1 HISTORY AND NATURE OF INTERNATIONAL LAW

1.1 Prior to International Law

International law is law made in Europe. Thus, history of international law *stricto sensu* is based upon the history of relations amongst European States and upon norms that they have established amongst themselves and for themselves, be it by practice and by treaties or be it by the virtue of influence of religious and philosophical authorities that lived from time to time in course of European history. The fact that law made in Europe now governs relations amongst States (and other subjects of international law) globally is the heritage of colonial times of the nineteenth and of the first half of the twentieth Century CE.

1.2 Ancient Civilizations

Having said the above, however, when talking of history of international law, it would be indeed unfair to omit touching upon aspects of State practice from ancient times. After all, many institutions inherent to public international law existed in the distant past, centuries, in fact millennia, prior to the creation of modern States and prior to the creation of public international law as we know it today.

States, as we define them nowadays, have in fact been around for about 5 thousand years.[1] The existence of statehood and mutual relations between States that came to existence in the ancient centers of civilizations, such as in Egypt, Mesopotamia, India, and China brought about institutions counterparts of which can be still found in contemporary international law.

[1] DAVID, Vladislav and Pavel SLADKÝ. *Mezinárodní právo veřejné.* 2nd ed. Praha: Linde, 2005, p. 2, 19

For illustration, there are accounts of practice of the so called "travelling envoys" taking care of diplomatic relations amongst Chinese States, who enjoyed immunities within the territory of ancient China. There are also accounts of establishment of diplomatic relations and embassies between ancient China and ancient Rome[2] during the times of the rule of the Han dynasty (roughly 166 CE). There are accounts of arbitral decisions (as dispute settlement tools alternative to warfare) decided often by one sovereign in a dispute between other sovereigns (i.e. peers and their respective States) in ancient Mesopotamia[3] as well as accounts of States entering into international treaties. As a good example of the latter can serve the Kadesh Treaty of 1277 BCE between the Egyptian pharaoh Ramesses II and the Hittite ruler Hattusili III.[4] This treaty, which has been preserved both in Egyptian hieroglyphs and Hittite alphabet [in Karnak and Thebes in Egypt and in Hattusa (contemporary Turkey) respectively] is a detailed peace settlement agreement between two empires, as well as a pact of mutual military aid (*de facto* pact of collective self-defense against either third parties or domestic slave uprisings), as well as an undertaking not to accept political refugees or escaping criminals (thus containing early undertakings dealing with the law of extradition and asylum issues).

Of paramount historic and cultural importance are also the Laws of Manu *(Manusmriti)* also known as *Mānava-Dharmaśāstra*, the most important and earliest work of the Dharmaśāstra textual tradition of Hinduism in ancient India. Although this codex is of importance predominantly on the plane of religious studies and philosophy, it also ventures into areas contemporality dealt with on the plane of law, such as family law in relation to divorce and women's rights (verses 9.72–9.81)[5] and to the area governed contemporarily by public international law, since in its chapter 7 it deals with statecraft and war, including the principles of just war, protection of civilians (contemporary rule of distinction), protection of PoWs, proportionality of the use of force, prohibition of poisoning wells

[2] YING-SHIH, Yü. Han Foreign Relations. In*:* TWITCHETT, Denis and Michael, LOEWE (eds). *The Cambridge History of China: Volume I: the Ch'in and Han Empires, 221 B.C. – A.D. 220.* Cambridge: Cambridge University Press, 2008, pp. 377–462.

[3] DAVID, Vladislav and Pavel SLADKÝ. *Mezinárodní právo veřejné*. 2nd ed. Praha: Linde, 2005, p. 2, 20.

[4] LANGDON, Stephen H. and Alan H. GARDINER. The Treaty of Alliance between Ḫattušili, King of the Hittites, and the Pharaoh Ramesses II of Egypt. *The Journal of Egyptian Archaeology* 6, 1920, No. 3, pp. 179–205.

[5] PATRICK, Olivelle. *Manu's Code of Law*. Oxford and New York: Oxford University Press, 2005, pp.190–207, 746–809.

(combination of the rule of distinction and the prohibition of chemical/ /biological weapons) and other rules.

Ancient Greece, a time and place of city States with a general sense of cultural belonging to the Greek culture is a period that gave rise to international treaties or pacts (depending upon the respective translation of the Greek word *Symmachia*), which could be seen as *de facto* predecessors to contemporary defense pacts, such as the NATO for example.

