The plea of domestic jurisdiction before the International Court of Justice: substance or procedure?

Gaetano Arangio-Ruiz

INTRODUCTION

The Cases in which the issue of domestic jurisdiction has arisen before the ICJ have been, so far, *Anglo-Iranian Oil Co.*, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *Norwegian Loans*, *Rights of Passage over Indian Territory*, *Interhandel* and *Aerial Incident*. The Court has pronounced itself conclusively on the plea in *Interpretation of Peace Treaties*, *Right of Passage* and *Interhandel*. Of the other cases, *Norwegian Loans* is interesting for the subject of the present chapter in view of opinions expressed by five dissenting judges. Although they are not devoid of interest we must leave out, for the sake of brevity, *Anglo-Iranian Oil Co.* and *Aerial Incident*.

A study of the said jurisprudence indicates with clarity, in our view, that although the Court, the parties, the single judges and commentators continue to refer, explicitly or implicitly, to the traditional concept of domestic jurisdiction, that concept does not seem to have played any effective role in determining the acceptance or the rejection of the objections based on domestic jurisdiction.

By the 'traditional concept' I understand that 'international law criterion' which was resorted to by the practice and doctrine of international adjudication as soon as it became clear to almost all that one could not find any matters belonging *per se* – namely, by their nature – to the domestic jurisdiction of states. As everybody knows, domestic jurisdiction was thus deemed to be, in conformity with this 'international law criterion', the sphere of relationships with regard to which a state is not bound by international obligations. By virtue of that criterion the appurtenance of a matter to domestic jurisdiction would not depend – or would not depend directly – upon the nature of the matter or question *per se*, but upon the attitude

currently held with regard to it by treaty or customary international law. Hence the equation – in French – 'domaine réservé/matières non-liées', and the equally well-known relativity of the reserved sphere in time and space. It is also well known that this concept has always been, to say the least, of difficult application:[1] particularly so in that phase of the Hague Court's proceedings in which a state (defendant or, less frequently, applicant) puts forward a plea of domestic jurisdiction in order to challenge the Court's jurisdiction. Once matters of domestic jurisdiction are identified with matters not covered by an international obligation it is inevitable that the question whether the plea should be dismissed or accepted coincides with the question whether the objecting state was actually bound or not by the international obligation invoked by the other party. A way had therefore to be sought in order to avoid prejudging the merits by a positive or negative decision on the preliminary question of jurisdiction. Hence the device known as the 'provisional conclusion'. According to this device it would not be necessary, in dealing with a plea of domestic jurisdiction, for the Court to pronounce itself 'upon the merits of the legal grounds (*titres*) invoked by the Parties'. According to the 1923 Opinion, such a course would admittedly prejudge the merits of the case.[2] The Court should confine itself to 'considering the arguments and legal grounds (*titres*) advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute', namely, in order to see whether the 'legal grounds (*titres*) relied on are such as to justify the *provisional conclusion* that they are of juridical importance for the dispute'.[3]

[1] Except, of course, when the domestic jurisdiction reservation is an automatic ('self-judging') one.

[2] *Nationality Decrees in Tunis and Morocco*, PCIJ, Series A/B, No. 4, p. 26.

[3] The sentences in quotation-marks are taken from PCIJ, Series A/B, No. 4, p. 26 – a page which, together with the preceding pages 23–5, is characterized, in my opinion, by a high degree of obscurity. The obscurity is considerably higher than that of the comparatively clear language by which the essence of the 1923 dictum on the point is condensed by the ICJ in the relevant passage of the *Interhandel* judgment (see p. 442 below). It should be noted in particular that the order in which I quote some of the phrases is different from the original in an attempt to make the discourse a bit less obscure.

Confronted once more with a text so frequently referred to in the literature on domestic jurisdiction I am unable to resist the temptation to recall again – for the delight of the eminent judge to whom these modest pages are wholeheartedly dedicated – the 'private information' reported in the 1923 volume of the *American Journal*, according to which one of the oral pleadings in the *Nationality Decrees* case had been so soporific as to give the members of the Court a chance to show 'their aptness for judicial function by falling fast asleep' (M. Ch. Noble Gregory, 'An Important Decision by the Permanent Court of International Justice', *AJIL*, 17 (1923), pp. 298ff at 306). Indeed, the reading of the Advisory Opinion does give the impression that the drafting of some of the passages of pp. 23–6 (perhaps too infrequently read directly by commentators) had been complicated here and there by interruptions. Some of the sentences look as if they had been cobbled together with little regard for that logical sequence that usually characterizes the prose of the Hague Court. An example is indicated in note 9 below.

It is our submission that despite the lip-service (not infrequently tacit) to the concept of domestic jurisdiction which is reflected in the 'international law criterion' – namely the equation 'domaine réservé/matières non-liées' – that concept has not really been applied. The concept of domestic jurisdiction on which both Hague Courts have actually relied in order to reject the objections of domestic jurisdiction seems to be – as will be shown – quite different.

THE MAIN ICJ CASES

To begin with *Interhandel* – the case in which the plea of domestic jurisdiction has been dealt with most significantly – the defendant United States submitted, *inter alia*, the objection that the seizure and retention of the vested shares of *Interhandel* were 'according to international law, matters within the domestic jurisdiction of the United States'.[4] In order to decide on that objection the Court 'based itself on the course followed' by the Permanent Court in the *Nationality Decrees* case:

> Accordingly the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter into the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this Case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.[5]

In conformity with this plan, the Court proceeded to take note of three points. Point one was that the parties disagreed over the relevance and the interpretation of a Washington Accord; point two that the parties disagreed over the concepts of enemy assets and neutral assets; point three that the parties disagreed over the interpretation of the compromissory clause contained in article VI of the Washington Accord and in a conciliation and arbitration treaty. Considering that the three points involved were related to questions of international law, the Court concluded that the plea of domestic jurisdiction raised by the United States 'must be . . . rejected'.[6]

[4] This was the Fourth Preliminary Objection (b), ICJ, 1959, p. 11. Fourth Preliminary Objection (a) was based instead on the well-known US automatic ('self-judging') domestic jurisdiction reservation (*ibid.*).

[5] ICJ Reports, 1959, p. 24.

[6] *Ibid.*, p. 25.

Despite the evocation of the 'international law criterion' which was obviously implied in the reference to the Permanent Court's dicta in *Nationality Decrees*, the ICJ failed, in our view completely – on the Permanent Court's example – to proceed to any serious verification of the existence of an international obligation of the United States. As planned, the Court abstained from any appreciation – to repeat the Court's own words – of the 'validity of the grounds invoked by the Swiss Government' or to give an opinion on their interpretation'. The Court added: 'That would be to enter upon the merits of the dispute.'[7] If, however, the Court did not touch in any measure upon the validity and interpretation of the (legal) 'grounds' one does not see in what sense the Court examined whether, in the subject matter of the dispute, there existed that legal obligation (the 'lien') of the US, only the presence of which could justify, according to the concept of domestic jurisdiction to which the Court adhered, the rejection of the US plea of domestic jurisdiction. The Court did not even attempt that superficial appreciation of the claimant state's allegations that could have allowed it to form a provisional view – however summary – of the degree of foundation of the Swiss claim. The Court does not seem to have gone beyond a finding that there was an international (legal) dispute between Switzerland and the US. This was similar to the Permanent Court's approach in the 1923 Opinion.[8] As it was put by Waldock, the Permanent Court had confined itself, in that Opinion, 'to a superficial examination – but we would say "enumeration" – of the four principal points in controversy between the parties', in order to conclude that: 'In deciding the question of domestic jurisdiction arising under Article 15(8) of the Covenant, the relevant issue was not the *actual legal rights* of the parties in the case but the *prima facie* status of the matters in dispute as being governed or not being governed by international law.'[9]

[7] *Ibid.*, p. 24.

