Nullity and Avoidance in Public International Law: A Preliminary Survey and A Theoretical Orientation

Hans W. Baade
Duke University

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the International Law Commons, and the Public Law and Legal Theory Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol39/iss3/5
In his usually quite delightful diplomatic memoirs, Daniele Varè has one macabre story to tell. The time is November, 1920, and the setting is the League of Nations at Geneva. The Fifth Committee of the League Assembly has before it an application of Armenia for League membership. Mr. Varè's diary records the following impressions of a plenary committee meeting on this subject:

As usual, everyone sheds tears over the sad fate of Armenia, but the only ones who declare themselves willing to rally round to her help are the representatives of the small states who have no armies or navies to offer. They show themselves most generous at other people's expense and tell us that we will be eternally disgraced if Armenia is not saved from the Russians and the Turks. How easy it is to spout moral platitudes when you assume no responsibility.¹

This state of affairs prompts Paul Mantoux, then the Chief of the Political Section of the League, to compose a mock draft resolution which he thinks is the only thing the League could do for the Armenians without the support of the Great Powers. That classic document reads:

Article I. No massacre of Armenians shall take place without the Council of the League being notified one month in advance.

Article II. If the massacre should include women and children, the notification to the Council of the League shall be given two months in advance.

Article III. Any massacre of Armenians which takes place without these formalities being observed shall be considered as

* This is a greatly expanded version of a paper presented on March 14, 1964, at a Regional Meeting of the American Society of International Law held at the Syracuse University College of Law. This article, in turn, is to be the nucleus of a monograph entitled NULLITY AND AVOIDANCE IN PUBLIC INTERNATIONAL LAW, to be published by the Syracuse University Press, with whose permission it appears here. The assistance of the Duke University Committee on International Relations in this connection is gratefully acknowledged.

† Professor of Law, Duke University.

¹ VARÈ, LAUGHING DIPLOMAT 188 (1938); see also id. at 177-79.
null and void (null et non avenu).

Of course, such a senseless and cruel resolution was neither introduced nor adopted. But the fact that it was conceived, even in jest, should point up two basic propositions about the subject of this paper. The first is that the “nullity” and “avoidance” are terms of art signifying legal consequences, not physical facts. Murder is a felony, but this does not bring the victim back to life. Still, for inheritance purposes, the parricide might be treated as if his ancestor were still alive. The second proposition is that “nullity” and “avoidance” are teleologically conditioned. They refer to intended consequences, not to any consequences. The hapless bigamist attempts a second marriage quite unsuccessfully, but he is nevertheless eminently successful in committing bigamy by the same act.

The advisory opinion of the Permanent Court of International Justice in the Interpretation of the Statute of the Memel Territory case may serve as a further illustration of this second proposition. The Allied Powers had ceded the Memel Territory to Lithuania, at the same time exacting certain specific treaty commitments to safeguard the autonomous administration of the territory. The President of the Territory’s Directorate had been dismissed by the Lithuanian governor because he had engaged in negotiations with a foreign power, thereby (in the opinion of Lithuania) jeopardizing public interests. The Allied Powers disputed the legality of this dismissal. The Statute of the Memel Territory contained no express provisions dealing with ultra vires acts of the Territory’s executive authorities. The Allied Powers advanced the ingenious argument that such provisions were omitted because they were unnecessary, since ultra vires acts of the Memel authorities could simply be ignored and treated as null et non avenu. Consequently, the Allied Powers earn-

2. Id. at 179.
3. See Petrogardsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 28, 170 N.E. 479, 481 (1930) (Cardozo, C.J.): “Exhibitions of power may be followed or attended by physical changes, legal or illegal. These we do not ignore, however lawless in origin, in any survey of the legal scene. They are the source at times of new rights and liabilities. Ex facto jus oritur. Exhibitions of power may couple the physical change with declarations of the jural consequences. These last we ignore, if the consequences, apart from the declaration, do not follow from the change itself. . . .”
4. This is only true, however, if there is a legal rule (either statutory or decisional) to this effect. See, e.g., In re Duncan’s Estate, 40 Wash.2d 850, 246 P.2d 445 (1952), in effect overruled by Wash. Rev. Code Ann. §§ 11.84.020–030 (1963).
5. In some civil law jurisdictions, a judicial declaration of nullity is required before the second marriage is effaced. See text at note 169 infra.
7. This is a French term of art which the court uses both in the French original and in the English translation of its opinion.
estly contended, Lithuania's only "remedy" against ultra vires acts of
Territorial authorities was simply to ignore these acts. In rejecting this
argument, the Permanent Court observed, with seemingly compelling
logic: "It is not difficult to imagine cases in which it would be no suf-
ficient protection to the Lithuanian Government to treat the act com-
plained of as non avenu."

A more recent illustration is offered by the reaction of the Federal
Republic of Germany to the recognition of the German Democratic Re-
public by third states. Since the Federal Republic does not recognize the
legal existence of a separate state or government in East Germany, it
might be argued that the recognition of the East German state or its gov-
ernment by other states (e.g., Yugoslavia) should be disregarded by the
Federal Republic because it is a legally impossible, and therefore a futile,
act. But as is well known, the Federal Republic takes a totally different
position. It resorts to stringent reactions against states that recognize
East Germany, asserting that such recognition is an interference in in-
ternal German affairs, an attempt to deny the German people's right to
self-determination, and hence—whatever its theoretical validity—an un-
friendly act against the Federal Republic of Germany.

It is not the purpose of the present study to discuss what may be
termed the collateral consequences of void or voidable acts under public
international law. Rather, the concern is with the more basic research
for rules that determine invalidity or permit avoidance. Having the
second proposition in mind, i.e., that "nullity" and "avoidance" are teleo-
logically conditioned, the concern is more specifically with public inter-
national legal rules that vitiate the intended consequences of acts attribut-
able to one or more sovereign states or international organizations de-
dsigned to create, modify, or abolish rights or obligations arising under
public international law.

This limitation is substantially more drastic than might be perceived
at first sight. First of all, rules of internal law that vitiate, so far as in-
ternal law is concerned, a treaty or a customary rule of international law,
i.e., the Bricker Amendment type of problem, are omitted from considera-
tion. Likewise, little attention is given to the preconditions stipulated by
internal law for the attribution of acts potentially giving rise to interna-
tional obligations to a sovereign state, and to the thorny question of the
effect, under international law, of constitutional or other restrictions up-

8. Id. at 26.
9. See Baade, Some Legal Issues Surrounding the Berlin Problem, in THE BERLIN
10. For a recent discussion of the notion of legal acts or transactions as here used,
see Suy, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 1-46
(1962).
on the treaty making power.\textsuperscript{11} Finally, the presently acute question of whether there is a rule of public international law that declares executive, legislative or judicial acts attributable to a sovereign state and \textit{not} intended to give rise to international rights or obligations to be void or voidable under the law of the actor state if "contrary" to international law will only be incidentally discussed.\textsuperscript{12} Such a stringent delimitation of the problem here treated is dictated not only by considerations of space and time, but also by the hope that, by concentrating on the core of the problem of nullity and avoidance in public international law, additional insights may be gained that take us beyond the arid disputations between "monists" and "dualists," between realists and natural lawyers.

II. Some Illustrative Cases

Students of international law will generally search in vain for references to "nullity," "avoidance" or "validity" in the indices of standard textbooks, digests and collections of judicial decisions and arbitral awards. Some of the more comprehensive treatises contain discussions of the validity of treaties and on the nullity of arbitral awards;\textsuperscript{13} and there is a good bit of periodical and monographic literature on these two areas, but very little in the English language.\textsuperscript{14} In fact, it appears that a 1935 article by Professor Verzijl and Professor Guggenheim's 1949 Hague lectures are the only comprehensive discussions of the subject to date; both are in French.\textsuperscript{15}

As for judicial decisions and state practice, the record is meager, though not bare. Since there is some reason to doubt the present authority of pre-World War I cases, especially those involving Latin American states as defendants,\textsuperscript{16} the discussion will be limited roughly to the last

\textsuperscript{11} Recent studies of these two problems are Deener, \textit{Treaties, Constitutions and Judicial Review}, 4 \textit{Va. J. Int'l L.} 7 (1964), and Geck, \textit{Die Völkerrechtlichen Wirkungen Verfassungswidriger Verträge} (1963).

\textsuperscript{12} Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), especially at 421, n.21. The author's position, which is in agreement with the Supreme Court's conclusions, is stated more fully in Baade, \textit{Indonesian Nationalisation Measures Before Foreign Courts—A Reply}, 54 \textit{Am. J. Int'l L.} 801 (1960), and Baade, \textit{The Validity of Foreign Confiscations: An Addendum}, 56 id. 504 (1962). See also text at notes 69-74 infra.

\textsuperscript{13} See 2 Dahm, \textit{Völkerrecht} 557-60 (1961); 3 id. at 32-42.

\textsuperscript{14} Notable exceptions are McNaip, \textit{The Law of Treaties} 206-36 (2d ed. 1961), and Carlston, \textit{The Process of International Arbitration} 63-258 (1946). See also Briefly, \textit{The Hague Conventions and the Nullity of Arbitral Awards}, 9 Brit. Y.B. Int'l L. 114 (1928); H. Lauterpacht, \textit{The Legal Remedy in Case of Excess of Jurisdiction}, id. at 117.

\textsuperscript{15} Verzijl, \textit{La validité et la nullité des actes juridiques internationaux}, 15 Revue de droit international (La Pradelle) 184 (1935); Guggenheim, \textit{La validité et la nullité des actes juridiques internationaux}, 74 Académie de droit international, Recueil des Cours 191 (1949-1). See also 1 Wengler, \textit{Völkerrecht} 555-76 (1964).

\textsuperscript{16} See, e.g., Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), [1960] I.C.J. Rep. 192, 221 (Holguín, J.
four decades. The following is a short survey of instances in which nullity and avoidance under international law were invoked successfully or unsuccessfully during that period of time. This survey is intended to be illustrative rather than exhaustive, although it is believed that, with the exception of enemy occupation problems which were deliberately excluded,¹⁷ not many significant cases have been overlooked.

A. The Eastern Greenland Case

Late in June, 1931, some Norwegian hunters hoisted the Norwegian flag in Mackenzie Bay in Eastern Greenland and announced that they had occupied Eastern Greenland in the name of the King of Norway. In spite of its original reaction that this was "an entirely private act," the Norwegian government some two weeks later issued a proclamation officially confirming the occupation of Eastern Greenland, and purporting to place it under Norwegian sovereignty. Two days after receiving notice of this proclamation, Denmark instituted proceedings against Norway before the Permanent Court of International Justice, seeking a judgment to the effect that "the promulgation of the declaration of occupation . . . and any steps taken in this connection by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid." Norway, in turn, requested the court to adjudge that Denmark did not have sovereignty over the portion of Greenland occupied by Norway, and that Norway had acquired sovereignty over such portion.¹⁸

Denmark contended that the area occupied by Norway was at the time of the occupation subject to Danish sovereignty, and that Norway

¹⁷. As to international law rules applicable during the occupation, see von Glahn, THE OCCUPATION OF ENEMY TERRITORY, A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION, passim (1957); Greenspan, THE MODERN LAW OF LAND WARFARE 209-77 (1959). The problem of the validity of enactments, administrative acts and judicial decisions stemming from the occupying power is invariably resolved by legislation of the occupied country enacted after the occupation. Such legislation can confirm the validity of internationally illegal acts of the occupant just as it can retroactively annul perfectly legitimate acts of the occupation authorities. Since in the absence of relevant clauses in peace treaties international law imposes few restraints in this regard, the question of the validity of actions taken under the authority of the occupying power is ultimately left to the internal law of the occupied state after the termination of the occupation. Cf. text at notes 35-38, 65-66, 186 infra.

had by treaty or otherwise recognized Danish sovereignty over all of Greenland and could not now dispute it. On the first contention, the court found that on the critical date, i.e., the promulgation date of the Norwegian proclamation, Denmark possessed a valid title to the sovereignty over all of Greenland. It accordingly held that the occupation of Eastern Greenland by Norway, and any steps taken in that connection, were "illegal and invalid." The court nevertheless proceeded to consider Denmark's second contention and found that, as a result of its undertaking contained in the famous Ihlen Declaration, Norway was "under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland."

