THE CAPACITY OF THE INDIVIDUAL TO CLAIM RIGHTS UNDER A TREATY IN THE NATIONAL COURTS

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I. INTRODUCTION

Easily one of the significant problems involved in establishing an international legal order concerns the role of the individual himself.[1] In the midst of an increasing effort to uphold his dignity,[2] should the individual be allowed to remain a pawn in the power politics of states? Although short of being a proper subject of international law, as a monist would advocate,[3] can not the individual be more than a mere passive subject[4] of the state's munificence? Even if only for a partial realization of his worth as a human being, must not the individual be allowed a certain sphere of action, consistent with the equal sovereignty of states, in the carrying into effect of international transactions or agreements? To explore this problem and its many facets is the purpose of this paper.

Statement of the Question.—As the title would indicate, the subject to be considered relates to the capacity of the individual to claim rights under a treaty in the national courts. Put differently, has the individual the personality or standing of his own to avail himself of the benefits of a treaty in the national courts of a particular state?

In this connection, it may be convenient to bear in mind that a treaty has been usually defined as an agreement of a contractual character between states, or organizations of states, creating legal rights and obligations between the parties.[5] The effect upon the parties is that they are bound by its provisions and that the signatories must execute the treaty in all its parts.[6]

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[1] LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 56-60 (1950); KATZ & BREWSTER, INTERNATIONAL TRANSACTIONS AND RELATIONS 1-2 (1960).

[2] LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 48 (1950). Cf. Dagleton, Some Questions as to the Place of the Individual in the International Law of the Future, 37 AM. J. INT'L L. 642 (1953). Also Robertson, The European Court of Human Rights, 9 AM. J. COMP. L. 1 (1960).

[3] KELSEN, PRINCIPLES OF INTERNATIONAL LAW 114 (1952).

[4] 1 OPPENHEIM, INTERNATIONAL LAW 460 (8th ed., Lauterpacht, 1955).

[5] *Id.* at 877.

"A treaty is one of the various forms of instruments by which states engage themselves." HUDSON, THE LAW OF TREATIES 4 (1931).

[6] *Id.* at 923.

"When the will of two or more states is properly declared, the declaration seems to be binding on the states concerned, in their relations to which it applies because of a general principle of international law that states must keep faith with each other. The juristic force of the declaration is not lost because one of the states concerned may fail to observe it, no more than national legislation would lose its force because of a violation." 1 HUDSON, INTERNATIONAL LEGISLATION xvii (1931).

The treatment of the question assumes the present state of international law and practices of states. It is particularly assumed that states, not individuals, are the proper subjects of international law.[1]

Scope.—Aside from a brief discussion on the incorporation of treaty provisions into municipal law, there is a consideration of the enforcement in the national courts of the rights arising under the treaty. Specially with respect to the last, the analysis concentrates on the problems created by the efforts to enforce treaty rights in national courts by the individual. When the state is a defendant, the concept of state immunity to suit and the doctrine of standing consent to suit may be pertinent. The relevance of the individual's nationality receives due attention especially when the individual is the plaintiff in the proceeding.

Court decisions on the subject are cumulated and classified according to their nationals. The rationale of these cases is in turn analyzed in the light of the court's reasoning itself as well as the views of recognized writers in the field. An attempt is made to look into a more profound reason for the ruling that the individual has no standing in court in the prosecution of cases of such nature.

With the foregoing as background, the individual's position in relation to the rights under a treaty receives proper consideration.

Approach.—As the nature of the subject demands, the treatment is mainly analytical. Whenever necessary and practicable, the historical method is employed as a supplement.

On the whole, an extensive and comprehensive analysis is made in connection with the different ramifications of the problem, the pertinent court decisions, and the considered views of recognized writers in international law. To lend greater clarity to the analysis, the evolution of a particular principle or rationale is resorted to whenever practicable.

II. NATURE OF RIGHTS UNDER A TREATY

Whether a treaty operates internally or not, so as to bind the subjects of municipal law and confer rights upon them and afford ground for redress in the courts is a question which has bothered the theorists more than the quite separate question whether customary international law exhibits a basic affinity with municipal

[1] But see *id.* 639 thus: "The various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of International Law. In proportion as the realization of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International Law."

law.[8] According to Wright, dualism implies that treaties, the object of which is to establish a relationship in international law, are applicable in national courts only in so far as they are incorporated in national law.[9] This is so because the rules laid down by the treaty for the parties thereto should generally be promulgated or legislated upon to be internally operative, unless it is the intention of the signatories that it should be self-executing.[10] The last observation is, of course, subject to the qualification that the state of municipal law in the countries concerned has to be taken into account.

Under the American practice, a treaty has the same footing as a statute.[11] Like the laws of the United States made in pursuance of the Constitution, treaties made under the authority of the United States are declared by the Constitution to be the supreme law of the land.[12] Where a treaty and an act of Congress are wholly inconsistent with each other and the two cannot be reconciled, the one later in point of time must prevail in municipal law.[13] This is

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[8] O'CONNELL, THE LAW OF STATE SUCCESSION 450-451 (1956).

[9] Wright, Treaties as Law in National Courts with Special Reference to the United States, 32 IND. L. J. 1 (1956).

"International monists hold that such incorporation is automatic, that national courts must apply international law in case of conflict. This theory, however, has little support in practice." *Id.*

That a treaty has to be incorporated into national law in order to be applicable in national courts is the British view as announced in Stoeck v. Public Trustee, L. R. (1921) 2 ch. at 67, 70-71, thus: "By virtue of the Treaty of Peace Act, 1919, the Treaty of Peace Order has effect as if enacted in that Act. In the result, therefore, the Treaty of Peace Order and the above-mentioned sections of the Treaty of Peace form part of the municipal law of this country."

[10] O'CONNELL, THE LAW OF STATE SUCCESSION 451 (1956).

"With regard to the former (self-execution treaties), there is no doubt that they should be applied by the courts exactly under the same conditions as the national laws are applied, and this has been the case in Cuba where treaties have been applied not only by the Supreme Court but also by lower courts every time that a rule established by an international treaty has been brought before them. And in so doing, these courts are of course empowered to interpret the treaties and determine their scope and concrete effects, the same as they do with the national laws." Dihigo, Treaties as Law in National Courts; Latin America, 16 LA. L. REV. 734, 741 (1956).

For instances of self-executing treaties, see *infra* notes 68, 101, 103, 104, 107, 108, 110 and 141, and of self-executing Philippine treaties under which, it is submitted, the individual may claim rights without municipal legislation, see Treaty on Academic Degrees and the Exercise of Professions between the Republic of the Philippines and the Spanish State dated March 4, 1949, Dept. of For. Affairs Treaty Series, Vol. I, No. 4, 13-15; Treaty of Friendship between the Philippines and Turkey dated June 13, 1949, *id.* at 58-60; Treaty of Friendship between the Philippines and Thailand dated June 14, 1949, *id.* at 61-63; Treaty of Friendship, Consular Service and Establishment between the Philippines and Greece dated August 28, 1950, Dept. of For. Affairs Treaty Series, Vol. II, No. 1, 121-123; Treaty of Friendship between the Philippines and Pakistan dated January 3, 1951, *id.* at 126-128; Treaty of Friendship between the Philippines and Indonesia dated June 21, 1951, *id.* at 131-133. Treaty of Amity between the Philippines and Ecuador dated March 24, 1948, *id.* 135-371; Treaty of Friendship between the Philippines and Cuba dated September 3, 1952, *id.* at 141-143; Treaty of Friendship between the Philippines and India dated July 1, 1952, Dept. of For. Affairs Treaty Series, Vol. II, No. 2, 1-3; Treaty of Friendship between the Philippines and Egypt dated January 18, 1955, Dept. of For. Affairs Treaty Series, Vol. II, No. 4, 1-3; Treaty of Friendship between the Philippines and the Swiss Confederation dated August 30, 1956, Dept. of For. Affairs Treaty Series, Vol. III, No. 1, 50-52; Treaty of Friendship between the Philippines and Argentina dated February 12, 1956, Dept. of For. Affairs Treaty Series, Vol. III, No. 3, 6-9; and Treaty of Friendship between the Philippines and Viet-nam dated April 26, 1959, *id.* at 10-1.2. See *infra* note 67.