[8] That the Court has done no more is also manifest in President Klaestad's Dissenting Opinion: 'I concur in the view of the Court that the dispute relating to these questions involves matters of international law, and that this Preliminary Objection should therefore be rejected' (ICJ Reports, 1959, p. 79).

[9] H. Waldock, 'The Plea of Domestic Jurisdiction before International Legal Tribunals', 31 *BYbIL* (1954), pp. 108–10. The Permanent Court's enumeration is at pp. 27–31 of PCIJ, Series A/B, No. 4.

It seems, indeed, strange to us that the Permanent Court could have satisfied itself with such a superficial examination of the parties' positions (as compared with what it should have done in order to maintain the logic of its own 'international law criterion') while the same crucial pages (23–6) of the Advisory Opinion contained the two following considerations: (a) 'It is certain – and this has been

The ICJ's enumeration of the *titres juridiques* in dispute in the *Interhandel* case was shorter and, if possible, even more superficial. It is difficult to avoid the impression that in so doing the Court really applied, on the example of its predecessor, neither the 'international law criterion' nor any theory of a 'provisional conclusion' worthy of the name.

Moving backwards, in *Norwegian Loans* the Court decided not to pronounce itself on the distinct (and main) Norwegian non-automatic reservation of domestic jurisdiction, the majority having applied in favour of Norway – as requested by the latter – the US automatic ('self-judging') domestic jurisdiction reservation. The case is interesting nonetheless, thanks to the opinions expressed by five of the judges, and particularly by Lauterpacht, Basdevant and Read. In his discussion of the nature of the Franco-Norwegian dispute Judge Lauterpacht rejected 'the view that the subject matter of the . . . dispute is not related to international law but exclusively to the national law of Norway'.[10] Despite the fact that the settlement of the matter would have implied the examination of many questions of Norwegian municipal law – a point he readily admitted – he believed that 'in principle, the . . . dispute is *also* one of international law and . . . it comes within the orbit of controversies enumerated in Article 36(2) of the Statute of the Court'.[11]

According to Judge Basdevant, although the main effort of Norway had been to show the non-international nature of the question, it had not succeeded in demonstrating that the question was solely one of national law.[12] Despite the ambiguities of the French conclusions, he believed that 'the discussion before the Court eliminated all assimilation between' the submissions 'of a bondholder proceeding against his Norwegian debtor before

recognized by the [League of Nations] in the case of the Aland Islands – that the *mere fact that a State brings a dispute before the League of Nations does not suffice* to give this dispute an *international legal character* calculated to except it from the application of paragraph 8 [of article 15 of the Covenant of the League of Nations]' (p. 25 at the bottom); (b) 'It is equally true that *the mere fact* that one of the parties *appeals to engagements of an international character* in order to contest the exclusive jurisdiction of the other is *not enough* to render paragraph 8 [of article 15 of the League of Nations Covenant] inapplicable' (p. 26 at the top) (emphasis added). It is difficult not to be impressed by the lack of consistency between these paragraphs (especially the second) and the fact that the Court did not do anything more than verify, by the so-called provisional conclusion, that there was, between the UK and France, an international (legal) dispute. Did it ascertain anything more than the fact that the UK 'appeal[ed] to engagements of an international character'?

[10] ICJ Reports, 1957, pp. 36–7.

[11] *Ibid.*, p. 38.

[12] ICJ Reports, 1957, pp. 72ff esp. 77–8.

a Norwegian tribunal' and the French Submissions.[13] An analogous position was taken by Judge Read. While acknowledging the presence in the case of aspects of municipal law, he also recognized that the French application 'properly construed, was broad enough in its terms to raise those aspects of the problem which consist solely of questions of international law',[14] a state of affairs which emerged even more clearly from the French final submissions.[15]

None of the three judges, however, seems to pay serious attention to the theories on the basis of which the domestic jurisdiction *exceptio* had been allegedly rejected in previous cases. None of them really pays attention either to the equation 'domaine réservé/matières non-liées' or to the provisional conclusion theory.[16] They confined themselves to noting that France and Norway were divided by questions partly covered by international law.[17]

The current equation and the summary conclusion theory do not seem to have had any explicit weight either in the opposing opinions of Judges Badawi and Moreno Quintana. The latter confined himself to the view that state loans, as acts of sovereignty, are governed by national law. The former relied mainly on what he considered a failure by France to demonstrate the international nature of the dispute.

[13] *Ibid.*, p. 77.

[14] *Ibid.*, p. 87.

[15] These submissions, the judge explained, clearly raised 'the questions of discrimination' and 'the question whether Norway could, in conformity with the principles of international law . . . unilaterally modify the substance of the contracts between Norwegian borrowers and French bondholders' (*ibid.*, p. 88).

[16] The three judges seem to have thought of the current equation when they asked themselves, and answered in the affirmative, the question whether international legal issues had really emerged, and which ones, and at what 'stage'. The current equation, however, should require that one determine whether the defendant state is or is not bound, in the case, by international obligations *vis-à-vis* the claimant state: and to such a task neither Lauterpacht nor Read nor Basdevant applied himself. They did not even apply themselves to the more limited task of seeking a summary conclusion on the existence of Norwegian international obligations and the degree of legal foundation of the French claim.

[17] The essence of the three judges' opinions with regard to the matter was, in conclusion, as follows:

(i) unnecessary to establish whether the French claim was legally founded in any measure: Judges Lauterpacht, Basdevant and Read confined themselves to finding that there was an international (legal) dispute;

(ii) it was equally unnecessary to reach a provisional conclusion in that sense: the dispute was obviously there, for any lawyer to see *ictu oculi*;

(iii) for the Norwegian objection to be rejected (had the automatic reservation not been sufficient) the existence of a dispute of the kind susceptible to adjudication before the Court was quite sufficient.

There is no trace of relevance, to that effect, either of an 'international law criterion' or of a 'conclusion', whether provisional or definitive with regard to the international obligations of Norway alleged by France.