The Permanent Court of International Justice would rather clearly appear to have held in the *Legal Status of Eastern Greenland* case that the acquisition of title through occupation is possible only with respect to *terra nullius*, and that acts purporting to establish title to territory through occupation are not merely illegal but also void where the territory to which they relate is subject to the sovereignty of another state. As the court did in fact find that Denmark was the territorial sovereign of all of Greenland, it was unnecessary to decide the quite different question whether an occupation of *terra nullius* in violation of treaty obligations is merely illegal or also void. This question is discussed in the dissenting opinion of Judge Anzilotti, which contains a particularly lucid discussion of nullity and avoidance in public international law.

Judge Anzilotti did not share the majority's view that Denmark was the territorial sovereign of Eastern Greenland at the critical date. However, he considered the Ihlen Declaration to be a binding obligation upon Norway. This led him to conclude:

As the Norwegian occupation was effected in violation of an undertaking validly assumed, it constitutes a violation of the existing legal situation, and it is therefore unlawful: within those limits the Court should, therefore, have acceded to the Danish Government's submission.

On the other hand, regarding the question from the stand-

19. Id. at 64.
21. Id. at 73.
22. Id. at 76, 86-92.
NULLITY AND AVOIDANCE

point that I have taken . . . the Court could not have declared the occupation invalid, if the term "invalid" signifies "null and void." A legal act is only non-existent if it lacks certain elements which are essential to its existence. Such would be the occupation of territory belonging to another State, because the status of a terra nullius is an essential factor to enable the occupation to serve as a means of acquiring territorial sovereignty. But this does not hold good in the case of the occupation of a terra nullius by a sovereign State in conformity with international law, merely because the occupying State had undertaken not to occupy it. Accordingly, it would have been for the Norwegian Government to revoke the occupation unlawfully carried out, without prejudice to the Danish Government's right to apply to the Court, as reparation for the unlawful act, to place this obligation on record.23

Finally, Judge Anzilotti would have rejected Norway's request for a judgment declaring that it had acquired sovereignty over Eastern Greenland, "for an unlawful act cannot serve as the basis of an action at law."24

B. Nullification of the "New Order": The Anschluss, the Munich Agreement, and the Vienna Awards

A large number of territorial changes were effected by the Axis powers in Eastern and Southeastern Europe between 1938 and 1945.25 Most of these changes occurred during belligerency and were subsequently treated as ineffective because, as the Nürnberg Tribunal held, conquest does not confer valid title to territory so long as the allies of the conquered state are still fighting to restore its territorial integrity.26 However, six or possibly seven territorial changes, while definitely fitting into the larger framework of the Axis "New Order," were effected without actual belligerency. Two of these—the cession of the Memel Territory by Lithuania to Germany by treaty of March 22, 1939,27 and the more doubtful case of the incorporation of the Free City of Danzig into Ger-

23. Id. at 94-95. The first sentence of the second paragraph here quoted reads in the French original: "Par contre au point de vue auquel je me place . . . , la Cour n'aurait pas pu déclarer l'occupation non valable si par "non valable" on entend 'nulle et non avenu' ou 'incassante.'" (Emphasis added.) The official English translation lumps the two terms here italicized together under "null and void."

24. Id. at 95.

25. For a discussion of these changes and of their influence on the internal legal systems of the areas affected, see Baade, Die Privatrechtsgeographie Ost- und Südosteuropas seit 1933, 7 JAHREBUCH FÜR INTERNATIONALES RECHT 315, 315-30 (1958).


27. [1939] 2 REICHSGESETZBLATT 608 (Ger.).
many on September 1, 1939—need not concern us here. The remaining four nonbelligerent territorial changes under Axis rule in Central and Southeastern Europe were nullified by the Allies.

1. Austria. Austria was incorporated into Germany in March, 1938, in violation of existing treaty obligations and arguably also through an aggressive act proscribed by international law. However, the incorporation was complete and effective; it gained a substantial amount of recognition by third states before the outbreak of the Second World War. On the strength of evidence now available, it seems reasonable to assume that Austria's incorporation into Germany was recognized de jure by the United States. No Austrian government went into exile, nor was one established after the outbreak of the war. Nevertheless, in their Declaration on Austria of November 1, 1943, the British, Soviet and United States governments announced that "they regard the annexation imposed upon Austria by Germany on March 15th [sic], 1938, as null and void." The three Allied Powers further declared that they did not consider themselves bound by any changes effected in Austria since that date, and that they wished to see free and independent Austria re-established.

28. Law of Sept. 1, 1939, [1939] 1 REICHSGESETZBLATT 1547 (Ger.). For discussions of the fate of the Free City from what might here be called the Danzig, Polish and German points of view, see Böttcher, Die völkerrechtliche Lage der Freien Stadt Danzig seit 1945 (1958); Skubiszewski, Book Review (of Böttcher), 9 JAHRBUCH FÜR INTERNATIONALES RECHT 396 (1961); and Stritzel, Die rechtliche Bedeutung der Eingliederung der Freien Stadt Danzig in das Deutsche Reich im Jahre 1939 (mimeographed dissertation, Kiel 1959), respectively.

29. They are presently submerged in the larger question as to Germany's Eastern borders, which in turn is, of course, overshadowed by the still larger question of the legal status of Germany. See Baade, supra note 9 and sources cited therein. One transfer of territory under the shadow of the Axis, the cession of the Southern Dobruja by Romania to Bulgaria through the Treaty of Craiova of Sept. 7, 1940, miraculously remained in effect after the end of the war. See Nicoloff, Die Dobrudschafrage vor und nach der Regelung von Craiova, 7 ZEITSCHRIFT FÜR OSTEUROPAISCHES RECHT 442 (1941). Article 1 of the Treaty of Peace With Bulgaria, Feb. 10, 1947, 61 Stat. 1953, provides that "The frontiers of Bulgaria . . . shall be those which existed on January 1, 1941." Thus, Bulgaria kept the Southern Dobruja.

30. "The Government of the United States recognizes that Austria has ceased to exist as an independent sovereign state and has been incorporated into the German Reich, and that Germany exercises de jure sovereignty over the territory of the former Republic of Austria." Letter From Secretary of State Cordell Hull to the Attorney General of the United States, May 27, 1939, quoted in a Memorandum of Assistant Legal Adviser Ralph S. Hill, March 2, 1942, 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW 328 (1963). The contrary conclusion is reached in a brief memorandum of Judge Hackworth (the then Legal Adviser) of June 3, 1942, id. at 329. This memorandum, which curiously enough seems to ignore the above quoted letter of the Secretary of State, could not unreasonably be regarded as a politically motivated ex post attempt to rectify history.

31. In November, 1943, a former Austrian cabinet minister approached the State Department, seeking recognition as the representative of the Austrian State. For various reasons, most of them political, such recognition was not accorded. 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW 330-31 (1963).

32. Reprinted in A DECADE OF AMERICAN FOREIGN POLICY. BASIC DOCUMENTS, 1941-49, at 11 (1950). For the historical origins of this formula, see note 68 infra and accompanying text.
NULLITY AND AVOIDANCE

Much has been written on the international legal status of Austria between 1938 and 1955. To take but two examples: One author (a political scientist) heartily approves of the nullification of Austria’s annexation. In his opinion, the question of the legality of the Anschluss has a deep significance to the international community, for “to say that the Anschluss was illegal but that the result of it was valid is to imply that international law did not supply a remedy for the wrong committed.”

Another commentator (a lawyer), on the other hand, bemoans the burdens that the fiction of the retroactive restoration of Austria places upon individual Austrians. “To demand that the Austrian of 1939 act at his peril as if Austria still existed is to ignore reality.”

As for the Austrians themselves, they would appear to have dealt quite effectively with their situation after the collapse of German authority. The Proclamation on the Independence of Austria of April 27, 1945, specifically declared that the Anschluss is “null and void.” But it prudently went on to provide that military, civil and personal loyalty obligations towards German authorities terminated, and corresponding obligations toward Austria were re-established, as of the date of the proclamation. In a similar vein, the Constitutional Act of May 1, 1945, on the Reestablishment of Austria’s Legal Order, repeals all laws enacted after March 13, 1938, that are incompatible with Austrian independence, democracy or public policy, or incorporate typical Nazi ideology; but it also declares that all other laws enacted since that time are “temporarily put into effect.”

As regards the most important enactment, this “temporary” state has continued up to the present so that the Austrians have enjoyed the best of two worlds. On the one side, they have escaped the stigma of Axis membership, all but retroactively joining the Allied cause. On the other, they continue to enjoy the benefits of German legislation, especially of the Marriage Law of 1938, and more specifically its pro-


34. S. L. Cohn, Ex Injuria Jus Non Oritur: A Principle Misapplied, 3 STA. CLARA LAW. 23, 41 (1962).


36. Rechts-Ueberleitungsgesetz §§ 1-2, [1945] STAATSGESETZBLATT No. 6, id. at 24-25. For a similar enactment in France after the fall of the Vichy regime, see note 186 infra.

37. Ehegesetz, July 6, 1938, [1938] 1 REICHSGESETZBLATT 807 (Ger.). Since the Austrian Civil Code of 1811 remained in effect, this statute contains some special provisions regarding Austria, id. §§ 99-128. This law, repealed in Germany by the Allied Control Council, is (with the exception of its racial clauses) still in effect in Austria today. It would be quite impossible to enact the provisions of this law dealing with divorce in Austria at the present; but it is likewise quite impossible to repeal them. Thus, “Red” and “Black” alike are presented with a fait accompli in an area which otherwise would present one of the hottest and most divisive political issues.
visions authorizing divorce.  

2. The Sudetenland. On September 29, 1938, Germany, Italy, Great Britain and France (the latter two acting with the prior authorization of Czechoslovakia) concluded the so-called Munich Agreement, which implemented the cession of the Sudeten German area by Czechoslovakia one day later, and was carried out by November 21, 1938. It seems beyond dispute that Czechoslovakia's consent was obtained only because the survival of the state itself was at issue: Germany was ready to invade and the Western Allies were unwilling to help unless Czechoslovakia agreed to the cession. Furthermore, the provisions of the Czechoslovak constitution dealing with the conclusion of treaties and the cession of territory were not complied with. Nevertheless, it seems difficult to maintain that the Munich Agreement and the transfer of the Sudetenland, then assumed to bring "peace for our time," were regarded as invalid in 1938.

