INTERNATIONAL LAW IN NORWEGIAN COURTS

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1. Among the Scandinavian countries Norway lived for long periods in a state of union with two politically more powerful neighbours, first Denmark and then Sweden, until the Swedish-Norwegian union was dissolved on June 7, 1905. This historical event can be regarded as symbolic in relation to the subject now to be discussed. From a Norwegian point of view it marked the successful conclusion of the struggle for national independence. But at the same time it must be admitted that it represented a setback for international cooperation and—we should now be willing to add—a setback for international principles of law. By unilaterally declaring the union to be dissolved, the Norwegian state organs on that occasion probably acted contrary to the country's international obligations—arising from the union.[1] Through this declaration a conflict was thus established between the municipal constitutional law of Norway and the international legal relationship between Sweden and Norway, which was based on the treaty of union. Thereby this political event strikes up both of the main themes that arise in this field of law. On the one hand, the desire for full independence in the formulation of the national legal rules holds sway. On the other hand, the external obligations that the individual state has undertaken—and thereby the international legal order as a whole—demand consideration.

It is a characteristic feature of the modern Scandinavian legal approach that it is becoming to an increasing degree open to international influence. One trend in this development is a growing willingness to accept that the creation of law is a process carried out not merely by national organs, but also on an international level. When the national authorities apply legal rules of this origin, the national legal system is enriched with new elements sometimes of great value.

[1] This is admitted at any rate in more recent Norwegian legal writing. Thus Frede Castberg, *Norges Statsforfatning* (The Constitution of Norway), vol. 1, 3rd ed. Oslo 1964, pp. 162–3, and *Juridiske stridsspørsmål i Norges politiske historie* (Juridical Conflicts in Norway's Political History), Oslo 1961, pp. 31–3.

It is the municipal rules of law that govern what attitude the national authorities shall take up as regards international legal norms. In what follows I shall attempt to give an account of the Norwegian sources of law and at the same time to set forth a few more general points of view regarding the application of international law by national courts. The primary question will be to what extent the national courts pay regard to international law—i.e., apply rules of international law directly, or in other ways allow arguments based upon international-law reasoning to influence their decisions—even though this is not expressly provided for in national legislation. The question could also be put in another form: To what extent is international law recognized as "valid law" in the national courts?

In the Nordic countries the main legal approach to the relationship between national and international law is sufficiently homogeneous for one to be able in this sphere, as well as in many others, to speak of general Nordic legal principles. But there have been differences both within and between the various national doctrines and, in addition, the legal sources of recent years have had the effect of creating a somewhat varying pattern. The following discussion will be confined to Norwegian law.

It is a question of essential interest how the individual states organize the lines of communication between their own law and the common international legal order. This will be the justification for putting forward an account from one small country. The subject is of such central importance juridically that it may possibly be asserted, contrary to what is usually the case,[2] that even the history of a small country can in this field claim general attention merely because it happened.

The relationship between the international legal order and the individual national legal systems is in our century one of the great problems of jurisprudence, where one finds a combination of fundamental theoretical considerations and practical decisions that may relate to essential values, both economic and ideal. The Norwegian discussion of this problem, however, does not comprise any contribution in the field of legal philosophy to the more comprehensive theories of the monistic and dualistic universal systems. The following account will scarcely disturb the reader's view of the world's legal scene. Nor does the politico-legal discussion of the problems involved offer independent elements of

[2] Cf. Folke Schmidt, *Scandinavian Studies in Law* 1957, p. 6.

particular interest. It is not, therefore, in the first instance the fundamental questions that will be dealt with. An attempt will be made to carry out an analysis of a more practical character of the interplay between international and national law. In doing so we shall encounter court decisions that may have a certain contribution to make to the international doctrine. We shall see how a standpoint that is dualistic in principle becomes modified through the adjustment to the requirements of a greater international community. And we shall observe that some of the more absolute maxims of constitutional law must give way when confronted with more recent and more relativistic schools of thought in the field of jurisprudence.

2. In the international community there are now growing up organizations which are said to be supranational in the sense that the authority that is the prerogative of the national state organs, including legislative power, has in part been transferred to the organization concerned. The major example of this is the regulations that are being adopted within the framework of the Rome Treaty on the establishment of the European Economic Community and which are assumed to have the force of national law within the various member states. By virtue of a new provision in the Norwegian Constitution (amendment of 1962) the way is now open for Norway to adhere to an organization that issues rules having such effect (art. 93 of the Constitution).[3] But this provision has not yet been applied, and at present this more advanced type of international rule plays no role on the Nordic scene. It will therefore continue to be a vital constitutional and jurisprudential problem what attitude the courts shall adopt in relation to that body of international law which derives from the traditional sources: treaties, international custom, and general principles of law. Even in relation to this more traditional body of international law one may venture to state that we are nowadays in the middle of a considerable development. And the discussion of the last decade demonstrates that when the consequences of the European Community rules on municipal law come to be determined in detail, one will turn—to a greater or lesser extent—back to the more general principles for application of international law by the national authorities.

3. The Norwegian Constitution is a typical representative of nineteenth-century constitutions in so far as, when adopted, it

[3] See further *infra*, section 19.

did not include any general provision concerning the effect of international law within the national legal system. And it still contains nothing having any direct bearing on this subject, except for a provision in art. 26, para. 2, added in 1931, regarding consent of the legislature (the Storting) to the ratification of treaties, which embodies a clause that the implementation of treaties may necessitate new legislation. Nor do the scattered provisions to be found in the ordinary statutory law, giving definite references to international law in relation to special fields, provide any basis for the drawing up of general guidelines.

The actual source material therefore consists primarily of the courts' own decisions. Until the last world war this material was scanty. And for this reason our theory has to a considerable degree been built on abstract principles, which have been developed through theoretical analyses of the differences in character between the rules of international and of national law, and which have to a great extent been derived from the predominant trend in Continental *doctrine* about the turn of the century. In the postwar period, however, and particularly as a consequence of the postwar settlement of claims, there has arisen a fairly comprehensive series of cases in which the courts have been faced with legal questions of an international nature. And even if these cases have sprung from extraordinary circumstances, they provide a certain basis for a more securely founded and more finely drawn theory regarding the effects of international law within the municipal sphere.

The subject is governed by several pervading principles, which are concerned partly with the *methods* for the application of international law and partly with the *limits* of this application. These principles may, according to the traditional conception, be designated as the principle of *presumption* of the municipal law's conformity with international law (the presumption rule), the principle of *transformation* as the condition for application of treaties (the transformation rule), and the principle of *supremacy of national law* in the event of a conflict of rules (the collision rule). These principles are assumed to be customary rules of constitutional law.

However, a formulation of such principles really explains relatively little. In the first place, the contrast between the presumption rule and the collision rule shows that a decisive factor as regards the municipal effect of international law is the way in which mutual limits are set to the fields of application of these

two rules. In other words, what is decisive is how far conformity can be stretched before a case of collision is established. The readier one is to assert that a state of conflict exists between municipal law and international law, the greater is the extent to which international law will be excluded. And the wider the application one gives to the presumption rule, the greater is the part that international law will play in national decisions. Further, it is a very vague and ambiguous proposition to say that municipal law is presumed to be in conformity with international law. When carrying that principle into effect, there will frequently be several possible solutions available that afford the international rule varying degrees of influence. And as regards the principle of transformation, it is, true enough, logically unassailable to state that the law applied by a national court is always simply national law, because international law is only taken into consideration to the extent that the law of the country concerned so prescribes, and because it can thus be said that a transformation of the international rules into internal rules has taken place. But this formal mode of reasoning does not tell us how and to what extent the courts do in reality pay regard to international law.

In my opinion the Norwegian courts have in fact expressed a more positive view on the municipal significance of international law than the above-mentioned principles suggest. A foundation has therefore now been provided for a reformulation of these maxims. I will attempt to demonstrate that it is today more accurate to draw up a principle of *municipal effectivation* of the norms of international law, a principle of *direct application of international law*, and a more *limited* principle of supremacy of *statute law* in *certain cases* of conflict.

4. It may be of interest to give, by way of background, a more general characterization of how the courts regard the international law and how they make use of international legal sources.

When a question of law arises before an *international* tribunal, the general rule is, as one knows, that only international law will be applied. The internal legal rules of a state are, in principle, not regarded as legal norms at all but merely as facts.[4] The

[4] This view has been laid down in several decisions of the International Court of Justice. The principle is especially clearly expressed in the *Case concerning Certain German Interests in Polish Upper Silesia (Merits)*, Permanent Court of International Justice, Series A, No. 7 (1926), pp. 4 ff., see p. 19.

corresponding question is, however, in a fundamentally different position in our *national* courts. In several respects where the division between law and fact is relevant, the Norwegian Supreme Court has adopted the standpoint that the international law on the subject at issue is to be regarded as a par with the national law. Thus the Supreme Court has held that an error with regard to the international illegality of a transaction is to be considered as an error of law in deciding the criminal nature of the transaction.[5] The same parity with municipal law applies in procedural respects. When a legal remedy is sought in respect of the position taken in a question of international law by a subordinate court, the appeal must be one on a point of law. A decision of 1956 on a civil claim admittedly runs in the opposite direction.[6] In that case the majority of the Supreme Court held that the recipient of a sum of money paid out by the German authorities during the occupation had become finally entitled to the sum, whether or not the payment occurred as an item in a settlement contrary to international law, because the recipient at any rate acted in good faith as regards the legality of the payment. This standpoint deviates from the general view in Norwegian law concerning the effect of an error of law as a basis for acquisition in good faith. But even if a decision of this type can create some uncertainty as regards questions of detail, it must be considered as certain that the rules of international law in general are treated as legal norms and applied in this capacity.

When the courts are confronted with a question of international law, the international norms are also treated in the same way as municipal ones in the sense that the courts undertake an independent evaluation and come to an independent decision. As a general rule the Norwegian courts are as little bound in principle by the Foreign Ministry's view on a question of international law as they are by, for example, the Ministry of Justice's view on a question of municipal law. As regards the Government's recognition of new regimes and new states, however, a special problem arises. It may probably be assumed that our courts are

[5] Cf., *inter alia*, 1947 N.Rt. 468 (see the Supreme Court's discussion, pp. 472–3, and the Court of Appeal's discussion, p. 487) and 1949 N.Rt. 982. According to the Norwegian Criminal Code there is a distinction to be made between various kinds of legal errors, and in this respect an error with regard to the international illegality has been held to be a "genuine" norm error, as opposed to a mixed legal-factual error.

[6] 1956 N.Rt. 36.

in the main bound in accordance with the principle found in the Anglo-Saxon "act of state" doctrine.[7] The Norwegian judgments on this problem are not conclusive.[8] But the proposition can also be founded on another basis. The duty of the courts to assess the municipal consequences of the government's recognition—in the first instance grant of immunity and acceptance of the new regime's rules as valid rules of law—is something different from a duty to follow the government's view in questions of law. For a government's recognition is more than a declaration of a legal opinion. In Norwegian doctrine such recognition is regarded as a constitutive action, which therefore binds our courts in accordance with the general presumption principle that the national law must be in conformity with our international obligations. With regard, then, to this question of recognition, the position of the Norwegian courts in relation to the Government may in reality not be very different from what obtains in countries where the courts are in principle more firmly bound by the views of the executive in questions of foreign relations.

In making their independent evaluation, the courts must base their decision on the international legal sources. It is probably a general phenomenon that a national court's discussion of problems of international law inevitably bears considerable traces of the mould in which that court's decisions are usually cast and of local traditions concerning questions of legal method. This also appears in the reasoning of the Norwegian decisions. And there is probably justification for saying that international law is not a thoroughly familiar field for our courts. Now and then one comes across somewhat outmoded conceptions and incomplete references in their opinions.

What is important, however, in this connection is what force the courts give to the rules of international law that they establish in this way.

[7] Cf. Frede Castberg, *Studier i folkerett* (Studies in International Law), Oslo 1952, pp. 140 ff.