The current equation and its ancillary 'provisional conclusion' theory were not applied any more rigorously in the ICJ's Advisory Opinion on *Interpretation of Peace Treaties*. History repeated itself here by an even more obvious (albeit tacit) acceptance by the Court of a British viewpoint not very dissimilar from the 1923 United Kingdom position in *Nationality Decrees*.[18]

Of course, the Court was right, as in all the other cases, in rejecting the three resisting states' pleas of domestic jurisdiction. The Court was also right as a matter of law – much as one may regret that it had not any reason to touch upon the underlying human rights issue – when it declared that it was not

> called upon to deal with the charges brought before the General Assembly since the Questions put to the Court relate neither to the alleged violations of the provisions of the Treaties concerning human rights and fundamental freedoms nor to the interpretation of the articles relating to these matters. The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for [in the Treaties in question].[19]

As regards the grounds on which the Court rejected the domestic jurisdiction *exceptio* raised by the 'respondent' states, once more one finds no explicit trace of an application, either of the current equation or of the summary conclusion theory. One only finds an implied application of the latter theory. After defining the scope of its task as above, the Court concluded: 'The interpretation of the terms of a treaty [for the above-mentioned purpose] could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court.'[20]

In 1923 the Permanent Court had not gone beyond the *constat* of the international legal nature of the four sets of issues that divided France and the UK over the *Nationality Decrees*. In 1950 the ICJ was even more laconic.

[18] As everybody knows, the British viewpoint was that in order to pronounce on the French plea it would suffice for the Court to note that an international legal dispute was before the League of Nations Council; (PCIJ, Series A/B, No. 4, pp. 15–16). France maintained that the plea could not be decided upon without a thorough examination of the Merits (*ibid.*, pp. 11–12).

[19] ICJ Reports, 1950, p. 70.

[20] *Ibid.*, pp. 70–1.

It again did very little indeed if one compares such a simple conclusion with what should have been done – in 1950 as in 1923 and in all the other cases – by way of a proper, rigorous application of the maxim 'domaine réservé/ matières non-liées'. The course followed in 1950 was even less of a middle one between the British and French positions of 1923. It was even more purely the *constat* that there was an international (legal) dispute.

The Court seems to revert instead to a rigorous application of the equation – as the PCIJ had done in *Losinger* and *Electricity Co. of Sofia and Bulgaria* – in the *Right of Passage over Indian Territory* case (1960). The parties were as much at odds about the way to handle the Indian plea of domestic jurisdiction as France and the UK had been in 1923, except that respondent and applicant reversed their roles. In 1923, the defendant France had maintained that the plea could not be properly treated without examining the whole merits, while the UK claimed that the plea should be rejected on the mere basis of the fact that the League Council had been seised of an international legal dispute. In *Right of Passage* the respondent India wanted the plea to be accepted *in limine*, on the almost equally simple (although reversed) basis that Portugal did not invoke plausible legal grounds. For claimant Portugal a decision on the plea presupposed an examination of the merits. After identifying the complex issues raised by the two sides, the Court decided that it would not be possible to decide on the *exceptio* of domestic jurisdiction at the preliminary stage without prejudging the merits. Consequently, it joined the plea to the merits. Following consideration of the merits, it rejected the Indian plea in that it acknowledged that 'Portugal had in 1954 a . . . right of passage over intervening Indian territory'.[21]

The Court's decision to join the plea to the merits was dissented from by Judge Klaestad, who believed that the plea should have been rejected *in limine*, and by the Indian *ad hoc* Judge Chagla, who maintained that the objection should have been upheld *in limine*. Both judges referred to the *Nationality Decrees* Opinion, namely to the current equation 'domaine réservé/ matières non-liées' and the 'provisional conclusion' theory.[22]

In this case one thus finds both extremes in the application of the 'international law criterion'.

The Court applied that criterion as rigorously as logic suggests it should be applied. By joining the plea to the merits it practically admitted, in our view,

[21] ICJ Reports, 1960, pp. 43–4.

[22] ICJ Reports, 1957, pp. 164–5 (Klaestad) and 173–8 (Chagla).

that the plea of domestic jurisdiction, as understood by the 'international law criterion', is a plea to the merits.

The two dissenting judges, for their part, applied the international law criterion as watered down by the provisional conclusion theory, namely by examining so superficially the parties' opposing legal arguments as to contradict, in our view, the international law criterion and taint with arbitrariness their respective conclusions.

This reminds one of the opposite results to which the provisional conclusion theory had led Lauterpacht, Basdevant and Read, on the one hand, and Badawi and Moreno Quintana, on the other hand, in *Norwegian Loans*.

THE PERMANENT COURT'S PRECEDENTS

It should not take long to show that the ICJ's jurisprudence has conformed essentially, with regard to the treatment of domestic jurisdiction objections, to the precedents set by the Permanent Court since 1923. Any difference seems to be to make it even clearer that the Hague Court does not pay any more than a cursory attention to the 'international law criterion' and to the provisional conclusion theory, and that it decides on the issue on the basis of much simpler elements.

Following the *Nationality Decrees* Opinion – reference to which has already been made[23] – the Permanent Court had dealt with domestic jurisdiction in *Treatment of Polish Nationals*, *Losinger* and *Electricity Co. of Sofia and Bulgaria*.

In the first case, the Court was called upon by the League of Nations Council to advise on the competence of the League's High Commissioner with regard to a dispute between Poland and Danzig arising from the alleged non-compliance by Danzig with provisions of the Danzig Constitution and legislation relating to the treatment of Polish nationals, the Commissioner's competence being subject to the dual condition that the dispute arose between Poland and the Free City and concerned a question pertaining to the relations between them. While not contesting that the interpretation of a constitution was in general a matter of national law, Poland contended that in view of the *sui generis* status of Danzig, the 'ordinary legal distinction between matters of a domestic and of an international character does not hold good in the present

[23] At pp. 440–2.

case'.[24] Poland referred in particular to the obligations and the League controls imposed upon Danzig by international rules in force at the time. Consequently, the Polish government claimed that despite the distinction Poland was entitled to put before the High Commissioner the alleged violations by Danzig of the provisions of its constitution and legislation relating to the treatment of Polish nationals.[25] The Court decided that Danzig's special international status did not authorize a departure from the principles that govern the relations between states and establish new rules for the relations between Poland and Danzig. According to the Court, notwithstanding its peculiarities, the constitution of Danzig was and remained, *vis-à-vis* Poland, the constitution of a foreign state. Therefore, the claims of Poland against the Free City based upon the application by Danzig of its constitution *as such* could not give rise, as between Poland and Danzig, to disputes falling within the scope of the High Commissioner's competence. At the international level the question of the treatment of Polish nationals could only be resolved on the basis of the applicable provisions of international law and not on the basis of Danzig's constitution.[26] Poland, therefore, was entitled to seise the High Commissioner with regard to the treatment of given persons in application of the Danzig constitution only 'in the case of disputes concerning the violation, *as a result* of such application, of an international obligation of Danzig towards Poland arising either from treaty provisions in force between them or from ordinary international law'.[27] It seems clear, therefore, that the Court did not really apply any 'international law criterion' in the sense of the current equation. The question was one of relations: and the Court found that the High Commissioner was competent to deal with disputes pertaining to Poland–Danzig relations and not to the relations of Danzig with the people under its jurisdiction and law.[28]

[24] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, PCIJ Series, A/B, No. 44, 4 February 1932, p. 23.

[25] *Ibid.*, pp. 23–5. [26] *Ibid.*, p. 24.

[27] *Ibid.*, at p. 42. The Court had also observed (at p. 24): 'The application of the Constitution of the Free City may, however, result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations, or under general international law; as for instance in the case of denial of justice in the generally accepted sense of that term in international law.' The Court further stated (*ibid.*) that in such an eventuality it would be not the Constitution of Danzig as such that gave rise to the responsibility of the Free City, but the international obligation. In such a case, Poland would undoubtedly be right to seise the organs of the League by virtue of the relevant international rules in force.