[11] "This report (concerning American treaty practice) also examined the subject of self-executing treaties. After the court decisions, it was found that the Supreme Court had determined that in order to operate as 'the supreme law of the land' under Article VI of the Constitution a treaty must be self-executing. Self-executing treaties were defined as those requiring no legislative or executive action to carry them into effect. It was held by the court that treaties which in themselves are incomplete as laws, or otherwise require legislation to make them operative, address themselves to the executive and legislative rather than to the judicial branch of the Government, and are not self-executing as the term is here used." Anderson, Treaties as Domestic Law, 29 AM. J. INT'L L. 472 (1935).

[12] 2 HYDE, INTERNATIONAL LAW 1463 (2d rev. ed., 1945).

[13] Whitney v. Robertson, 124 U.S. 190 (1880); 2 HYDE, INTERNATIONAL LAW 1463-1464 (2d rev. ed., 1945).

only true in municipal laws, inasmuch as on the international plane the rights and obligations of the signatories to the treaty are not affected.[14]

The treaty practice of the United States is signally different from that of the United Kingdom and the British Commonwealth, where a treaty does not become legally enforceable, nor does it have any effect upon private rights, until it is aided by domestic legislation.[15] Under this system, all treaties intended to give rights and impose duties on individuals are paralleled by legislation to carry out this purpose and, in the view of internal law, constitute only a promise to enact such legislation.[16]

Continental European constitutions usually require certain formalities or the participation of the legislature in the making of treaties affecting individual rights and then authorize the courts to apply such treaties as law.[17] Typical examples of this are presented in the case of Austria[18] and Italy.[19] However, a different rule exists in French law upholding the supremacy of treaties over municipal law.[20] In Swiss law, "though the rule of treaty super-

[14] Cf. SCHWARZENBERGER, INTERNATIONAL LAW 575 (3rd ed., 1957).
"A treaty prevails over inconsistent state legislation without regard to the date of such legislation. The state law predates the treaty, or it may follow the treaty in time. in either case it fails if it is in conflict with the treaty. A different rule applies to the conflict between a treaty or an international agreement and an Act of Congress, where the one later in date is commonly said to prevail. It is clear that a later act of Congress prevails over a conflicting provision of a treaty, so far as the national courts of the United States are concerned. Such an act of Congress, however, cannot affect the international status of the treaty with the foreign country which may not have given its consent to the congressional modification or repeal of the treaty." Hynning, Treaty Law for the Private Practitioner, 23 U. CHI. L. REV. 36, 44 (1955).

[15] *Id.* at 45-46. Also *supra* note 9.
"It is well-established rule of Anglo-Canadian law that the provisions of a treaty, though binding upon the state under international law, do not become part of the law of the land unless they are implemented by legislation. A treaty that has not been implemented by legislation cannot be a source of legal obligations affecting private rights." Bourne, International Law—Unimplemented Treaties—Their Effect on Municipal Law, 29 CAN. B. REV. 969 (1951).

[16] Rice, The Position of International Treaties in Swiss Law, 46 AM. J. INT'L L. 741, 645 (1952).
"Such incorporation may be effected by general constitutional mandate such as that in Article VI of the U.S. Constitution which declares that treaties are the supreme law of the land, or it may be accomplished by specific legislation, dealing with a particular treaty or a particular body of customary law. In Great Britain, for example, treaties are concluded by the Crown in Council. Normally, they are not directly applicable as law in national courts except in the case of prize courts. Thus, it is necessary for Parliament to pass legislation incorporating the rules of a treaty into national law." Wright, Treaties as Law in National Courts with Special Reference to the United States, 32 IND. L. J. 2 (1956).

[17] *Id.*

[18] "Austria adheres to the notion that international agreements concluded by or adhered to by Austria are automatically transformed into internal law. Without further acts of transformation they bind the Austrian Administration. However, in order to render them binding on the public in general, a further formality must be observed. No legal norm can be binding on the general public unless duly published in the *Bundesgesetzblatt*." Seidl-Hohenveldern, Relation of International Law to Internal Law in Austria, 49 AM. J. INT'L L. 451, 460 (1955).

[19] "As said above (incorporation of *pacta sunt servanda* by art. 10 of Italian Constitution into legal order), its purpose is to create a constitutional obligation of the Italian State to conform to its internationally assumed conventional commitments, by putting into movement the necessary machinery of legal production in order to execute them. Article 10 protects this fundamental obligation and does not cover the modes of execution of treaties. It does not incorporate the single provisions of the treaties into the domestic legal order by way of a process of automatic legal production, but provides for the guarantee of their insertion through the necessary devices offered by the legal order." Bisconti, Treaties as Law in National Courts: an Italian Viewpoint, 16 LA. L. REV. 762, 764 (1956).

[20] Jones-Dujardin v. Tournant and Haussy (France, Tribunal Civil of Arras, February 2, 1951). (1951) I.L.R. 434; KATZ & BREWSTER, INTERNATIONAL TRANSACTIONS AND RELATIONS 94 (1960).
"How is the treaty in French law? The answer seems clear if one looks at the text of the present French Constitution (1946) which provides in Article 26: 'Diplomatic treaties duly

iority was for a while often stated and sometimes applied," for nearly twenty years the contrary rule that statutes and treaties are of equal rank has remained unimpugned.[21]

With respect to treaties, the Philippine practice is very much in line with the American.[22] Significantly, the Latin American States share the Western legal tradition in that the treaty-making process gives treaties the "juridical character of true laws." [23] Specifically in Chile, some treaties are sufficiently detailed in terms or state general principles of international law so that they can be enforced without specific legislative implementation.[24] On the whole, Soviet treaty law is not too different from Western treaty law because "they shared one cradle, and this common origin still shows." [25] Under Soviet treaty-making process, a treaty, if self-executing, is immediately incorporated into municipal law upon publication without aid of legislation.[26]

Under the American and French views, the treaty is incorporated into municipal law especially in the case of the so-called self-executing treaties.[27] As earlier noted, there are other states subscribing to the American and French views.[28] Even in the case of the British view, the incorporation of the treaty into municipal law is generally conditioned only by the enactment of parallel legislation.[29]

III. INDIVIDUAL'S POSITION RELATIVE TO SUCH RIGHTS

The problem of incorporating treaty law into municipal law has been discussed earlier. The groundwork has thus been laid for the discussion of the substantive nature of the individual's position in relation to treaty rights. Before identifying the position of the individual in this domain of the law, it may be worthwhile to review the analogies, if any exists, between international law and municipal law, and between treaty and contract.

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ratified and published shall have the force of law even when contrary to French international legislation.'" Rice, The Position of International Treaties in Swiss Law, 46 AM. J. INT'L L. 641, 645 (1952). But cf. O'CONNELL, THE LAW OF STATE SUCCESSION 470 (1956).

[21] Rice, The Position of International Treaties in Swiss Law, 46 AM. J. INT'L L. 641, 665 (1952).

[22] Singh v. Collector of Customs, 38 Phil. 867, 872 (1918). Cf. SINCO, PHILIPPINE POLITICAL LAW 124 (10th ed., 1954). Also O'CONNELL, THE LAW OF STATE SUCCESSION 467 (1956).

See also *supra* note 10.

[23] Evans, Treaty Practice in Chile, Argentina and Mexico, 53 AM. SOC. INT'L L. PROC. 302-303 (1959).

"In fact, due to the procedure that requires that treaties be approved by the Legislative Power it has been admitted that once the convention has been concluded with all the aforementioned constitutional requisites, it becomes effective within the territory of the State without need of a law expressly to put it into effect." Dihigo, Treaties as Law in National Courts: Latin America, 16 LA. L. REV. 734 (1956).

[24] Evans, Treaty Practice in Chile, Argentina and Mexico, 53 AM. SOC. INT'L L. PROC. 302, 304 (1959).

[25] Triska, The Soviet Law of Treaties, 53 AM. SOC. INT'L L. PROC. 294, 301 (1959).

[26] *Id.* at 297-298.

[27] See *supra* note 10.

[28] See *supra* notes10, 20, 22, and 23.

[29] See *supra* notes 15 and 16.

Analogy between International Law and Municipal Law.—As one writer notes, the problem of the relationship between international law and municipal law is an all-pervasive one.[30] In Oppenheim's view, the law of nations and the municipal law of the several states are essentially different from each other as regards their sources, the relations they regulate, and the substance of their law.[31] Under the last distinction, that is, as to substance, it is said that while municipal law is a law of a sovereign over individuals subjected to his sway, the law of nations is a law not above, but between sovereign states, and therefore a weaker law.[32]

It is not surprising then that international tribunals have applied the rule that municipal laws are only facts generative of a legal situation and not in themselves criteria of decisions.[33] On the other hand, O'Connell observes that it would be difficult to discover a municipal law system which did not utilize international law rules as the norms of decision.[34] Aside from what has been stated earlier regarding incorporation of treaty law into municipal law,[35] it may be considered that treaties are a source of international law.[36] More-

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[30] O'Connell, The Relationship between International Law and Municipal Law, 48 GEO. L. J. 431 (1960).