Apart from that, however, in a sharp contrast to (for example) the cultural conditions in ancient India under the influence of the Laws of Manu, the relevant legal framework on the plane of statecraft and the laws of war was close to non-existent in ancient Greece. Indeed, the times of war in the ancient Greek era were times of barbarism, where killing civilian, including women and children or enslaving and selling them on as slaves was a common practice.

The only area of *de facto* international law that did develop and even prevailed into the subsequent Roman times was the *lex Rhodia de iactu* (ca. 800 BCE) – a set of rules of naval law originating in ancient Rhodes. This set of norms included the flag principle in relations to law applicable onboard, legal principles regarding territorial waters, as well as the institution of peaceful passage, for example.

In ancient Rome, Roman law *(ius civile)* did not contain any norms of public international law *per se*. Roman law needs to be seen as municipal law of one of numerous State actors in the course of history that existed in the given timeframe along with other State actors and their respective municipal legal orders. Nevertheless, Roman law and the related religious practice conducted by the *fetiales* (priests) developed a notion and practice that can be found in contemporary international law as well, namely of declaring war as a just war *(bellum iustum)* which later finds application in early Christian and medieval philosophy and prevails indeed until mid-20th Century.

The Roman cultural and legal epoch is however also interesting from a different point of view. Roman legal philosophy and theory used to distinguish between municipal law (in case of Rome the *ius civile*, but acknowledging existence of it counterparts in other societies/States) as a matter of positive law and between *ius gentium*, a kind of natural law *(ius naturale)* common to all peoples. Gaius defined the *ius gentium* as what 'natural reason has established amongst all peoples'.[6] Cicero distinguishes between things that are written

[6] *Quod vero naturalis ratio inter omnes homines constituit ... vocator ius gentium.*

and those that are unwritten but upheld by the *ius gentium* or the *mos maiorum*, 'ancestral custom'.[7] In his treatise *De officiis*, Cicero regards the *ius gentium* as a higher law of moral obligation binding humans beyond the requirements of civil law. A person driven into exile, for instance, – according to Cicero – lost his legal standing as a Roman citizen; yet such person would retain the basic protections extended to all human beings under the *ius gentium*. This, however, was in sharp contrast with the practice of slavery both in Rome and beyond, so it remains questionable as to what extent Cicero's approach was merely philosophical, or, if the reader wishes, *de lege ferenda.* In fact, towards the 3rd Century CE, the notion of *ius gentium* encompasses the institutions relevant to sovereignty, ownership rights, property boundaries, commerce (except those governed by *ius civile*), so that it is fair to say that the concept of *ius gentium* evolved into law of transnational trade within the territory of the Roman Empire rather than some kind of *ius naturale*.[8]

The Sunni Muslim world of the 7th Century CE also produced certain milestones in the development of norms of *ius in bello* / the humanitarian law. The first successor the prophet Mohammed in the Sunni branch of Islam, the first Caliph Abu Bakr, defined the right conduct of the Sunni armies. In May of 632 CE,[9] he formed the following Ten Rules for the Muslim army:

> *'O people! I charge you with ten rules; learn them well! Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone.* '[10]

The principles laid out by Abu Bakr were followed by the Sunni armies in centuries to come, including the famous retaking of Jerusalem by Saladin in 1187 CE, in a sharp contrast with the way Christian crusaders had conducted

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[7] SCHILLER, Arthur A. *Roman Law: Mechanisms of Development*. Mouton, 1978, pp. 254–255.

[8] BOZEMAN, Adda B. *Politics and Culture in International History from the Ancient Near East to the Opening of the Modern Age*. Transaction Publishers. 2nd ed. 2010, originally published 1960 by Princeton University Press, p. 210.

[9] DONNER, Fred M. *The History of Al-Tabari:The conquest of Arabia.* New York: State University of New York Press, 1993, p. 16.