[8] The standpoint of the Norwegian theory, to the effect that the "act of state" doctrine has been adopted in our law, is in the first instance based on a Supreme Court decision in 1938 N.Rt. 804, which concerned a dispute during the Spanish Civil War between the Barcelona government's and the Franco government's representatives in Norway about the archives of the Spanish legation. But the judgment's value as a precedent is rather weak, partly through the special party position, as both parties represented belligerent governments, partly through the special nature of the object sought, and partly through express reservations in the Supreme Court's judgment. The decision may be said to offer some, but rather vague, general guidance.

Legal writers have been especially concerned with the areas of conflict between international and national law. This is not, in my opinion, the most interesting aspect. In spite of everything the conflicts are the pathological cases. Besides, clear conflict situations are rare. Significantly enough, scarcely one has been brought before the Norwegian Supreme Court, and probably such cases will not be frequent in the future either. One will also acquire a somewhat distorted and a too negative view of the significance of international law in the municipal sphere by concentrating upon these situations.

During the proceedings of the French-Norwegian gold clause case before the International Court of Justice at The Hague in 1957, Maurice Bourquin, the Belgian professor who represented the Norwegian Government, stated in the course of his oral argument that all the lacunae, all the obscurities, and all the uncertainties in the municipal law afford the Norwegian courts the opportunity to apply international law.[9] It is here that one arrives at the more practically important fields. This statement may perhaps contain a certain element of over-emphasis. But our courts have gone a long way in the direction of creating a harmonious relationship with international law.

5. The general proposition that Norwegian law is presumed to conform with international law covers questions of different character.

The situation varies according to whether the courts are confronted with the possibility of a solution contrary to international law or not, in formulating the rule of municipal law. It is a comparatively elementary assumption that the courts will seek to eliminate the internationally illegitimate solutions, since otherwise the state will face the risk of reactions on the international level. The tendency, however, is for analysis to come to a standstill at this point. But it is precisely here that it begins to become interesting. For the influence of international law is not limited to providing a justification for the *elimination* of certain solutions. There exists also a *positive interaction* between national and international law in the choice between several solutions valid in international law. Frede Castberg has demonstrated how international law has been used in a number of cases as a means of

[9] International Court of Justice, *Case of Certain Norwegian Loans; Pleadings, Oral Arguments, Documents*, vol. II, p. 166. (Reference is, of course, only made to those questions which have an international-law aspect.)

interpretation of municipal law.[1] I shall attempt to pursue this point of view.

The application of international law by national courts represents a form of enforcement of international law. Different municipal solutions may give different degrees of effect to the corresponding international rules. The municipal rules can be formulated in such a way as to support the international norms. This can be brought about if the municipal solutions counteract or reduce the effect of internationally illegal transactions, on the one hand, and if they facilitate the carrying out of transactions that are in accordance with the purpose of the international rules, on the other. The choice of the municipal solution to be adopted may therefore have international relevance even if one finds oneself outside the range of international sanctions.[2]

In order to appreciate the attitude of the Norwegian courts to questions of this type, it will be of interest to discuss and compare three groups of cases, concerned respectively with the legal consequences of measures imposed by the German occupation authorities in relation to private property and personal legal rights, the criminal proceedings against Norwegians trading with the enemy, and the Norwegian prosecution of German war criminals.

6. In the decisions concerning *postliminium* after the occupation—the decisions in which the courts determined the more detailed effects of the measures imposed by the occupation authorities—the courts had, to a considerable extent, to decide on what weight should be accorded to the international law basis for these measures. There were here scarcely any international law *limitations* upon Norwegian internal law when the case to be judged was one between Norwegian citizens or between the Norwegian state and Norwegian citizens.[3] But in accordance with general basic principles of European public law, a factor already taken

[1] Cf. particularly *Studier i folkerett,* pp. 33 ff. From more recent court decisions there can be mentioned 1966 N.Rt. 476, in which the European Convention on Human Rights of 1950 was referred to in the Supreme Court's reasoning as a factor in the interpretation of our Constitution.

[2] In several decisions arguments from international law have been introduced into the grounds of the judgment even though one cannot say that the decision has any significance from an international-law point of view. This account will not pay much attention to such cases.

[3] As regards Norwegian doctrine in this field, see Frede Castberg, *Postliminium,* Uppsala 1944, p. 5, Finn Seyersted in *T.f.R.* 1945, pp. 129 ff., and *United Nations Forces,* Leyden 1966, pp. 244 ff.

into account in the Norwegian legislation on restitution, and further pursued in the court decisions, was whether the acts of the occupying authorities were contrary to or in conformity with international law. And it will be found that one line of reasoning stands out in this context: the consideration paid to an effective implementation of the occupation rules of international law. This approach was adopted by the courts both in their interpretation of the restitution provisions, in their harmonization of these provinsions with other legislation, and in their more free formulation of rules.

In cases where the interference in property rights on the part of the Germans had been of a type contrary to international law, the main principle was that restitution should be made. And such restitution was effected, with the support of arguments derived from international law, with great consistency. It could take several forms: restoration of property, awarding of damages and, where appropriate, revision of contract, and even recovery of property contrary to the ordinary rules relating to bona fide acquisition.[4] The legal measures in respect of confiscated securities are illustrative in this context. During the second world war a provisional Royal ordinance issued in London conferred on bondholders who had had their bonds confiscated by the occupation power a right to recover the bonds, even though they were negotiable instruments and even though they had come into the possession of purchasers in good faith.[5] An exception was thereby made to the general rule of Norwegian law concerning bona fide acquisition, which is embodied in the Promissory Notes Act of 1939. After the war it was argued on behalf of some of the purchasers—with reference to the constitutional rule that Royal ordinances must not conflict with acts of the Storting—that the ordinance was invalid in this respect because it conflicted with the said statutory rule concerning bona fide acquisition. But this argument was rejected by the courts on the ground that the Promissory Notes Act had not been intended to set rules for such circumstances as were under consideration, where private property

[4] On damages, cf. 1950 N.Rt. 871 concerning dismissal in employment relations. On revision of contract, cf. 1951 N.Rt. 1035, in which the contract had as its background an internationally illegal exercise of power. The contract was here held to be invalid. But a contract might also, according to the circumstances, have been declared merely partially invalid.

[5] Provisional Royal ordinance of December 18, 1942, sec. 2. The rule is repeated in the provisional Royal ordinance of September 21, 1945, sec. 3.

had been seized contrary to international law.[6] By means of this restrictive interpretation of the exception-free provision of the Act of 1939 on bona fide acquisition—which was adopted with reference to the international illegality—the *status quo ante* confiscation was re-established. The invalidity according to international law was thereby given maximum municipal effect. This consequence implies in other words that the circumstance that a seizure is contrary to international law has been given greater weight than *any other illegal element* in an acquisition, since the statutory provision concerning bona fide acquisition applies even where a negotiable instrument has been taken from the owner by theft or robbery. In a corresponding manner the courts made exceptions from other exception-free provisions concerning bona fide acquistition and allowed recovery if an appropriation had not satisfied the requisition conditions of the Hague Regulations.[7]

A series of judgments concerning the seizure of claims contrary to international law is of special interest in this connection, partly because the principle of effectiveness was here expressed with particular clarity, and partly because the courts had no support in the restitution legislation on this point. In cases where the occupation authorities had confiscated a claim and then enforced payment of it by duress, the question arose whether the loss should fall on the creditor or the debtor.[8] There was a great deal to be said for allowing the loss to rest with the creditor by virtue of the consideration—which could find some support in international legal theory—that the illegitimate measure was directed against him and his property.[9] Contrary to this, however, there could be put forward an argument deriving from international law, which was laid down in a Supreme Court decision of 1947.[1] The circumstances were as follows:

[6] Cf. 1949 N.Rt. 23.

[7] Cf. thus 1950 N.Rt. 326, which is analysed in *T.f.R.* 1962, p. 191. On a par with sale of confiscated property was considered to be the sale of an association's assets undertaken by an unlawfully constituted board, cf. *Rettens Gang* (report of Norwegian subordinate courts' decisions) 1957, p. 473 (*Rettens Gang* hereinafter abbreviated N.R.G.).—By *The Hague Regulations* is meant the Regulations respecting the Laws and Customs of War on Land annexed to the Convention IV of the Second Peace Conference of 1907 in The Hague.

[8] Where compliance on the debtor's part had a voluntary character, there was relatively little doubt as to placing the risk on the debtor's side. We have several decisions to this effect, cf. *Bankforeningens Domssamling* (report of decisions issued by the Commercial Banks' Association) 1949 no. 50, 1949 no. 80, 1950 no. 51, and 1950 no. 90. This report hereinafter referred to as B.D.

[9] Cf. on this point Frede Castberg, *Postliminium*, p. 32.

[1] 1947 N.Rt. 235.

After the assets of the Norwegian Shipowners' Association had been confiscated by the occupation authorities, the Gestapo, contrary to international law, demanded payment out of the Association's deposits in two banks. Subjected to pressure, the banks found it necessary to yield to this demand. After the war the question then arose whether the banks were obliged to pay out once more to the depositor, or whether the latter would have to bear the consequences of the exaction that had occurred. The Supreme Court first referred to the ordinary contractual rule that a debtor who pays a person who is neither entitled nor authorized to receive payment is not discharged from his obligation to the rightful creditor, even if the payment is made under duress. The court then considered the question whether this rule should also apply in the special circumstances of a case where the pressure had been exerted by an occupying power. It answered this question in the affirmative. Certainly the court was open to the idea that the ordinary rules as to discharging a debt might be departed from in such extraordinary circumstances, and indeed this point was expressly mentioned. Moreover, the court did not content itself with the purely negative approach that there was no reason in this case to make any exception from the general rules. It found a *positive* basis for its decision by *referring to the rules of international law* in this field. In the first opinion delivered, the judge stated that it is "in the interest of the community that the ordinary rules should be followed in cases of this kind, because that course of action will have an influence on the maintenance of the rules in this field laid down in international law for the protection of an occupied country when the debtor has to reckon with being obliged to bear the loss himself if he accedes to a demand for payment contrary to international law from the occupying power". And in one of the subsequent opinions delivered, another judge developed this point of view further, stating that in deciding "this question, which is in character purely one of legal policy", he would "accord decisive weight to (the factor) that after a war such as we have just lived through it is perhaps more important than ever to strengthen such tendencies as serve to counteract the appalling contempt for the international legal rules of warfare that we also in our country constantly witnessed. For this reason I should regard it as especially unfortunate if the Supreme Court were, by its decision in this case, to proceed to alter our law as now in force to the extent that pressure exerted contrary to international law would be accorded the effect of an

excuse comparable to force majeure when a borrower . . . has paid out to an occupying power a sum of money corresponding in amount to the sum standing to the creditor's account which the said power was unlawfully trying to appropriate. Should such a legal conception be adopted today, . . . the risk that a borrower has hitherto run of being obliged to pay twice, to the usurper and to the lender, would then be eliminated. In other words, his incentive to create the greatest possible difficulties in his own interest, *inter alia* to protest that the usurper's conduct is contrary to international law, would be weakened. Even in the last war one had the experience that protests not infrequently attained their object. A change . . . would, to put it in another way, countenance and even encourage a passive attitude on the part of the debtor under threat, and would thereby positively serve to increase the belligerent's inclination for, and facilitate his execution of, this kind of exaction contrary to international law. It would also ill accord with the modern tendency to increase the respect for, and the effectiveness of, the precepts of international law . . .".

Thus the principal point of view is that the Supreme Court must reach a decision that is in accordance with the modern tendency to increase the respect for, and the effectiveness of, the precepts of international law. The internationally illegal character of the demand for payment was accorded essential weight in assessing the municipal effect of the payment, and the status before the internationally illegal exaction was restored in this case also. The Supreme Court chose the solution which would most effectively counteract measures imposed contrary to international law, and which nullified the municipal effects of the internationally illegal transactions.