"There are four possible attitudes toward the question (concerning the relationship between international law and municipal law):

(a) That international law has primacy over municipal law in both international and municipal decisions. This is the *monist* theory.

(b) That international law has primacy over municipal law in international decisions, and municipal law has primacy over international law in municipal decisions. This is the *dualist* theory.

(c) That municipal law has primacy over international law in both international and municipal decisions. This is a species of *monism in reverse*.

(d) That since international law and municipal law each derives from a fundamental legal order the perspective rules should be harmonized, but that in the rare event of direct collision, a court is obliged by its own constitution, and hence may be required to apply a rule of municipal law which is at odds with one of international law, or *vice versa*. This is a position midway between monism and dualism." *Id.* at 431-432.

[31] 1 OPPENHEIM, INTERNATIONAL LAW 37 (8th ed., Lauterpacht, 1955).

[32] *Id.*

[33] In the Case Concerning Certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A. No. 7, 19 (1926), it has been ruled that "municipal laws are merely facts which express the will and constitute the activities of States in the same manner as do legal decisions and administrative measures."

Cf. O'Connell, The Relationship between International Law and Municipal Law, 48 GEO. L. J. 431, 441-442 (1960).

[34] O'Connell, The Relationship between International Law and Municipal Law, 48 GEO. L. J. 431, 444 (1960).

"Paragraph 14 (1) of the Preamble to the French Constitution of 1946 reads: 'The French Republic, faithful to its tradition, abides by the rules of international public law.' (adhered to by the 1958 Const. preamble). It would seem that the proclamation of adherence to the rules of international public law in 1946 (by the 1958 Const. in its preamble) is descriptive of the attitude of municipal courts. French judges have never doubted that they were bound to apply rules of customary international law whenever appropriate, although no constitutional rule enjoined them to do so." *Id.* at 468.

The Phil. Const. art. II, sec. 3, provides: "The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as a part of the law of the Nation."

"In the first place, although many judges and jurists had laid down in broad terms that international law is part of the law of England, these broad statements were merely prefaces to the ruling in particular cases, which turned upon the application of a particular rule of international law to cases concerning the immunities of foreign sovereigns or ambasadors, questions as to the criminal liability of subjects for breaches of truces or for raising subscriptions or doing other acts to help revolutions against friendly powers, or questions arising in civil actions in which the existence of some rule of international law was relevant to the issues in the case." Holdsworth, The Relation of English Law to International Law, 26 MINN. L. REV. 141, 148 (1942).

[35] See *supra* notes 8 to 29.

[36] "Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes,

over, certain private law principles are being made use of in the solution of some international law problems.[37]

Analogy between Treaty and Contract.—By definition, a treaty is a formal instrument of agreement by which two or more states establish or seek to establish a relation under international law between themselves.[38] It is one of the means by which subjects of international law undertake binding obligations under international law towards one another.[39] It is a compact entered into between two or more sovereign states executed as and exhibiting the principal features of a contract.[40] According to Schwarzenberger, every treaty has three constituent elements: (1) there must be a meeting of wills; (2) the contracting parties must be subjects of international law; and (3) the parties must have the intention to create legal obligation.[41] Although in most respects the general principles applicable to private contracts apply, there is one startling difference in that duress does not invalidate consent, as it does in the municipal law of contracts. A dictated treaty is as valid legally as one freely entered into on both sides.[42]

Highly relevant on this point is the observation made by Hyde:

> That unscrupulous States have shown contempt for valid compacts when it was believed that their provisions could be safely or advantageously

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usually such treaties only are regarded as a source of International Law as stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character." I OPPENHEIM, INTERNATIONAL LAW 27-28 (8th ed., Lauterpacht, 1955). Also HENRY, TREATIES AND FEDERAL CONSTITUTIONS 1 (1955).

[37] "It is possible to conceive the private law analogy of servitude being expanded in the future to embrace treaty rights and obligations which are not specifically easements. The doctrine of real rights is thus a potential instrument for compelling a State to acknowledge the contractual relations of its predecessor when justice demands it." O'CONNELL, THE LAW OF STATE SUCCESSION 63 (1956).

[38] Research in International Law, Draft Convention on the Law of Treaties (Harvard Law School), art. 1(a), 29 AM. J. INT'L L. SUPP. 653, 657 (1935). Also *supra* note 5.

In the absence of a treaty, a state may be bound in favor of another state under two rival doctrines. The first is the doctrine of "fundamental rights" which is a corollary of the doctrine of the "state of nature." Such doctrine teaches that "every state, by the very fact that it is a state, is endowed with certain fundamental, or inherent, or natural, rights." The second is the doctrine of positivism which teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented. However, the ultimate explanation of the binding force of all law is that man, whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live. BRIERLY, LAW OF NATIONS 50-57 (5th ed., 1955). Cf. JESSUP, A MODERN LAW OF NATIONS 94-122 (1948); 1 OPPENHEIM, INTERNATIONAL LAW 13-18 (8th ed., Lauterpacht, 1955). KATZ & BREWSTER, INTERNATIONAL TRANSACTIONS AND RELATIONS 1-5 (1960). Also Sison v. Board of Accountancy and Ferguzon, 85 Phil. 276 (1949).

[39] SCHWARZENBERGER, INTERNATIONAL LAW 421 (3rd ed., 1957).

[40] ALLEN, THE TREATY AS AN INSTRUMENT OF LEGISLATION 1 (1952). Also Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. PA. L. REV. 903, 907 (1959).

[41] See *supra* note 95 at 421-422.

[42] BRIERLY, LAW OF NATIONS 243-244 (5th ed., 1955).

However, if duress is employed against the person of the representative, the treaty is invalid. 1 OPPENHEIM, INTERNATIONAL LAW 891 (8th ed., Lauterpacht, 1955).

The historical explanation of this state of the law is that so long as interantional law was not strong enough to forbid the settlement of disputes by force, it would be idle for it to refuse to recognize an agreement induced by force. A dictated treaty obviously violates the first principle of any civilized law of contracts. But more closely viewed, some fallacy in such view may be discovered. As an example, if after an aggressor state is defeated in war the victors dictate a treaty imposing an indemnity for the damage caused by the aggression and containing terms designed to prevent its repetition, such a treaty, as the law stands, will be binding. BRIERLY, LAW OF NATIONS 244 (5th ed., 1955). Cf. 1 OPPENHEIM, INTERNATIONAL LAW 891-892 (8th ed., Lauterpacht, 1955).

> ignored, is not proof that States have been or remain generally disposed to act on such a principle. Nor is the absence of a sanction established by law indicative that no burden or restraint of a legal nature is imposed upon a State which consents to bear or respect it. The family of nations has acted upon a different theory. Practice has long revealed the habits of its members or performing from a sense of obligation, to which must be ascribed the character of law, numerous duties not enforceable by judicial process or by the application of any force applied by the arm of the law. Recognition of legal restraints arising from treaty has thus been a natural consequence of an experience characterized by an acknowledgment of the legal nature of obligations not recorded in definite agreements, and for which, nevertheless, the society of nations has united in demanding observance.[43]

It has been further noted that the United States, by reason of the history and character of its own legal institutions, must be, and remains, prone to seek in Anglo-American concepts and statements of the law of contracts analogies which it deems to be applicable to the law pertaining to treaties.[44] In his work entitled "Conclusions Derived from Treaty Cases Decided by the U.S. Supreme Court," [45] Lenoir states that treaties are also continually referred to as contracts and in some decisions have been compared with contracts in private law.

a. *Stipulations in favor of immediate parties.*—By a treaty, as under a contract, the contracting parties are bound by its stipulations and they must execute it in all its parts.[46] Concluding that treaties are clearly a source of "special" or "particular" law for the parties, Brierly states that there is more scope for the application of the maxim that "agreement is a law for those who make it" in international than there is in municipal law. His reason is that municipal law generally includes a great number of peremptory rules the application of which cannot be excluded by agreement between the parties, whereas in international law almost complete freedom of contract prevails.[47] According to Hyde, treaties are concluded because in the minds of the contracting parties their undertakings are to be performed, and because the right of non-performance is given up.[48] The basis for this is that there has been found to be a readiness on the part of states to acknowledge that an obligation of an essentially legal character, possessing the quality which the