[28] The Court gave an essentially correct opinion concerning: (a) the lack of any title for Poland to discuss the conformity of Danzig's conduct with the constitution of Danzig on the international level; and (b) the right of Poland, on the contrary, to file an international complaint with respect to the conformity of Danzig's conduct with international law. We shall see that this case is particularly significant for a proper understanding of the concept of domestic jurisdiction (see pp. 457–8 below).

In *Losinger*, the first contentious case in which a plea of domestic jurisdiction was raised before the Hague Court, Switzerland alleged the violation by Yugoslavia of a compromissory clause contained in a contract between the Yugoslav government and the Losinger company. Yugoslavia contended that the matter was one of 'national' law, the dispute thus not being of an international nature. The Court found that the objection was closely linked to the merits of the case and so joined it to the principal issue.[29] By joining the preliminary exception to the merits – namely, to the examination of the question whether Yugoslavia was or was not in breach of international law – the Court implicitly but unambiguously admitted that, if and in the degree to which the reserved domain was the sphere of 'matières non-liées', the reserved domain did not play any really restrictive role with respect to the jurisdiction of an international organ of a judicial nature. At the same time, by retaining jurisdiction, the Court did not apply the provisional conclusion doctrine. It based itself merely upon the international (legal) nature of the Swiss claim.

In *Electricity Co. of Sofia and Bulgaria*, where Belgium considered the treatment of a Belgian company by Bulgarian authorities to be in breach of the international obligations of Bulgaria, the respondent state invoked domestic jurisdiction, alleging that the object of the Belgian claim was a question of municipal law. It also invoked the non-exhaustion of local remedies in that the acts of Bulgarian authorities which were complained of by Belgium had not reached a definitive stage, the two objections appearing intertwined. The plea of domestic jurisdiction – envisaged by the Court as a *ratione materiae* objection – was examined by it distinctly with regard to the two different titles of jurisdiction invoked by Belgium.[30] From both viewpoints – despite not very relevant *nuances* – the Bulgarian reasoning was considered to be of such a nature as to concern the merits of the dispute. From the viewpoint of one of the titles of jurisdiction the objection was thus considered not to present the character of a preliminary *exceptio* in the sense of article 62 of the Rules, and was joined to the merits. From the viewpoint of the second title of jurisdiction it was declared inadmissible, the parties remaining at liberty to develop the matter as a defence on the merits.

It is difficult to see in what sense the Court could think that the Bulgarian objection raised a question *ratione materiae*. It was not a question of subject matter in *Electricity Company* any more than it was such a question in

[29] The Court did the same with the non-exhaustion of local remedies objection raised by Yugoslavia.

[30] One was a Belgo-Bulgarian arbitration treaty; the other was the parties' acceptance of the Optional Clause.

Nationality Decrees or *Losinger*. Even less was it a question of how the subject matter stood under international law, namely 'matière liée' or 'non-liée'. What Bulgaria contested was, essentially, the international nature of the Belgian claim and of the dispute. The only issue to be considered was whether the Court was seised of the international dispute between Belgium and Bulgaria or of the national law dispute between the Belgian company and the Bulgarian state. The Bulgarian exception of domestic jurisdiction was no different, from that essential viewpoint, from the Yugoslav objection in *Losinger*.[31] The doubts raised by Bulgaria over the international nature of the dispute were obviously strengthened (within the framework of one of the titles of jurisdiction) by the absence of that final decision (within Bulgarian law) on the relationship between the company and the Bulgarian state, which was at the basis of the objection relating to the non-exhaustion of local remedies.

Despite its imperfections, the *Electricity Company* decision teaches a good lesson, both positive and negative. From the negative side it tells us once more that the Hague judges did not really believe in the 'international law criterion' of domestic jurisdiction or, for that matter, in the provisional conclusion theory. From the positive viewpoint it tells us, despite language ambiguities, that the really decisive point, in the face of a plea of domestic jurisdiction, was the international (or national) nature of the dispute.[32]

Essentially the same was later to be the issue before the IJC in *Anglo-Iranian Oil Co.*, except for the fact that the plea of domestic jurisdiction was considered in that case only for the purpose of the IJC's competence to indicate provisional measures. Two main points of interest are discernible for us in this case. One is that the Court observed that the dispute submitted by the UK was between that state and Persia, not between the Anglo-Iranian Oil Co. and Persia. The second point related to the object of the dispute. The dispute related to an alleged infringement of international law consisting of a breach of contract and denial of justice. Once more, the Court did not pay any real attention to the 'international law criterion' or the provisional conclusion theory. It could be contended, though, that the lack of regard for the 'international law criterion' was, in this particular case, only a consequence of the fact that the Court considered the problem of its jurisdiction for the purposes not of a decision on the merits but only of an indication of interim measures.

[31] Just as Yugoslavia contended that Switzerland raised a question of (Yugoslav) national law, Bulgaria contended that Belgium raised a question of (Bulgarian) national law.

[32] The preliminary objection of Bulgaria concerning the non-exhaustion of the local remedies added, of course, to the doubts about the international nature of the dispute (see p. 458 below).

SUBSTANCE OR PROCEDURE

The difficulties arising from the concept of domestic jurisdiction are so widely perceived by commentators that it would be futile to encumber this chapter with citations from the voluminous literature.[33] Suffice it to mention, first of all, the reports and debates devoted to the subject by the International Law Institute – and not for the first time – between 1950 and 1954. Although the 1954 Session's resulting resolution endorsed the 'international law criterion' which for international legal tribunals had prevailed constantly since 1923,[34] the debates revealed an extremely high degree of ambiguity on the concept of the exclusive domain of states.[35] Furthermore, one must register a high degree of scepticism professed by commentators about the effectiveness of domestic jurisdiction reservations in the area of legal disputes. The prevailing view has been for some time now that those reservations serve either no restrictive purpose at all, or a very small one.

As Waldock put it in 1954: 'If the matter is within the reserved domain, the tribunal is incompetent to investigate the merits at all. Yet it cannot determine whether or not the matter is within the reserved domain without an investigation of the merits.'[36] We would specify, however, the whole of the merits. According to an Italian scholar:

> It is easy to see that the domestic jurisdiction reservation is inapt to achieve the purpose that is typical of any reservation appended to instruments conferring jurisdiction upon the Court, namely, to prevent a decision on the merits of the dispute of which the Court has been seised. Indeed, a finding of lack of jurisdiction based upon the fact that the subject matter of the dispute lies within the exclusive

[33] As explained further on, we leave out the even more difficult problems relating to the role that the reservation has played before political bodies, such as the Assembly and the Councils of the League and of the United Nations. The problem and the solution are *mutatis mutandis*, the same (see pp. 461–2 below).

[34] 'The "reserved domain" is the domain of state activities where the jurisdiction of the state is not bound [*liée* in the French text] by International Law.' 'The extent of this domain depends on International Law and varies according to its development' (*Annuaire* of the ILI, 54, 5 (1954), pp. 150 and 299).