In later decisions *further conclusions* were in several respects—and on the same foundation—drawn from this interpretation of the law. It will be found that other links in the chain of argument fall away one by one. In the 1947 decision the fact that the creditor had refused to take part in the withdrawal of the money was taken into consideration. But in a Supreme Court decision of 1948 the debtor bank had to bear a corresponding loss even in a case where the creditor had cooperated in handing over the bonds in question.[2] In the 1947 decision it had been pointed out that the bank had to be prepared to run this element of risk. But by a decision of the Supreme Court in 1949

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In later decisions *further conclusions* were in several respects—and on the same foundation—drawn from this interpretation of the law. It will be found that other links in the chain of argument fall away one by one. In the 1947 decision the fact that the creditor had refused to take part in the withdrawal of the money was taken into consideration. But in a Supreme Court decision of 1948 the debtor bank had to bear a corresponding loss even in a case where the creditor had cooperated in handing over the bonds in question.[2] In the 1947 decision it had been pointed out that the bank had to be prepared to run this element of risk. But by a decision of the Supreme Court in 1949

[2] 1948 N.Rt. 275.

a bank was also obliged to make restitution of an amount which, even at the time it was paid in, represented confiscated property —compensation for confiscated ships—and had been credited to an already confiscated account.[3] The court recognized, it is true, that the bank's risk thereby became of an exceptional extent; but, in accordance with the view that the court had earlier expressed, there was no object in having the debtor's risk eliminated—on the contrary one should be wary of reducing this risk, having regard to the norms of international law. Once more the desire to give effect to those rules formed the basis of the decision, and this aim was here pursued even further. But the court did not rest there. In the 1947 decision a reservation was made for the case where a bank was subject to a statutory obligation to accept deposits. But in a Supreme Court decision of 1951 the Bank of Norway was nevertheless deemed to have accepted the debtor's risk in this respect where a deposit was made with the bank before the confiscation in accordance with the statutory provisions on deposit of payment in the central bank in cases of *mora creditoris* or competing claims.[4] In the 1947 decision importance was attached to the fact that the payment had been made to the occupation authorities. But by a later Supreme Court decision of 1951 the debtor was obliged to bear the loss even though he had, in connection with the illegal demand for payment, attempted to meet his obligations by making an otherwise discharging deposit in the name of the creditor.[5] In the 1947 decision it was finally stressed that the deposit was a *depositum irregulare* (whereby the bank became owner of the money), and that the borrower therefore could not have a custodian's more limited duty of care. But in a third Supreme Court judgment in 1951 the same solution was reached in a case that more nearly resembled custody.[6] The courts have also derived yet another private-law consequence from their application of the principle of effectiveness in this context. In a City Court decision of 1950 there was established a personal liability in a recourse action against the persons who handed over the property.[7] This liability also arose from a consistent furthering of the main view of legal policy that measures contrary to international law should be

[3] 1949 N.Rt. 357.
[4] 1951 N.Rt. 523.
[5] 1951 N.Rt. 905.
[6] 1951 N.Rt. 727. An earlier City Court judgment in the same direction in 1949 B.D. no. 35.
[7] 1950 N.R.G. 200 (Trondhjem City Court).

counteracted through the municipal rules, and it was specifically based on this argument.

If the decisions discussed above are compared, it will be seen that as regards the former owner's right to recover the courts *broke away* from the ordinary rules as to extinction of title, while as regards his claim to be reimbursed they *upheld* the ordinary rules as to discharge of a debt in spite of the extensive risk to which the debtor was thus subjected. In the former case the Promissory Notes Act, *inter alia,* was given a restrictive interpretation, while in the latter case the same statute was given full effect. In both cases the interpretation was orientated by international law. And in both cases a transaction contrary to international law was counteracted to the fullest municipal extent. In neither case, however, did international law make any direct demand on the content of the municipal law. But in both cases the municipal solution represented a furthering of the purposes of the international rule concerned.

This principle of effectiveness has also a more *constructive* aspect. The positive consequence of the application of international law was that the legal dispositions of the occupation authorities were given full municipal effect after the occupation if they were made in accordance with valid rules of international law. This aspect is illuminated by a decision of 1950 regarding an appointment to the public service made during the war.[8] And at the same time one can observe in the opinions in this case a confrontation between a view that rejects international law and one that accepts it.

A public official who had been appointed by the Nazi authorities was dismissed after the war, and he then claimed repayment of the amount he had contributed to the pension fund while he was in the public service. The statutory rules contained no provision that was applicable to this claim. The question was then whether international law offered any guidance. A minority in the Supreme Court was in favour of rejecting the claim. In their opinion it was of no significance whether the appointment was contrary to international law or not. For international law made no demands on the municipal law as regards the more detailed settlements in respect of unreceived salary and similar claims from the occupation period, including pension contributions. In other words, since the state was not bound by inter-

[8] 1950 N.Rt. 84.

national law in this field, there was no further reason to accord any weight to the international-law aspect of the case. But the majority chose another line. The judge who delivered the first opinion, as a representative of the majority, began by tracing the general guideline that, when Norwegian municipal provisions are lacking, the precepts of international law will be an essential factor in the judgment. It was further stated that, in the absence of any provision to the contrary, Norwegian law must be assumed to be in harmony with the general principles of international law in this field. The principle of international law that the judge then applied was the provision in the Hague Regulations, art. 43, that the occupant shall take all steps in his power to re-establish and ensure, as far as possible, public order and public life in accordance with the law of the country. From this it follows, said the judge, that "when the occupying power sees to it that ... vacant posts are filled in accordance with the statutes of the occupied country, this measure is ... legitimate both in relation to the international law and in relation to the law of the occupied country—i.e. Norway—and it must in the present context be equated with a normal exercise of administrative power".

The view taken is thus that, to the extent to which the occupying power acted in this field in conformity with the requirements of international law, its action must according to Norwegian law also be regarded as a lawful exercise of administrative power. And this principle was carried so far that in deciding the amount of the sum the plaintiff could claim, the Supreme Court applied the calculation provisions contained in our ordinary legislation relating to the state pension fund. A corresponding positive application of international law was undertaken in other legal fields as well, thus in relation to the question of the transfer of title, where it was held that a requisition in accordance with international law effected a final transfer of title, such that a later sale gave the buyer the legal ownership of the article sold.[9] In these relations, too, the rules of international law were given the fullest possible municipal effect.[1] But here it is the international-

[9] Cf. 1946 N.R.G. 437 and 1947 N.R.G. 202. See further on this point Finn Seyersted, *United Nations Forces*, pp. 246 ff.

[1] But the principle of effectiveness has, of course, its limitations. When one comes to more secondary questions in the municipal system, where the solution is to a lesser degree relevant to international law, the consideration of effective implementation loses its strength derived from legal policy. A couple of examples from court decisions: The rule as to recovery of securities

law *validity* that is enforced municipally, and to this extent the decisions provide a contrast to the confiscation judgments, in which it was the international-law *invalidity* that was given decisive influence.

7. In the *criminal proceedings against Norwegians accused of collaboration with the enemy* great significance was likewise attached to the international legal aspect. A declaration with respect to the decisive legal sources in this sphere can be found in a Supreme Court decision of 1947, where one of the judges stated that in deciding the question of illegality, "the starting point" must be "the statutes passed by our legitimate state authorities and other valid rules of law, including the rules of international law".[2] As regards the question of *the relation* of the international rules to the other relevant rules, this was of a special interest in cases involving *economic support* to the enemy, because of the occupation authorities' right to requisition articles and services in accordance with art. 52 of the Hague Regulations. Here the possibility of a collision of norms arose—a conflict between the population's possible duty of obedience in relation to directives from the occupation authorities and the duty of allegiance to the legitimate national authorities which was established in Norwegian criminal legislation. The task of harmonizing these possibly conflicting norms was carried out by means of the interpretation given to a general reservation to the criminal liability expressed in the municipal provisions. This reservation was implied in the provision in the criminal code against support to the enemy, by virtue of the condition that the act must be "wrongful" ("contrary to law"), and in the use of the corresponding term "unwarranted" in both the provisional Royal ordinance (issued during the war) and the later Act (passed after the war) relating to collaboration. In assessing whether the economic cooperation in question was thus "wrongful" or "unwarranted", our courts took as their cri-

confiscated contrary to international law was not given effect so far that the stockbroker's legal guarantee for seller's title was upheld, cf. 1948 N.Rt. 811. On the other hand, contributions requisitioned in accordance with international law could not be considered so identical with ordinary deliveries that they determined remuneration for the agent, cf. 1946 N.Rt. 1305.

[2] 1947 *Riksadvokatens Meddelelsesblad* (Information paper of the Public Prosecutor) no. 26, p. 36 (Mr. Justice Schjelderup's opinion), cited on p. 40. This information paper was issued during the period of the postwar criminal proceedings (Oslo 1945–54). It is hereinafter referred to as R.M.—On the postwar settlement in general, cf. Johs. Andenæs in *Norway and the Second World War*, Oslo 1966, pp. 120 ff.

terion whether or not the said cooperation fell within the framework of the Hague Regulations.

A number of judgments are clearly founded on the view that compliance with a requisition which was imposed *in accordance with international law* must also be regarded as a legitimate transaction according to Norwegian law.[3] The same legal opinion is by implication laid down in a series of other decisions too, *inter alia* in judgments in which it is put forward as a link in the chain of argumentation for criminal liability that the contributions fell outside the framework of the Hague Regulations.[4] It is true that in the premises of some judgments greater stress is laid on the duty of allegiance. But, so far as one can see from a perusal of the great number of judgments reported in treason cases, there is only one convicting judgment in the Supreme Court that conflicts with the view that the legality of an act in international law should be decisive when assessing its municipal legality; and even this judgment leaves some doubt whether the Supreme Court really intended to depart from this principle.[5]

In applying the rule the courts subjected it to certain modifications. As a condition for acquittal, a proper requisition from a competent authority was regarded as a necessary element in all circumstances.[6] Besides, the individual economic activity undertaken could be contrary to law by reason of the manner in which the connection with the occupying authority was established and the manner in which the activity was later carried out. Further, there must in reality have existed a peremptory order to supply the contributions in question.[7] But these modifications—which have in part been the subject of dispute—mark no departure of principle from the main rule.

The case material does not, however, offer *any specific reason why* the Supreme Court allowed a demand from the occupation authorities in accordance with international law to confer absolution from criminal consequences. It is therefore an open question

[3] The precedents for acquittal are discussed in a public account on the proceedings against enemy collaborators: *Om Landssvikoppgjøret*, 1962, "Innstilling fra Landssvikutvalget av 1955", p. 105.

[4] Cf., *inter alia*, Supreme Court decisions in 1947 R.M. no. 39, p. 10. and 1948 R.M. no. 49, p. 104.

[5] 1948 R.M. no. 41, p. 119.

[6] This is laid down in a Supreme Court judgment in 1948 R.M. no 45, p. 62, and in several other decisions.

[7] A precedent for this opinion was a Supreme Court decision in 1946 N.Rt. 1035, and it was later followed in a long series of judgments, despite a certain discussion in a Supreme Court decision in 1948 R.M. no. 44, p. 62.

whether the Supreme Court took up this standpoint because it considered it to be required by international law, or whether the Court merely on the basis of more general principles of law adopted the position that one ought to recognize such cooperation as was founded on the occupation rules. Concerning the assessment of the legal position of the population during an occupation, there are two different main opinions. The first approach, which used to be the dominant one, assumes that the inhabitants have a duty to obey the occupying power when it issues commands that fall within the framework of the Hague Regulations. On this assumption it will be contrary to international law if the national criminal law prevents the citizens from complying with these commands. The other approach rejects any such legal duty for the population, and asserts that resistance by the people is not contrary to international law, but merely lacks protection from international law against the use of force. On this assumption it will not be contrary to international law, either, if the legitimate authorities attempt through legislation to further such resistance. As a consequence of the events of the second world war, opinion has swung towards the second approach.[8] The positive features of the Supreme Court's application of international law can therefore be summarized by saying that, although it was probably not legally necessary according to international law, the Supreme Court allowed the provisions of the Hague Regulations to be the lines marking the limits of what was municipally unlawful.[9] The motives for this application of in-

[8] As regards this debate in Scandinavian legal writing: Ole Torleif Røed, *Fra krigens folkerett* (From the International Law of War), Oslo 1945, pp. 64 ff.; Johs. Andenæs, "Var hjemmefrontens kamp folkerettsstridig?" *Avhandlinger og foredrag.* ("Was the Resistance of the Home Front Contrary to International Law?" Dissertations and Lectures), Oslo 1962, pp. 347 ff.; Frede Castberg, *Soldater, partisaner og franktirører* (Soldiers, partisans and franctireurs), Oslo 1954, pp. 22 ff., and besides Halvar Sundberg, Hilding Eek and Erik Fahlbeck, *Den norska rättsuppgörelsen* (The Norwegian Postwar Legal Settlement), Stockholm-Helsinki 1956, pp. 60 ff., together with the discussion this study evoked, on this point especially Stephan Hurwitz in *T.f.R.* 1956, pp. 304 ff, see specially pp. 309 ff. In the places referred to further references will be found.