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[43] 2 HYDE, INTERNATIONAL LAW 1370 (2d rev. ed., 1945).
[44] *Id.* at 1372.
[45] 7 MISS. L. J. 401 (1935).
[46] See *supra* note 6.
"Unless the parties to a consensual engagement intend to create moral obligations or to create obligations under some other legal system, the effect of consent given in accordance with the requirements of international law is to create rights and duties under international law between the parties." SCHWARZENBERGER, INTERNATIONAL LAW 447 (3rd ed., 1957).
[47] BRIERLY, LAW OF NATIONS 58 (5th ed., 1955).
[48] 2 HYDE, INTERNATIONAL LAW 1369 (2d rev. ed., 1945).

law familiarly attaches to contracts between individuals, should be deemed to be impressed upon public international agreements.[49]

In reciprocal obligations, the duty of one party to perform exists hand in hand with his right to demand performance by the other party. As in a contract in municipal law, whatever provisions are contained in the treaty in favor of the contracting states can be availed of by them separately. So far as concerns the immediate parties to a contract or a treaty, there is no dispute concerning their right to benefit from the stipulations made in their favor. Specific remedies exist for the enforcement of such rights both in municipal and international law.[50]

b. *Stipulations in favor of third states.*—While international treaties normally do not obligate third states,[51] there is general agreement among writers on international law that treaties may stipulate benefits in favor of third states.[52] In fact many recent and important treaties contain provisions in favor of third states.[53]

There is, however, the question concerning the effect of such stipulations. The problem boils down to whether (1) the third party is entitled to claim benefits directly, or such benefits have to be claimed through good offices of a state that is a party to the treaty; (2) the parties to the treaty may amend or abolish the stipulation by subsequent agreements, without the assent of the beneficiary; and (3) an act of acceptance by the third party is necessary in order to be vested with a right to the benefit stipulated.[54]

It is natural that in dealing with these questions the express provisions of the treaty should be looked into as deserving primary consideration.

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[49] *Id.*

[50] See Z. & F. Assets Realization Corp. v. Hull, 114 F. 2d 464 (D.C. Cir. 1940); Jurisdiction of the Courts of Danzig, PCIJ Advisory Opinion of March 3, 1928, ser. B., No. 15, 2 HUDSON, WORLD COURT REPORTS 236 (1935).

[51] Triska, The Soviet Law of Treaties, 53 AM. SOC. INT'L L. PROC. 294, 297 (1959).

However, in some cases treaties have an effect upon third states as when a treaty touches previous treaty rights of third states. For example, a commercial treaty conceding more favorable conditions than have hitherto been conceded by the parties thereto has an effect upon all such third states as have previously concluded commercial treaties containing the so-called *most-favored-nation* clause with one of the contracting parties. 1 OPPENHEIM, INTERNATIONAL LAW 926 (8th ed., Lauterpacht, 1955). Also *id.* at 928-929.

[52] Jimenez de Arechaga, Treaty Stipulations in Favor of Third States, 50 AM. J. INT'L L. 338, 340 (1956).

"According to the principle *pacta tertiis nec nocent nec prosunt*, a treaty concerns the contracting States only; neither rights nor duties, as a rule, arise under a treaty for third States which are not parties to the treaty. But in some cases treaties have indeed an effect upon third States. Such an effect is always produced when a treaty touches previous treaty rights of third States. Thus, for instance, a commercial treaty conceding more favourable conditions than hitherto have been conceded by the parties thereto has an effect upon all such third States as have previously concluded commercial treaties containing the so-called *most-favoured-nation clause* with one of the contracting parties." I OPPENHEIM, INTERNATIONAL LAW 925-926 (8th ed., Lauterpacht, 1955). Cf. 2 HYDE, INTERNATIONAL LAW 1466-1467 (2d rev. ed., 1945); SCHWARZENBERGER, INTERNATIONAL LAW 458 (3rd ed., 1957).

[53] Jimenez de Arechaga, Treaty Stipulations in Favor of Third States, 50 AM. J. INT'L L. 338 (1956). Also U.N. Charter, arts. 2(7), 32, 35, 50 and 81. Cf. BRIERLY, LAW OF NATIONS 252 (5th ed., 1955); JESSUP, MODERN LAW OF NATIONS 132-133 (1948). See *Supra* note 63.

[54] Jimenez de Arechaga, Treaty Stipulations in Favor of Third States, 50 AM. J. INT'L L. 338, 340 (1956).

This subject has been extensively treated in ROXBURGH, INTERNATIONAL CONVENTIONS AND THIRD STATES 36-71 (1917).

With respect to the first problem posed above, one writer has observed that international practice has recognized that a third party may claim directly rights stipulated in its favor.[55] The reasoning is that when there is the intention to avoid this effect it is necessary to stipulate in a different way, as in the case of the Versailles Peace Treaty.[56] The conclusion drawn from this is that unless a different method is provided for in the treaty itself, third parties must be regarded as having the necessary standing to assert a direct claim to the benefit.[57]

Concerning the second problem, one view is that if a treaty stipulates a right for third states and they make use of such a right, they acquire a legal right for themselves, so that the treaty could not be abrogated without their consent. In other words, having accepted a right which was offered to them, they could not be deprived of it against their will.[58] However, the same writer makes the qualification that

> There is no doubt that this line of argument would be correct, if the contracting parties really intended to offer such right to third States. But it may well be doubted whether such is always their intention. It may be said that, if the contracting parties had intended to do so, they would have embodied a stipulation in the treaty, according to which the third parties concerned could accede to it.[59]

Another writer observes that, even in those cases in which the stipulation may be revoked without the consent of the beneficiary, the third party has an undeniable right to its execution while it is still in force. Just as in municipal law, the individual citizen has rights in spite of the fact that the law can be amended or abolished by the law-maker without the consent of the subject of those rights.[60] As the basis for such view, the same writer gives the following observation:

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[55] Jimenez de Arechaga, Treaty Stipulations in Favor of Third States 50 AM. J. INT'L L. 338, 351 (1956).

[56] According to arts. 41 and 268(c) thereof, Germany undertook to grant certain benefits to Luxembourg "when a demand to that effect is made to her by the Principal Allied and Associated Powers." *Id.*

[57] *Id.*

"x x x It is clear that this possibility is hardly admissible in the case in point, seeing that the Conventon of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly, by the provisions. Nevertheless by reason of the objective nature of the settlement of the Aaland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it. This is all the more true owing to the fact that Sweden has always made use of it and it has never been called in question by the signatory Powers." The Aaland Islands Question, Report of the Committee of Jurists, League of Nations Off. J., Sp. Supp. No. 3, 18-19 (1920).

"This requirement of designation *ad nominem* of the beneficiary has, however, been left completely aside by modern doctrine and practice." Jimenez de Arechaga, Treaty Stipulations in Favor of Third States, 50 AM. J. INT'L L. 338, 356 (1956).

[58] I OPPENHEIM, INTERNATIONAL LAW 927-928 (8th ed., Lauterpacht, 1955).

[59] *Id.* at 680.

[60] See *supra* note 55 at 345.

> This brief survey of comparative law shows that stipulations "*in favorem tertii*" are now accepted in municipal law as confering irrevocable rights. They have thus become a principle of private law held in common by civilized states and therefore ripe for absorption into international law, according to Article 38(c) of the Court's Statute. This is, in our submission, the legal foundation of the validity and effects of treaty stipulations in favor of third states, some of which, as seen above, could not be explained by the rule "*pacta sunt servanda.*" [61]

It follows that until these provisions are duly replaced by others, every state interested in the stipulation in its favor has the right to insist upon compliance with them.[62]

The third problem is whether the act of acceptance by the third party is necessary in order to vest the latter with the right stipulated. As mentioned earlier, what should be primarily considered on this point are the provisions of the treaty itself. Fundamentally, if the treaty expressly provides for accession before any right can be vested in third states, the latter should accede to the treaty in the manner provided for in order to have the right vested in them. The other extreme assumes the posture of the stipulation as absolutely vesting the right stipulated in the third state without any act of acceptance, much less accession. In this case, the language of the treaty must clearly indicate that the contracting parties intended it to be so. The middle ground between these two extremes is that the stipulation merely constitutes an offer and until accepted may be withdrawn by the contracting parties for the reason that no right has yet been vested in the beneficiary.[63]

c. *Stipulations in favor of individuals.*—Treaty stipulations "*pour autri*" may benefit not only states but also individuals.[64] Special rights may be accorded individuals in foreign countries under a treaty between two or more states.[65] Contrary to the view that "the binding force of a treaty concerns the contracting state only, and not their subjects," [66] is that a treaty dealing with individual interests, as when it declares the rights and privileges which nationals of one contracting state shall enjoy in the territory of the other, will be construed as operating by its own force without auxil-

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[61] *Id.* at 348-349.