[35] The underlying, mostly unexpressed, *leitmotif* of the debate was the confrontation between two different concepts of the essence of domestic jurisdiction. One was the notion of domestic jurisdiction as a *ratione materiae* delimitation protecting the freedom or liberty (our sovereignty–freedom) of states. The other was the notion of an ill-defined delimitation protecting the independence (for us sovereignty–independence) of states. The first concept prevailed. The second concept seemed at times to approach the notion of a demarcation line (see pp. 460–1 below) between areas of relations rather than areas of subject matters. A similar *leitmotif* can be traced between the lines of the Institute's earlier efforts on the matter. It can also be seen that much of the contrast was due to the different (but frequently implied) view of the participants about the relationship between international law and municipal law (see pp. 462–4 below).

[36] Waldock, 'The Plea of Domestic Jurisdiction', pp. 140–2.

> domestic jurisdiction of the [objecting] state presupposes a determination of absence of international obligations of that state with regard to the said subject matter; but it is precisely in such determination that the consideration of the merits of the dispute consists.[37]

Other commentators are perhaps equally severe, although less drastic. Sir Hersch Lauterpacht has expressed himself on the point at least three times to the effect that (unless of course the reservation were an automatic one) the reservation *per se* was highly problematic.[38] As for the provisional conclusion theory, it was 'of a more theoretical than practical value'. In a penetrating study on the subject Waldock concluded, for his part, that the domestic jurisdiction reservation 'creates an entirely artificial position in international legal tribunals'.[39]

We fully share the serious perplexities of the cited scholars and many others. We are puzzled, however, by the fact that commentators so conscious of the total or partial futility of domestic jurisdiction reservations to international jurisdiction do not wonder whether the fault lies perhaps not so much with the reservations and the concept originally formulated in articles 15(8) of the Covenant and 2(7) of the Charter as with the manner in which both reservations and the concept have been understood by all concerned since 1923. While rightly perceiving the 'artificiality' of the position created by the reservation before international tribunals, Waldock himself, for example, surrenders to the generally accepted interpretation of the Permanent Court's *Nationality Decrees* Opinion and the consequent ineluctability of the provisional conclusion theory.[40] After noting the perplexities expressed particularly by Lauterpacht, Sir Humphrey wrote in 1954:

[37] V. Starace, *La competenza della Corte internazionale di giustizia in materia contenziosa* (Naples, 1970), at pp. 193ff, esp. 196–7 (my translation).

[38] H. Lauterpacht, *International Law and Human Rights* (London, 1950), pp. 166ff; 'The British Reservation to the Optional Clause', *Economica*, 10 (nos. 28–30) (1930), pp. 153–4; and Dissenting Opinion in *Interhandel*, ICJ Reports, 1959, pp. 121–2. I leave out, of course, Sir Hersch's well-known discussion of automatic domestic jurisdiction reservations.

[39] Waldock, 'The Plea of Domestic Jurisdiction', pp. 96ff, at p. 140f.

It is also significant that the state endowed with one of the most knowledgeable foreign office legal departments abandoned, at one stage, the domestic jurisdiction reservation to the Hague Court's competence (Starace, *La competenza*, p. 200).

[40] Waldock's cited article contains actually the best possible (however vain) defence of the provisional conclusion theory.

A certain inconsistency is also present in Lauterpacht's position as expressed in his opinion in the *Interhandel* case. Clearly, while approving the Court's reliance on the 1923 precedent he does not entertain any illusions with regard to the value of the current equation with its corollary, the provisional conclusion theory. After noting that the Court had rejected the plea 'by reference to the principle

> It may be that, as Professor Lauterpacht suggested in 1930, though for somewhat different reasons, the 'provisional view' theory will prove to be of 'more theoretical than practical' importance in contentious cases. *But no one has suggested any other practical method of separating the question of jurisdiction from the question of the substantive rights and obligations of the parties* when a tribunal is confronted with a preliminary objection to jurisdiction on the plea that the case concerns matters within a reserved domain of domestic jurisdiction.[41]

We regret not being able to learn whether Sir Humphrey Waldock would have found our 'method of separating' to be a 'practical' one. We do believe, though, that a better method does exist for a tribunal, in considering a plea of domestic jurisdiction, to separate the question of jurisdiction from the question of merits. Our method consists in setting aside, as in our view it deserves, not domestic jurisdiction but that concept of domestic jurisdiction

enunciated' by the PCIJ in *Nationality Decrees*, Judge Lauterpacht stated: 'I concur in that result although it is clear that the test adopted by reference to that Opinion reduces to the bare minimum the practical effect envisaged by the reservation in question. For it is not often that a case may arise in which the grounds of international law relied upon by the applicant State are not, upon provisional examination, relevant to the issue' (ICJ Reports, 1959, p. 121). But this is, in our opinion, an understatement. The possibility envisaged by the judge is not just rare; it is merely a scholastic hypothesis. Judge Lauterpacht also remarked, in the same Opinion (*ibid.*,pp. 121–2), that 'a reservation of that kind [namely, of domestic jurisdiction] is inherent in every declaration of Acceptance and . . . there is no need to spell it out expressly' and that 'States are in any case fully protected from any interference whatsoever by the Court in matters which are according to international law essentially within their jurisdiction. They are so protected not by virtue of any reservation but in consequence of the fact that if a matter is exclusively within the domestic jurisdiction of a State, not circumscribed by any obligation stemming from a source of international law as formulated in Article 38 of its Statute, the Court must inevitably reject the claim as being without foundation in international law.' We are surprised that such considerations did not induce Judge Lauterpacht to wonder whether the traditional, current interpretation of the domestic jurisdiction reservations and of the 1923 definition given by the Permanent Court should not be thoroughly reconsidered. It is indeed difficult to believe that states appended a domestic jurisdiction reservation to their declarations of acceptance of the Court's jurisdiction for no other purpose than that of excluding from that jurisdiction disputes in which the claim would be rejected for lack of valid international legal grounds. A reservation intended to restrict the competence of the Court is not conceivable unless it is of a nature to exclude, in some hypotheses at least, the possibility that the Court's jurisdiction be exercised with regard to the merits of a case. A reservation intended to protect a defendant state from the peril that the Court attribute to it non-existing obligations is not a reservation affecting the Court's competence. It is simply a reminder to the Court that it is a court of law and should not step out of the law.

This does not affect, of course, the value of Judge Lauterpacht's remarks. And it is not insignificant that those remarks were expressed with regard to a case such as *Interhandel*. Unlike the 1923 *Nationality Decrees* case, where the PCIJ was called to evaluate the impact of the plea of domestic jurisdiction on the competence of another international body (namely, the League Council), in *Interhandel* the Court was deciding on its own jurisdiction. This explains perhaps why reflections such as those of Judge Lauterpacht in 1959 about the relationship between summary view and merits had not occurred to anybody in 1923. It remains for us difficult to explain how Lauterpacht nevertheless accepted, in *Interhandel*, the Court's reference to the *Nationality Decrees* Opinion.

[41] Waldock, 'The Plea of Domestic Jurisdiction', p. 114 (emphasis added).

that has afflicted practice and literature since about 1923. I refer to the idea that domestic jurisdiction is the sphere of matters not covered by international obligations (namely to the 'international law criterion') together with the ancillary provisional conclusion theory.