[9] Also as regards the treatment of Norwegians' exercising of administrative authority on behalf of the occupation authorities, an international-law evaluation entered into the courts' judgment of the legality of the acts concerned, both in a negative and a positive direction. Cf. thus, *inter alia*, Supreme Court decisions in 1946 N.Rt. 75 and 1950 R.M. no 57, p. 60. But the international law consideration did not here attain the same importance in principle, because the case material seems to limit itself to instances where the Norwegians concerned in their collaboration with the enemy had either car-

ternational law may have been complex—a plain sense of justice may incline one in the same direction. But it can certainly be stated that the application implies, at least in its consequences, an effectivation of the relevant rules of international law (the requisition provisions).

8. With regard to the prosecution of *war criminals,* both the provisional Royal ordinances issued during the war and the later statutory provisions referred directly to the laws and customs of war, and it was accordingly a condition for establishing criminal liability that the international rules of warfare should have been violated. But in addition, these rules of international law were actively taken into consideration in the courts' reasoning both in deciding the range of the Norwegian legislation and in the meting out of the punishment.

As regards the *authority for pronouncing the death penalty,* the Supreme Court in a dramatic plenary decision in 1946 had to deal with the question of retroactivity.[1] The background was an extension of the power to pass death sentences which was made just before the end of the war by virtue of a provisional Royal ordinance of 4 May 1945. The Supreme Court held by a majority of 9 to 4 that sentence of death could be passed despite the fact that this penalty was not authorized by the Norwegian legislation relating to the crimes in question at the time they took place. In the reasons given for this decision, which was subsequently followed in similar cases, the rules of international law provided a decisive link in the chain of reasoning. A group of seven members within the majority, who thus also constituted a majority of the Court, grounded their decision expressly on the Norwegian Royal ordinance and found that it could apply to previous transgressions, despite the general constitutional prohibition against giving laws a retroactive effect, contained in Article 97 of the Norwegian Constitution, because "both the criminal liability and the extent of the penal sanction had already been established in the rules of international law regarding the laws and customs of warfare". And one element running through the reasoning of the judgment is an emphasis on the international character of the prosecution of the war criminals. The judge delivering the first opinion, as a

ried out the task voluntarily or had gone beyond the framework of their task. The same applies to the treatment of acts carried out by Norwegians outside the Nazi administration, such as informing against countrymen and opposition to Norwegian home forces, cf. Supreme Court decisions in 1947 N.Rt. 86 and 1948 R.M. no. 44, p. 16.

[1] 1946 N.Rt. 198.

representative of this majority, maintained—prior to the Nuremberg judgment—that international law had established individual criminal responsibility in respect of the acts under discussion, and further, that according to international law the most severe penalties, including sentence of death, could be inflicted for these war crimes. The judge then dealt with the question whether the constitutional provision against retroactive effect could prevent "the incorporation of the international rules by way of the Royal ordinance of 1945 from having effect as regards the war crimes committed before the passing of the ordinance". His reply was in the negative, and his reasons were given in statements of this character: "The foreign war criminals who are sentenced in Norway will not be sentenced for an act that was not previously punishable, nor be sentenced to a penalty that could not previously have been inflicted, even though one assumes that a Norwegian court could not have done it without the Royal ordinance of 1945. But here, then, I accord decisive weight to the fact that what characterizes the acts now in question is not that they are crimes according to Norwegian law, but that they are *war crimes*. And I further emphasize the correspondingly international character of the proceedings against—and punishment of—the war criminals." In a later passage the judge underlined that the acts perpetrated by the accused "at the time when they were carried out, were crimes according to international law and were punishable with the most severe penalty". And the same line in reasoning was developed further. "The passing of the Royal ordinance of 1945 was a link in—or a consequence of—Norway's agreement with the allied nations on punishment of the war criminals and on the sharing of these proceedings. The legal claim to such punishment on the part of the allied belligerent nations—including Norway—arose by virtue of the rules of international law regarding the laws and customs of warfare, and with a substance determined by these, the very moment the war crimes were committed." The effect of the Royal ordinance of 1945 was, then, in reality only this, that with respect to the requirement in the Norwegian constitution that any punishment must be authorized by Norwegian law, it opened the way for Norwegian courts to give effect to "the legal claim to punishment previously acquired". The other group within the majority of the Court avoided the question of retroactive effect, for the two judges in question considered it unnecessary to found their judgments on the Norwegian ordinance, but held that the accused could be sen-

tenced by virtue of a direct application of the universal rules of warfare, which were immediately binding upon him.[2] Some Norwegians, including the author of this article, have difficulty in accepting this decision and its application of international law, since this application in this instance worked to the detriment of the accused and did so in relation to some of the most important guarantees of justice entrenched in our constitution. It can also be asserted that, as regards the main and decisive view taken, one is faced with an application of international law that is primarily aimed at extending and giving effect to some of the *national* legal rules. But it must at the same time be recognized that in this decision one comes across the same main guideline for the application of international law as in the other groups of cases: an interpretation—and a bold one—of Norwegian law with the aim of giving the greatest possible municipal effect to the rules that the Supreme Court regarded as the applicable rules of international law.

In assessing the *extent of the punishment* also, the view that the rules of international law shall be made effective by the national legal enforcement was, to some extent, vigorously upheld. In a Supreme Court decision of 1947, in which a prison guard was sentenced to death, chiefly because he had killed a Serbian prisoner of war, the judge delivering the first opinion declared that the killing was a war crime under international law, that international law lays down stringent provisions for the treatment of prisoners, that prisoners of war have no protection other than that which strong legal provisions can afford, and that strong legal protection in these circumstances presupposes a stringent enforcement of the rules.[3] And in a later opinion another judge emphasized that he likewise attached decisive weight to the factor "that the protection that the international law has for so long sought to give to prisoners of war must be strengthened".

[2] This standpoint was partly specified to the effect that the Norwegian ordinance of 1945 was to be understood as providing mere rules of interpretation, and partly to the effect that enemies invading the country stand outside the Norwegian legal community. In a later Supreme Court decision, 1947 N.Rt. 434, this line was developed in greater detail in a separate opinion, in which the constitutional requirement as to Norwegian authority for a punishment was subjected to a more thorough analysis. It was submitted here, that in a legal field such as the one under discussion, where penal provisions could not, by virtue of the circumstances, have been crystallized out into statutory form, it must suffice that this penal rule was sufficiently clear with regard to the nature of the act and the threat of punishment.

[3] 1947 R.M. no. 38, p. 43.

9. The sectors of the postwar settlement discussed above offer, in my opinion, a basis for formulating a permanent principle as regards the application of international law, since the use made of this law was not of a partial character. It was applied both to support restitution and to deny restitution, both to establish legal liability and to exclude such liability.

There also exist other Norwegian decisions in which one can trace a corresponding influence from international law. The international rules of immunity have on several occasions been given wider effects than were strictly necessary. Thus on the basis of these rules the Supreme Court has refused to recognize a so-called latent right to maritime lien on a state vessel, a lien that might have been enforced if the vessel had later come into private ownership; and the Court did this even though it had thereby to resort to both an extensive interpretation of the municipal statutory rules on immunity and a direct limitation of the wording of a provision in the Maritime Code of 1893.[4]

The courts have only to a limited extent concerned themselves with discussions on the general principles relating to the guidelines for the application of international law. But one line stands out clearly amidst the mass of decisions, although it stretches over widely differing types of cases: the courts display a strong loyalty to the international rules and their purposes, and the courts go a long way in the direction of actively shaping the municipal rules so as to give municipal effect to the rules derived from the background of international law. In the restitution cases the courts followed the international-law points of view rather independently of whether this meant that they upheld or departed from the ordinary municipal rules. And in the criminal cases the rules of international law were applied partly to support a restrictive statutory interpretation, partly to draw far-reaching conclusions of constitutional significance. The force here totally accorded to the norms of international law and their objects corresponds to that which is otherwise only given to legal principles and legal considerations of the first rank. Against this background the presumption principle in the proper sense—relating to the elimination of solutions contrary to international law—is only one aspect of a more comprehensive principle of effectiveness.

10. The next main principle is the requirement of *transformation* as a condition for the application of rules of international law by Norwegian courts.

[4] 1949 N.Rt. 881.

In our earlier constitutional *doctrine*, i.e. in the theory current in the nineteenth century, international law was, to a considerable extent, accorded a direct municipal effect. International law, including the law of treaties, was in principle regarded as a national source of law in the fields in which it had municipal relevance.[5] It is true that an important exception was made for those cases in which treaties intruded upon the sphere of the legislative power, since a treaty would not have municipal validity in this sphere unless it was authorized by statute or transformed through municipal provisions.[6] But according to this view transformation was not a general necessity by virtue of the different characters of international and municipal law. The question was concerned with the relationship between the executive and the legislative powers, and the setting of limits depended upon the constitutional principle of the separation of powers. As regards rules of law that lay within the King's sphere of authority, the King's entering into a treaty was sufficient, and one could here find support in a legal tradition reaching back to the era of absolute monarchy. On the other hand, if rules falling within the sphere of our constitutional "principle of legality" were concerned—i.e. the principle that rules affecting rights and liberties of the citizens regularly require statutory form ("formal law")—then legislation was necessary in order to create directives binding upon the citizens. Because of this dichotomy the main rule depended upon the field in which one took the starting point. And this starting point shifted in theory, which went over to concentrating on the rules that lay within the legislature's sphere of authority, a development that probably occurred under the influence of the growing legal competence and actual power of the Storting in constitutional matters.[7]

In this century an opinion has thus gradually come to be generally accepted in Norwegian theory that a general transformation principle prevails, which to some extent is so wide in scope that it applies to all international law—with a reservation for the presumption principle in relation to generally recognized rules of

[5] Cf. L. M. B. Aubert, *De norske Retskilder* (The Sources of Norwegian Law), Christiania 1877, p. 24.

[6] Cf. Aubert, *op. cit.*, pp. 263–4.

[7] As early as Aschehoug's work the classic dualistic view appears, cf. *Norges nuværende Statsforfatning* (The Present Constitution of Norway), 2nd ed. Christiania 1892, vol. II, p. 519 and pp. 533 ff.

international law.[8] There has not, however, been any extensive discussion in principle, either in theory or in court decisions, about the general guidelines for the application of international law, apart from certain beginnings in recent years. The dualistic basic view has slowly advanced unopposed and has apparently been accepted in legal doctrine as a necessary consequence of constitutional law. It is probably Triepel's work *Völkerrecht und Landesrecht* (1899) and the school of thought created by this work that have exercised a decisive influence. If at the beginning of this century the Norwegian writers had given more attention to the less positivistic and more monistically inclined Anglo-Saxon attitude, our constitutional development on this point might have taken another course.

But here, too, real life has revealed finer distinctions than has principle-bound theory.

11. The requirement of transformation can obviously not be made in respect of the rules based on customary law and generally accepted principles of law. These sources of international law have to a great extent been used both to *supplement* and to *modify* the municipal law.