In March, 1939, Germany occupied Bohemia and Moravia. The Czech parts of Czechoslovakia were placed under a so-called German "protectorate" and Slovakia was set up as an independent state under German protection. While there were violent protests by the Allied Powers, and while Slovakia failed to win general recognition as an independent state, no Czechoslovak government in exile was organized until after the outbreak of the Second World War. And while the occupation and dismemberment of Czechoslovakia was clearly a flagrant breach of the Munich settlement, neither France nor Great Britain saw fit to question, before September, 1939, the validity or finality of the territorial settlement agreed upon at Munich.

This attitude changed drastically during the course of the war. A Czechoslovak National Council was organized in exile and soon gained recognition by the Allied powers. On September 30, 1940, Prime Minister Churchill stated in a broadcast to the Czechoslovak people that Ger-

38. Ibid.
39. For a chronological documentation, see Royal Institute of International Affairs, 2 Documents on International Affairs 1938, at 189 et seq. (Curtis ed. 1943).
40. See generally Taborsky, "Munich," the Vienna Arbitration and International Law, Czechoslovak Yearbook of International Law 20, 22-25 (1942).
41. Id. at 26. For a somewhat surprisingly sharp rejection of the thesis that this deficiency vitiated Czechoslovakia's acceptance of the Munich Agreement, see Marek, Identity and Continuity of States in Public International Law 309-11 (1954).
42. For historical background, see Gilbert & Gott, The Appeasers, passim & 113-84 (1963).
43. For discussion of the legal nature of this protectorate, see Marek, op. cit. supra note 41, at 292-303, and Klein, Die staats- und völkerrechtliche Stellung des Protektorats Böhmen und Mähren, 31 Archiv des öffentlichen Rechts (n.s.) 255 (1940).
44. See Marek, op. cit. supra note 41, at 290-91. Still, a number of important powers did at one time extend recognition to Slovakia. See Langer, Seizure of Territory, The Sykes-Picot Doctrine and Related Principles in Legal Theory and Diplomatic Practice 233 (1947).
many had "destroyed" the arrangements made at Munich. And on
August 5, 1942, the British Foreign Secretary stated in a note to the
Czechoslovak Minister for Foreign Affairs that,

... as Germany has deliberately destroyed the arrangements
concerning Czechoslovakia, reached in 1938, in which His Maj-
esty's Government in the United Kingdom participated, His
Majesty's Government regard themselves as free from any en-
gagements in this respect. At the final settlement of Czecho-
slovakia's frontiers to be reached at the end of the war, they will
not be influenced by any changes effected in and since 1938.45

While the British government thus apparently merely undertook to
free itself of its commitments assumed at Munich in view of the other
party's breach of the same agreement, the French government-in-exile
was even more emphatic in its repudiation of the Munich settlement. On
September 29, 1942, the then Chairman of the French National Com-
mittee, General de Gaulle, issued a declaration: "The French National
Committee, rejecting the agreements signed in Munich on September 29,
1938, solemnly declare that they consider these agreements null and void
as also all acts accomplished in the application or in consequence of these
same agreements."46 On August 22, 1944, the Provisional Government
of the French Republic and the Czechoslovak Government issued a joint
statement, "again declaring that they consider the Munich Treaty with
all its consequences as null and void."47

At the end of the war, Czechoslovakia was re-established within its
pre-Munich boundaries.48 Although there is, of course, as yet no peace
treaty between Germany and Czechoslovakia, it is now clear that the Fed-
eral Republic of Germany does not assert title to any territory that was
not German on December 31, 1937. Thus, the "annulment" of the Mun-
ich Agreement would appear to have been generally recognized. There
is, however, substantial disagreement as to whether the Munich settle-
ment was destroyed ex tunc or merely ex nunc.49 The latter would appear
to be the better view.50 If so, the repudiation of Munich by the Western
Allies is not a case of declaration of nullity or avoidance, but merely that
of the repudiation of an international agreement by one side in view of

45. Quoted in id. at 237. For a brief contemporary analysis, see Pergler, The Mu-

46. Quoted id. at 310; see also LANGER, op. cit. supra note 44, at 238.
47. Quoted id. at 240.
48. Id. at 244; see generally id. at 207-44, and MAREK, op. cit. supra note 41, at 283-
330.
49. Compare id. at 320-22 and Pergler, supra note 45, with Taborsky, supra note 40,
at 38.
50. This is also the opinion of Guggenheim, supra note 15, at 240-42.
its breach by the other. Still, there remains a curious difficulty: It seems reasonably well established that the repudiation of an agreement because of changed circumstances or because of breach by the other party will not affect the validity of frontier settlements. Thus, it might be thought, the *in rem* effect of the Munich settlement should have survived the repudiation of the agreement itself. Still, in 1945 the victors had the power to establish new territorial settlements, and perhaps the best legal explanation of the re-establishment of the pre-Munich German-Czechoslovak frontier is that this is a territorial settlement imposed by the Allies on Germany in anticipation of the eventual conclusion of a peace treaty.

3. The First Vienna Award. The Munich Agreement had provided that the problem of the Polish and Hungarian minorities in Czechoslovakia, if not settled within three months by agreement between the respective governments, was to be the subject of another Four Power Conference. Through direct negotiations, Hungary and Czechoslovakia agreed to submit the dispute between them as to the revision of their frontiers along ethnic lines to the joint arbitration of Germany and Italy. An award was rendered by the German and Italian Foreign Ministers, Ribbentrop and Count Ciano, at Vienna on November 2, 1938. This award, which accorded to Hungary substantial portions of Slovakia and of the Carpatho-Ukraine, was accepted by the parties and duly executed.

It seems rather hard to find any fault with this award on traditional grounds. Nevertheless, Czechoslovakia was, of course, acting under pressure (although not primarily from Hungary), and Czechoslovak constitutional provisions regarding the conclusion of treaties and the cession of territory were again not complied with. Furthermore, it has been maintained that the award of November 2, 1938, although not incorporated into the Munich Agreement itself, is still part and parcel of the Munich settlement and therefore shares its legal fate.

The First Vienna Award was annulled, along with the Second Vienna Award, by the armistice with Hungary; this action was confirmed by the Hungarian peace treaty of 1947. These two agreements will be discussed below, in connection with the Second Award.

4. The Second Vienna Award. Hungary, the real loser of the

---

53. English translation in Royal Institute of International Affairs, *op. cit.* supra note 39, at 315.
55. See notes 60 & 61 infra.
First World War in terms of territory, had to cede all of Transylvania and portions of Eastern Hungary to Romania by the Treaty of Trianon.\(^56\) This loss of territory was felt by Hungary to be particularly unjust, and the existence of a large minority of ethnic Hungarians in Romania had given rise to serious conflicts between Hungary and Romania.\(^57\) The latter managed to resist Hungarian irredentist pressure until 1940, when French and British influence ceased to be a factor in Southeastern Europe. In August, 1940, in reaction to strong pressures on the part of the Axis Powers, Hungary and Romania agreed to submit the question of the delimitation of their mutual boundaries along ethnic lines to joint arbitration by the German and Italian governments. An arbitral award rendered by Ribbentrop and Ciano at Vienna on August 30, 1940, accorded to Hungary large portions of Transylvania and formerly Eastern Hungary. This award, although apparently considered to be unexpectedly severe by the Romanian negotiators,\(^58\) was accepted by both parties\(^59\) and duly executed.

So far as can be determined, the validity of the Second Vienna Award was not disputed until the collapse of the Southeast European Axis satellites in the fall of 1944. The Armistice with Rumania of September 12, 1944, contains the following clause:

The Allied Governments regard the decision of the Vienna Award regarding Transylvania as null and void and are agreed that Transylvania (or the greater part thereof) should be returned to Rumania, subject to confirmation at the peace settlement, and the Soviet Government agrees that Soviet forces shall take part for this purpose in joint military operations with Rumania against Germany and Hungary.\(^60\)

This undertaking by the Allied powers was further implemented by the Armistice with Hungary of January 20, 1945, providing that "The Vienna Arbitration Award of November 2, 1938 and the Vienna Award of August 30, 1940 are hereby declared to be null and void."\(^61\)

---

57. For a comprehensive discussion of one of the most famous of these conflicts, see Déak, THE HUNGARIAN-RUMANIAN LAND DISPUTE, A STUDY OF HUNGARIAN PROPERTY RIGHTS IN TRANSYLVANIA UNDER THE TREATY OF TRIANON (1928).
58. For the eyewitness account of Dr. Paul Schmidt, the chief interpreter of the German Foreign Office, see Schmidt, Hitler’s Interpreter 189 (Steed ed. 1951). Romanian Foreign Minister Manoilescu is there reported to have fainted at the sight of the map.
59. The text of the award is reprinted in 38 Martens, NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS (3rd ser.) 338. As to the acceptance of the award, see the Protocol of Aug. 30, 1940, 39 id. at 348.
60. See A DECADE OF AMERICAN FOREIGN POLICY, op. cit. supra note 32, at 487, 490.
61. Id. at 494, 497.
While Hungary apparently entertained some hope that at least part of Transylvania would ultimately remain Hungarian, this hope did not materialize. The Treaty of Peace with Romania states that "the decisions of the Vienna Award of August 30, 1940, are declared null and void," and restores the Hungarian-Romanian frontier as it existed on January 1, 1938. The Treaty of Peace with Hungary repeats these provisions, and also includes a like declaration of nullity with respect to the First Vienna Award.

Transylvania had been part of Hungary for more than four years; its population (over two million) had for that period been subject to Hungarian law as administered by Hungarian courts. One might ordinarily think that the "annulment" of a cession of territory such as this would lead to massive uncertainty in the law and to the unsettling of justified legal expectations. This, however, does not appear to have been the case. A Romanian law of April 4, 1945, generally extended Romanian legislation to Transylvania "which has been liberated from the Hungarian occupation imposed by the dictate of Vienna of August 30, 1940." But it also confirmed the validity of all transactions and rights based on Hungarian legislation enacted between August 30, 1940, and October 25, 1944, unless contrary to Romanian public policy.

In conclusion, it might be asked why the Allies chose the novel device of declaring territorial transfers under Axis hegemony to be "null and void" rather than merely imposing, as had theretofore been customary, appropriate territorial settlements after the end of the war. This question seems all the more legitimate in view of the seemingly incontestable initial validity of some of the acts nullified, especially the Second Vienna Award. The explanation that most readily suggests itself is that the Allies, having foresworn territorial aggrandizement in the Atlantic Charter, were loath to employ the traditional device of cessions of territory.