[10] ABOUL-ENEIN, Youssef H. and Sherifa ZUHUR. *Islamic Rulings on Warfare*. Strategic Studies Institute, US Army War College, Diane Publishing Co., Darby PA, 2004, p. 22.

themselves when taking Jerusalem in 1099 CE. In fact, the principles of humanitarian law laid down by Abu Bakr in 632 CE in Arabia and previously contained in the Laws of Manu in Ancient India were only first matched by western positive law as late as in the mid-19th Century during the American civil war [General Order No. 100 of 1863 CE issued by A. Lincoln to the Union Forces, known under the name of his factual author Dr. Franz Lieber (a native of Berlin) as the Lieber Code].

1.3 Public International Law: Medieval and Modern Time Authors Who Shaped its Contours

The development of institutions and methods of public international law in medieval and post-medieval Christian Europe naturally went hand-in-hand with the philosophy and theology of the respective times.

It is thus not surprising that one of the early authors often mentioned amongst the contributors to early theory of international law is also **St. Thomas Aquinas**. He distinguished between three levels of law, namely *lex divina* (divine or ethernal law), *lex naturalis* (natural law), and *lex humana* (human, positive, law).

The works of St. Thomas Aquinas were being interpreted and reconciled with the new political and economic order during the Renaissance times by the Spanish and Portuguese philosophers and theologians who were called after the center of their teachings as the **School of Salamanca**. This school was *de facto* founded by Francisco de Vitoria (1483–1546 CE). De Vitoria was then followed by Domingo de Sotto (1494–1560 CE), Martín de Azpilcueta (1491–1586 CE), Tomás de Mercado (1525–1575 CE), and Francisco Suaréz (1548–1617 CE). The School of Salamanca brought about an end to the medieval concept[11] of law, reviving the notion of liberties and natural rights of men, including the right to life, economic rights (i.e. to own properties) and spiritual rights. It also reformulated the concept of natural law as law existing in nature *per se* with the argument that given that all human beings share the same nature, they also share the same natural rights, i.e. to life and liberty; this concept was indeed a novelty at the time and it was in a strong contrast in particular to Spanish activities *vis-à-vis* indigenous communities in Latin America.

[11] WOLF, Ernst. Naturrecht, In: *Die Religion in Geschichte und Gegenwart*. 3rd ed. Germany: Tübingen, 1960, col. 1357.

The School of Salamanca that came to existence under catholic conditions was followed by the thoughts of Hugo Grotius /or Huge de Groot/ (1583–1645 CE) in the predominantly protestant Dutch Republic.

Grotius laid the foundations of international law as we know it nowadays, based upon natural law. His understanding of natural law was, however, slightly different from that of the School of Salamanca in that natural law, in Grotius' view, was not an entity in itself, but was a God's creation.

Besides the religious concept of natural law, Grotius' work also includes extensive writing on humanitarian law and maritime navigation, including the concept of the free sea *(mare librum)*. In his work the *Mare Librum* (1609 CE) he formulated the new principle that the sea was an international territory free to be used by all nations for seafaring trade. His work provided suitable ideological justification for breaking up naval trading monopolies of the British.

One of his paramount works is *De jure belli ac pacis libri tres* (On the Law of War and Peace: Three books), first published in 1625 CE. The treatise advances a system of principles of natural law, which are held to be binding on all people and nations regardless of local custom. The work is divided into three books: Book I advances Grotius' understanding of war and of natural justice, arguing that there are some circumstances in which war is justifiable. Book II identifies three 'just causes' for war: self-defense, reparation of injury, and punishment; Book III takes up the question of what rules govern the conduct of war once it has begun; Grotius argues that all parties to war are bound by such rules, irrespective of the existence of just cause of the respective party.

The list of later noteworthy thinkers further includes for instance:

Jean Jacques Rousseau (1712–1778 CE) – the author of the contractual concept statehood introduced in *Du contract social ou priciples du droit politique* (1762 CE);

Immanuel Kant (1724–1804 CE), who defined international law as a teaching about mutual rights of States and who also defined State sovereignty not as an abstract matter or matter derivative from a divine source, but rather as derivative from groupings of individuals. Kant was also amongst the first advocates of international organizations (yet to come more than a Century after his death) as guarantors of peace. Fernando R. Tesón summarized Kant's key thoughts in respect to international law and State sovereignty as follows, calling it the 'liberal theory of international law':

