PART I

INTERNATIONAL LAW IN GENERAL

II.—Sources

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International law in general—Sources—General principles of law—Generally recognized principle—Application by Arbitral Commission on Property, Rights and Interests in Germany.

See p. 587 (*Levis and Levis and Veerman* v. *Federal Republic of Germany*).

International law in general—Sources—Principles of international law—When a rule can be regarded as a principle.

See p. 549 (*Bengtson* v. *Federal Republic of Germany*).

International law—Sources—Customary international law—Criteria for establishment of custom—Constant and uniform repetition—Breadth of territorial waters—Whether Convention on Territorial Sea, 1958, declaratory of international law—The law of Italy.

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III.—Subjects of International Law

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International law—Subjects of—Individuals—Whether entitled to challenge validity of legislation on ground of inconsistency with treaty—Relevance of specific provision for settlement of disputes arising under treaty—Convention on Settlement of Matters arising out of the War and the Occupation, 1954—The law of Germany.

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IV.—Relation to Municipal Law

[*See also* PART VIII: B, VII; *and* PART VI: A.]

International law—Relation to municipal law—Treaty providing that certain municipal legislation cannot be replaced except with consent of specified States—Convention on Settlement of Matters arising out of the War and the Occupation, 1954—Restitution legislation required to be maintained in force by Federal Republic of Germany—Amendment and replacement of such legislation only with consent of the Three Powers—Whether Federal German Restitution Law, 1957, in breach of Convention, Chapter 1, Article 1, and Chapter 3, Articles 2, 3 and 4.

NEWHOUSE *ET AL. v. REICH.*

Federal Republic of Germany, Supreme Restitution Court, Second Division.[1]

December 16, 1959.

THE FACTS.—The claimants, Charlotte Newhouse and eight other persons, had successfully brought a claim for compensation under Law 59, the Restitution Law applicable in the former British Zone of Germany, in respect of household effects of which their predecessor in title had been deprived. The Chamber, whose decision was upheld by the *Oberlandesgericht* of Düsseldorf, ordered the *Reich* to pay the claimants compensation in the amount of DM 20,500. The claimants submitted a petition for review to the Supreme Restitution Court objecting to the method of assessing the compensation followed by the lower courts.

Their main contention was that the *Oberlandesgericht* should not have relied on the provisions of the Federal Restitution Law (*Bundesrückerstättungsgesetz*) relating to the computation of compensation as this Law was null and void. They maintained that, in enacting the Law, the Federal Republic violated Articles 2, 3 and 4 of Chapter 3 of the Settlement Convention[2] and disregarded the fact that the Convention had become internal German law.

The claimants further contended that the Federal Restitution Law violated the Military Government restitution legislation to their detriment, and that this constituted an act of confiscation without due process of law and without compensation, in contravention of Articles 3 and 14 of the Basic Law.

[1] The Second Division of the Supreme Restitution Court exercises the powers and jurisdiction of the former Supreme Restitution Court for the British Zone, and commenced work on December 15, 1955.

[2] Convention on the Settlement of Matters arising out of the War and the Occupation, 1954 (U.N.T.S. Vol. 332, p. 220).

If, contrary to their contention, the Federal Restitution Law was held to be valid and applicable, the claimants objected to the way in which the lower Courts had applied Article 16 of the Law concerning the computation of compensation in D Marks. It provided that the sum payable was to be governed by the cost of replacement of the affected property, and that the material date for arriving at the cost of replacement was April 1, 1956. The present report is limited to the claimants' main contentions, as the argument on the application of Article 16 of the Federal Restitution Law was concerned solely with German municipal law.

Held: that the claimants' main contentions must be rejected. The Federal Restitution Law was not in conflict with the relevant provisions of the Settlement Convention, and there was no evidence that the Three Powers had challenged any of the provisions of the Law. Moreover, the Powers had expressly agreed to the application of the Law to Berlin, and it could not be supposed that they would disapprove its application to the Federal Republic. Even assuming that the Law had been enacted without the consent of the Powers, its validity could not be challenged before the Supreme Restitution Court by an individual, in view of Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany.[1]

With regard to the alleged violation of the Military Government restitution legislation, the sole judges of the consistency of Federal legislation with the Military Government legislation in this field were the Powers, and they had not contested the Law.