65. For details see Arato, PROBLEMS DER WIEDERVEREINIGUNG DER OSTUNGARISCHEN UND SIEBENBÜRIGISCHEN GEBIETE MIT Ungarn, 7 ZEITSCHRIFT FÜR OSTEUROPAISCHES RECHT 362 (1941).
67. The Declaration of the President of the United States and the Prime Minister of the United Kingdom of August 14, 1941, contains the following provisions in this re-
by peace treaty, preferring instead a technique that made the ultimate territorial settlement appear like a restoration rather than a transfer. A second factor not to be neglected may have been the emotive content of the terminology employed, which was eminently suitable for propaganda purposes: the assertion that Axis acts were "null and void" had enormous potential for unnerving the enemy, or more particularly, those reluctantly or unwillingly subject to Axis rule. This latter consideration seems to have been the main reason for the inclusion of the "null and void" formula in the Moscow Declaration on Austria of November 1, 1943, the first three-power instrument to make use of these terms. The declaration is substantially identical with a draft prepared by the British Foreign Office and forwarded to the United States Department of State under cover of an aide-memoire dated August 28, 1943. The latter states with engaging candor:

As the tide of war turns increasingly in favour of the United Nations, the possibility of causing embarrassment to Germany by encouraging resistance and sabotage in Austria improves. Anti-German feeling appears to be growing and there is some evidence that active resistance to the German regime is on the increase. On the other hand opinion in Austria seems to be aimless and in need of reassurance regarding the aims of the Allies for the future of the country. With this in mind and in the hope that the United States and Soviet Governments will be prepared to agree in principle to the re-creation of an independent Austrian state after the war, His Majesty's Government have prepared as a basis for discussion the draft of a declaration to be issued jointly as soon as possible by His Majesty's Government, the United States Government and the Soviet Government, making clear their desire to see re-established a free and independent Austria.⁶⁸

⁶⁸. United States Foreign Relations 515, 516 (1943). The first paragraph of the declaration enclosed with this aide-memoire read as follows: "Austria was the first free country to fall a victim to Nazi aggression. In 1938 the Austrians were deprived by the Nazis of the rights of self-government set forth in the Atlantic Charter and reaffirmed by the United Nations." The final version of this paragraph is the following: "The Governments of the United Kingdom, the Soviet Union and the United States of America are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination." See note 32 supra. A revision proposed by the United States on October 9, 1943, and accepted by the United Kingdom had recast the first paragraph to start: "Having taken counsel together in the spirit of the Atlantic Charter..." The reason given for this change was that the first paragraph referred "to events preceding the formulation of the Atlantic Charter."
C. The Indonesian Expropriations

In its note of December 18, 1959, to the Indonesian Government, the Government of the Netherlands asserted that certain nationalization measures taken by Indonesia with respect to the properties of Netherlands nationals were "absolutely at variance with international law and therefore unlawful and invalid." It seems that this is the first assertion of nullity in state practice since the end of the second World War, and the first case where the argument was advanced that an act which is violative of international law is invalid under the offending state's own internal law. But the problem of the validity of internal law that is contrary to international law is not under consideration, and the Netherlands-Indonesian nationalization dispute, which has been discussed more fully elsewhere, is thus beyond the scope of this paper.

Nevertheless, it might be pointed out that the question of the validity of internal law that is violative of international law was discussed by the Permanent Court of International Justice in the Memel Statute case. The court held the dismissal of the Director of the Memel Territory by the Lithuanian Governor was not violative of the Memel Statute, but it also held that the dissolution of the legislative chamber by the Lithuanian Governor was "not in order." After so holding, it hastened to observe:

The Court thinks it well to add that its function in the present case is limited to that of interpreting the Memel Statute in its treaty aspect. It has arrived at the conclusion that on the proper construction of the Statute the Governor ought not to have taken certain action which he did take. It does not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. This is tantamount to saying that the dissolution is not to be regarded as void in the sense that the old Chamber is still in existence, and that the new Chamber since elected has no legal existence.

70. See note 12 supra.
71. See Editorial by the Board of Editors, The Measures Taken by the Indonesian Government Against Netherlands Enterprises, 5 NETHERLANDS REV. 227 (1958); Opinions by Lord McNair, Rolin, and Verdross, 6 id. at 218, 260, 278 (1958); Domke, Indonesian Nationalization Measures Before Foreign Courts, 54 AM. J. INT'L L. 350 (1960); and Baade, Indonesian Nationalization Measures Before Foreign Courts—A Reply, id. at 901 (1960).
72. See notes 6-8 supra and accompanying text.
It would therefore seem, at the very least, that there is no general rule of public international law to the effect that internal laws violative of international law are ipso iure invalid.\textsuperscript{74}

D. The Award of the King of Spain

In July, 1958, Honduras instituted proceedings against Nicaragua before the International Court of Justice, seeking a judgment to the effect that Nicaragua’s failure to execute an arbitral award rendered by the King of Spain on November 18, 1906, in a boundary dispute between the two states, constituted a violation of an international obligation. Nicaragua’s defense, in substance, was that the Award of Spain was invalid. In its judgment of November 18, 1961, the court rejected the various grounds for the nullity of the award advanced by Nicaragua, holding that the award is valid and binding, and that Nicaragua is under an obligation to give effect to it.\textsuperscript{75}

Nicaragua advanced no less than five reasons for the invalidity of the award. It argued that the Gámez-Bonilla Treaty of October 7, 1894, on which the arbitration was based, had expired when the King of Spain accepted the office of sole arbitrator. Secondly, Nicaragua contended that the appointment of a sole arbitrator was not in conformity with the treaty, and that his “arbitral” decision was not for this reason an arbitral award. The other grounds for nullity urged by Nicaragua were that the decision was vitiated by essential errors, that the King had exceeded his jurisdiction, and that his award was not supported by an adequate statement of reasons. In any event, Nicaragua concluded, the award was incapable of execution because of its obscurities and contradictions.

The court first discussed whether the asserted irregularities in the selection of the King of Spain as the sole arbitrator vitiated his award, and whether the Gámez-Bonilla Treaty had expired at the time of his appointment. The latter contention was rejected in part by resort to treaty interpretation, which is not of concern here. But the court also rejected the attacks on the validity of the arbitration agreement and on the appointment of the arbitrator on more general grounds. Both parties had proceeded to plead on the merits before the arbitrator, and neither had asserted any irregularities in the creation or composition of the tribunal. These jurisdictional defenses were first advanced in 1912 and 1920, re-

\textsuperscript{74} See also Guggenheim, \textit{supra} note 15, at 200-01; Verzijl, \textit{supra} note 15, at 292-94; 1 \textsc{Dahm, Völkerrecht} 56 (1958). \textsc{Contra}, Domke, \textit{Foreign Nationalizations}, 55 Am. J. Int’l L. 585, 610-13 (1961). As a practical matter, the dispute on this point would appear to have been resolved in favor of the proposition stated in the text of Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

\textsuperscript{75} Case Concerning the Arbitral Award Made by the King of Spain on 23 Dec. 1906 (Honduras v. Nicaragua), [1960] I.C.J. Rep. 192.
spectively. At that time, the court held, it was "no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the award." 8

The Court then considered whether the defendant was also precluded from challenging the award itself. After discussing a series of communications between Nicaragua, Honduras and Spain, as well as internal Nicaraguan state papers, the court found that

Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award has become known to it further confirms the conclusion at which the Court had arrived. 77

However, the court went on to state that even if Nicaragua were not precluded from now disputing the validity of the award, it still would have to be recognized as valid. In this connection the court noted that the award was not subject to appeal, and that the issue was not whether the award was right or wrong, but merely whether it had been proved to be a nullity. 78 The excess-of-jurisdiction defense was then disposed of by treaty interpretation, which need not concern us here. The "essential error" defense was based on the evaluation of documentary and other evidence. In rejecting this line of attack, the court stated summarily: "The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question." 79 The court then disposed of the contentions that the award was not supported by adequate reasons and that, in any case, it was self-contradictory and incapable of execution. These last two defenses were disposed of by resort to the award itself.

In a separate opinion Judge Moreno Quintana stated that the majority opinion should have dealt more adequately with the application of the principle of uti possidetis, and that there should have been a finding that Nicaragua had acted in good faith. More fundamentally, since the case essentially involved the validity or invalidity of an international legal act, he thought that the judgment should have established the extrinsic and intrinsic validity of the award instead of resting its case in advance on the acquiescence of the parties. 80 In another separate opinion Judge Sir Percy

76. Id. at 209.
77. Id. at 213.
78. Id. at 214.
79. Id. at 215-16.
80. Id. at 217-18.
Spender, on the other hand, would decide every issue but that of the continued effect of the Gámez-Bonilla Treaty merely on the ground that Nicaragua was precluded by its own conduct from contesting the regularity of the arbitration proceeding and the validity of the award. He considered the majority's discussion of Nicaragua's defenses to be an "irrelevant excursion." However, presumably in view of the cardinal importance of the principle that "the validity of the Award depends initially upon the sovereign consent of the two states that an award may be made," Sir Percy would have decided the question as to the continued effect of the treaty solely by resort to treaty interpretation. His views on this issue are identical with those of the majority, but there remains the question whether he would have been prepared to hold that subsequent conduct not amounting to the conclusion of a new agreement will suffice to validate an otherwise invalid agreement to arbitrate. 8

The sole dissenter, Judge ad hoc Urrutia Holguín, would consider the award to be vitiated by excess of jurisdiction through erroneous application of the substantive standards established by the treaty, and by the lack of adequate reasons. He would reject the defense of acquiescence not only because there was no reliance giving rise to estoppel, but also because in his view, it necessarily follows from the absence of a system for the compulsory adjudication of international disputes that there is no middle ground between validity and invalidity in public international law. Thus, there are no defects which are sanables and others that are insanables. Consequently, a defect in an invalid award can be cured only by a new treaty, or by a clear and formal unilateral declaration of the party disadvantaged. 82

E. The Temple Case (Jurisdiction)

The famous "optional clause" in Article 36 of the Statute of the International Court of Justice, which substantially corresponds to the same

81. Id. at 219-20.
82. Id. at 221. As to the historical origin and significance of the distinction between nullitates sanables and insanables, see notes 202-03 infra. The contention that the category of voidable judgments or awards cannot exist in international law in the absence of a system of compulsory adjudication, and that consequently the defects which would make a judgment or award merely voidable in internal law rendered in absolutely void (inexistent) in international law, was one of the mainstays of Nicaragua's defense. See 1 CASE CONCERNING THE ARBITRAL AWARD MADE BY THE KING OF SPAIN ON 23 Dec. 1906 (Honduras); 2 id. at 268-79 (Argument of Professor Morelli for Nicaragua), especially "Le principe correct devrait être . . . : 'pas d'annulabilité sans instance.'" 2 id. at 275. (The author's debt to Professor Herbert W. Briggs of Cornell University, who was of counsel for Honduras in this case, is acknowledged for having called these highly significant pleadings to his attention.)
article in the statute of the Permanent Court of International Justice, provides that the states which are parties to the statute can by general declaration, conditionally or unconditionally, with or without limitations as to time, subject themselves to the compulsory jurisdiction of the International Court of Justice. The new statute further provides that declarations under the statute of the former court are to be deemed, "as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."\(^8\)

In the *Case Concerning the Aerial Incident of July 27, 1955*, the court decided that this latter provision only referred to declarations by states that were members of the new statute at the time of the dissolution of the Permanent Court of International Justice in April, 1946. Thus, Bulgaria's acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, made in 1921 and not subject to time limitations, automatically lapsed in April, 1946, and was not revived when Bulgaria joined the United Nations in 1955. Consequently, the court dismissed Israel's action against Bulgaria for lack of jurisdiction.\(^8\)\(^4\)

When Cambodia brought proceedings against Thailand in 1959 to determine title to the region of the Temple of Preah Vihear, Thailand sought to avail itself of the jurisdictional defense afforded by the *Aerial Incident* case. Like Bulgaria, Thailand was not a member of the United Nations or a party to the Statute of the International Court of Justice at the time of the dissolution of the Permanent Court. But unlike Bulgaria, Thailand had, on May 20, 1950, made a declaration purporting to "renew" its declaration of acceptance of the compulsory jurisdiction of the Permanent Court of International Justice. Thailand did not dispute that the 1950 "renewal" was intended to be an acceptance of the compulsory jurisdiction of the International Court of Justice. It did contend that this "renewal" was ineffective *ab initio*, because in the light of the *Aerial Incident* decision there was nothing to renew on May 20, 1950. The court stated Thailand's position to be "similar to that of a man who desires to make certain testamentary dispositions, and fully intends them; nevertheless, he will not achieve his object, as a matter of law, if he fails to observe the forms and requirements prescribed by the applicable law for the making of testamentary dispositions."\(^8\)\(^5\)

It was, of course, quite clear that Thailand had committed an error in framing the 1950 declaration, but in the court's opinion, this error was

---

one of law and did not vitiate the reality of Thailand's consent to the compulsory jurisdiction of the International Court of Justice. Once it is established that this was the purpose of the 1950 declaration, the only question remaining was whether the use of "renewal" rather than "acceptance" language in the declaration was a fatal defect of form. In answering this question in the negative, the court made the following observations:

As regards the question of forms and formalities, as distinct from intentions, the Court considers that, to cite examples drawn from the field of private law, there are cases where, for the protection of the interested parties, or for reasons of public policy, or on other grounds, the law prescribes as mandatory certain formalities which, hence, become essential for the validity of certain transactions, such as for instance testamentary dispositions; and another example, amongst many possible ones, would be that of a marriage ceremony. But the position in the cases just mentioned (wills, marriage, etc.) arises because of the existence in those cases of mandatory requirements of law as to forms and formalities. Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.