[62] The Aaland Islands Question, Report of the Committee of Jurists, League of Nations Off. J., Sp. Supp. No. 3, 19 (1920).

[63] See Convention respecting the Free Navigation of the Suez Maritime Canal, signed at Constantinople, Oct. 29, 1888, in English translation in The Suez Canal: A Selection of Documents relating to the International Status of the Suez Canal and the Position of the Suez Canal Company, 5 INT'L & COMP. L. Q. SP. SUPP. 48 (1956). See also the treaty between the United States and Great Britain to Facilitate the Construction of a Ship Canal (the Hay-Pauncefote Treaty"), signed at Washington, Nov. 18, 1901, 32 Stat. 1903, T.S. No. 401.

[64] See *supra* note 55 at 357.

[65] 1 OPPENHEIM, INTERNATIONAL LAW 637 (8th ed., Lauterpacht, 1955).

[66] "As International Law is primarily a law between States only and exclusively, treaties can normally have effect upon States only. This can, as has been pointed out by the Permanent Court of International Justice, be altered by the express or implied terms of the treaty, in which case its provisions become self-executory." *Id.* at 924.

iary legislative or execution action.[67] Such a treaty, operating *proprio vigore* so that rights thereunder are capable of enforcement in a judicial tribunal, will be restored to by the courts as the rule for decision for the cases pending before them under the treaty.[68]

The principle enunciated above, it is submitted, apply with equal force to nationals of both the contracting parties and third states.

Position of the Individual.—In considering the position of the individual relative to treaty rights, two possibilities present themselves. The first involves the situation where the treaty expressly provides for benefits in favor of the individual himself. This has been covered in the preceding discussion. The second situation is where the treaty does not so expressly provide for the same. The main problem with which this paper is concerned is the second situation. This is obvious from the tendency of the discussions so far made.

Can the individual claim benefits under the treaty where the latter does not expressly stipulate rights in his favor? Has he the capacity to seek the enforcement of his rights in the national courts without the intervention of his state?

Certainly, under the present posture of the law, generally speaking, the individual can not have recourse against his own state.[69] On the other hand, the state of which he is a national can waive whatever rights he has and thus deprive him of any remedy.[70]

The only possible recourse which the individual normally has is against the contracting party or parties other than his own state. But can he seek a remedy or enforce the benefit in the national courts of such contracting party or parties without any intervention on the part of his own state? Has he any standing to claim benefits under the treaty directly in the national courts of the contracting state or states other than the state of which he is a national?

In some jurisdictions, treaty law is considered automatically incorporated into municipal law, as discussed earlier, specially in the case of self-executing treaties.[71] Being part of municipal law, treaty law can be resorted to by national courts for a rule of decision

[67] See *supra* note 27.

[68] Jurisdiction of the Courts of Danzig, PCIJ Advisory Opinion of March 3, 1928, Ser. B, No. 15, 2 HUDSON, WORLD COURT REPORTS 236 (1935).

[69] But see European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, Nov. 4, 1950, Great Britain Treaty Series No. 71 (1953) art. 50 of which provides as follows: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequence of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

[70] MCNAIR, THE LAW OF TREATIES 336 (1938).

[71] See *supra* note 27.

in cases where a party claims rights under the treaty in question.[72] As one writer properly observes, the problem of the validity of treaties and their application by the courts of one of the contracting states arises mainly in connection with claims of private individuals affected by conventions.[73]

With the analogies between international law and municipal law noted above, it may not be asking too much to draw further support for this view from a reasoning by analogy. This relates to the incapacity of the individual to bring suit before international tribunals.[74] While realizing the weighty objections existing at present to the recognition of the right of the individuals to bring states before international tribunals independently of their consent, a well-known writer expresses the view that there is

> no decisive reason why individuals should not be able to exercise a right of this nature within the framework of such obligations of compulsory arbitral and judicial settlement as may be undertaken by States.[75]

The same writer stresses this point by observing further that

> when States subscribe to the obligations of the Optional Clause of the Statute of the International Court of Justice there is no intrinsic reason, save that of the traditional doctrine in the matter, why the reciprocal undertaking in question should not inure to the benefit of the nationals of the States concerned.[76]

In the light of this reasoning, it is submitted that by agreeing to a treaty granting certain benefits to their respective nationals, the contracting states have impliedly agreed, at least, by virtue of such treaty to make available to the nationals of each of them standing before their courts to seek a remedy to avail themselves of or to enforce such benefits. Moreover, by virtue of such treaty, the contracting states are understood to have waived their immunity

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[72] See *supra* note 68.

[73] Dihigo, Treaties as Law in National Courts: Latin America, 16 LA. L. REV. 734 (1956).

[74] "The traditional doctrine in the matter of subjects of international law has derived much support from the rule that only States have a *locus standi* before international tribunals. That rule has found terse expression in Article 34 of the Statute of the International Court of Justice, which lays down that 'Only States may be parties in cases before the Court.' x x x It is a provision defining the competence of the Court. It is not intended to be declaratory of any general principle of international law. No such principle prevents States, if they so wish, from securing to individuals and international public bodies access to international courts and tribunals." LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 48 (1950).

"Leaving aside the question of whether States are the only subjects of international law or whether individuals may also be such, there is no doubt that while some treaties are effective only as regards the contracting States, others do affect the interests of private persons. x x x Therefore, the result will be that generally the courts of a country will intervene when a citizen of that country establishes a claim under the terms of an international treaty. This does not preclude the possibility that the courts will also intervene on petition of a foreigner appearing before them." See *supra* note 73.

[75] LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 56 (1950).

[76] *Id.*

Lauterpacht is of the view that the nationals of said states can avail of the right of action in respect of the four categories of "legal" disputes enumerated in Article 36 of the Statute of the International Court of Justice. *Id.* at 58-60.

Cf. JESSUP, A MODERN LAW OF NATIONS 136-138 (1948).

to suit in this connection.[77] Questions may arise if the individual brings a suit invoking a treaty in the national courts of his own state against the other contracting state or states.[78] But with such standing consent to suit as embodied expressly or impliedly in the treaty, the contracting state is estopped from raising any technical objection on this ground when sued under the treaty in its own national courts or in those of the other contracting state by the national of the latter.[79]

IV. JURISPRUDENTIAL CONSIDERATIONS

A survey of cases on extradition provides a significant insight into the question whether the individual has capacity to claim rights under a treaty in the courts of a state. The choice of extradition cases in preference to other cases is intentional. The reason for this is that such cases involve an individual, most of the time without the intervention of his state, invoking certain rights under an extradition treaty in the courts of other states. In effect, these cases make available typical situations as appropriate materials for this study.

For the sake of convenience, these extradition cases can be generally classified into two groups. One group covers those cases where the individual failed to prevent extradition. The other group consists of those cases where the individual succeeded in preventing extradition. In the first, the application for extradition prospered while in the second, it failed. These two general groups are further classified according to more specific rationales.

A further classification of the first group consists of cases (1) where the challenged treaty of extradition was held valid and effective;[80] (2) where the offenses charged were within the scope of the treaty of extradition;[81] (3) where the evidence was considered sufficient to justify the commissioner in committing the accused for extradition;[82] (4) where the technical defects in the pleadings[83]

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[77] National City Bank v. Republic of China, 348 U.S. 356 (1955).

[78] See Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958). Also U.S. v. R. P. Oldham Co., 152 F Supp. 818 (N.D.Cal. 1957).

[79] Cf. Compania General de Tabacos v. Govt. of P.I., 45 Phil. 663, 665 (1924).

[80] Ivancenic v. Artukovic, 211 F. 2d 565 (9th Cir. 1954) cert. denied 348 U.S. 818 (1954); Argento v. Horn, 241 F. 2d 258 (6th Cir. 1957).