On the contention that the Federal Restitution Law had violated the Basic Law, it was held, first, that the Basic Law did not apply to a *lex specialis* like Law 59, enacted by the Military Government by virtue of its supreme authority; secondly, that Article 3, paragraph 2, of Chapter 3 of the Settlement Convention did not mention the Basic Law; and finally, that there was no conflict between the Federal Restitution Law and Articles 3 and 14 of the Basic Law.

The Court said (in part): " . . . The claimants submit that under Law 59 the position of the *Reich* does not differ from that of any

[1] Article 9 provides:

" 1. There shall be established an Arbitration Tribunal which shall function in accordance with the provisions of the annexed Charter.

" 2. The Arbitration Tribunal shall have exclusive jurisdiction over all disputes arising between the Three Powers and the Federal Republic under the provisions of the present Convention or the annexed Charter or any of the related Conventions which the parties are not able to settle by negotiation or by other means agreed between all the Signatory States, except as otherwise provided by paragraph 3 of this Article or in the annexed Charter or in the related Conventions.

" 3. Any dispute involving the rights of the Three Powers referred to in Article 2, the first two sentences of paragraph 1 of Article 4, the first sentence of paragraph 2 of Article 4 and the first two sentences of paragraph 2 of Article 5, or action taken thereunder, shall not be subject to the jurisdiction of the Arbitration Tribunal or of any other tribunal or court."

other defendant in restitution proceedings; that equality of treatment is due to all restitution claimants, particularly with respect to monetary claims in connection with which capital and revenue have the same standing; and that the Federal Republic has not automatically become liable in law for the indebtedness of the *Reich* under Law 59. They consider that, in enacting the Federal Restitution Law, the Federal Republic violated Articles 2, 3 and 4 of Chapter Three of the Settlement Convention and disregarded the fact that this Convention had become internal German law. They contend that a violation of the Military Government restitution legislation to the detriment of the claimants ' who were financially affected thereby constituted an act of confiscation without due process of law and without compensation '; this, in their view, amounted to a contravention of Articles 3 and 14 of the Basic Law.

" The claimants have taken specific exception to a number of Articles of the Federal Restitution Law. In actual fact the only provision of that Law, on which the *Oberlandesgericht* relied in its decision was—as the *Oberlandesgericht* has pertinently observed—Article 16. It will, therefore, be unnecessary for us to examine in detail the objections of the claimants to the other Articles.

" In our judgement the Federal Restitution Law is not inconsistent with Articles 2, 3 and 4 of Chapter Three of the Settlement Convention.

" In Article 2 of this Chapter the Federal Republic assumed the obligation to implement fully the Military Government restitution legislation. Paragraph 1 of Article 3 requires this legislation, as amended in paragraph 2 of Article 4, to be maintained in force until all claims filed thereunder have been fully dealt with. Under paragraph 2 of Article 3, however, the Federal Republic may exercise all legislative powers exercisable by the Three Powers, or any of them, pursuant to the restitution legislation in a manner not inconsistent therewith.

" Under Article 1 of Chapter One of the Convention, legislation which is required to be maintained in force may only be amended or replaced with the consent of the Three Powers.

" The draft of the Federal Restitution Law was submitted to the Three Powers before the enactment of the Law. The Three Powers expressed at the time no view on the consonance of the draft with Article 4 of Chapter Three of the Settlement Convention and reserved their rights under the Convention in case they should think that an obligation assumed by the Federal Republic had not been fulfilled in a satisfactory manner. This follows from the correspondence between the Federal Government and the Three Powers:

' Besides, the Federal Government takes the view that the draft does full justice to the requirements of Article 4 of Chapter Three of the Convention on the Settlement of Matters Arising out of the War and the

Occupation and that it is in every respect consonant with the said Convention . . .

' . . .

'As regards the question whether or not the draft of the Law is in every respect consonant with Article 4 of Chapter Three of the Convention on the Settlement of Matters Arising out of the War and the Occupation the Government of the United States (or Her Majesty's Government or the Government of the French Republic respectively) for the moment renounce their right to express their view and reserve all rights to which the Three Powers are entitled under this Convention in case they should think that a liability assumed by the Federal Republic has not been fulfilled in a satisfactory manner.'