Indeed, the study of the Hague jurisprudence considered in the preceding sections proves beyond any reasonable doubt that the Hague Court does not really apply the 'international law criterion'. The only way to apply that criterion would be to examine the whole merits of the case in order to find out whether the objecting state is or is not bound by the international obligation in question. Only a positive or negative finding on such a point – namely, on the whole of the merits – could justify the rejection or the acceptance of a plea of domestic jurisdiction as currently understood. No provisional conclusion, assuming that the 'international law criterion' were correct, could be an acceptable substitute for a complete consideration of the merits. Such a full consideration would be the only way for the 'international law criterion' to be brought to bear. The provisional conclusion theory cannot be viewed, as a matter of logic, as an answer to the insuperable difficulty of distinguishing jurisdiction from merits which arises from a plea of domestic jurisdiction as currently understood.

As everybody knows, only a few kinds of preliminary objections to jurisdiction or admissibility are such as not to require some incursion into the merits. Beside preliminary objections that seem to be of a purely formal or procedural nature (such as the validity of the application or its presentation, the indication of a plausible jurisdictional link, or the fact that the applicant is a state), everybody recognizes the existence of preliminary objections involving more or less substantial issues pertaining to the merits.[42] Such objections include existence of a dispute, dating of the dispute, legal or political nature of the dispute, exhaustion of local remedies, discontinuance, nationality of the claim. For the Court to decide on objections of this second kind it is indispensable for the Court to take a look at one or more aspects of the merits and reach a summary view in that regard. Considering that only certain elements of the merits are involved (frequently requiring no more than a cursory consideration) such a summary view will normally not be such as really to prejudge the merits. But almost everybody admits that this is not the case with a plea of domestic jurisdiction as currently understood. As has been

[42] H. W. A. Thirlway, 'Preliminary Objections', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, 1981), pp. 179ff, esp. 179–80.

noted, a provisional conclusion on a plea of domestic jurisdiction (as currently understood) is either meaningless as an application of the 'international law criterion', in the sense that it does not answer in any measure the question whether the matter is or is not the object of an obligation of the objecting state; or it prejudges that question. A plea of domestic jurisdiction is inevitably, under the current concept, a plea to the merits – and the whole of the merits – of the case. It follows that while the rejection of the plea on the basis of a summary view may lead to a manifest contradiction,[43] the acceptance of the plea on the same basis may lead to a legally unjustified practical rejection of the claim on the merits. Although this would be bizarre even in the case where the tribunal is called to decide on the plea against the jurisdiction of another international body,[44] it becomes simply absurd when, as in most cases, the tribunal must pronounce itself *in limine* on its own jurisdiction.

Were logical reasons insufficient to prove the untenability of the current concept, the practice of both Hague Courts is there to prove it. As shown in the preceding sections (pp. 442ff. and 448ff.):

(1) Neither Court has rejected *in limine* the plea of domestic jurisdiction on any basis other than the mere finding that there was an international (legal) dispute: which is far too little for a provisional conclusion on the question whether the matter is one of domestic jurisdiction in the current sense.
(2) In more than one case the Court found it necessary to join the plea to the merits (as in *Norwegian Loans* and *Right of Passage*) or simply to suggest that the parties feel at liberty to address the issue of domestic jurisdiction in the merits phase (as in *Electricity Company of Sofia and Bulgaria*), clearly nullifying, either way, the restrictive role of the reservation as currently understood.

Fortunately, in addition to proving the untenability of the current concept, the Hague jurisprudence also indicates – to anyone willing to see it – in which direction the real and only possible significance of the reservations of domestic jurisdiction should be sought.

Both Courts reject the objection under two conditions relating both to procedure and leaving the merits unprejudged. We discern a positive condition and a negative condition. The positive condition is the presence of

[43] As it occurred in the *Aland Islands* case between the three jurists who advised on the preliminary issue and the League Council which dealt with the merits on the basis of a report of three rapporteurs.

[44] As was the case, for example, in the Hague Court's Advisory Opinions in *Nationality Decrees*, *Treatment of Polish Nationals*, *Interpretation of Peace Treaties*; and in the Opinion of the three jurists on the preliminary issue in the *Aland Islands* case.

an international (legal) dispute. The negative condition is that the object of the dispute be such that the Court would not pronounce itself directly on a relationship of national law of the objecting state.[45]

The positive condition is manifestly at the basis of the Court's decision in all the cases in which the domestic jurisdiction objection has been rejected in the preliminary phase: by the Court in *Nationality Decrees*, *Interhandel*, *Interpretation of Peace Treaties*; and by Judges Lauterpacht, Basdevant and Read in *Norwegian Loans*.

The presence of the negative condition clearly emerges, in a number of cases, from the express or implied – early or belated – finding by the Court or by dissenting judges that the Court would not be called to pronounce directly on a national law dispute or relationship. Such was the case in *Anglo-Iranian Oil Co.*, where the Court found that it was not called upon to deal with a dispute between the company and Persia; in *Interhandel*, where it found it was not called to deal with a dispute between Interhandel itself and the US; and in *Norwegian Loans*, where three of the dissenting judges believed that the case was not one between the French bondholders and the Norwegian state. It was actually the same negative condition that operated implicitly in the retention of jurisdiction in the cases where the objection was joined to the merits. In *Losinger* the dispute to be determined was between Switzerland and Yugoslavia and not between Losinger and Yugoslavia; and in *Electricity Co.* it was between Belgium and Bulgaria, and not between the company and the Bulgarian state[46]

The negative condition was found instead to be absent in the Advisory Opinion in *Treatment of Polish Nationals*. While obviously facing a dispute between Poland and Danzig – namely an international dispute – the Court expressed itself against the jurisdiction of the League's High Commissioner. The reason given was that Poland was claiming not a breach by Danzig of

[45] Of course this does not mean that an international tribunal – and the Hague Court in particular – does not take account (and in that sense apply) national law for the purpose of deciding the international dispute. It actually does so frequently and with no difficulty. What an international tribunal or the Hague Court does not do is apply municipal (national) law in order to decide a national law dispute in the place of national courts. In *Norwegian Loans* for example, it would have been one thing for the ICJ incidentally to consider issues of Norwegian law in order to decide the claim of France against Norway (where the state of Norwegian law would be relevant as part of the conduct of Norway *vis-à-vis* France through the latter's nationals); and another thing for the Court to apply Norwegian law – getting into the shoes of the courts of Norway – to the underlying relationship between the French bondholders and the Norwegian state.

[46] Although less manifest, the negative condition was as present in those cases as in those where the plea was rejected in the preliminary phase.

international obligations *vis-à-vis* Poland itself but a breach by Danzig of the rights of Polish nationals, deriving from the constitution or the legislation of Danzig: clearly a dispute with a non-interstate object.

The role of the negative condition – the essence, in our view, of the domestic jurisdiction reservation – explains the well-known fact that the objection of domestic jurisdiction frequently accompanies or is accompanied by a plea of non-exhaustion of local remedies.

Such has been the case, for example, in *Losinger*, *Norwegian Loans*, *Aerial Incident* and *Interhandel*.