It is this last position which obtains in the case of acceptances of the compulsory jurisdiction of the Court. 86

F. The Expenses Case

By a resolution adopted on December 20, 1961, the General Assembly of the United Nations requested an advisory opinion from the International Court of Justice on the question whether certain expenses authorized by the General Assembly to defray the expenses of United Nations operations in the Congo (ONUC) and the Near East (UNEF) were "expenses of the organization" within the meaning of Article 17 of the Charter of the United Nations: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." This question was carefully formulated so as to raise neither the issue of the validity or legality of the resolutions authorizing the expenses, nor of the resolutions pursuant to which the operations themselves were conducted, nor, finally, of the "Uniting for Peace" resolution which furnished the legal basis at least for the resolutions relating to the Near East. A French

86. Id. at 31.
amendment which would have asked also for an opinion on the question whether the expenses resolutions (but not the "causal" resolutions) were "decided in conformity with the Charter," was defeated in the General Assembly. In other words, the narrow issue presented was whether the General Assembly had the power to apportion those ONUC and UNEF expenses which had actually been incurred and paid by the Organization. The states urging an affirmative answer to the question strongly suggested that the issue of the legality or validity of the resolutions should not be decided. Yet, it was conceded by the proponents of the request for the advisory opinion that the court was authorized to pass on this latter question if it arrived at the conclusion that the issue before it could not otherwise be resolved. In any event, the court so interpreted its mandate, and discussed the validity of the underlying resolutions at some length.

The first question was whether decisions of the General Assembly on budgetary matters were not final and binding, regardless of the legality of the underlying cause. The proponents of an affirmative answer, notably the United States, used a two-step argument. They contended that resolutions adopted without important procedural irregularity or "a substantive invalidity so patent as to amount to manifest usurpation" could, until authoritatively set aside, be regarded as valid and effective by persons or states dealing with Organization in respect to the matters covered by such resolutions. Then, if the Secretary General entered into obligations towards member states or private parties in the effectuation of such resolutions, these obligations were binding upon the United Nations as an organization, which therefore had not only the power but also the duty to make the necessary appropriations.

The court rejected the extreme variant of this argument, holding that "expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the organization.'" But, it added, "when the Organization takes action which warrants the assertion that it

88. See, e.g., CERTAIN EXPENSES OF THE UNITED NATIONS (ART. 17, PARA 2, OF THE CHARTER)—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 336 (I.C.J. 1962) (Statement of Sir R. Manningham-Butler for the United Kingdom); id. at 415-16 (Statement of Mr. Chayes for the United States).
89. See, e.g., id. at 416-17 (Statement of Mr. Chayes for the United States).
was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization."

Since it was beyond dispute that both the ONUC and the UNEF operations were undertaken in pursuance of the purposes of the United Nations, the court had to deal with the question that was really at the heart of the case: Were the resolutions adopted by the General Assembly in connection with UNEF invalid because, while the United Nations as a whole was competent to adopt these measures, the General Assembly was not? In a rather remarkable passage, the court seemingly answered this question in the negative:

If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization."

But while stating that this reasoning "might suffice" to answer the question posed, the court nevertheless proceeded to discuss whether the UNEF resolutions really were ultra vires the General Assembly. It ultimately answered this question in the negative, but on grounds that substantially differ from a mere objective classification of functions and powers. An examination of the relevant resolutions led the court to the seemingly rather modest conclusion that "it could not . . . have been

93. Id. at 168.
94. Ibid.
patent on the face of the resolution" that the establishment of UNEF was in effect enforcement action which belongs to the exclusive province of the Security Council. Furthermore, it was "apparent that the operations were undertaken to fulfil a prime purpose of the United Nations." Therefore, the Secretary-General properly exercised the authority given to him to incur financial obligations of the Organization, and such expenses are "expenses of the Organization" within the meaning of Article 17 of the Charter.95

In sum, the International Court of Justice appears to have arrived at the following four conclusions regarding the validity of appropriations of funds by the United Nations. First, expenditures for a purpose that is not one of the purposes of the United Nations are not "expenses of the Organization." Secondly, any action taken by an organ of the United Nations that warrants the assumption that it was in fulfilment of one of the purposes of the United Nations is presumed to be valid. Thirdly, any action by an organ of the United Nations that is within the scope of the functions of the Organization, but not in conformity with the division of functions among its several organs as delimited by the Charter, is nevertheless valid (semble). In the alternative, expenses incurred by the Secretary-General pursuant to any resolution of the General Assembly that is (a) manifestly intended to fulfil a prime purpose of the United Nations and (b) not patently and on its face a violation of the exclusive competence of the Security Council are "expenses of the organization."

It can readily be seen that these conclusions are of very great actual and tremendous potential significance for United Nations law96 and, more generally, for international law. It might very well be that the Expenses case will become "the Marbury v. Madison of the law of international organizations."97 But what has here been referred to as the court's opinion received the votes of only five of the fourteen judges sitting.98

While agreeing that formally valid budget decisions of the General Assembly are at least prima facie presumed to be valid and that the ONUC and UNEF resolutions were (with the benefit of this presump-

95. Id. at 171-72.
97. Address by Harlan Cleveland, Duke University, May 9, 1963.
98. There were five dissents and four concurring opinions, the latter including a brief statement by Judge Spiropoulos who felt that the issue of the validity of UNEF and ONUC resolutions was precluded by the defeat of the French amendment. [1962] I.C.J. Rep. at 180-81. Most of the concurring and dissenting opinions deal with points not directly material for the purposes of the present study. However, the question of the validity of acts of organs of the United Nations is discussed in some detail in the concurring opinions of Judges Sir Gerald Fitzmaurice and Morelli, and in the dissenting opinion of President Winiarski.
tion, and for other reasons) valid acts of the General Assembly, Judge Sir Gerald Fitzmaurice in his concurring opinion registered rather strong reservations on the plurality opinion's other mainstay. He did not think that the notion of the irrelevance of the internal division of functions when dealing with third parties was not to be pressed too far. 99

It is certainly correct in one sense, namely, that internal irregularities would not affect liabilities definitely incurred by or on behalf of the Organization, in relation to third parties outside the Organization or its membership. 100 But what is really in question here is the relationship of the Member States inter se, and vis-à-vis the Organization as such, and there can be no doubt that, in principle at least, expenditures incurred in excess of the powers of the expending body are invalid expenditures. The question is, are they invalid if they merely exceed the powers of the particular organ authorizing them, but not those of the Organization as a whole? It is true that there are cases, both in the domestic and in the international legal spheres, where all that matters (except on the purely internal plane) is that a certain act has in fact been performed, or not performed, as the case may be, and where the reasons for, or channels through which the performance or non-performance has taken place are immaterial. But in the present case, the question of the financial obligations of Member States in relation to the Organization is a question moving on the internal plane; and if an instrument such as the Charter of the United Nations attributes given functions in an exclusive manner to one of its organs, constituted in a certain way—other and different functions being attributed to other and differently constituted organs—this can only be because, in respect of the performance of the functions concerned, importance was attached to the precise constitution of the organ concerned. 101

Furthermore, Sir Gerald refused to accept the plurality's seeming view that because of the absence of a regular procedure for judicial review, decisions by United Nations organs as to their own jurisdiction were binding upon those outvoted. Where this bootstrap method was employed

99. Id. at 199-200.
100. "I will postulate for present purposes that the third party is prima facie, entitled in the particular circumstances, to assume that the liabilities have been validly incurred." Id. at 200 n.2.
101. "Clearly an organ constituted in a particular way will tend to carry out a given function in a different way from an organ differently constituted, and will have been entrusted with that function for that reason, inter alia." Id. at 200 n.3.
to impose assessments upon protesting members, he would be willing to recognize that "Member States retain a last resort right not to pay." However, he did not indicate what this right consisted of and under what precise conditions it could be exercised.\footnote{102. \textit{Id.} at 203-04.}

Judge Morelli’s unusually thorough treatment of the nullity problem, on the other hand, would seem to be almost in the nature of a detailed refutation of these reservations. His starting point is a general analysis of the problem of the validity of legal acts in “any system.” The problem is one of finding the proper balance between the twin goals of legality and certainty. Absolute insistence on the former would destroy the latter. The compromise found in national legal systems, particularly as regards administrative actions,\footnote{103. Judge Morelli employs the term, \textit{acte administratif}, which has a definite meaning in Continental administrative law. See text after note 179 \textit{infra}.} is marked by a scale of non-conformities according to the gravity of the deviation from the norm. At the bottom of the scale there are many cases involving “mere irregularities having no effect on the validity of the act.” At the other extreme are the most serious infractions which \textit{ipso iure} bring about absolute nullity. This latter group is quite small; it only comprises cases of an exceptional character. In between these two extremes there is a vast array of actions that are merely voidable, \textit{i.e.}, which in spite of their defects produce all their effects unless and until annulled by a competent organ. The very existence of administrative and judicial machinery for the control of defective administrative action presupposes, of course, the validity of all acts not attacked within the proper time and by the appropriate means.

Since the United Nations does not have a machinery for judicial review comparable to that existing in domestic law, the concept of voidability cannot be applied to actions of United Nations organs; such actions can only be either fully valid or absolutely void. This means that the defective actions making up the “voidable” category in domestic law have to be assigned to one or the other of these two groups. In Judge Morelli’s opinion, any extension of the category of absolutely void acts would have very serious consequences for the stability of actions taken by international organizations, laying their effectiveness open to perpetual uncertainty.