" No action, as far as we know, has been taken by the Three Powers in pursuance of their reservation so far. This, in our opinion, indicates that the Three Powers have not challenged any of the provisions of the Federal Restitution Law. It is true that the Federal Restitution Law itself does not mention that the Three Powers' consent was obtained under Article 1 of Chapter One of the Settlement Convention. But this Article does not lay down that the consent of the Three Powers must be publicly notified or even expressed in writing.

" The Federal Restitution Law was taken over and promulgated in Berlin with the express consent of the Allied Kommandatura:

'With reference to your letter No. Just 1101—III/A—44—of April 19, 1957, the Allied Kommandatura has the honour to inform you that it gives its consent to the adoption by Berlin of the Federal law under reference, it being understood that the final text of this law will be the one transmitted under your letter of April 19, 1957, as amended by the *Bundesrat* (*Drucksache* 240/57 of the *Bundesrat* dated May 31, 1957).' (BK/L (57) 24 of June 29, 1957).

" Moreover, the Allied Kommandatura informed the Governing Mayor that, in the event of any inconsistency between the Federal Restitution Law and the Allied legislation on restitution, the provisions of the Federal Restitution Law would apply:

'Pursuant to Article VI of the Declaration on Berlin which entered into force on May 5, 1955, the Allied Kommandatura, Berlin, as well as the Commandants of the British, American and French Sectors of Berlin in their separate capacities hereby approve that, to the extent of any inconsistency between existing Allied legislation in force in Berlin and the provisions of the law of the Federal Republic for the Settlement of Pecuniary Obligations under Restitution Law of the German Reich and Legal Entities Assimilated to it in Status as applied to Berlin by Mantelgesetz, Allied legislation shall not apply.' (BK/O (57) 9 of July 3, 1957).

" The Allied Commanders in Berlin act on the instructions of their respective Governments (*cf.* Statement of June 5, 1945, by the Governments of the UK, the USA and the USSR and the Provisional Government of the French Republic on control

machinery in Germany[1]). It cannot be supposed that the Three Powers, while agreeing for Berlin to the amendment of the restitution legislation which the Federal Restitution Law contained or implied, disapproved of it for the Federal Republic.

" Even if it were assumed for the sake of argument that the Federal Restitution Law was enacted without the consent of the Three Powers, a private litigant, in our opinion, could not challenge its validity before the Supreme Restitution Court. The obligations assumed by the Federal Republic in the Settlement Convention were assumed towards the Three Powers, and only the Arbitration Tribunal contemplated by Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany[2] could be seised of a dispute regarding the fulfilment of those obligations. The Federal Government and the Governments of the Three Powers alone may be parties before that Tribunal (*cf.* paragraph 5 of Article 9 of the Charter of the Arbitration Tribunal). The claimants' argument that it is possible for individuals to base themselves directly upon the provisions of international treaties which have become parts of the internal German law is, in our view, devoid of substance in the present case because the treaties in question, *i.e.*, the Bonn Conventions, have defined and limited the remedy for eventual breaches of their terms.

" We therefore conclude that there is no force in the claimants' contention that the Federal Restitution Law violated the Settlement Convention.

" There remains the claimants' contention that the Federal Restitution Law violates the Military Government restitution legislation, the Federal Law of March 28, 1954 (*supra*), approving the Bonn Conventions, and Articles 3 and 14 of the Basic Law. The most flagrant violation of these Laws, the claimants contend, is to be found in Article 16 of the Federal Restitution Law.

" The claimants' contention, in our opinion, is based on a misunderstanding. They agree that the Federal Republic did not automatically become liable in law for the indebtedness of the *Reich* under Law 59 . . . They seem, however, to ignore the fact that the undertaking of the Federal Republic to ensure the satisfaction of judgments and awards against the former Reich was subject to certain limitations (ceiling of DM 1,500,000,000.—; latitude as to

[1 United Kingdom, Germany No. 1, 1945, Cmd. 6648. Also contained in " Selected Documents on Germany and the Question of Berlin, 1944–1961 ", United Kingdom, Germany No. 2, 1961, Cmnd. 1552, p. 43, and in A.J.I.L., 39 (1945), Supp., p. 177.]