There is a series of Supreme Court judgments that resort to a far-reaching—and partly exclusive—application of such international rules within fields where there may be said to be gaps in Norwegian law. The judgement of 1950 concerning pension contributions shows how international law was in this way applied as a *supplementary* source of law.[9] Another illustrative case in which international law fulfilled this function is a Supreme Court judgment from 1933 concerning the occupation of no man's

[8] The following authors—who among themselves have to a certain extent somewhat differing opinions—can be specially mentioned: Mikael Lie, *Legitimation ved traktat* (Legitimation by Treaty), Christiania 1912, p. 128; Nikolaus Gjelsvik, *Lærebok i folkerett* (Textbook of International Law), Christiania 1915, pp. 51 ff., and later writings; Francis Hagerup, *Folkerett i fredstid* (International Law in Time of Peace), Oslo 1932, p. 40. The author who especially gives strength and depth to the modern dualistic doctrine in Norwegian law is *Frede Castberg*, who enters into these questions in several connections in his writings, *inter alia*, *Norges Statsforfatning* (The Constitution of Norway), 3rd ed. 1964, vol. II, pp. 125–6, *Folkerett* (International Law), 2nd ed. Oslo 1948, p. 33, and *Studier i folkerett* (Studies in International Law), Oslo 1952, pp. 28 ff., just as he has also maintained this view as legal adviser to the Norwegian Foreign Ministry. Among the most recent writers may be mentioned Finn Hiorthøy in *T.f.R.* 1953, pp. 379 ff., and—but modified to a significant degree—Carl August Fleischer, *Hovedpunkter i folkeretten* (Main Points in International Law), Oslo 1966, pp. 242 ff.

[9] Cf. *supra*, section 6.

land.[1] A private citizen, Birger Jacobsen, undertook, in 1921, an expedition to Jan Mayen Island in the Norwegian Sea, which was at that time not yet subject to Norwegian sovereignty but according to international law was *terra nullius*. Here he made various arrangements with the intention of occupying a considerable area of the island. A short time afterwards the Norwegian government established a meteorological station on Jan Mayen Island, and the leader of this expedition, observing Jacobsen's preparations towards occupation, decided on his own initiative to proceed to occupy an important part of the same area in the name of the State Meteorological Institute. In both cases it was a purely private occupation that was intended, and consequently there arose two competing claims as regards the ownership of this area. Jacobsen brought a suit asking for a declaration that the Government was not entitled to any rights of ownership over that part of the island which he had occupied, and he succeeded in the Supreme Court. What is of interest in this connection is the sources that the Court applied to resolve this conflict. The main question in the case was whether Jacobsen's enterprise was to be regarded as a valid private-law occupation, and this again depended on whether such activity as he had undertaken fulfilled the conditions which must be stipulated as to acts of occupation. Now the occupation of ownerless land is certainly not an everyday affair. On Norwegian territory no such acquisition has taken place legally for many hundreds of years, and as I understand it, one would be quite justified in saying that if one can at all speak of lacunae in the law, we are here faced with a lacuna in our municipal law. We have neither statutory rules, nor customs, nor earlier court decisions. But this did not appear to create the slightest difficulty of principle for the Supreme Court, which proceeded boldly to discuss whether Jacobsen's erection of houses and boundary marks, etc., satisfied the necessary requirements as to "manifest actions expressing a seriously intended and effective taking of possession". In reading the premises of the decision one is at first inclined to ask: Where does the Supreme Court obtain these rules from? Why does the Court specify precisely these conditions for occupation and not more lenient or more stringent ones? But gradually the matter becomes clear through some of the expressions used in the judgment. The rules applied are evidently those which the Supreme Court regards as being

[1] 1933 N.Rt. 511.

the recognized international-law norms concerning private acquisition of land by occupation, those rules which are based on general international opinion and which have received international acceptance. It appears to have been so much a matter of course for the Supreme Court to base the decision on the international rules in this case that it did not even find sufficient reason for undertaking any discussion of the competence for so exclusive an application of international law.

In a corresponding manner the Supreme Court has applied the international-law rules concerning the formation of new régimes, concerning the boundary between the jurisdiction of an occupation power's military courts and that of the occupied country's own courts, and also concerning the transfer of the right of ownership of enemy military property on capitulation.[2]

The court decisions discussed above show that the general rules of warfare and occupation are widely applied to *modify* the Norwegian rules in force.

12. The law of treaties has likewise been introduced into the grounds of judgments without any formal process of transformation. In several decisions the Supreme Court has accorded weight to treaties that respectively establish and limit the rules of international law concerning jurisdictional immunity of foreign states in municipal courts;[3] in one decision the court even referred to a convention, on immunity of state vessels, which at the time of decision had simply been signed but neither ratified nor implemented by any Norwegian Act.[4] In a postwar decision the Court of Appeal based its judgment on the Paris Convention concerning reparations from Germany when deciding whether a workshop had, by virtue of repairs done to a ship taken "in Anspruch", a right of retention against the owner.[5] And in a number of decisions one finds a more negative type of treaty application, where the courts undertake at times fairly comprehen-

[2] Cf. thus 1926 N.Rt. 779, 1940 N.Rt. 343 (the Supreme Court's Chamber of Appeals in Interlocutory Proceedings), 1954 N.Rt. 451 and 1958 N.Rt. 1239. Concerning such court decisions cf. also Edvard Hambro in 1949, *Acta Scandinavica juris gentium*, pp. 8 ff., together with Løchen and Torgersen, *Norway's Views on Sovereignty*, 1955, pp. 82 ff.

[3] 1936 N.Rt. 136 and 1938 N.Rt. 584. See also 1948 N.Rt. 706, 1949 N.Rt. 149, and 1949 N.Rt. 881.

[4] 1938 N.Rt. 584. There could not, of course, in this instance be any application of the treaty as a binding text since ratification was lacking—and the reference to the treaty ought probably to be regarded as a link in the justification for establishing a general international norm.

[5] 1950 N.D. 181.

sive discussions of treaty rules in order to analyse whether they have any relevance in relation to the question before the court, albeit with a negative result. Some of these decisions leave one with a definite impression that the courts would have based their finding on the treaty if the interpretation had resulted in the opposite solution. Reference may here be made especially to two earlier decisions on the effects of a Swedish-Norwegian and a Russian-Norwegian treaty on real property relationships in certain border districts.[6] What one presumably cannot find are decisions of the courts that reject treaty provisions.

13. This material is not comprehensive, but should be considered as a sufficient basis for a more general conclusion that international law is, to a significant extent, given *direct application* by Norwegian courts.

In the 1950's a comprehensive debate took place in Scandinavian theory about the concept of "application of law" in private international law, a discussion that especially concerned the principle of *ordre public* and its relation to preliminary (*préjudiciel*) questions, but which was also extended to relate to foreign rules and preliminary questions more generally.[7] In this discussion it was maintained that courts, by a preliminary decision of a legal relationship in accordance with foreign law, *do not apply* the foreign rule of law, since in their conclusion they have not stipulated the legal consequence that this rule specifies. When Scandinavian courts recognize certain legal effects of a foreign polygamous marriage—e.g. rights of inheritance such as would follow from a valid marriage—the foreign rule of law permitting polygamy is not thereby applied, but the courts merely admit by applying the municipal rule of inheritance that the marriage in question is valid according to the foreign law. Against this point of view it has been urged that it fails to recognize properly the fragmentary character of the rules of law, and that a legal rule must be said to have been applied on every occasion when it has been included in the judgment as a link in the chain of reasoning on which the conclusion of the judgment is based.

[6] 1873 N.Rt. 773 and 1916 N.Rt. 1157.

[7] Cf. Torsten Gihl in *T.f.R.* 1950, pp. 133 ff., *T.f.R.* 1952, pp. 137 ff., and *T.f.R.* 1955, pp. 16 ff.; Hjalmar Karlgren in *T.f.R.* 1951, pp. 457 ff., and *T.f.R.* 1952, pp. 492 ff.; Lars Hjerner in *T.f.R.* 1953, pp. 40 ff.; and Alf Ross in *T.f.R.* 1954, pp. 241 ff. and *T.f.R.* 1955, pp. 496 ff. Last year the discussion broke out anew, cf. Torsten Gihl in *T.f.R.* 1967, pp. 25 ff., and Alf Ross in *T.f.R.* 1967, pp. 637 ff. Further references are given at the places mentioned.

In a corresponding manner, as regards the judgment of international-law relationships by municipal courts it can be maintained: *that* the introduction of international legal norms into the *ratio* of municipal judgments always presupposes a municipal authority, which may be unwritten and which may be created by the court in the individual case—and which may even be entirely unmentioned and "invisible"—but which may be regarded as a transformation rule, *that* the relevant international law rule thereby only enters into a preliminary decision, and *that* consequently no real application of the international legal norm takes place. Here we face, as is well known, difficult questions of a jurisprudential and terminological character. The purpose of the present paper, however, is to show with what degree of activity international legal norms have entered into the whole pattern of argument in Norwegian court decisions. In this connection the juridical construction means little. But for a realistic description of the courts' activity the following simple assumptions seem to be adequate. An *application* of international law takes place because the substance of the international rules has motivated the conclusions of the court. And this type of judicial argumentation represents a *direct* application of international law—from a natural point of view—because there has taken place no transformation by virtue of municipal provisions, but only an independent decision on the courts' own part to include the international norms in the grounds of their judgments.

14. The question thus becomes: How comprehensive are the *exceptions* that must be made?

Among the treaties an exception has been made for law-making treaties, those that "have a wider aim than the already existing international law".[8] Thus it was stated in a Government bill promoted in 1961–62 that the presumption that Norwegian law is in conformity with international law is not without further ado valid in relation to such treaties.[9] I think that such an exception neither can nor ought to be made. This so-called presumption will certainly not apply with equal force in every case. The scope a rule has in the international community will be one of the factors that must be given positive effect in assessing what muni-

[8] Concerning law-making treaties, see Oppenheim-Lauterpacht, *International Law*, vol I, 8th ed. London 1955, pp. 878 ff., with further references.

[9] *Odelstingsproposisjon* (Government bill) *no. 23 for 1961–62* (concerning an amendment to the code of legal procedure in respect of international immunity), p. 1.

cipal consequence it shall be accorded—and the law-making treaties are regularly concluded among a considerable number of states.[1] Nor should, however, all special treaty rules be denied any municipal effect whatsoever. There is at least one weighty reason for giving *all* treaties municipal application to the extent they presuppose it, namely the simple reason that the state is obliged to do so. And this standpoint has been expressed—if somewhat cautiously—in the proposal from the Storting's enlarged legal committee on the legislative question mentioned above, in which the committee emphasized the general principle of interpretation that Norwegian law should be understood in such a manner as to conform with general international law "and in cases of doubt also with the treaties that Norway has become party to, at any rate so far as more recent legislation is concerned".[2] This is in accordance with a comprehensive series of court decisions in many countries in Western Europe.[3] Support for this view can further be found in the doctrine that our courts must be considered bound by the standpoint taken up by the government of the country towards new régimes.[4] For a declaration of recognition is, as mentioned above, not merely an announcement of the government's opinion on a legal question, but simultaneously amounts to a declaration towards the state concerned laying down certain obligations. A special reservation is partly made in Norwegian doctrine in respect of the so-called "contractual treaties", which have the character of contracts between states. The reason for this is that an application of these treaties presupposes a detailed knowledge of the relationship between Norway and the other party to the treaty, since the foreign state possibly neither can nor will demand special rights in accordance with the treaty, e.g. as a consequence of a default.[5] It is not, however, a special characteristic of contractual treaties that a state will not always demand that a treaty right should be enforced for the benefit of its citizens. And, generally speaking, the preliminary doubtful questions that the courts will face in this regard are scarcely of greater difficulty than the questions the courts otherwise deal with—both in international law and municipal law.

[1] Oppenheim-Lauterpacht, *loc. cit.*

[2] *Innstilling til Odelstinget* (report to the national assembly) *no. 49 for 1961–62.*

[3] Cf. on this point the survey made by Felice Morgenstern in *British Year Book of International Law* 1950, pp. 84. ff.