\textbf{[This]} makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined, and hence to regard to a large extent the non-conformity of the act with a legal rule as a mere irregularity having no effect on the validity of the act. It
is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization).¹⁰⁴

In domestic law, a violation of rules governing competence usually merely involves voidability, not absolute nullity. Actions of organs of the United Nations in violation of that Organization’s internal distribution of competences cannot, of course, be voidable, nor do such violations have the more serious consequence of absolute nullity. “This means that the failure of the act to conform to the rules concerning competence has no influence on the validity of the act, which amounts to saying that each organ of the United Nations is the judge of its own competence.”¹⁰⁵

Judge Morelli’s analysis, in turn, is seemingly singled out for refutation in President Winiarski’s dissenting opinion. He states succinctly:

> It has been said that the nullity of a legal instrument can be relied upon only when there has been a finding of nullity by a competent tribunal. This reasoning must be regarded as echoing the position in municipal or State law, in the international legal system. In the international legal system, however, there is, in the absence of agreement to the contrary, no tribunal competent to make a finding of nullity. It is the State which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity. Such a decision is obviously a grave one and one to which resort can be had only in exceptional cases, but one which is nevertheless sometimes inevitable and which is recognized as such by general international law.”¹⁰⁶

G. The Northern Cameroons Case

The most recent decision of the International Court of Justice again involves, if only incidentally, the question of the validity of actions taken


¹⁰⁵. *Id.* at 105. Note, incidentally, that Italian administrative law sharply distinguishes between the relative and the absolute incompetence of organs of public administration, the former entailing mere voidability upon timely action by the party aggrieved before the competent authority, and the latter absolute invalidity *ipso iure*. See Galeotti, *The Judicial Control of Public Authorities in England and in Italy, A Comparative Study* 104-08 (1954); 1 Vitta, *Diritto amministrativo* 451-52, 452 n.2 (4th ed. 1954); 1 Zanobini, *Corso di diritto amministrativo* 246-47 (6th ed. 1952). For a comparative discussion of the validity of administrative actions, see text at notes 172-95 *infra*.

by the United Nations. On March 30, 1961, the Republic of Cameroon instituted proceedings before the court against Great Britain, seeking a judicial declaration to the effect that the United Kingdom had failed to respect certain obligations imposed by the Trusteeship Agreement for the British Cameroons. The pertinent facts follow: In 1919, Germany renounced title to the West African colony of Kamerun, which was placed under the mandates system of the League of Nations and divided into two mandates, administered by France and Great Britain, respectively. After the Second World War, both mandates were placed by the mandatory powers under the trusteeship system of the United Nations and administered pursuant to trusteeship agreements approved by the General Assembly. The plaintiff in this case, the former French Cameroons, became independent on January 1, 1960, and joined the United Nations as the Republic of Cameroon on September 20 of that year.

While the French Cameroons had apparently always been administered as one entity, the British Cameroons had from the inception of the mandate been divided into two areas, the Northern and the Southern Cameroons. The Northern region was administered as an integral part of the adjacent provinces of the then Protectorate of Nigeria, while the Southern Cameroons was governed as a separate and distinct province of Nigeria. Separate plebiscites were held in the two regions under United Nations auspices in February, 1961. The Northern region decided to join the Federation of Nigeria, and the Southern region, the Republic of Cameroon. A United Nations resolution of April 21, 1961, endorsed the results of these plebiscites, decided that they should be implemented, and terminated the Trusteeship Agreement with the United Kingdom as of the date of the respective transfers of sovereignty (June 1 and October 1, 1961).

Immediately subsequent to attaining independence, the Republic of Cameroon had taken strong exception to the British administration of the Cameroons, asserting that the division of the trusteeship territory into different administrative regions violated both the Trusteeship Agreement and the United Nations Charter, and also alleging other irregularities. A White Book distributed to all members of the United Nations in March, 1961, stated that “failure to separate the administrations of the two territories destroyed an essential guarantee of impartiality and effectively sabotaged the plebiscite.” The White Book asserted that “the only acceptable solution to avoid a monstrous injustice . . . is to declare the plebiscite . . . null and void.” Needless to say, the Republic of the Cameroons voted against the resolution of the General Assembly which approved and implemented the plebiscites and terminated the trusteeship.

The gist of the plaintiff’s case is that Great Britain, by administering
the Cameroons Trusteeship Territory in violation of the Trusteeship Agreement and the United Nations Charter, had brought about a plebiscite that did not reflect the real wishes of the population, the inference being that if the area had been administered as one entity, it would have voted to join the Republic of the Cameroons. But the plaintiff sought neither restitution nor damages, limiting itself to a request for a judgment determining these allegations to be well founded.

The International Court of Justice decided on December 2, 1963, that any adjudication of the controversy at this late stage would be "devoid of purpose," and that it therefore could not adjudicate upon the merits. A concise summary of the court's reasoning is to be found in the following passage:

If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application. The role of the Court is not the same as that of the General Assembly. The decisions of the General Assembly would not be reversed by the judgment of the Court. The Trusteeship Agreement would not be revived and given new life by the judgment. The former Trust Territory of the Northern Cameroons would not be joined to the Republic of Cameroon. The union of that territory with the Federation of Nigeria would not be invalidated. The United Kingdom would have no right or authority to take any action with a view to satisfying the underlying desires of the Republic of Cameroon. In accordance with Article 59 of the Statute, the judgment would not be binding on Nigeria, or on any other State, or on any organ of the United Nations.

The court observed that "these truths are not controverted by the Applicant." Indeed, the Observations and Submissions of the Republic of the Cameroons had expressly stated that the violations of the Trusteeship Agreement having been "finally consummated," plaintiff "cannot ask for a restitutio in integrum having the effect of non-occurrence of the Union with Nigeria or non-division of the Territory, or fulfilment of the objectives laid down in . . . the Agreement." It might be that this posture of the case detracts from the precedential character of the court's observa-

tions as to the finality, validity, and non-reviewability of the decision of
the General Assembly to implement the plebiscite and to terminate the
trusteeship. Still, it seems not unreasonable to assume that the court clear-
ly indicated that it was prepared to hold decisions of the General Assembly
terminating trusteeship agreements and disposing of trusteeship territory
to be subject only to the discretion of the General Assembly itself and not
reviewable elsewhere. This conclusion is further fortified by a reading
of the concurring and dissenting opinions.\textsuperscript{110}

III. A Theoretical Orientation

The purpose of the present study is to discuss public international
legal rules that vitiate the intended consequences of acts attributable to
one or more states or international organizations designed to create, modi-
fy, or abolish rights or obligations arising under public international
law.\textsuperscript{111} The survey has shown that the assertion of the nullity of acts
thus defined is not a frequent phenomenon in international relations.
Nevertheless, it has also become reasonably clear that the subject is not
one to be neglected, and that especially in the increasingly important area
of the law of international organizations, it might easily assume propor-
tions of utmost importance. If (to take the most obvious example) the
premises of the plurality opinion or the views expressed in some of the
concurring opinions in the \textit{Expenses} case are taken as established and as
capable of generalization, the maxim of traditional international law that
"restrictions upon the independence of states cannot . . . be presumed"\textsuperscript{112}
is now replaced by a presumption in favor of the validity of actions by
United Nations organs,\textsuperscript{113} further fortified by rules validating most, if
not all, United Nations acts that are tainted with illegality.

As will be shown presently, such a state of affairs is not altogether
shocking nor even surprising, for no major legal system, be it secular or
ecclesiastical, completely equates validity with legality. The simplistic
slogan, \textit{ex iniuria non oritur ius}, is hardly a general principle of law recog-
nized by civilized nations.\textsuperscript{114} This is so not because a primitive legal sys-

\begin{footnotesize}
\begin{enumerate}
\item[110.] See the separate opinions of Judges Wellington Koo, \textit{id.} at 41, 46, 61, 64, and
Sir Percy Spender, \textit{id.} at 65 79-80; and the dissenting opinions of Judge Bustamente, \textit{id.}
at 154, 176-77, and Judge \textit{ad hoc} Beb A Don, \textit{id.} at 184, 189. Wengler, \textit{Note}, [1964]
\textit{NEUE JURISTISCHE WOCHENSCHRIFT} 376 observes—quite correctly, it is submitted—that
the Northern Cameroons case is authority for the proposition that the International Court
of Justice will not, on its own motion, invoke the maxim \textit{ex iniuria non oritur ius}. \textit{Cf.}
Gross, \textit{supra} note 107, at 430-31.
\item[111.] See text at note 10 \textit{supra}.
\item[112.] Case of the S.S. \textit{"Lotus"} (France v. Turkey), \textit{P.C.I.J.}, ser. A, No. 10, at 18
(1927).
\item[113.] See text at note 93 \textit{supra}; see also Gross, \textit{supra} note 96, at 26.
\item[114.] 1 WENGLER, \textit{VÖLKERRECHT} 570 (1964). The statement in the text is borne out,
it is submitted, by the comparative survey. See notes 123-209 \textit{infra} and accompanying

text.
\end{enumerate}
\end{footnotesize}
tem places a higher value on “power” than on “right,” but because all sophisticated legal systems acknowledge that the certainty and stability of existing situations and relationships is just as much a moral and an ethical desideratum as is strict compliance with all requirements of the law. After all, the notion of illegal but nevertheless valid acts is even to be found in theology; it underlies the theory of apostolic succession in the schismatic churches and of the validity of their sacraments.115

Basically, the problem is to enumerate and classify the actions (as defined above) that, while not in full conformity with public international law, are nevertheless treated as valid by it. But before embarking on such a task by analysis of the cases discussed above, it seems highly appropriate to clarify the term of reference. As was rightly remarked by the representative of The Netherlands in his oral argument in the Expenses case, “there are perhaps few legal expressions which cover so many totally different things as the word ‘validity’ in relation to a legal act.”116

A. Basic Categories of Validity and Invalidity

The categories which will be used are not exact descriptions of reality, nor reflections of compelling dictates of logic (although they are, of course, intended to be logically consistent with each other). They are mere constructs or “ideal types”117 used solely for descriptive and analytical purposes. Nevertheless, as shown in greater detail below, they substantially correspond to the categories employed in discussions of the problem of nullity in the major legal systems.

1. Types of Validity and Invalidity. Four basic types of validity or invalidity must be distinguished.

a. Non-acts or inexistgent transactions. These correspond to the Nicht-Rechtsgeschäfte of German law and the actes inexistants of French law. Although a certain legal consequence is intended, one or more absolutely indispensable basic ingredients (formative elements) are lacking; and as a result, there is nothing that could possibly bring about the in-

115. For a detailed historical exposition from a decidedly Protestant point of view, see 2 Sohm, Kirchenrecht 308-79 (Jacobi & Mayer eds. 1923). For recent modifications of this position, see Clark, Anglican Orders and Defect of Intention (1956), reflecting the present Roman Catholic view. (Note, however, that there are at least today some sacraments which can, in the Roman Catholic view, be dispensed or created without the participation of a validly ordained priest, e.g., baptism generally and marriage between baptised non-Catholics).


