BGBl. 1956, pt. 2 p. 1879.