[4] Cf. *supra*, section 4.

[5] Cf. Frede Castberg, *Folkerett* (International Law), 2nd ed. 1948, pp. 33–4.

The only absolute limit that the courts must recognize as regards their direct application of international law is, as far as I can see, the above-mentioned constitutional principle of legality.[6] However, the importance of this principle must be reduced to its proper dimensions in this connection. A statutory provision ("formal law") is required to authorize a punishment in accordance with the express provision in art. 96 of the Norwegian Constitution.[7] Likewise, as a general rule, a formal statutory provision is necessary when administrative organs interfere with the rights or liberties of the citizens. It has here been shown in the discussion concerning this principle of legality that the requirement as to the character and strength of the statutory authorization may vary according to the nature of the encroachment;[8] but a rule of international law will undoubtedly not by itself be sufficient in this field. This means that a treaty will not succeed in encroaching on existing rights. And it can be added that a rule of international law is certainly not sufficient authority in a case where a legislative provision itself refers to "a regulation" or similar formal requirement.[9] But otherwise there is probably no significant reality in the principle of legality today as regards the courts' decision of questions of law generally, even if these concern legal fields traditionally considered to be the citizens' "own legal sphere". Norwegian courts have thus permitted themselves a general freedom to decide questions on the basis of the "nature of the case" within the whole sphere of private property law. Within this framework treaty law may have ample room to operate.[1]

15. Against this background a main principle can be established: *international law is part of Norwegian law.* It has to some extent been asserted, most recently in the parliamentary

[6] On this principle, see *supra,* section 10.

[7] In the war crimes trials, as mentioned above, two members of the Supreme Court (including Chief Justice Paal Berg) declared that punishment could be inflicted on the basis of a direct application of international law. But their grounds were exclusively aimed at these cases. Cf. 1946 N.Rt. 198 and 1947 N.Rt. 435.

[8] Cf. Torkel Opsahl in *T.f.R.* 1962, pp. 377 ff.

[9] Cf. 1951 N.Rt. 667.

[1] Thus, also changes in the law may here, according to the circumstances, be carried out by treaty, provided that no earlier statute stands in the way, and provided that the rules are not given retroactive effect on established legal relationships. It has been said that on this point I underrate the range of our principle of legality. Cf. C. A. Fleischer, *op. cit.,* pp. 253 ff. The limits for the sphere of application of this principle are undeniably uncertain.

debate on the amendment of the Constitution concerning adherence to supranational organizations, that the Norwegian legal system is in this respect *contrary to* the English,[2] in which a basic maxim is framed in Blackstone's striking passage, where he says that the law of nations is part of the law of the land. But there seems to be almost as good a foundation in the positive source material for asserting this maxim in Norwegian law as there is in the homeland of the doctrine. As is known, it has long been held in English law that the doctrine only extends to customary law and generally recognized principles of law, and that it is besides only an element of the common law, with the consequence that the rules of international law are ousted by contrary statutory law. In accordance with the international terminology in this field there is therefore justification for classifying the Norwegian system in the same manner.[3] The difference from the common-law position lies essentially in the fact that in Norwegian law a deliberate recognition of the maxim has hitherto been lacking. The reality is essentially the same, even though the English maxim expresses a view of international law different in principle from the dualistic standpoint that we have traditionally defended.

The principle of legality offers no hindrance to such a recognition. Within the sphere of this principle other Norwegian legal rules than statutory rules will not normally be sufficient either —this is therefore no special characteristic of the rules of international law. A special act of transformation cannot, contrary to the ordinary opinion, be considered necessary in principle as a condition for the application of international law. Such an act is required only to give the international rule the level in the municipal legal system appertaining to the transformation rule employed.

It must, however, be added that the summary of the legal posi-

[2] To this effect Edvard Hambro in *Stortingsforhandlinger* (Parliamentary Debates) *1961–62*, p. 2283. It is appropriate to add that Professor Hambro, a well-known expert in this field, was in favour of the amendment.

[3] It has been submitted in Norwegian theory that also foreign law can be applied as an argument by Norwegian courts in their grounds of judgment without this having the consequence that one designates the foreign legislation as Norwegian law. Cf. C. A. Fleischer, *op. cit.*, p. 249. I regard it as a decisive difference that international law seems to be applied as a general rule where it is relevant, and applied with a considerable penetrating power, whereas foreign law is only sporadically referred to as a guiding model, and only as a supporting argument where the courts are not bound by the present sources.

tion put forward here would scarcely meet with general acceptance among Norwegian jurists at the present time.[4]

16. When placing the rules of international law in the national hierarchy of legal norms, one comes across the classic question of *conflict* between a national and an international legal norm.

A preliminary question here is *when* the courts choose to declare the existence of a case of conflict.

If a study of the internal legal sources alone shows that two solutions are about equally well-founded, but that one is in accordance with international law while the other is not, it is clear that the courts will choose the internationally valid solution. Most of the world's courts would certainly make this choice. A more interesting question, however, is *how far* the courts will go in the direction of choosing a solution that corresponds with international law when there is another solution that appears more obvious if the internal sources are considered alone.

This question becomes acute when there exists an unequivocal clash between a municipal statute, literally interpreted, and a rule of international law. The question here will be whether the courts will continue to be loyal to the international rules, or whether they now find that they must yield to the municipal legislation. If they are still willing to make a decision that is in accordance with international law, it must normally come about through a restrictive interpretation, and in some circumstances a ruthless interpretation, of the statutory provision in question.

In many cases it is fairly clear that the legislator has not intended to make a statute of internationally illegitimate character, but has simply not taken into consideration the special cases that may lead to conflict with international law, and has therefore merely forgotten to make the necessary municipal provisos. There was formerly a perfect example in Norwegian legislation. In our criminal code there is a general reservation saying that the code's rules regarding the applicability of Norwegian criminal law are limited by the exceptions recognized in international law. Until 1962 we had no corresponding reservation in our code of criminal procedure, which contains our rules as to the conditions for detention. But foreign diplomats could safely follow their drinking and driving customs despite this lack of a proviso.

In cases of this type Norwegian courts have in several respects

[4] In a guidance for civil servants in the Foreign Ministry concerning conclusion of agreements with foreign states (issued 1966 by Egil Amlie) a more restrictive view is thus submitted.

patched up the incomplete legislation. One of our city courts once dealt with a dispute which had arisen on board a foreign ship in a Norwegian harbour between the captain and one of his crew. The Supreme Court annulled the decision, in spite of lack of support in the legislative provisions, with a reference to an assumed prevailing international custom that disputes arising on ships abroad cannot be brought before the courts of the foreign country but lie within the jurisdiction of the national consular representative on the spot.[5] And the Supreme Court's Chamber on Appeals in Interlocutory Proceedings has annulled an injunction against a ship with reference to the rules of international law relating to the immunity of state ships, despite the fact that these rules were not incorporated in Norwegian legislation at that time.[6]

When the courts can no longer in this way find support in a hypothetical intention of the legislator, a considerably greater demand is made on their boldness. We now reach an area where the independence and breadth of vision of the judges are really put to the test.

A case decided by the Supreme Court in 1957 shows how a consideration for the law of the land struggles with a consideration for international law.[7] An elderly German was engaged in carrying freight in a small vessel he owned. During the war his home was bombed, he took the remainder of his possessions on board his vessel, and at the time of the capitulation in 1945 he was transporting coal along the Norwegian coast. After the capitulation he continued his transport activities according to orders from the allied authorities. But in May 1946 the vessel was seized, the German and his wife were forcibly removed and sent to Germany, being allowed to take with them nothing but the clothes they were wearing. The man later brought a suit against the Norwegian government and, *inter alia,* claimed compensation for the chattels on board, including things like clothes, toilet articles, ordinary equipment, kitchen utensils, etc. The appropriation had been carried out in accordance with the Norwegian statute relating to enemy property, which in its definition of enemy property mentioned without any exception chattels found in the

[5] 1908 N.Rt. 749. One can debate whether any international rule with this content exists. But what is of interest in this connection is the application the Supreme Court gave the international rule that the court declared in the preliminary issue.

[6] 1938 N.Rt. 584. See comments *supra,* section 12, with note 4 on p. 179.

[7] 1957 N.Rt. 942.

realm. Both the City Court and a majority in the Court of Appeal therefore found that the tribunals could not go beyond the clear provisions of the statute, but stated that it was desirable that the German should be indemnified by an *ex gratia* payment for at least part of the loss. A single judge in the Court of Appeal dissented, however, and his opinion deserves further attention. He first discussed the problem in relation to international law and found on the basis of an interpretation of the Hague Regulations that the appropriation of the chattels was contrary to international law. He went on to discuss whether it was possible to subject the wording of the statute to certain general limitations against the background of the aim of the statute. He found, however, that he must reject this approach. But he then continued:

> When, nevertheless, I remain of the opinion that the appropriation of Koppelmann's chattels was not lawfully authorized, it is for the following considerations:
>
> It seems to me to be a debasement of our Western culture that when recognized rules of international law adopted with binding force in a convention are put to the test, they are swept aside as mere paper provisions. The courts must be especially on their guard in the extreme exceptional cases in which the result would be particularly unjust and objectionable—in order to safeguard as far as possible the cultural values that should be gained.

One approaches the Supreme Court's decision with a sense of expectation. However, even the Supreme Court found the wording of the statute conclusive, associating itself at the same time with the recommendation of an *ex gratia* indemnification.

In my opinion this is a somewhat disappointing judgment. In all likelihood it cannot be maintained, as a consequence of the practice that has been laid down after the two world wars, that the Hague Regulations offer any general protection to enemy private property in a hostile country. But so extensive an appropriation as the one in question seems difficult to accept, and in this case the courts have at any rate gone to the furthest limit of what may be permissible in international law. The situation is accordingly that the courts found themselves unable to depart from the wording of the municipal statute, despite the fact that the outcome would give rise to grave doubts when regarded from the international-law point of view, despite the fact that the courts themselves found the result so unjust and objectionable that they recommended an *ex gratia* payment, and despite the fact that

in this claim the courts were confronted with an exceptional case, since it was almost a mere chance—or rather accident— that led to these articles' being in Norway instead of remaining in Germany. The opinion of the dissenting appeal court judge is the one that does most credit to Norwegian legal standard.

17. Finally, there is the direct conflict between a municipal and an international norm which the courts are unable to eliminate by way of interpretation. This is the grand question from the theoretical point of view, but practically speaking, it is plainly of modest dimensions. The case will be quite out of the ordinary, both because the legislative and executive authorities will regularly comply with their international obligations, and because the courts in their judicial process exercise control over the refining of both the international and the national rule.

But what of the case when the extraordinary actually happens?

In the nineteenth century we adopted the American doctrine of judicial review of the constitutionality of legislation. This was a bold step in constitutional law. And thereafter a halt was called. A judicial review of the international legality of legislation was excluded from this extension of the court's constitutional competence. From the beginning of the present century Norwegian theory has firmly implemented the dualistic doctrine and given priority to the Norwegian rule.[8] The courts have also, on several occasions, more or less definitely expressed the opinion that Norwegian statutes and decrees must be followed even if they are in conflict with international law.[9] And this standpoint has been presupposed in our legislative process and administrative practice, especially in the task of transforming treaties into Norwegian law.[1] The doctrine has, it is true, not passed unchallenged in theory.[2] Nor has it ever been clearly ratified by the Supreme Court—in the judgment discussed above concerning the appropriation of chattels the Court completely avoided

[8] Cf. the sources mentioned *supra*, section 10, note 8 on p. 177, in connection with the transformation doctrine. See also Johs. Andenæs, *Statsforfatningen i Norge* (The Constitution of Norway), 3rd ed. Oslo 1962, p. 19.

[9] The Supreme Court decisions in 1945 N.Rt. 13 and 1945 N.Rt. 232 contain the most relevant statements. Cf. as further instances of some importance Supreme Court decisions in 1947 R.M. no. 26, p. 36, 1947 R.M. no. 28, p. 139, and 1949 N.Rt. 983.