> *'Liberal theory commits itself instead to normative individualism, to the premise that the primary normative unit is the individual, not the state. The end of states*

and governments is to benefit, serve, and protect their components, human beings; and the end of international law must also be to benefit, serve, and protect human beings, and not its components, states and governments. Respect for states is merely derivative of respect for persons. In this way, the notion of state sovereignty is redefined the sovereignty of the state is dependent upon the state's domestic legitimacy; and therefore the principles of international justice must be congruent with the principles of internal justice.'[12]

It needs to be pointed out that the Kantian theory of international law, the liberal theory, although often referred to in times when idealism surfaces in the theories of international relations, never quite made it into positive international law. As Tesón further and rightly points out:

'Traditional international legal theory focuses upon the rights and duties of states and rejects the contention that the rights of states are merely derivative of the rights and interests of the individuals who reside within them. Accordingly, International legitimacy and sovereignty are a function of whether the government politically controls the population, rather than whether it justly represents its people. This statist conceptualization of international law argues for a dual paradigm for the ordering of individuals: one domestic, the other international. Justice and legitimacy are conceptually separate. It may well be that domestic systems strive to promote justice; but international systems only seek order and compliance.'[13]

Thomas Hobbes (1588–1679 CE). Unlike Kant and also Heggel, Hobbes approached the view of statehood and the mutual relations in-between States from a rather realistic point of view. As Dyzenhaus summarizes quoting Hobbes:

'Perhaps the most influential passage on the rule of law in international law comes from chapter 13 of Thomas Hobbes's Leviathan. In the course of describing the miserable condition of mankind in the state of nature, Hobbes remarks to readers who might be skeptical that such a state ever existed that they need only look to international relations – the relations between independent states – to observe one:

But though there had never been any time, wherein particular men were in

[12] TESÓN, Fernando R. The Kantian Theory of International Law. *Columbia Law Review*, 1992, No. 1, p. 54.

[13] TESÓN, Fernando R. The Kantian Theory of International Law. *Columbia Law Review*, 1992, No. 1, p. 53.

> *a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War.'*[14]

The passage is influential because realists take Hobbes not only to be describing international relations but also making a statement about what international relations should be – an arena in which individual States relentlessly pursue goals that they take to serve their particular interests. It has to be that way, on the view traditionally attributed to Hobbes, because the conditions that make the rule of law possible within a State – namely, an absolute sovereign with a monopoly on the power to make, enforce, and interpret the law – are so conspicuously lacking in the international arena.'[15]

1.4 Public International Law: Milestones of Modern History of Public International Law

1.4.1 1324 CE – The Defender of Peace / Sovereignty

Marsilio da Padova authored, in 1324 CE, the tract called *Defensor pacis* (The Defender of Peace). It was written in the political context of the struggle between the Holy Roman Emperor Luis IV. and Pope John XXII. The keystone of the tract is the idea of separation of a secular State from religious authority, arguing that the pope and further officers of the church be limited merely matters of religion and without political power upon the organization of secular society. The principle of sovereignty emerges on the plane of political thoughts or philosophy.

1.4.2 The Peace of Westphalia of 1648 CE and the Westphalian Sovereignty

[14] HOBBES, Thomas. *Leviathan*. Cambridge: Cambridge University Press, 1999, p. 221; citation via supra.

[15] DYZENHAUS, David. Hobbes on the International Rule of Law. *Ethics & International Affairs*, 2014, No. 1, pp. 53–64.

History of modern public international law is generally considered to have commenced with the Peace of Westphalia in 1648 CE, at the end of the Thirty Years War. As history textbooks tell us, this war, which started in Prague in 1618 CE, ended the *de facto* hegemony of the Catholic Church in Continental Europe within the Holy Roman Empire (Holy Roman Empire of the German Nation, since 1512 CE) and beyond and led to the creation of *de facto* sovereign States even within the Holy Roman Empire of the German Nation[16] in Central Europe in the 17th Century, whereby the respective duchies and their sovereigns would become sovereign within their territorial boundaries. The peace settlement leading to the emergence of factually sovereign States, however, must be seen merely as a standard in international relations not international law. It is so as it is rather hard to find legal basis for a general definition of sovereign States in the treaties of 1648 CE.[17] Nevertheless, it is the year of 1648 CE, which in European context indeed meant the emergence of secularization of international relations as the importance of the Papal office had suffered a substantial blow during the Thirty Years War.