[81] Wright v. Henkel, 190 U.S. 40 (1903); Collins v. O'Niel, 214 U.S. 113 (1909); Collins v. Johnston, 237 U.S. 502 (1915); In re Wright, 123 F. 463 (S.D.N.Y. 1903); In re Dr. Paulo Deleuze (Brazil, Supreme Federal Tribunal, April 29 1922), (1919-1922) Ann. Dig. 265 (1932); In re Alarcon (Venezuela, Court of Federal Affairs and of Cassation, October 10, 1922), (1919-1922) Ann. Dig. 275 (1932); In re Jeanprost (Chile, Supreme Court, June 12 and August 20, 1923), (1923-1924) Ann. Dig. 276 (1933); Ex parte Stenger (Italy, Court of Cassation, September 3, 1951), (1951) I.L.R. 325.

[82] Ex parte Bryant, 167 U.S. 104 (1897); Grin v. Shine, 187 U.S. 181 (1902); Glucksman v. Henkel, 221 U.S. 508 (1911); Charlton v. Kelly, 229 U.S. 447 (1913); In re Reiner, 122 F. 109 (S.D.N.Y. 1903); Sternaman v. Peck, 80 F. 883 (2d Cir. 1897); In re Balensi, 120 F. 622 (S.D.N.Y. 1897); Ex parte Zentner, 188 F. 344 (D. Mass. 1919); Laubenheimer v. Factor, 61 F. 2d 626 (7th Cir. 1932); Cleugh v. Strakosch, 109 F. 2d 330 (9th Cir. 1940); U.S. ex rel.

or technical objections to the admissibility of evidence before the committing magistrate were given no favorable consideration;[84] (5) where matters of defense during the trial were not entertained by the committing magistrate;[85] (6) where the evidence before the commissioner failed to establish that the offenses for which extradition was sought were of a political character rather than for private gain;[86] and (7) where it was ruled that upon application for extradition, the accused being found within the territory of the state, the court, in passing upon his plea to jurisdiction, will not enter upon an inquiry as to whether he came to the country voluntarily or against his will,[87] and the committing magistrate was presumed to have done his duty and his determination was conclusive upon the courts that the offenses alleged constituted an extraditable offense.[88]

Within the second group are the following categories: (1) where the treaty of extradition was held inoperative in the case at bar;[89] (2) where the offenses for which extradition was sought were not within the scope of the extradition treaty;[90] (3) where the offense was not within the jurisdiction of either party to the treaty of extradition;[91] (4) where the accused was not prosecuted for the same offense for which he was extradited;[92] (5) where the warrant of arrest was issued without the preliminary examination required by the treaty of extradition;[93] (6) where the evidence was insufficient to establish a reasonable belief as to the accused's iden-

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Rauch, 269 F. 2d 681 (2d Cir. 1959); In re Extradition of D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959); In re Kawalek, 187 F. Supp. 861 (D.N.J. 1960); In re Peruzzo (Switzerland, Federal Tribunal, January 24, 1951), (1952) I.L.R. 369.

[83] Rice v. Ames, 180 U.S. 371 (1901); In re Rowe, 77 F. 161 (8th Cir. 1896); In re Neely, 103 F. 626 (S.D.N.Y. 1900) aff'd Neely v. Henkel, 180 U.S. 126 (1901); U.S. v. Greene, 146 F. 766 (S.D. Ga. 1906); Ex parte Dinehart, 188 F. 858 (S.D.N.Y. 1911); Powell v. U.S., 206 F. 400 (6th Cir. 1913); State v. Spiegel, 111 Iowa 701, 83 N.W. 722 (1900).

[84] Collins v. Loisel, 259 U.S. 309 (1922); Ex parte Yordi, 166 F. 921 (W.D. Tex. 1909) aff'd & *sub nom.* Yordi v. Nolte, 215 U.S. 227 (1909).

[85] Terlinden v. Ames, 184 U.S. 270 (1902); Hatfield v. Gusy, 87 F.2d 858 (1st Cir. 1937); President of the U.S. ex rel. Caputo v. Kelly, 96 F. 2d 787 (2d Cir. 1938).

[86] Gallina v. Fraser, 177 F. Supp. 856 (D. Conn. 1959); In re Fabijan (Germany, Supreme Court, March 9, 1933), (1933-1934) Ann. Dig. 360 (1940).

[87] In re Newman, 79 F. 622 (N.D. Cal. 1897).

[88] People ex rel. Stilwell v. Hanley, 240 N.Y. 455, 148 N.E. 634 (1925).

[89] In re Lo Dolce, 106 F. Supp. 455 (W.D.N.Y. 1952); In re Kraussman, 130 F. Supp. 926 (D. Conn. 1955).

[90] In re Korn (Germany, Supreme Court of the Reich [in Criminal Matters], March 25, 1935), (1935-1937) Ann. Dig. 350 (1941); U.S. v. Link and Green (Canada, Superior Court of Quebec, December 17, 1954), (1954) I.L.R. 284.

[91] Cohn v. Jones, 100 F. 639 (S.D. Iowa 1900); In re Taylor, 118 F. 196 (D. Mass. 1902).

[92] Cosgrove v. Winney, 174 U.S. 64 (1899); Johnson v. Browne, 205 U.S. 309 (1907); Greene v. U.S., 154 F. 401 (5th Cir. 1907) cert. denied 207 U.S. 596 (1907); U.S. v. Sobell, 142 F. Supp. 515 (S.D.N.Y. 1956) aff'd 244 F. 2d 520 (2d Cir. 1957) cert. denied 355 U.S. 873 (1957); Dominguez v. State, 90 Tex. Cr. R. 92, 234 S.W. 79 (1921); In re Millet (France Tribunal Correctional of Fontainebleu, January 13, 1937), (1938-1940) Ann. Dig. 400 (1942). An exception to this is found in the case of *Ex parte* Fischl, 57 Tex. Cr. R. 63, 100 S.W. 773 (1907) where the petitioner was extradited from Mexico under an indictment charging an extraditable offense, and thereafter the indictment was quashed in the demanding state, and the petitioner was not entitled to a reasonable time to return to Mexico before being called on to answer to a new indictment charging the same facts. Also *In re Tirptis* (Belgium, Court of Cassation, February 8, 1937), (1938-1940) Ann. Dig. 401 (1942) where the appellant had by waiving the formalities of extradition expressly consented to be tried for offenses other than those for which his extradition was granted.

[93] Pettit v. Walshe, 194 U.S. 205 (1904).

tity and as to the latter's guilt of the offenses charged;[94] (7) where the offenses charged were political in character and not extraditable under the treaty;[95] and (8) where a subsequent extradition was requested within such period as was allowed the accused under the treaty for leaving a country after trial or the demanding state was guilty of laches.[96]

An examination of the cases falling under the first group indicates that the individual's bid for release or discharge from custody in extradition proceedings did not prosper and the application for extradition was granted not because the individual did not have standing in court. In all such cases, the individual's personality to invoke the treaty of extradition concerned was practically assumed and recognized altogether.

To consider the cases under the second group only sustains the above view. Under the second group of cases here considered, the individual's standing was never questioned and his claim to benefits under the extradition treaties involved found favorable consideration by the courts.

It is significant to note that in most of the cases under both groups, the individual invoked treaty rights in the courts of states of which he was not a national. At any rate, it may be safely stated that, in the case of treaties in the category of extradition treaties generally, the individual's nationality is hardly relevant at all. Such view finds further support in a pronouncement made by the California Supreme Court that "an extradition treaty may be set up by persons having rights secured or recognized thereby as defense to criminal prosecution in disregard thereof." [97] In the aforecited case of *Coumas v. Superior Court*, the Court went further in saying that the extradition treaty between the United States and Greece is part of the supreme law of the land and is binding on state courts.[98]

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[94] In re Lucke, 20 F. Supp. 658 (N.D. Tex. 1937); In re Wise, 168 F. Supp. 366 (S.D. Tex. 1957); U.S. ex rel. Argento v. Jacobs, 176 F. Supp. 877 (N.D. Ohio 1959); Ex parte La Mantia, 206 F. 330 (S.D.N.Y. 1913); In re Frank, 107 F. 272 (D. Or. 1901); In re Rukavina (Italy. Court of Appeal of Rome (Chamber of Accusations, July 28, 1949) (1949) Ann. Dig. 273 (1955); In re Kiburz and Buchser (France, Cour de Cassation, July 10, 1952), (1952) I.L.R. 365; Re Van Lierde (Argentina, Camara Nacional Especial, April 1, 1954), (1959) I.L.R. 238; Waskerz v. Attorney-General (Israel, Supreme Court sitting as High Court of Justice, July 26, 1954), (1954) I.L.R. 236.