As related by Cançado Trindade in his interesting study, Shabtai Rosenne's oral argumentation for Israel in *Aerial Incident* included the observation that '*the exhaustion of local remedies rule appears as a particularization of the exception of domestic jurisdiction*, although it differs from it in that it implies the possibility of subsequent international proceedings of some sort or other' and in certain circumstances it may be treated in the same way as the objection of domestic jurisdiction.[47]

Setting aside the issue of whether the exhaustion requirement is mainly a matter of substance or procedure (our belief being that it is predominantly, although not exclusively, a matter of substance), Rosenne's interesting observation (obviously formulated within the framework of the current concept of domestic jurisdiction) could usefully be tested against the different notion that we defend. Within the framework of our concept, the exhaustion of local remedies would seem to pertain to what we call (see pp. 457–8 above) the negative condition for the rejection of a plea of domestic jurisdiction. In that sense, the plea of non-exhaustion would be 'a particularization of the exception of domestic jurisdiction'. The matter is worthy of further exploration.

A FEW CONCLUDING REMARKS

The study of the Hague Court's jurisprudence on the plea of domestic jurisdiction leads us to believe, more broadly, that the reservations on the basis of which that plea is raised do not really mean what they have generally been considered to mean since 1923. From the very outset, the literature of international law has overlooked, in our opinion, the real significance of, first,

[47] Thus, A. A. Cançado Trindade, 'Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis', *Indian Journal of International Law*, 16 (1976), quoting from ICJ Reports, 1959; Pleadings, Oral Arguments, Documents; Oral arguments of 25 March 1959, p. 523.

article 15(8) of the League of Nations Covenant and then article 2(7) of the United Nations Charter. This is revealed in particular by a textual analysis of those two provisions and by the *travaux préparatoires* of article 2(7) of the Charter. It is confirmed by the study of the practice of the political organs of the League and the UN.

To confine ourselves to the two cited texts, it seems difficult to avoid the impression that their literal wording does not justify the generally accepted reading, originally put forward, not without ambiguity, in the *Nationality Decrees* Opinion of 1923. According to this reading the sphere of domestic jurisdiction is the sphere where a state is free from international obligations, namely a sphere of freedom or liberty. However, articles 15(8) of the Covenant and 2(7) of the Charter use the English term *jurisdiction* (and the French term 'compétence'), terms the meaning of which should be clear enough, in international as well as municipal law, not to give rise to controversy.

While clearly indicating spheres of functions, powers or attributions, jurisdiction (or 'compétence') is normally not used to mean sphere of liberty, freedom or exemption from obligation. In fact, there is nothing in the concept that would justify the understanding that it means freedom, liberty or exemption from obligation. On the contrary, spheres of jurisdiction are perfectly compatible with spheres of obligation, duty or restriction. National and local legislators are bound by constitutional and legislative rules; administrators and judges are bound by the laws they implement.

Under international law, states are endowed with original or, according to certain theories, delegated jurisdiction (legislative, administrative and judicial). It is perfectly normal that in any such areas they should be subject to international rules the effect of which may be not only to oblige them to restrict their jurisdiction but also to exercise a given jurisdiction in a given manner and in pursuance of given purposes. To take the example of nationality (the matter with regard to which the 1923 Opinion was given) it seems unquestionable that the attribution of nationality is a matter within the exclusive competence of a state. It is simply inconceivable that French nationality could be attributed – or revoked – by any entity other than the French state. Nevertheless, in attributing nationality a state is not *iure solutus* from the viewpoint of international law. Apart from the obvious prohibition on extending arbitrarily its nationality to whole peoples of other states, a state's jurisdiction in that area is restricted in many ways by rules of general and conventional international law. Any such restrictions, however, are perfectly compatible with the exclusiveness of the power of granting or refusing nationality. A nationality that was granted by a state in disregard of international requirements or prescriptions would be not valid for certain

international purposes but, even where the state in question had been in breach of its obligations, it would still be the nationality of that state, granted by that state in the exercise of an exclusive power.[48]

Although they are generally viewed as an indistinct group, the restrictive clauses appended by states to dispute-settlement instruments are of two different kinds. One kind is that of the restrictive clauses that are meant to draw – *ratione materiae*, *personae*, *loci* or *temporis* – distinctions among the inter-state disputes that may occur among the contracting states. To these kinds of restrictive clauses belong the old reservations of honour or vital interests and the newer reservations excluding disputes concerning given matters or areas (such as territorial questions, fishing zones, maritime boundaries, air spaces), given states (unrecognized states, members of a Commonwealth, non-sovereign entities); or the disputes arising prior to a certain date or from facts prior to a date. Considering that such clauses are all concerned with distinctions between categories of state-to-state disputes – namely, always between disputes arising at the level of international relations – they could be called 'horizontal' reservations.

Of a different kind seem to be the restrictive clauses that are intended to exclude disputes pertaining to the jurisdiction or competence of national authorities. Such clauses as those excluding constitutional questions, questions of domestic legislation, questions reserved to national tribunals or, more generally, questions affecting the independence of states or their sovereignty in the sense of independence seem to us to belong to this class. An obvious instance is the exhaustion of local remedies requirement where it appears (in a settlement instrument) in such terms as to be a procedural condition, giving rise to pleas against jurisdiction.

Restrictive clauses of this kind are obviously not meant to operate distinctions between different species of inter-state disputes. They are intended to exclude, from direct international consideration or decision matters, disputes or issues pertaining not to inter-state relations but to relationships of national law between private parties or between private parties and governmental institutions of the 'reserving' state. It would seem appropriate to classify them as 'vertical' reservations of a state's jurisdiction (in

[48] It is possible that this elementary truth was not sufficiently considered by the Permanent Court in 1923 because of the special feature represented by the fact that the nationality decrees that originated the Anglo-French dispute concerned people from Tunisia and Morocco, under French protectorate. This consideration does not justify, however, the obvious confusion, in the Opinion, between the exclusivity of a state's power to grant its nationality, on the one hand, and the freedom (or not) of the state to do so, on the other.

a broad sense) and 'vertical' restrictions of the jurisdiction of international organs.[49]

Now, if domestic jurisdiction reservations were read, as in our view they should be, in the light of the jurisprudence considered in the preceding sections (see pp. 442ff. and 448ff.) and in the light of the interpretation of that jurisprudence briefly set forth on pp. 455–8, they would fall precisely within the class of 'vertical' reservations.

Moreover, domestic jurisdiction reservations embrace, within a broader scope of delimitation, all the traditional 'vertical' restrictive clauses, whether they pertain to the legislative, the administrative or the judicial functions of the state. We have noted, for example, the close relationship revealed by the practice of international adjudication between the plea of domestic jurisdiction and the plea of non-exhaustion of local remedies.[50]

On the present occasion it is, of course, not appropriate to extend the analysis of the nature and function of domestic jurisdiction reservations from the area of international tribunals to that of international political bodies. Considering, however, the obvious unity of the concept of domestic jurisdiction we feel it necessary to stress our belief that the data one collects from the practice of the political organs of the League of Nations and the UN contradicts the current concept of domestic jurisdiction even more clearly than the Hague jurisprudence.[51]

Indeed, the practice of (international) political bodies also indicates that the plea of domestic jurisdiction fails in the presence of two conditions. These are the same, *mutatis mutandis*, as the positive and negative conditions of the rejection of domestic jurisdiction pleas to the jurisdiction of an international tribunal. The positive condition is that the question or dispute to be dealt with by the political body is an inter-state one (whatever the subject matter). The negative condition is that the treatment of the question or dispute does not

[49] Of course, the exclusion of such disputes from the scope of third-party settlement obligations (of international disputes) should go without saying. The reservations are appended just the same, *ex abundanti cautela*. The same is true, in our view, judging also from the Hague jurisprudence, of the domestic jurisdiction reservation.