[1] This was strongly asserted by the then head of the legislative department of the Norwegian Ministry of Justice, Finn Hiorthøy in *T.f.R.* 1953, pp. 385 ff.

[2] Cf. *infra* the present section at notes 4–5. See also Per Augdahl, *Rettskilder* (Sources of law), 2nd ed. Oslo 1961, pp. 69–70.

the international-law aspect of the matter. And it is doubtful whether there is any basis for maintaining that a principle of customary law has developed; for, even though for some considerable time a clear assumption on the primacy of municipal law has been present in the preparation of legislation, one must take into account that there also exist other conclusive reasons supporting a technical legislative transformation besides the consideration of making a treaty internally binding, thus a regard for the statute law as a source of information, and a regard for a proper incorporation of the treaty provisions in the national system of statute law. But, even if there can thus scarcely be shown to be a single basis that is of itself sufficient authority for the rule as to the precedence of national law in cases of collision, one must nevertheless regard it, when undertaking a more overall consideration, as a definite main principle.[3] I regret this conclusion, but I consider it unavoidable.

There are, however, several signs of the times which indicate that the strongly nationalistic legal viewpoint expressed by the traditional doctrine is coming to be regarded as unsatisfactory. In legal writing there have been reactions from several quarters recently. These attempts to break away have been made in different guises. On the one hand, it has been asserted that a more recent treaty should take precedence over an earlier statute by virtue of chronology,[4] on the other hand, that a treaty binds the legislative authority with a constitutional tie, so that an earlier treaty must prevail over a more recent conflicting statute.[5] To the extent that such solutions are put forward as general rules, however, these attempts are doomed to failure. Despite the incisive constitutional arguments that can to some extent be advanced, the results are inevitably a failure, because it is, quite simply, too strongly opposed to both our legal tradition and to general Norwegian legal opinion to regard a treaty as a source of law superior to or on a par with legislation.

At this juncture there is reason to discuss briefly a proud chap-

[3] On the other hand, doubt can prevail about how far this principle stretches in our constitutional law, both with regard to which national norms will take precedence and with regard to which international norms will give way in a conflict. See further *infra*, section 18.

[4] Edvard Hambro puts this forward as a possible solution, cf. *T.f.R.* 1947, pp. 96 ff., especially pp. 109–10, and *Acta Scandinavica juris gentium* 1949, pp. 18–9. See also *Norsk fremmedrett* (Norwegian law on aliens), Oslo 1950, pp. 49–50.

[5] Cf. Kiær Mordt in *T.f.R.* 1953, pp. 205–7.

ter in the Norwegian Supreme Court's fight for justice during the occupation, since now and then special reference is made to the Supreme Court's declaration on its recession in 1940. The German Reich Commissioner (*Reichskommissar*) had in a letter to the Court, dated December 3, 1940, stated that neither the Supreme Court nor any other Norwegian court could question the validity of the legal decrees issued by the Reich Commissioner or by the Norwegian "commissioner ministers" constituted by him. In its declaration of December 12, the Supreme Court replied as follows:

> We wish to maintain that the courts have in accordance with Norwegian constitutional law a duty to review the validity of statutes and administrative decrees. During a military occupation the courts, in our opinion, must in the same way, when deciding the legal questions brought before them in a case, be able—to the extent authorized by international law—to take up a position as regards the international legal validity of decrees that are issued by organs of the occupation power.

The declaration added that the members of the court could not comply with the view of the courts' authority expressed in the Reich Commissioner's letter, without acting contrary to their duties as judges of the Norwegian Supreme Court, and that the members of the court therefore found themselves unable to continue in their judicial office.[6] — It has since been contended that the view which the Supreme Court here maintained in relation to the occupying power must imply an obligation on the Supreme Court also to ensure that the *legitimate Norwegian authorities* act in accordance with the demands of international law.[7] Such a deduction cannot, however, be accepted. Now it is, from a juridical point of view, unsatisfactory to content oneself with a reference to the extraordinary *political situation*. It must therefore be emphasized that the nature of the *legal problem* is quite different in the two situations, from the point of view of both

[6] During the remaining part of the war the Supreme Court was not in function. The Nazi administration appointed new judges, who were of course not regarded as constituting a legitimate court. Norway had thus a judicial system without an acting supreme tribunal. The withdrawal of our Supreme Court played a very considerable part in the building of the national resistance movement.

[7] Cf. J. B. Hjort in *Lov og Rett*, 1962, p. 114, and in *Jussens Venner*, series W., no. 1, p. 15. Also Edvard Hambro regards it as a natural interpretation to consider the Supreme Court's letter as an expression to the effect that the courts can pass judgment on the international validity of statutes and decrees, cf. *T.f.R.* 1947, p. 96, and *Acta Scandinavica juris gentium* 1949, pp. 16–7.

legal logic and legal policy. Where the decrees of an occupant pass beyond the bounds of what is internationally legitimate, the decrees have no other legal basis than, possibly, the occupant's own national law. And they can therefore, *qua* rules of law, at most be regarded as *foreign* internal rules by the courts of the occupied country. But when the internationally illegal internal rule is a foreign rule, what is otherwise the main basis for giving the internal rule precedence — namely consideration for the national interests of the country of the forum — is lacking. This consideration calls for precisely opposite solutions in the two situations. After the war the Supreme Court also characterized it as "obviously untenable" that a German rule contrary to international law should be upheld by a Norwegian court.[8]

This negative attitude towards the significance of the Supreme Court's recessional declaration in this respect implies also the positive assessment that the court on this occasion did not deviate from general Norwegian legal conceptions.

In the Supreme Court's reasoning in recent years one can, however,—in more ordinary judicial matters—perceive traces of a more international attitude. In three cases before the Supreme Court—all unconnected with the postwar settlement—it has been argued that a Norwegian statute was contrary to international law.[9] And in all three instances the Supreme Court has, in stating the grounds for its judgment, taken the course of showing that international law—as understood by the Court—made no demand on the municipal law which was infringed by the statute in question. In no case did the Court apply the doctrine of the supremacy of national law in the event of a conflict between national and international rules, despite the fact that the Court in its reasoning partly found it necessary to undertake a very comprehensive discussion of the international-law aspect. Now one must always be particularly wary of basing anything at all on what a court does *not* say. But the circumstance that the Supreme Court chooses to discuss the international-law aspect in a case in which it considers the Norwegian statute to be clear, shows that the Court does not *wish* to found a decision on the doctrine of the precedence of national law. The premises also include formulations that may indicate that the solution of a collision of norms can no longer be considered entirely obvious.

[8] 1947 N.Rt. 468.
[9] 1954 N.Rt. 478, 1961 N.Rt. 1350, and 1966 N.Rt. 476.

This attitude may contain the germ of a future break with the doctrine.

18. But as regards the situation today, also, the discussion concerning the internationally illegal Norwegian rule ought to be taken a little further. I shall attempt to outline another approach which may possibly also be applied within other national systems.

In my opinion it is erroneous to assume that one can arrive at clear general rules as to which norms, the national or the international, shall take precedence in cases of conflict. That the discussion has for so long been carried out on such lines in this field can probably be explained by the fact that the conflict has taken on a particularly sharp and dramatic form because there were different legal systems which collided. But if one recognizes at the outset that international law is a part of Norwegian law, there is also reason to draw the consequence that this kind of norm conflict must be resolved in the same manner as are conflicts between different municipal legal norms. One will thereby obtain a more refined picture, which will better portray the legal situation of today. On a conflict of rules there must as a starting point be applied the ordinary principles governing such collisions, relating to precedence for, respectively, the superior rule, the more recent rule, and the special rule. And by the application of the *lex superior* principle—the principle of the priority of the rule of superior rank in the norm hierarchy—it must be assumed as a general guiding line that the rules of international law rank on a lower norm level than statutes. But at the same time we must in this field also take full advantage of the transition from the older jurisprudential doctrine with its stricter norms for the application of law to the present outlook on legal methods, which is more free and less tied up by the demands of formal logics. This will imply that the collision norms mentioned may not be applied like mechanical principles, but that the pragmatic factors in the application of law enter in with full force. The collision norms are—as Alf Ross has put it—not axioms, but principles of relative weight, which interact with other considerations in the interpretation and application of law.[1]

This means, first and foremost, that the principle of precedence of the rule of higher normative order does not have an absolute effect, even though we in principle recognize the national statute as the superior rule. Norwegian court decisions from other fields

[1] *On Law and Justice*, London 1958, p. 134.

in which the *lex superior* principle applies, show that it has little power to hinder free legislative assessments from playing their part at the expense of the superior rule. This is thus the case in the relationship between a statute and a provisional Royal ordinance, where the *lex superior* principle even has the force of constitutional law as a consequence of authority in art. 17 of the Constitution.[2] The courts have ample possibilities for giving effect to the lower norm by holding that it simply supplements and specifies the superior norm without deviating from it. And since the relationship between law and treaty is not of so certain a character as to constitute a superior/inferior norm-ranking, the *lex superior* principle may be directly deviated from according to the circumstances, if this deviation has sufficiently strong support in pragmatic considerations. This particularly applies if such a deviation can at the same time be supported by one of the other norms concerning rule collision.

In accordance with these guidelines it will in the first place be of some importance whether the rule conflict is only *partial* or is of a more *total* nature. The more limited the conflict is, the more easily can the international law rule be given priority as the special rule, as we have long given, e.g., the immunity rules and the rules as to consular jurisdiction effect as exceptions to our procedural legislation, to some extent without any specific municipal authority. The solution here receives a clear explanation by way of *lex specialis,* without any need to seek out an unrevealed intention of the legislator.

Furthermore, the *strength of the international rule* will be a factor. This strength will, on the one hand, depend upon its *legislative* force. As regards the relation to the European Convention on Human Rights, Chief Justice Terje Wold has submitted that the convention must be applied by Norwegian courts even in the face of conflicting Norwegian laws.[3] This he bases in the first instance on the fact that the convention, according to its content, establishes personal rights immediately for individual persons. This reasoning may be questioned. It is difficult to see why individual treaty rights should necessarily have a greater penetrating power than state treaty rights. But the result ought probably to be accepted, and if so, simply on the basis of the great force of legal policy accumulated in this very convention—a considera-

[2] Cf. Torkel Opsahl, *Delegasjon av Stortingets myndighet* (Delegation of the Storting's Power), pp. 302 ff.

[3] *Legal Essays, Festskrift til Frede Castberg,* Oslo 1963, p. 358.

tion we ought to be able to accept in Human Rights Year, 1968.[4] In a corresponding manner the *degree of acceptance* of the rule in the international community ought to be taken into account. A certain concession is thereby made to the general view that more particular treaties and contract treaties shall not receive application, but at the same time the necessary dilution of this view is effected.

In the opposite scale will be weighed the *strength of the national rule*. This rule's resistance power will depend first on what *ranking level* it has in the municipal norm system. In this respect also there has been a tendency to favour the formulation of absolute collision rules. Thus, it has been maintained that a provisional ordinance must be fully equated with a statute and be given precedence over conflicting rules of international law. But even though these ordinances are in many respects to be equated with a formal statute, nevertheless our Constitution provides that in cases of collision they are to be ranked one step lower down the ladder. And this must probably be taken into account in the total evaluation. In this way the power of resistance will be weakened as one goes downwards in the pyramid of norms. In assessing the strength of the national rule, consideration must further be paid to *all the factors* that determine a rule's degree of effect according to prevailing theories of legal sources: the rule's legislative value, its support in objective legal sources, its age, etc. If a national rule stands weakly enough on this foundation, e.g. because it has been weakened through obsolescence, it may have to succumb also to an international rule, and this might in special instances happen even to a statutory provision in its entirety. To take one example from our rather outdated monetary legislation: The Monetary Act of 1875 states that the value of the krone shall correspond to a weight of about 0.4 grammes of fine gold. On Norway's adhesion to the Bretton Woods Convention relating to the establishing of the International Monetary Fund, however, we bound ourselves to maintain a different par value for the krone—at present it is based on a gold weight of about 0.1 gramme—without the authorities having provided for an amendment of the older statutory rule. In such an instance there ought not, from a juridical point of view, to be any objection raised against accepting the international rule to the neglect of the statu-

[4] One may find a certain support for a consideration of this type in our more recent theory of legal sources. Cf. Per Augdahl, *op. cit.*, p. 70.

tory rule, inasmuch as the Monetary Act has on this point long since lost contact with economic realities.