117. Max Weber’s understanding of that term is used. Weber, Die “Objektivität” sozialwissenschaftlicher und sozialpolitischer Erkenntnis, 19 Archiv für Sozialwissenschaft und Sozialpolitik 22, 64 et seq. (1904).
tended legal result. The most common example is the "action" of the famous "captain of Köpenick," a vagrant who rented a military uniform, commandeered a corporal's guard, and purported to sequestrate the city treasury.\(^{118}\) A parallel in public international law would be a declaration of war by a private individual against a state.

b. Void (invalid) acts. Here, the formative elements appear to be present and the consequences are intended, but one or more of the basic ingredients are seriously defective. This category is usually called \textit{Nichtigkeit} in German and \textit{nullité} in French law, but caution is indicated especially in the use of the latter term which is also frequently used to denote voidability. Common examples are wills not meeting the prescribed requirements as to form, commercial transactions expressly prohibited by regulatory or penal statutes, and, in Anglo-American law, bigamous marriages. For reasons to be explained below, it is not so easy to supply an example of a void act in public international law. Perhaps a divorce granted by resolution of the United Nations General Assembly might serve as an illustration. Three important characteristics of void acts distinguish them from voidable acts: (1) the invalidity of void acts can be asserted by any party at any time, and it must—or at least, may—be raised by a court on its own motion; (2) they are by definition invalid \textit{ab initio}; (3) the subsequent removal of the cause of invalidity will not validate the act; a new transaction will be needed to achieve the desired result.

c. Voidable acts. This group, the most important one for present purposes, comprises all acts and transactions that will produce their intended results unless and until they are avoided by the parties entitled to do so, and in the manner prescribed by law. It seems logically correct, though not quite uncontroversial, to call these acts initially valid, for it will by definition take affirmative action to set them aside. The contrary argument, with somewhat less compelling logic, proceeds from the premise that a voidable transaction, at least if still at the executory stage, cannot be enforced because the nonconforming party has a valid defense. For this reason the term relative nullity is sometimes used to describe this category. The technical terms used are \textit{Anfechtbarkeit} in German\(^{119}\) and \textit{nullité} in French.\(^{120}\) Common examples of voidable acts in internal law

---

118. See 1 \textsc{ForsthoFF}, \textsc{Verwaltungsrecht} 210 (8th ed. 1961).

119. The first author to employ this term seems to be Savigny. 4 \textsc{Savigny}, \textsc{System des heutigen Römischen Rechts} 537 (1841).

120. The French term is apt to be a misleading expression, for in some areas of law it is used to denote "absolutely" void acts. For one notable example of terminological confusion, see note 23 \textit{supra}. \textit{Cf.} 1 \textsc{Planiol, Ripert & Boulanger, Traité élémentaire de droit civil} 149-56 (5th ed. 1953). As a general rule of thumb, \textit{nullité absolue or nullité de plein droit} is used in French \textit{civil} law to signify acts here called void, and \textit{nullité relative, or annulabilité} for acts here called voidable. Note, however, that in
are contracts induced by fraud or duress, marriages by minors without the required consent of their parents, and administrative action in abuse of discretion. The salient features of voidable acts that distinguish them from void acts are (1) that their invalidity can only be asserted by a limited group of parties; (2) that this right to invalidate has an independent existence and can be destroyed by renunciation or extinction, thus rendering the act in substance valid ab initio; and (3) that even if an act is invalidated in due form and by the proper parties, there is no prima facie compelling reason to make this invalidation relate back in all respects.

d. Valid acts. It might be thought that this category is self-explanatory. However, it should be noted that it includes, besides acts that are regular in every way, acts to the irregularity of which the law attaches no consequence. Examples of the latter category are, in American law, marriages without compliance with so-called directory requirements (obtaining a marriage license, taking a blood test, and the like). Another illustration might be a statute enacted in due form with the requisite majority, but in violation of parliamentary rules on the legislative process (e.g., referral to committee; number of readings required).

2. Formative Elements of Transactions. Civil law learning has developed four basic ingredients of valid legal transactions: a subject or subjects with capacity to act; an appropriate object; the requisite will; and, where material, the prescribed form.\(^2\) This classification is followed here because of its apparent utility, but subject to a refinement that seems essential. As will become apparent further below, the category of the "appropriate object" in reality comprises two distinct sub-categories: (1) a res or a fact situation with certain characteristics required by law, and (2) a licit transaction, i.e., one that is not prohibited by law. For instance, title to the territory of another state cannot be acquired by occupation alone, because that mode of the acquisition of territory operates only with respect to terra nullius. The annexation of the same territory by forcible means, on the other hand, would run afoul of the prohibition of the threat or use of force against the territorial integrity of another state contained in Article 2, Section 4 of the United Nations Charter.

marriage law and in public law generally, inexistence signifies void acts, and nullité voidable acts. See text at notes 165-66 & 177-86 infra.

121. However, invalidity ex nunc in all respects would, of course, be no separate legal category but merely an unnecessarily complicated and possibly misleading synonym for the termination or extinction of rights.

122. The classification has been adopted by Judge Anzilotti in his classic treatise (1 Anzilotti, Corso di diritto internazionale 305 (3d ed. 1928)) and employed by Professor Monaco in his oral argument on behalf of Italy in the Expenses case. Certain Expenses of the United Nations (Art. 17, Para. 2, of the Charter)—Pleadings, Oral Arguments, and Documents 331 (I.C.J. 1962).
It seems not unreasonable to suppose that the law might attach different consequences to a defect in the subject matter and the violation of a prohibition—that it might, e.g., react differently to “marriages” between persons of the same sex and to marriage ceremonies performed in violation of penal statutes requiring the issuance of a license or the taking of blood tests. Consequently, it seems important to distinguish between five, not four, basic ingredients or formative elements of legal transactions: capacity, object, legality, will, and form.

3. Presumptions. In several areas of the law, notably marriage and administrative acts, there are presumptions in favor of the validity of transactions. Logically, these presumptions should apply only to void acts, for a valid act is valid. In particular, it seems potentially misleading to say that voidable acts are presumed to be valid, for they are not upheld (unless avoided) because they are presumed to be valid, but because they are valid unless avoided. But this is not the place to discuss the incredibly complicated subject of presumptions. Suffice it to say that, logically, a presumption as such will not validate a transaction, but might enhance the difficulty of establishing its invalidity (or of factors giving a party the right to avoid the transaction).

B. An Historical and Comparative Frame of Reference

It has already been mentioned that the categories developed above largely correspond to those employed in some major legal systems, and this interrelationship has been made further apparent by some of the illustrations supplied. Such a reliance on notions of internal law should not be taken to represent yet another attempt to unearth “general principles of law recognized by civilized nations;” it merely reflects the obvious dependence of public international law upon the terminology and the basic categories of established legal systems. This dependence has become quite apparent wherever international tribunals have had occasion to deal with the problem of validity. The relevant discussions in Expenses, Temple (Jurisdiction), and Award of the King of Spain cases are all but unintelligible unless seen against the backdrop of internal legal systems; indeed, they are replete with reference to these.

When public international law employs a borrowed legal terminology in an area where it has not as yet firmly established rules of its own, this

---


125. See text at notes 87-106, 83-86, & 75-85 supra.
is inclined to be more than a mere use of an existing language and its relevant technical vocabulary for the sake of convenience. Terms of art tend to carry built-in references to their ultimate consequences, and their adoption could easily be a first step towards the incorporation of rules of internal law into public international law. Such a process, if permissible at all, requires care in two directions: the rules "received" into public international law must be apposite to the peculiar international context, and they should not be too one-sidedly the products of one particular national legal system. The first caveat is best illustrated again by the Temple case: the parallel of the invalidity of wills for lack of compliance with formal requirements was out of place because international law generally does not impose form requirements.\textsuperscript{126} The second point is familiar enough; most international jurists tend to think in terms of their domestic legal systems. A telling recent example in point is, with all due respect, Judge Morelli's concurring opinion in the Expenses case.\textsuperscript{127}

Curiously enough, the second danger is considerably smaller than the first. Not only are the relevant basic notions substantially identical the world over,\textsuperscript{128} but there are also great similarities in the treatment of the various typical contexts of invalidity by different legal systems. The basic difficulty, it is submitted, is that the solution of the nullity problem differs from context to context within the same legal system.

Historical research tends to indicate the following general line of development: Primitive legal systems—if at all aware of these theoretical subtleties—generally distinguish merely between non-acts that are ineffective because the solemnities prescribed for the creation of one of the as yet rather few specific rights recognized by the legal order have not been met, and valid transactions (i.e., those accomplished by observing the required formalities).\textsuperscript{129} This conceptual scheme proves to be unsatisfactory for a more advanced legal system that gradually comes to distinguish between form and substance, and that increasingly recognizes the legal relevance of defective intent. But while the talismanic significance of formal acts dwindles, the progressing reglementation and standardization of important spheres of social life gives rise to a new, rational (or bu-

\textsuperscript{126} See text at note 86 supra.
\textsuperscript{127} See text at notes 103-05 supra; see also text at notes 187-95 infra.
\textsuperscript{128} ESSER, \textit{GRUNDSATZ UND NOIIx IN DER 1ICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS} 351 (1956). The author's reservation regarding this assertion concerned the consequences of nullity and voidability in individual contexts, not the similarity of the basic notions themselves. See BAABE, \textit{DAS VERHALTNIS VON PARLAMENT UND REGIERUNG IM BEREICH DER AUS; WARTIGEN GEWALT DER BUNDESREPUBLIK DEUTSCHLAND} 137 n.156 (1962).
\textsuperscript{129} See generally MAINE, \textit{ANCIENT LAW} 338-39 (Pollock ed. 1930); 1 HEUSLER, \textit{INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS} 45 et seq. (1885); 1 KASER, \textit{DAS RÖMISCHE PRIVATRECHT} 34-36 (1955).
Still, the new formalism does not completely replace the old; it merely asserts itself where what ultimately comes to be recognized as the public interest must place decisive emphasis upon the values of clarity and conclusiveness. The result is that in a mature legal system, the correlation between "legality" and validity becomes, generally speaking, inversely proportional to the degree of public interest in the finality of each particular type of act or transaction.

The following is a brief analysis of the interrelationship between "legality" and validity in four distinct contexts: private law transactions; marriage; administrative actions; and judgments. The purpose of this discussion is to demonstrate that each of these four contexts tends to have rules of nullity and avoidance that are quite distinct from those governing other areas of the law, and that both this basic differentiation and some of the more important special rules are apparently the common property of modern legal systems.

1. Private Law Transactions. The origins of a coherent theory of nullity and avoidance can probably be traced to pre-classical Roman private law. Subsequent discussions have generally been influenced by this derivation in at least two respects: learned attention has usually concentrated on the area of private law, and the civilian tradition has predominated.

The learned elaboration of the Roman sources and doctrines, later reflected in varying degrees in the great West European and Soviet codifications, has produced a remarkably uniform system. Broadly speak-
ing, transactions by subjects totally lacking capacity to act (e.g., minors beyond a minimum age of discretion; permanently insane persons) are absolutely void; transactions by persons who can act only with the approval of others (e.g., minors and spendthrifts) are invalid but subject to ratification. Transactions envisaging a performance that is objectively impossible to attain are likewise void, although a party who knew or should have known of such impossibility is, at least in some legal systems, liable for reliance damages. Whether the violation of penal statutes rendered private transactions invalid was seemingly controversial in pre-classical Roman law. An interpretative constitution of Emperor Theodosius, dated 439 A.D., settled this issue in the sense that all transactions in violation of penal laws are void unless the penal statute itself provides otherwise. This solution has become common ground in modern legal systems, although there are substantial differences as to the consequences of the invalidity of a prohibited transaction, especially as regards restitution.

Transactions in violation of form requirements are generally treated as void, but there has been a very substantial attrition of such requirements in private law, with the exception of marriage where, as will be seen presently, the development has been in the opposite direction. Form requirements enforced by the sanction of invalidity usually include wills, certain property transactions more or less limited to the field of real property, and contracts of guarantee among non-merchants. But even here, there is a clearly discernible modern trend towards disregarding form requirements where the insistence of a party on the formal invalidity of a transaction would do violence to the requirements of good faith and fair dealing.

Lack of capacity, possible object, or prescribed form, and violation of statutory prohibition are the classical cases of invalidity of the Roman ius civile. Transactions subject to these defects are absolutely and incurably void. While the ius civile generally recognized only the category

---


138. For a critical appraisal of this tendency in German law, see Gernhuber, Formlichkeit und Treu und Glauben, in FESTSCHRIFT ZUM 70. GEBURTSTAG VON WALTER WALTER SCHMIDT-RIMPLER 151 (1957).