[2 Article 9, paragraph 5, provides: " Only the Governments of one or more of the Three Powers, on the one hand, and the Federal Government, on the other, may be parties before the Tribunal. If the Federal Government brings a complaint against one or two of the Governments of the Three Powers, or if one or two of the Governments of the Three Powers brings a complaint against the Federal Government, the other Government or Governments of the Three Powers may apply to the Tribunal to be joined as parties."]

time and method of payment; paragraph 3 of Article 4 of Chapter Three of the Settlement Convention). Apart from this, the Federal Republic, as we have already remarked, may, under paragraph 2 of Article 3 of that Chapter, exercise the legislative powers previously exercisable by the Three Powers in the field of restitution, and the only restriction on their exercise of these powers is that it should not be inconsistent with the Military Government restitution legislation. For the reasons which we have given above the Three Powers are the sole judges of this consistency, which they have not so far contested.

" We consider, therefore, that there is no force in the claimant's contention that the Federal Restitution Law violates the Military Government restitution legislation or the Federal Law giving effect to that legislation and the Bonn Conventions.

" There remains the question of the Basic Law, We should say at the outset that the provisions of this Law do not apply, in our opinion, to legislation implementing a *lex specialis* like Law 59, which was enacted by Military Government in virtue of its supreme authority. Paragraph 2 of Article 3 of Chapter Three of the Settlement Convention makes no reference to the Basic Law. Any apparent conflict between the provisions of the Federal Restitution Law and those of the Basic Law would, in our judgement, be covered by Article 142a (Vertrag mit den Drei Mächten) which was inserted in the Basic Law by the Law of March 26, 1954 (*supra*).

" In point of fact we do not consider that there is any conflict between the Federal Restitution Law, Article 16, and Articles 3 and 14 of the Basic Law. The purpose of the Federal Restitution Law was to satisfy proportionally claims against the former *Reich*, the former *Land* Preussen, the former NSDAP [the Nazi Party] and its ramifications, and certain specified entities. The proportional satisfaction of claims obtains in insolvency and similar proceedings. What Article 3 of the Basic Law forbids is discrimination in the treatment of persons. It does not prevent differentiation in the satisfaction of claims, where the differentiation is based not on the personality of the claimant but on the nature of the claim. For these reasons the appointment of April 1, 1956, as the material date for the determination of the replacement value of lost property in the computation of damages and the settlement of profits or interest by the addition of a lump sum (a percentage of 25% or 10%) to the amount of damages, do not appear to us to contravene the principle of equality before the law. Similarly, they do not appear to us to constitute unlawful acts of expropriation (Article 14 of the Basic Law). On the claimants' own showing the Federal Republic did not automatically become liable for the former *Reich*'s indebtedness under the restitution legislation. It cannot be said, therefore, that the limitation of the liability it assumed amounted to the expropriation of any claim against itself. Apart from this, preferential and deferred claims are normal incidents of insolvency and similar proceedings.

" In the result, the claimants' contention that the Federal Restitution Law violates the Basic Law seems to us devoid of foundation. This equally applies to the contention that the Federal Restitution Law violates general principles of German law.

" We consider, however, that the claimants' petition must succeed on the actual application of Article 16. . . ."

(The remainder of the judgment is concerned solely with the question of the method of assessment of compensation, and is not reproduced here.)

[Report: *Supreme Restitution Court, Second Division, Selected Decisions*, vol. III, p. 431 (in English).]

International law—Relation to municipal law—Inter-Governmental Agreement—Exchange of letters annexed to Agreement—Letters not published as provided by constitutional law of country of forum—Whether parties to proceedings in country of forum entitled to rely on content of letters—The law of France.

See p. 438 (*Re Government Commissioner with the Commission for the Distribution of Compensation for Czechoslovak Nationalizations*.)

International law—Relation to municipal law—Special treaties establishing supra-national organizations—European Coal and Steel Community Treaty, 1951—Concentration of industry under Treaty—Right to sanction concentration reserved to High Authority—Concentration effected without sanction—Dismissal of employee of enterprise caused by concentration—Whether employee entitled to damages for wrongful dismissal.