[95] Ramos v. Diaz, 179 F. Supp. 459 (S.D. Fla. 1959); Karadzole v. Artukovic, 247 F. 2d 198 (9th Cir. 1957); Gillars v. U.S., 182 F. 2d 962 (D.C. Cir. 1950); In re Pavelic and Kwaternik (Italy, Court of Appeal of Turin, November 23, 1934), (1933-1934) Ann. Dig. 372 (1940); Re Garcia Zepeda (Chile, Supreme Court, April 14, 1955), (1955) I.L.R. 528.

[96] U.S. ex rel. Donnelly v. Mulligan, 74 F. 2d 220 (2d Cir. 1934); In re Dawson, 101 F. 253 (D.N.Y. 1900); Ex parte Reed, 158 F. 891 (D.N.Y. 1908); In re Normano, 7 F. Supp. 329 (D. Mass. 1934); In re Mylonas, 187 F. Supp. 716 (S.D. Ala. 1960). However, the principle of specialty does not prevent prosecution once the person concerned has been at liberty for one month and has not left the country. Novic v. Public Prosecutor of the Canton of Basel-Stadt (Switzerland, Court of Cassation, October 27, 1955), (1955) I.L.R. 515.

[97] Coumas v. Superior Court, 192 P. 2d 449 (Cal. Sup. Ct. 1948).

[98] *Id.*

But extradition should not be used as a means for obtaining jurisdiction of the person of the accused for civil proceedings. Smith v. Govt. of Canal Zone, 249 F. 278-279 (5th Cir. 1918).

What then is the basis for the rule that the individual has no standing in court as held in certain cases? The recent case of *Pauling v. McElroy*[99] provides a typical illustration. In this case, American citizens, residents of Marshall Islands, and other non-resident aliens brought actions to enjoin the Commissioners of the Atomic Energy Commission and the Secretary of Defense from detonating nuclear weapons in Marshall Islands. The plaintiffs moved for preliminary injunctions, while the defendants moved to dismiss the complaints. The United States District Court for the District of Columbia held that the plainiffs failed to establish such an imminent threatened invasion of a legal interest of their own as to give them standing to sue with respect to a justiciable controversy within its jurisdiction. The reason given by the court for this is that the provisions of the United Nations Charter, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by the plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in the courts. As a consequence, the Court stated that the claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereigns concerned.[100]

Another aspect of the problem received consideration in the earlier case of *Edye v. Robertson*,[101] known popularly as The Head Money Cases. This was a suit brought to recover from Robertson the sum of money received by him, as collector of the port of New York, from the plaintiffs, on account of their landing in that port passengers from foreign ports, not citizens of the United States, at the rate of 50 cents for each of such passengers. The collection was made under the Act of Congress of August 3, 1882, entitled "An Act to Regulate Immigration." Realizing that the precise question involved was a supposed conflict between an Act of Congress imposing a customs duty, and a treaty with Russia on that subject, in force when the Act was passed, the United States Supreme Court said, *inter alia*, as follows:[102]

> But a treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnishes a rule of decision in such cases.

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[99] 164 F. Supp. 390 (D.D.C. 1958).

[100] *Id.* at 393.

The Court gave another reason in support of its holding as follows: "The Atomic Energy Act of 1954 does not conflict with the so-called human rights provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, or the international principle of freedom of the seas. In any event, if there were any such conflict, the Atomic Energy Act of 1954 being a part of the supreme law of the land under the Constitution and later enacted, would be paramount to any such conflicting provisions." *Id.*

[101] 112 U.S. 580 (1884).

[102] *Id.* at 598-599.

> The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are to be tried.
>
> But in this respect, so far as the provisions of a treaty can become the subject of judicial cognizance in the courts of the country, they are subject to such acts as congress may pass for their enforcement, modification, or repeal.

Along the same line was the ruling of the United States Supreme Court in *Whitney v. Robertson.*[103] It may also be noted that the same tendency has been shown in the ruling made in *Tag v. Rogers.*[104]

Under the Multilateral Convention for Protection of Industrial Property of June 2, 1934,[105] it has been held that the protection to a United States trade-mark owner against unfair competition and trademark infringement in Canada is secured only to the extent that Canadian law recognizes a treaty obligation as creating private rights or has made the convention operative by implementing legislation.[106] In *U.S. v. R. P. Oldham Co.*,[107] the Court ruled that even if the provision of the treaty of friendship, commerce and navigation between the United States and Japan were held to provide an exclusive remedy for anti-trust violations, the defendant importers charged with conspiracy in restraint of intestate and foreign commerce in Japanese wire nails would have no standing to invoke such a treaty. The Court proceeded to take into account that the defendants were American corporations and the treaty was not intended to exempt nationals from the enactment of their own country's laws. It is believed that a different result would have been reached if the parties invoking the rights under the treaty in question were Japanese nationals. The alien individual's right under the Treaty with Denmark of 1826 (8 Stat. 340) was upheld by the Court in *Nielsen v. Johnson.*[108] The treaty provided that no higher taxes shall be levied on personal property of citizens of respective countries on removal of the same from their territories or dominions reciprocally, either on the inheritance of such property or otherwise, than are payable on the same when removed by a citizen of such

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[103] In the Whitney Case, it was ruled that the Act of Congress under which duties on centrifugal and molasses sugars from San Domingo are collected authorized their exaction and was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the statute, the latter must control. 124 U.S. 190 (1888).

[104] 267 F. 2d 664 (D.C. Cir. 1959).

[105] 53 Stat. 1748.

[106] Vanity Fair Mills v. T. Eaton Co., 234 F. 2d 633 (2d Cir. 1956).

[107] 152 F. Supp. 818 (S.D. Cal. 1957).

[108] 279 U.S. 47 (1929).

Clark v. Allen, 331 U.S. 503 (1947), upheld the rights of the German heirs of "any person" holding realty in the United States under the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, and proclaimed October 14, 1925, 44 Stat. 2132. This was to the extent of the right to inherit under Article IV of the treaty, the rest having been abrogated.

state, respectively. The ruling of the Court is that the Code of Iowa of 1927 making the estate of a decedent passing to certain non-resident alien relatives subject to inheritance tax, making any estate of less than $15,000 passing to a parent, who is not a non-resident alien, tax free, and making the tax a lien on such estate until the tax is paid, was violative of the treaty.

Further to illustrate the point, the cases of *Skiriotes v. Florida* [109] and *Ker v. Illinois* [110] must be mentioned. In *Skiriotes v. Florida,* appellant Skiriotes was convicted of the use of diving equipment in the taking of sponges from the Gulf of Mexico off the coast of Florida in violation of a state statute.[111] In his attempt to quash the information, the appellant contended, among other things, that the Constitution of Florida fixing the boundary of the State and the statute under which he was prosecuted violated the Constitution and the treaties of the United States.[112] To support this contention, the appellant invoked several provisions of the Constitution of the United States [113] and also relied upon numerous treaties of the United States, including the Treaty with Spain of February 22, 1919, and the treaties with several countries, signed between 1924 and 1930, inclusive, for the prevention of smuggling of intoxicating liquors.[114] Finding appellant's contention unmeritorious and affirming the judgment of conviction, the United States Supreme Court, speaking through Mr. Chief Justice Hughes, found that the appellant was a citizen of Florida and of the United States, operating a Florida vessel. Consequently, the Court ruled that "certainly appellant has not shown himself entitled to any greater rights than those which a citizen of Florida possesses." [115] In disposing of appellant's reliance on the treaties invoked, the Court stated that "none of the treaties which appellant cites are applicable to his case," [116] and, therefore, he had no standing to invoke them.[117]

At this juncture, it should be noted that the Court, in ruling that the appellant had no standing to invoke those treaties, stated that "he is not in a position to invoke the rights of other governments or of the nationals of other countries." [118] If Skiriotes was not an American citizen but one of the "nationals of other countries" referred to by the Court, could he not have the requisite personality to invoke rights under those treaties? It seems there is a strong

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[109] 313 U.S. 69 (1941).
[110] 119 U.S. 436 (1886).
[111] See *supra* note 109 at 69-70.
[112] *Id.* at 71.
[113] Art. I, sec. 10, clauses 1 and 3, Art. II, sec. 2, clause 2, Art. VI, and amend. XIV.
[114] See *supra* note 109.
[115] *Id.* at 71-72.
[116] Id. at 74.
[117] *Id.* at 76.
[118] See *Supra* note 116.

indication, although negatively, of the individual's standing to avail himself of treaty rights in cases of this category as has also been observed in connection with *U. S. v. R. P. Oldham Co.*,[119] and *Clark v. Allen.*[120]

Still another facet of the question has been explored in *Ker v. Illinois.*[121] Ker was kidnapped in Peru and forcibly brought to the United States with no reference to an extradition treaty, though one existed, and without proceedings under the treaty. His contention was that by virtue of the treaty of extradition with Peru he acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the Courts of the United States in all cases.[122] This was the nature of his reliance on the treaty of extradition which he invoked in his defence. Holding that the facts in the case did not establish any right under the Constitution, or laws or treaties of the United States, the United States Supreme Court stated that

> "there is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware which says that a party fleeing from the United States to escape punishment for a crime becomes thereby entitled to an asylum in the country to which he fled." [123]

The Court added that "the absurdity of such a proposition would at once prevent the making of a treaty of that kind." [124] Obviously, such ruling cannot be taken as precluding the individual's power to invoke substantive rights under a treaty in an appropriate case. On the other hand, it is an indication of a tendency to recognize the individual's standing in court to assert his rights under the treaty invoked.