1.4.3 The Vienna Peace Conference of 1815 CE

The Vienna peace conference of November 1814 CE through June 1815 CE, generally called the Congress of Vienna (Wiener Kongress), was a conference of ambassadors of European States that took place with the intention to provide for a long-lasting peace subsequent to the French Revolution and the consequent Napoleonic Wars. Apart from settling numerous territorial claims,[18] the Creation of the German Confederation, or the confirmation of neutrality of Switzerland, the conference also produced certain institutions that did contribute to the development of international law. The most important of these institutions is the creation of special regimes for the freedom of navigation of numerous rivers important to international trade in Europe, namely for example the Rhine and the Danube.

1.4.4 The Great War and its Consequences (1914–1918 CE)

[16] Dissolved as result of Napoleonic Invasion in 1806 CE.

[17] OSIANDER, Andreas. Sovereignty, International Relations, and the Westphalian Myth. *International Organization*, 2001, Vol. 55, No. 2, pp. 251–287.

[18] Such as the confirmation of Russia getting to keep Finland which it then held until 1917 CE and which it had annexed from Sweden in 1809 CE.

WWI influenced the development of international relations and consequently of international law quite substantially, in particular in relation to the mechanisms of international settlement of disputes, creation of international organizations, and in regard to the so-called mandate territories of former colonies of those powers that happened to be on the losing side of the Great War.

The Great War also influenced the perception of war on the plane of international relations and consequently on the plane of international law. There were attempts made to prosecute the German Emperor for having *de facto* started the war (incited thereto), as if entering into war would have suddenly and instantly become criminal at the end of the Great War. Whilst the Emperor found political asylum in the Netherlands, it was this chain of thoughts, though, that eventually gave rise to the category of Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing in the Nurnberg Charter (Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis) after WWII.

1.4.5 WWII (1939–1945 CE) and beyond

The further atrocities committed by the Nazi- and Communist Regimes in the respective occupied territories during the second world war gave rise to further development of international law. The previously mentioned Nuremberg Tribunal's Charter was the founding stone of the theory of international criminal law, albeit the tribunal's jurisdiction did not extend over the Soviet forces and thus only persons on the losing side of the war were being prosecuted.

Humanitarian law had also been subjected to substantial test and had proven not to correspond to the practicalities of warfare of the time. As a good example can serve the fact that all the resistance movements across Europe were in fact civilians illegally taking part in hostilities as per the definition of Combatants under the Hague Conventions. As a result of the definition of combatants at that time under the Hague Conventions, for instance the Operation Anthropoid / the assassination of Reinhard Heydrich in Prague in 1942 CE in fact amounted to perfidy as the Czechoslovak soldiers under British command were feigning civilian, non-combatant

status when deploying into attack so that that those individuals who carried out the assassination (and whom the Czechs celebrate as heroes) in fact committed criminal offence by the optics of public international law of that time.[19]

The creation of the United Nations, as a direct result of the war brought along the total prohibition of aggressive warfare save in anticipatory self-defense and/or with the approval of the UN Security Council as a measure aimed at maintaining international peace and security.

The post WWII era gave also rise to the process of decolonization which resulted in creation of dozens of new States and discussion of issues of State succession.

Throughout the so-called Cold War (1948 CE through 1989 CE), entire areas of public international law that had previously been quite limited within the framework of customary international law or nonexistent at all underwent codification: be it the law of the sea, diplomatic law, consular law, or space law.

1.5 The Nature of International Law

1.5.1 Public International Law as Law

Is international law really law? If so, how come States have that little respect for it and continue breaching it in pursuit of their respective interests on the plane of international relations? How come grave breaches of international law, such as the 2003 invasion of Iraq, 2008 invasion of Georgia, the annexation of Crimea by Russia or the on-the-ground involvement of western powers in Libya in the post Arab-spring have come unpunished (to mentioned the most obvious ones in the past 15 years or so)?

The answers to these questions rest in the distinction between the existence of law on one hand and the compliance with such law on the other hand. To say that criminal law of a State does not exist just because murders do occur in that jurisdiction would be comparably misleading as to say that public international law is in fact no law since it is often being breached.