[50] Rosenne's idea (put forward in connection with the *Aerial Incident* case: see p. 458 above) that the plea of non-exhaustion is a 'particularization of the exception of domestic jurisdiction' is significant in this regard: especially if one abandons the fallacious concept of domestic jurisdiction as an area in which the state is not bound by international obligations.

[51] Not in the sense, however, of a simple substitution of 'international concern' or simply arbitrary criteria for the 'international law criterion' (Gaetano Arangio-Ruiz, 'Le domaine réservé: cours général, de droit international public', *Recueil des cours*, 225, 6 (1990), pp. 9–484, esp. 345ff, 378–90).

bring about a direct, interpository intrusion, by the international body, into the governmental structures and social fabric of the target state or states. Considering that the competence of international political bodies is intended mainly to cover questions or disputes of a political nature, namely, non-juridical issues, the 'international law criterion' would be utterly inappropriate as a restrictive factor on the international body's role. This is amply shown by the practice.[52]

The occasion is not appropriate either for an exploration into the causes of what we rightly or wrongly consider to be a gravely fallacious concept of domestic jurisdiction. We confine ourselves, in that respect, to indicating that the prevalence of that concept since the early 1920s has been the consequence of a series of interrelated factors the ultimate roots of which may be traced back to the federal analogy in international law, namely, to the notion of international law as the decentralized order of a legal community of mankind as opposed to the rudimentary law of the inter-state system.[53]

It was the federal analogy, and the notion of national legal orders as legal systems delegated by international law, that led, in the first place, to the distorted interpretations of articles 15(8) of the Covenant and 2(7) of the UN Charter. I refer to the reading of those provisions in the false light of an

[52] The activities of international bodies fall, in our view, into one or the other of two classes: 'international activities in a strict sense' and 'vicarious state activities'. 'International activities' of international bodies consist of enactments (binding or non-binding resolutions, decisions or judgments) addressed to states and other international persons. This is the case of most resolutions and decisions of UN bodies, of the Hague Court judgments, of arbitral decisions. These acts remain at interstate level unless incorporated into national law. 'Vicarious state activities' are those actions (usually classified as 'operational' or 'supranational') that are carried out by international organs directly *vis-à-vis* individuals and other persons of national law (River Commissions, mixed arbitral tribunals, EC institutions, operational activities of UN and other international organs). In performing vicarious state activities international organs qualify, from the legal viewpoint, as common organs of the participating states: a more realistic description, in our view, than that of 'supranational' institutions ('The Normative Role of the General Assembly of the UN and the Declaration of Principles of Friendly Relations', *Recueil des cours*, 137, 3 (1972), pp. 419–742, esp. pp. 668ff of the Appendix).

The practice of the Hague Court and that of political bodies (as well as a proper reading of the relevant texts) indicate that the function of the reservations of domestic jurisdiction is to condemn as *ultra vires* the trespassing, by international organs, from the area of interstate activity to the area of vicarious state activity.

A regime of vicarious state activity should be envisaged, in our opinion, for the Code of Crimes against the Peace and Security of Mankind (if adopted) and to any international criminal tribunal(s) eventually called to implement that Code or other provisions relating to international crimes of individuals. The Code should be conceived as a piece of common criminal law and the tribunal as a common organ of the states participating in the constituent treaty. The European Human Rights system seems not to have fully reached that stage yet.

[53] 'Le domaine réservé', pp. 151ff. and Chapter XII.

unwarranted analogy with the clauses of federal constitutions that directly or indirectly reserve given matters to the jurisdiction of the member states of the federation.[54] It was indeed from the utter impossibility of finding any rules of international law specifying matters characterized as domestic from the viewpoint of international law that scholars, counsels and judges had to revert to the impossible notion that the reserved 'matters' were those not covered by international obligations.

It was because of the federal analogy that one was unable to perceive with the necessary clarity the obvious fact that international law and municipal law govern different relations but not different matters.[55] The difference between the relations that they respectively govern is sufficient to permit national and international law to deal with the same matters, as they do in fact all the time, without directly conflicting with each other. In other words, national and international law are not homogeneous. They constantly interact with each other while remaining in their separate and different domains.

Within such a dual context, the function of domestic jurisdiction reservations was, and is, simply to exclude in principle from the direct action of international judicial or political organs – *ex abundanti cautela*, and subject, of course, to any agreed exceptions – those inter-individual relations, the direct regulation, administration and adjudication of which is considered by states to be their exclusive sovereign (in the sense of independent) prerogative.[56] It is precisely that sovereign prerogative that states forfeit when they dissolve into the federal structure of an integrated nation. And it is that same sovereign prerogative that states restrict in compliance with international agreements establishing so-called supra-national institutions or, more simply, common organs.

Now, federal and, more generally, public law analogies are in our view

[54] That error was combined with the arbitrary reading of the term 'jurisdiction' (*compétence, giurisdizione, Zuständigkeit*) as meaning freedom from obligation, overlooking the obvious fact that jurisdiction is perfectly compatible with obligation (see pp. 458–60 above).

[55] Fitzmaurice described the difference as one of 'fields' and of 'classes' or 'sets of relations' ('General Principles of International Law', *Recueil des cours*, 92 (1957, II), p. 70f). If he failed, in our view, to see the real nature of domestic jurisdiction it was because of an inadequate perception of the nature of the 'state in the sense of international law', of sovereignty–independence and of the consequent essential difference between international law and municipal law, Arangio-Ruiz, 'Le domaine réservé', p. 435ff.

[56] In 1925 Brierly described domestic jurisdiction (envisaged as a *ratione materiae* reservation) as a 'formidable newcomer' at the side of vital interests and honour (J. L. Brierly, 'Matters of Domestic Jurisdiction', *BYbIL*, 6 (1935), pp. 8–19, at p. 8). On the novelty we would not have been able to agree because domestic jurisdiction was only a consolidation of older 'vertical' restrictive clauses (see p. 460 above). We would have agreed on the 'formidable' because domestic jurisdiction was and is nothing but a reservation of the state's sovereignty–independence: a formidable reservation indeed in the 1920s, only a very little bit more formidable than today.

surely useful in the theory and practice of European integration as well as, perhaps, in the theory and practice of institutionalized systems of protection of human rights and other special areas.[57] Nevertheless, even in those exceptionally advanced areas, the analogies should be used with caution and parsimony.

However, in that area of purely interstate relations whose regulation is still, by far, the predominant *raison d'être* of international law – namely, the realm of Hersch Lauterpacht's 'private [and not public!] law analogies' – federal analogies are more likely to bring confusion than light. The vicissitudes of the concept of domestic jurisdiction since about 1923 are perhaps the best illustration.

[57] See note 52 above.