A careful examination of the above cases would indicate that, apart from the historical ground mentioned earlier,[125] there is no sound basis for the no-standing rule. In a vicious circle, such historical reason has given support to the traditional doctrine that only states are proper subjects of international law.[126] This historical doctrine can not prevent states, if they wish, from granting to indi-

[119] See *supra* note 107.
[120] See *supra* note 108.
[121] See *supra* note 110.
[122] *Id.* at 441.
[123] *Id.* at 442.
[124] *Id.*
[125] See *supra* note 74.
[126] *Id.*

viduals full personality before their courts to avail themselves of rights or benefits under a treaty.[127] This is especially so if account is taken of the opinion rendered by the Permanent Court of International Justice interpreting the Danzig-Polish Agreement of October 22, 1921.[128] The question submitted for opinion was whether the railway employees who had passed from the service of the Free City into the Polish service were entitled to bring action in respect of pecuniary claims, even if these claims were based on the Danzig-Polish Agreement of October 22, 1921 (Agreement concerning officials, *Beamtenabkommen*) or on the declaration made under Article I of this Agreement, which was accepted by the Polish Railways Administration. In sustaining the individuals' capacity to bring the actions in the national courts, the Permanent Court of International Justice expressed the opinion that

> It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the Contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such intention in the present case can be established by reference to the terms of the *Beamtenabkommen*.[129]

V. ENFORCEMENT OF RIGHTS UNDER A TREATY IN NATIONAL COURTS

Two procedural possibilities present themselves in the enforcement of treaty rights in national courts. The first is where it is the individual who brings the action against the state of which he is or is not a national but which is a party to the treaty being invoked. In other words, the individual is the plaintiff in the case. The second is where the action is instituted by the state which is a party to the treaty against the individual who is its own national or is a national of the other signatory state.

Individual as Party Plaintiff.—In the case where the individual is the plaintiff, the preliminary question of state immunity to suit comes to the foreground. The general principle that a sovereign state cannot be sued without its consent, either in its own courts or those of another state, is well established.[130]

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[127] See *id.*
[128] See *supra* note 68.
[129] *Id.*
[130] OPPENHEIM, INTERNATIONAL LAW 264-267 (8th ed., Lapterpacht, 1955).

The state concerned may, however, waive such immunity upon certain conditions.[131] Such waiver may take the express form of a special or standing consent to be sued.[132] It may be implied in a case where the state appears as the plaintiff.[133] This form of waiver applies more appropriately to the second procedural possibility under consideration.

At any rate, in the matter of treaty rights, it is the form of standing consent that properly applies more than any other of the above. Such waiver may be expressly or impliedly reduced from the provisions of the treaty itself.

Individual as Party Defendant.—Where the state is the plaintiff and the individual is the defendant in the case, the bringing of the action by the state constitutes an implied waiver of the state immunity to suit.[134] This procedural situation is only relevant in this paper so far as concerns the possibility of the individual as defendant asserting a counterclaim against the state which is a party plaintiff in the case. The reason for this observation is easily discernible from the posture of the question under treatment. As enunciated in *National City Bank v. Republic of China,*[135] it is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity. It is further noted in the same case that this is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its applications.[136]

Relevance of Individual's Nationality.—In either of these two procedural situations, is the individual's nationality relevant? Without touching on the substantive aspect of the problem, it is inescapable for practical purposes to limit whatever recourse may be had under the treaty to individuals having connection with the states parties to the treaty or with third states under certain conditions. That connection assumes conveniently the form of nationality.

For purposes of this paper, the answer to the numerous problems arising from the requirements of genuine link between the individual and the particular state will be assumed.[137]

Suffice it to say that, in instances where the subjects of the benefits are limited by the treaty itself to individuals linked with

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[131] "And if it so desires, the state may waive its immunity; this may be held to have done to a greater or less extent when it appears as a plaintiff in the courts of another state." Note and Comment, 29 MICH. L. REV. 894, 897 (1931).
[132] See *supra* note 79.
[133] See *supra* note 77.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 364
[137] See Nottebohm Case (Liechtenstein v. Guatemala), (1955) I.C.J. Rep. 4 (1955), I.L.R. 349.

a particular state or states, one requisite for invoking treaty rights in the national courts is nationality.[138] It would be entirely a different case where the benefits are expressly stipulated in favor of individuals indifferently of any state connection. In such case, nationality or any other link is immaterial.

VI. CONCLUSION AND RECOMMENDATIONS

Conclusion.—From the foregoing authorities, it may be gathered that a treaty is to be regarded as equivalent to an act of the legislature, whenever the treaty operates by itself, that is, self-executing without the aid of any legislative provision.[139] As such, a treaty may contain provisions prescribing a rule by which the rights of a private citizen or subject may be determined and thereby partake of the nature of a municipal law which is capable of enforcement as between private parties in the courts.[140] An example of this kind of treaty, in addition to those already cited and discussed, is the Pan American Trade-Mark Treaty of February 27, 1931 [141] which on ratification became part of the law, and no special legislation in the United States was necessary to make it effective.[142]

Under the present posture of the law, it may be deduced that the individual's standing in national courts to claim rights under self-executing treaties is conceded, if not expressly, at least impliedly. This is especially so in states where a treaty is considered as part of the supreme law of the land. Of course, this concerns the process of incorporating the treaty law into the municipal law of a state. Even in those cases where the individual's attempt at invoking treaty rights failed, there is a clear indication, although in a negative or indirect way, of the recognition accorded to the individual's standing in the national courts. As shown in those cases where the individual succeeded in obtaining relief or benefit under a treaty, there is in effect a positive acknowledgment of the individual's capacity to invoke rights or benefits under a treaty in the national courts. Any doubt on this point is cleared away by the opinion of the Permanent Court of International Justice concerning the Danzig-Polish Agreement of October 22, 1921.[143]

Recommendations.—The increased importance being given at present to the individual human being must be due to the great changes in human life and social organizations during the past cen-

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[138] *Id.*
[139] Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 10 (1936). See *supra* note 10.
[140] Z. & F. Assets Realization Corp. v. Hull, 114 F. 2d 464, 470-471 (D.C. Cir. 1940).
[141] 46 Stat. 2907.
[142] Bacardi Corp. v. Domenech, 311 U.S. 150, 161 (1940).
[143] See *supra* notes 128 and 129.

tury.[144] One result of this is the realization of the pressing demands of the individual for more security than in the past.[145]

A more receptive attitude of the states toward the personality of the individual before their courts can pave the way for rendering effective that security. To open the door of the courts in proper cases to the individual claiming rights under a treaty is one way of giving release to pent-up feelings, thereby easing tension in an already troubled world community. In this manner, greater confidence of alien individuals in the judicial system of other states may be fostered. Diplomatic channels can be relieved of much strain, thus enabling them to devote enough time and effort to the more pressing problems of world peace and security.

In the drafting of treaties intended to benefit the individual, directly or indirectly, efforts should be made at clarifying the individual's position relative thereto. His capacity to claim directly the benefits under such treaties should be made as clear as possible, especially his capacity to resort to the national courts of the signatory state or states of which he is or is not a national.

Such a step is likely to give rise to a number of difficulties. But these difficulties are worth the trouble if we are for a healthy development of the law and if an international legal order has to be fashioned and the same workable and effective for the benefit of mankind.

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[144] Eagleton, Some Questions as to the Place of the Individual in the International Law of the Future, 37 AM. J. INT'L L. 642 (1943).
[145] *Id.* at 644.