The 19th Century positivist John Austin argued that international law

[19] On the definition of perfidy under contemporary customary international humanitarian law see for instance the ICRC database of customary humanitarian law: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ca_rule65.

is not really law because it has no sovereign. He defined law 'properly so called' as commands of a sovereign.[20] In the discussion to this argument it needs to be noted that (i) the structure of sources of international law runs parallel to any need for a sovereign and (ii) the definition of law, as he argues "properly so called" only corresponds to a positivist definition of set of norms. As Kaczorowska correctly points out:

> *'The reply to Austin is that no legal system conforms to his theory. In the US the separation of powers does not admit a single sovereign, and in the UK the legislature is not the only source of law-making. Further, Austin's emphasis on the role of habitual obedience to a sovereign does not explain how new sovereign authority emergences. His criticism of international law is largely based on his peculiar conception of law.'*[21]

Yet on the other hand it is also fair to admit the argument that unlike in municipal legal systems, where subject of law is in fact subjected to the power of a sovereign State, on the plane of international law, there is legally no sovereign that would stand above other subjects of international law. At least formally, all States are equal in their sovereignty (save if they limit it voluntarily by treaty in order to become protectorates), although their respective individual sovereignties are no longer absolute, as they are limited by mutual international obligations and norms of international law, including the peremptory norms of international law.

1.6 The Relationship between International Law and Municipal Legal Systems

From the point of view of public international law, it is upon each State to decide upon the relationship between international law and the State's municipal law (i.e national law).

On the theoretical plane, there exist two polar theories that find application in constitutional law of respective States, namely (i) dualism and (ii) monism.

1.6.1 Dualism

[20] KACZOROWSKA, Alina. *Public International Law*. 4th ed. New York: Routledge, 2010, p. 14.
[21] KACZOROWSKA, Alina. *Public International Law*. 4th ed. New York: Routledge, 2010, p. 15.

Under the dualistic theory, international law and municipal law are two independent systems, separate one from the other. Neither of the two legal systems has got the power to create or modify the norms of the other. However, as they may regulate the same subject matter, precaution needs to be had to the fact that obligations entered into on the plane of international law (such as treaty obligations or obligations stemming from customary law) are binding for the respective States, irrespective of what they regulate for domestically. On the other hand, though, obligations that the States have on the outside are not, under the dualistic concept, automatically enforceable domestically without further due.

1.6.2 Monism

The idea of monism is that both international law and municipal law are one unity, part of the same legal order. Should they collide, regulating the same subject matter, any such conflict would be resolved in favor of public international law.

As we have observed above, it is upon the respective States to determine from themselves which of the two concepts (and eventually to which extent a combination of the two) applies. In order to be able to determine to what extent and how international law finds application in each and every municipal legal system, we must look in that respective State's constitutional law.

Just to give a comparison, we shall analyze two constitutional legal systems, namely that of the Federal Republic of Germany and that of the United Kingdom of Great Britain and Northern Ireland.

Under section 25(2) of the **German Constitution** *(Grundgesetz)* the general rules of public international law have priority over municipal acts. The terminology of the German constitution talking of general rules of public international law is being explained by German legal theory as meaning customs and basic principles of international law. German constitutional system thus integrates customary norms of public international law and the basic principles of public international law into the hierarchy of German legal system (under the so called Kelsen's Pyramid of Norms) just below the German constitution and above common acts of parliament. This would correspond to a variant of monism. In sharp contrast to this, under the principle of dualism, then stands the formal position of international treaties under the German constitution. According to section 59(2) of the German Constitution: Treaties that regulate the political relations of the Federation or relate to subjects of federal

legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*.

Under the unwritten constitution of the **United Kingdom** of Great Britain and Northern Ireland, since the *Trendtex Case,*[22] customary law is part of English law automatically, as long as it is not inconsistent with the Acts of Parliament. The reasons for the condition of consistency with the Acts of Parliament is the fact that under UK Constitutional law all sovereignty rests with the Parliament (Consisting of the House of Lords, House of Commons, and the Crown) and therefore no part of English law can be in contradiction with the will of the sovereign Parliament. Unlike customs, treaties must naturally first be entered into. Entering into treaties is the royal prerogative of the Crown executed by the executive branch (Her Majesty's Government) and their ratification thus needs no consent of the Parliament. However, in order for norms stemming from international treaties to be given effect domestically as part of positive municipal law of England and Wales (or other parts of the UK), a primary or secondary legislation must be passed to give them effect (transformation via enabling legislation).

[22] *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529, [1976] 3 All ER 437, [1976] 1 WLR 868.