See p. 497 (*Fabre* v. *Société commerciale d'Affrètements et de Commissions*).

International law—Relation to municipal law—Municipal decree giving effect to content of treaty—General municipal law inconsistent with decree—Whether provisions of decree or general municipal law applicable—The law of France.

See p. 439 (*Kern* v. *Public Prosecutor*.)

International law—Relation to municipal law—Terms of Treaty providing for entry into force on signature—Constitution of one Contracting Party providing for requirement of ratification—Whether Treaty applicable in territory of such Party from date of signature or from date of ratification—The law of France.

See p. 436 (*Re Dame Nguyen Huu Chau*).

International law—Relation to municipal law—Operation of treaties—Whether individuals entitled to claim under treaties.

See p. 269 (*Re Compagnie française des chemins de fer de l'Indochine et du Yunnan*).

International law—Relation to municipal law—Treaties—Operation as part of municipal law—European Economic Community (Common Market) Treaty of March 25, 1957—Provisions of Treaty prohibiting restrictive trade practices—The law of Germany.

See p. 508 (*Prohibition of Restrictive Trade Practices (Germany) Case*).

International law—Relation to municipal law—Restitution Law in Germany—Overriding effect of international law.

See p. 396 (*Cassirer and Geheeb* v. *Japan*).

International law—Relation to municipal law—International law expressly part of municipal law by Constitution—Basic Law of Federal Republic of Germany, Article 25—Applicability of Article 25 to West Berlin—Application of international law by West Berlin courts apart from Article 25.

See p. 385 (*Weinmann* v. *Republic of Latvia*).

International law in general—Relation to municipal law—Whether individuals can claim rights under treaties—Effect of Agreement between United Kingdom and Israel relating to transfer of pension liabilities—Treaty not incorporated in domestic law—Whether pensioner " relies " upon Treaty in making claim.

See p. 442 (*Richuk* v. *State of Israel*).

International law in general—Relation to municipal law—Constitutional provision requiring conformity between municipal law and international law—Constitution of Italy, Article 10.

See p. 170 (*Re Martinez and Others*).

International law in general—Relation to municipal law—Treaties—Whether part of the law of the land—Constitutional provisions—Article 66 of the Netherlands Constitution.

See p. 268 (*A.J.K.* v. *Public Prosecutor*).

International law in general—Relation to municipal law—Whether treaties form part of domestic law—Relation to prior and subsequent legislation—Whether treaties self-executing—The law of Spain.

See p. 461 (*Re Application of Spanish-Swiss Convention of November 14, 1879*).

International law—Relation to municipal law—Private contracts inconsistent with treaty provisions—Validity of, in municipal law—Foreign exchange regulations—Bretton Woods Agreement, 1945.

See p. 539 (*Southwestern Shipping Corporation* v. *The National City Bank of New York*).

International law in general—Relation to municipal law—Treaties—Operation of—Effect in municipal law—Non-self-executing treaties—Convention of 1934 for the Protection of Industrial Property—The law of the United States of America.

See p. 471 (*Kemart Corporation* v. *Printing Arts Research Laboratories, Inc.*).

International law—Relation to municipal law—Treaties—Operation of—Effect in municipal law of subsequently enacted statute—Customary international law—Consistency of statute with—Seizure of property of enemy alien in time of war—The law of the United States of America.

See p. 467 (*Tag* v. *Rogers, Attorney General, et Al.*).

International law—Relation to municipal law—Treaty containing prohibition of discriminatory trade practices in contracts between individuals—Contract between individuals violating prohibition contained in treaty—Whether parties to contract entitled to rely on invalidity or partial invalidity of contract by reason of violation of treaty—Treaty establishing European Coal and Steel Community, 1951—The law of Germany.

See p. 497 (*Saar Coal* (*Discriminatory Conditions of Sale*) *Case*).

V.—International Comity

International law—International comity—Naturalization decree—Collateral attack on naturalization decree in courts of another State—The law of the United States of America.

See p. 275 (*MacKay* v. *McAlexander, Acting District Director, Immigration and Naturalization Service*).