This method of total evaluation will imply a disintegration of definite norms. But, in my opinion, this is the most realistic attitude. And simultaneously it gives international law considerable opportunities for expanding its influence within the framework of our national legal system.

19. With an eye to the future one may pose the question what internal legal effect the European Community law will be able to exert in the event of a Norwegian entry into the EEC in a post-Gaullist period.[5]

It is clear that an EEC regulation will be directly applicable in all member states in accordance with art. 189 of the Rome Treaty, together with such EEC decisions as are addressed directly to the internal legal subjects of the member states. It is likewise clear that on the Norwegian side these EEC rules will, if and when Norway joins, be regarded as directly applicable also by virtue of Norwegian constitutional law. To this extent there is clear authority in the constitutional amendment of 1962. The EEC rules now mentioned will have the force of law for Norwegian citizens and authorities, and they will alter earlier Norwegian legislation of deviating content.

The salient question will be the solution of the conflict between a directly applicable EEC rule and a *subsequent* Norwegian legislative provision. And this problem will present itself to us in the familiar form: whether the Community rules will have the same quality as Norwegian legislation, so that the conflict should be resolved in favour of the Norwegian rule by virtue of the *lex posterior* principle, or whether the Community rules should be regarded as having a higher ranking in the hierarchy of norms, so that the conflict should be resolved in favour of the Community rule in question by virtue of the *lex superior* principle.

In its decision of 1964 in the case of *Costa* v *ENEL*,[6] the Court of Justice of the European Communities, with reasons that sound like a paean of triumph to European jurists, declared that no sub-

[5] The following discussion is, for the sake of simplicity, confined to the EEC and does not embrace the other European Communities. It is also regarded as unnecessary to give references to the already comprehensive literature on the relationship between Community law and the law of member states.

[6] 1964 *Recueil de jurisprudence de la Cour*, vol. X, p. 1141 (ENEL = Ente Nazionale Energia Elettrica).

sequent national legal measure can supplant the Community rules. But the question has thereby been solved only within the system of Community law. The resolution of the conflict by Norwegian courts will depend upon Norwegian constitutional law.

It seems somewhat difficult to envisage the practical significance of the solution of this collision of norms. On the one hand, in this instance also the judicial principle of establishing a harmony of rules will be able to smooth out most conflicts, and there is reason to assume that our courts, as a consequence of the real interests involved, will carry out such a harmonizing in an energetic manner by applying the maxim of *in dubio pro communitate*. On the other hand, the courts will probably be pushed into the background if the Norwegian Storting in a vital Community question is willing to enter into a conflict, since one will here face a situation that must lead to negotiations or a withdrawal from the Community. But there is a remaining area. And the solution of the question will in any case have a significant political and theoretical interest, since the solution is an essential factor in assessing the degree to which sovereignty has been relinquished. It is evident that the Community organs have attached significant weight to the question. This has been clearly expressed through the two Dehousse reports of 1965 and 1967 to the European Parliament, of which the first aims at firing a "warning shot" to prevent a development towards the disintegration of Community law into a series of partial, autonomous, and divergent legal orders.[7]

The solution must be said to be uncertain in the light of our Constitution. The new art. 93 gives authority for empowering an international organization to exercise powers that otherwise belong to the state authorities. This may be read to imply that the Community rules can only be on a par with ordinary legislation; but at the same time an express exception has been made from the authority to delegate as far as constitutional amendments are concerned, which further implies that there subsists no corresponding direct prohibition against accepting Community rules that represent a norm level between constitutional law and ordinary legislation.[8] When the solution lacks roots in our positive

[7] Report of 25 May 1965, Document 43 for 1965–66, and report of 3 May 1967, Document 38 for 1967–68.

[8] The new article is worded as follows:

"In order to secure international peace and security, or in order to promote

constitutional law, it must consequently be reached on a basis of more free considerations.

The statements which have been made during the preparatory work preceding the Norwegian applications for membership have gone in the direction of recognizing the primacy of the Community rules in relation to Norwegian legislation.[9] But no real debating of the question has yet taken place. This means that we can neither announce any definite solution of our national problem nor any contribution to the comprehensive continental European discussion on the ranking order of the norms. There is reason to assume that a possible future solution will depend on three main groups of factors: first, an analysis of the points on which the Community law differs from, respectively, the general international law (which can possibly provide a basis for a deviation from the general collision principle) and the ordinary Norwegian law (which can possibly provide a basis for a deviation from the *lex posterior* principle); secondly, a comparative study of the municipal court decisions within the Community countries; and thirdly, a consideration of the guidelines now laid down for the application of international law by Norwegian courts.

Some of the main views that have been advanced in Continental doctrine as grounds for the paramountcy of Community law will probably have a relatively weak standing in present Norwegian juridical conceptions—e.g. the federalistic theories and the doctrine of the different characters of Community law and national law, which by logical legal arguments will demonstrate that the ordinary principles as to norm collisions do not apply—because there has in more recent times prevailed among us a considerable scepticism in respect of arguments of this "construc-

international law and order and co-operation between nations, the Storting may, by a three-fourths majority, consent that an international organization, of which Norway is or becomes a member, shall have the right, within a functionally limited field, to exercise powers which in accordance with this Constitution are normally vested in the Norwegian authorities, exclusive of the power to alter this Constitution. For such consent as provided above at least two-thirds of the members of the Storting—the same quorum as is required for changes in or amendments to this Constitution—shall be present and voting.

The provisions of the preceding paragraph do not apply in cases of membership in an international organization, the decisions of which are not binding on Norway except as obligations under international law."

(Translation by the Norwegian Ministry of Foreign Affairs.)

[9] Cf. Johs. Andenæs in Document no. 3 (1961–62), p. 17, *Markedsutvalgets rapport del II, juni 1967* (Report of the Committee on the Common Market, part II, June 1967), p. 10, and Torkel Opsahl in Document no. 10 (1966–67), p. 21. See also C. A. Fleischer in 1963 *T.f.R.*, pp. 71 ff.

tive" character. The municipal court decisions in the EEC countries will probably be given more weight; but these decisions show that the question has scarcely received a definite clarification, and cannot therefore at the present juncture offer any essential support for the primacy of the Community law. Such general considerations seem to indicate that it is realistic to assume that the relationship with the Community law will with some degree of probability be resolved within the framework of the general principles relating to the status of international law in our courts.

But within this framework, too, the Community rules will be able to obtain the necessary penetrating power, provided that the foregoing guidelines for the application of international law are recognized. Just as the European rules on human rights should take precedence over Norwegian legislation by virtue of their inner legislative force, so should the European rules on economic cooperation as a main principle be given precedence by virtue of the strong material considerations that support this solution: the great importance for the realization of the objectives of the Rome Treaty and for the EEC's activity that the Community rules should receive a unified application within the whole Community sphere, and the unfortunate economic discrimination that might be the result of separate national measures. This is an evaluation of real (social) factors (as opposed to arguments based upon formal logic), which will have great persuasive force according to the Norwegian way of legal thinking and which ought to be sufficient in this connection. A solution built upon this foundation is at the same time sufficiently flexible to allow room for certain modifications, which one can realistically reckon the courts will feel to be needed in a transitional period, and which should be recognized without having the main principle blown up.

There is reason to assume that the discussion which will probably take place in this field will also be of essential significance for the general rules relating to the application of international law by Norwegian courts.

20. In conclusion I should like to make a few remarks of a politico-legal nature.

It has been said by colleagues in the other Scandinavian countries that in dealing with Norwegian jurists one often comes across a poem where one would expect to find an argument. In his great dramatic poem, Peer Gynt, Henrik Ibsen allows his thought to

play over two sources of Norwegian national pride—our law and our high mountains:

> A breaker of his country's laws? Ah yes!
> But one true light above the law prevails,
> As sure as over Glittertind's white tent
> The piling clouds build higher mountains still.

For the international norms it is an essential condition for their effectiveness that the individual national legal system should regulate its relationship to international law in a way which is receptive of these norms. An appropriate mechanism for the reception of international law in the municipal law, which will introduce the international provisions smoothly into the municipal legal order, is a precondition if the international cooperation is to attain the necessary degree of effect. This is the important background for the principles that are being dealt with. Whatever may be sacrificed by giving an international rule precedence over a national rule, is sacrificed for the advantage of giving driving force to the international legal community.

Effectiveness and loyalty on the part of the legislative and executive authorities are the best guarantees that the municipal law is brought into harmony with the international law. But perfect harmonization will not come about exclusively by legislative and administrative measures. The courts will always exercise an influence on the degree of energy and consistency in the harmonizing process. The principles for the courts' application of international law ought, therefore, constantly to be developed to the advancement of the international legal order.

The Norwegian dualistic principle in matters of rule collision is, as mentioned, scarcely of any considerable practical importance, at any rate in most fields. If in other respects there exist rational guidelines for the reception of international law, the rule as to the paramountcy of the municipal law in a norm conflict becomes only a small, though inconvenient, reef that international law can sail past relatively unhindered. But nevertheless one ought not to content oneself with regarding the international law as in principle only a *secondary* source of law. The minimum demand in these times ought to be the recognition of it as a *coordinate* and *equivalent* set of rules. In a small West European country with which we may naturally compare ourselves, namely the Netherlands, a constitutional amendment was passed in 1953, which declares that treaty law is directly *superior* to the internal

legislation.[1] This is the true international spirit. The traditional Nordic view is, on the contrary, an expression of a certain legal isolationism.

But must not the quality of the foreign elements be subject to control in the application of law? Should one throw the door wide open to rules that can be decisively pervaded by the interests of other states and by a basic legal view different from our own? Many regard this prospect with apprehension. There are, however, important requirements to be made before a rule becomes recognized as a binding international rule of customary law or a binding principle of international law. And for treaty rules one exercises national control in connection with ratification. As regards Norwegian constitutional law it is here provided that the Storting must give its consent to the conclusion of treaties of special importance. This implies that the legislative organ can exercise the necessary democratic control, even though the consent to ratification is not dealt with or enacted in statutory form. Besides, it is always in the courts' power to undertake the final polishing of the rules.

One sees in several countries in our time that the inroads made by international law into the sphere of municipal law meet with resistance. Such a resistance can be based on rivalry between state authorities, either in the relationship between the legislative power and the executive power, as when powerful forces in the United States have attacked the President's authority to legislate through treaties, or in an unwillingness to accept a strong judicial competence in fields with political overtones. And opposition can be based on conceptions of national sovereignty. A further development in the direction of increasing the influence of international law will scarcely proceed painlessly even in the Nordic countries. But it seems plain which way we are headed. And now to come full circle: In one of the vital parliamentary debates during the Union crisis in 1905 the newly appointed Norwegian foreign minister complained that an opposition in the national

[1] In accordance with this constitutional provision, art. 65, a treaty takes precedence over not only an older statute, but also a more recent statute, and not only over an ordinary statute, but also over even the provisions of the Constitution. The text of the article, now art. 66, was revised in 1956, whereby the sphere of its application was somewhat reduced, since the precedence of treaty law now only applies to self-executing treaties, but the principle is otherwise the same. Regarding the Netherlands' law in this field see Erades and Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States*, 1961, pp. 371 ff. and pp. 393 ff.

assembly had embarked upon "wildish and dangerous ways" by putting forward a proposal which referred several questions to the then Hague Court (the international Permanent Court of Arbitration), and which "would lead to simply submitting the resolution of June 7 to an international test".[2] For young Norwegian jurists I think that this kind of attitude is coming to seem more and more remote.

[2] Secretary of State Jørgen Løvland in *Stortingsforhandlinger* (Parliamentary Debates) *1904–1905*, p. 457.