139. D. 50,17,29 (Paulus): "Quod initio vitiosum est, non potest tractu temporis convalescere."
of absolute invalidity,\textsuperscript{140} the praetorian \textit{ius gentium} introduced the notion of voidable transactions. The strict civil law paid little heed to defects of will occasioned by fraud, duress or mistake. In due time, the praetor mitigated the harshness of the law by granting appropriate relief.\textsuperscript{141} Since a transaction tainted by defective intent ceased to be binding only when the praetor interceded, it was by definition not void \textit{ipso iure}, but merely voidable at the instance of the injured party.

The parallels between English and Roman legal history have often been observed,\textsuperscript{142} and it should hardly be surprising that the development of English law proceeded along similar lines. The common law originally refused to make allowances for defective intent, and the chancellor eventually came to grant equitable relief from obligations induced by fraud or duress.\textsuperscript{143} There are, of course, quite substantial differences between the various legal systems as to the type and degree of fraud, duress and especially mistake required for relief from legal obligations, but quite probably in good measure due to this seeming historical accident of parallel development, the basic rule in this area appears to be the common property of both the modern common law and civil law systems: Defective intent renders private law transactions merely voidable at the instance of the injured party, not absolutely void.

It has occasionally been contended that transactions are voidable only if there is a judicial authority that is empowered to avoid them.\textsuperscript{144} Quite clearly, the historical development of the category of voidability is closely linked with two judicial authorities: the Roman praetor and the English chancellor. But \textit{ius civile} and \textit{ius gentium} have been merged into one legal system practically since times immemorial, and so have (much more recently) equity and common law. Furthermore, the forms of actions have gradually been abolished; at least since about the middle of the nineteenth century, legal theory sharply distinguishes between substantive and adjectival law.\textsuperscript{145} As a consequence of these developments, substantive rights have generally been emancipated from the procedures devised for their

\textsuperscript{140} Kaser, \textit{op. cit. supra} note 129, at 215. There were, however, some exceptions, the most notable of which was the \textit{querela inofficiosi testamenti}: the will pretermitting an heir was valid unless set aside \textit{pro tanto} by the heir disadvantaged. \textit{Id.} at 591-94.

\textsuperscript{141} See, \textit{e.g.}, \textit{id.} at 34 & 212-14.

\textsuperscript{142} See, \textit{e.g.}, Buckland & McNair, \textit{Roman Law & Common Law, A Comparison in Outline} 1-6 (2d ed. Lawson 1952).

\textsuperscript{143} See, \textit{e.g.}, Plucknett, A \textit{Concise History of the Common Law} 689, 691 (5th ed. 1956).

\textsuperscript{144} See note 82 \textit{supra} and accompanying text; but see note 220 \textit{infra}. See also Professor Monaco's statement on behalf of Italy in \textit{Certain Expenses of the United Nations (Art. 17, Para 2, of the Charter)—Pleadings, Oral Arguments, and Documents} 331-32 (I.C.J. 1962).

\textsuperscript{145} A pioneering study was Windscheid, \textit{Die Actio des römischen Zivilrechts vom Standpunkte des heutigen Rechts} (1856). \textit{Cf.} 1 Windscheid, \textit{op. cit. supra} note 132, at 190-91.
implementation. It seems quite clear that in at least some major legal systems, the avoidance of obligations tainted by defective intent is now recognized as a subjective right that can be exercised by appropriate extra-judicial action.146

2. Marriage. It thus appears that in the area of general private law the significance of formal requirements for the validity of transactions has steadily declined, while there was a corresponding increase in the importance of other elements, particularly legality and intent. Furthermore, the emancipation of substantive law from the forms of action has divorced the "substantive" law of nullity from the "procedural" means for asserting the nullity of private law transactions. Generalizations on such a comprehensive scale can not as readily be made with respect to the law of marriage and annulment, which is much more subject to varying social customs and, particularly, to religious influences. Nevertheless, if discussion is limited to the European and Anglo-American systems (which, in any event, appear to be the most viable and influential so far as developments elsewhere are concerned), it would seem possible to state that marriage law has taken almost exactly the opposite historical course. Formal requirements have gradually assumed prime importance; the significance of other elements, especially legality, has drastically declined, and judicial procedures for the annulment of marriages have come to attain a significance that can hardly be called anything but substantive.

Present knowledge of the pre-classical and the classical Roman law of marriage is somewhat limited. Especially as regards the interrelationship of the legality and the validity of marriages, some points are still controversial among scholars.147 Still, it seems clear that there was, generally speaking, no form requirement for the conclusion of valid marriages, and the general trend would appear to have been to equate illegality with invalidity.148 This, in any event, was the rule adopted by Justinian's codification. There were a number of impediments, such as consanguinity and prior subsisting marriage, strict requirements as to intent, and a series of prohibitions, e.g., of marriages between guardian and ward. The presence of any impediment, the lack of intent, or the violation of prohibitions entailed the nullity of the marriage—or, perhaps more accurately,

146. See, e.g., German Civil Code §§ 119-24; Swiss Law of Obligations art. 31, both calling for the avoidance through extra-judicial declaration of transactions induced by fraud, mistake or duress. At common law, a marriage voidable because of non-age could be disaffirmed by extra-judicial repudiation upon attainment of marital capacity. See infra at note 170.
147. See generally Cordett, The Roman Law of Marriage (1930); J. Gaudemet, Justum Matrimonium, 2 Revue Internationale des Droits d'Antiquité 309 (= Mélanges Fernand de Visscher, 1949).
made it a non-marriage. The category of voidable marriages was unknown to Roman law.

This situation was radically changed by the canon law of the Roman Catholic Church, which became the primary source of the marriage law of the Western World in the later Middle Ages and provided the basic model for subsequent developments, even in secular states after the Reformation. There are probably several historical reasons for the rise of the notion of voidable marriages and for the fundamental separation of legality and validity in this area. First, even Byzantine law had increasingly recognized the consequences of "invalid" unions. This tendency towards respecting existing situations had seemingly progressed so far in Barbarian law and in the law of the Merovingian and Carolingian churches that the category of void marriages became all but extinct. Secondly, it would appear that as the formal act of the celebration of marriage assumed greater importance, the either-or alternative between valid marriages and non-marriages lost most of its logical appeal. Thirdly and perhaps most importantly, the church undertook to grant dispensations from impediments not founded in divine law, thus validating some marriages that would otherwise be void. Finally, the theological doctrine of the sacrament as a res, coupled with the notion of the character indebilis of clerical orders, necessitated a disregard for lesser irregularities in the interest of the stability of religious acts deemed indispensable for the salvation of souls. This latter consideration found its classic expression in a communication of Pope Innocent III to the Archbishop of Pisa dated December, 1198, which ruled that religious professions of monks made before the expiration of the prescribed probationary period were nevertheless valid, quia multa fieri prohibentur, quae, si facta fuerint, obtinent roboris firmitatem.
The distinction between legality and validity which found expression in this often-quoted passage was to become one of the mainstays of the canon law of marriage. A second basic principle in derogation of Roman law was introduced by the decree of the Council of Trent, adopted in 1563, which established the requirement of a formal marriage ceremony.\textsuperscript{154} The canon law rules on the validity of marriage are, in the main, the product of the interplay of these two new principles with the notion of impediments, taken over from Roman law and molded in accordance with theological doctrines. The most important among the latter is the principle of the indissolubility of validly concluded and consummated marriages;\textsuperscript{155} it precludes the express recognition of the category of voidable marriages on the substantive level (but not, as will be seen, its implied recognition by procedural devices).

The provisions of the present Code of Canon Law for the Western Church, while of course reflecting a number of technical and some doctrinal changes that have occurred since the later Middle Ages, still in the main present a classical model and summary of that canon law of marriage which served as a model or a point of departure for secular marriage laws in the past. Its basic principles may be summarized as follows: A marriage that lacks the prescribed form (\textit{i.e.}, that was not celebrated in Roman Catholic form although one of the prospective spouses was baptized in that religion) is a non-marriage. Its invalidity need not be established in a judicial proceeding.\textsuperscript{156} Where there has been a valid ceremony, invalidity can still result from the presence of impediments, but not all impediments are sanctioned by invalidity. As formulated in

\textsuperscript{154} Concilium Tridentinum, sess. XXIV, \textit{de ref. matrim.}, c. 1 (1563); see generally 2 A. Esmein, \textit{op. cit. supra} note 151, at 156 \textit{et seq.} Note, however, that the decree \textit{Tametsi} was effective only where promulgated locally, so that until quite recently, Roman Catholic canon law recognized marriages of Roman Catholics formally valid under the \textit{lex loci} even when there was no compliance with canonical form. For details, see, \textit{e.g.}, Heneghan, \textit{The Decree "Tametsi" in the United States}, 3 \textit{The Jurist} 318 (1943). The form requirements currently in force are laid down by CIC can. 1094 \textit{et seq.}, especially can. 1094 & 1099.

\textsuperscript{155} CIC can. 1118: \textquote{Matrimonium validum ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest.}

CIC canon 1036, an *impedient* impediment merely contains a grave prohibition against contracting marriage, but does not render invalid a marriage contracted in spite of it. A *diriment* impediment, on the other hand, prohibits the marriage and prevents it from being contracted validly.\(^{157}\) Impediments that do not entail invalidity are simple vows, mixed \(i.e.,\) Christian) religion, and \(i.e.,\) the adoptive parent-child relationship.\(^{158}\) All other impediments \(e.g.,\) subsisting prior marriage; disparity of cult; fraud; duress) are diriment.

It would thus seem that canon law employs only three of the four categories here used: non-marriage, void marriage, and valid marriage (the latter including some illegal marriages). On closer examination, however, it will be seen that the category of "void" marriages is subdivided into two basic categories: those involving defects of intent and those vitiated by other impediments. The former can be validated by a mere expression of consent; the latter, once the impediment has disappeared or has been dispensed, can be validated only in the form prescribed by law, \(i.e.,\) a new marriage ceremony. In both categories, the invalidity of marriage has to be established by judicial decision. But while a summary judicial procedure will suffice where the impediment is public \(e.g.,\) prior subsisting marriage), a marriage vitiated by lack of consent can only be declared void in a formal proceeding, involving a full trial and at least one appeal. Furthermore, proceedings for declaration of nullity can be brought either by the public prosecutor or an innocent spouse where the impediment is public, but only by the latter where there is lack of consent; after the death of the spouses, only a marriage subject to a public impediment can be declared invalid if the question of its validity is incidentally at issue in another proceeding.\(^{159}\) In spite of terminological refinements necessitated by theological doctrine, it thus appears that marriages vitiated by defective intent are in substance treated as merely voidable in canon law.

In short, the canon law of the Roman Catholic Church has introduced the following four innovations into the marriage nullity law: a stringent form requirement; the distinction between *diriment* (fatal) and *impedient* (prohibitive but harmless) impediments; a differentiation between general impediments and those connected with intent, with nullity

---

157. See generally 2 EICHMANN, LEHRBUCH DES KIRCHENRECHTS 163 et seq. (10th ed. Mörsdorf 1958); BOUSCAREN, ELLIS & KORTH, op. cit. supra note 152, at 488 et seq. (The latter contains English translations of CIC can. 1012-1143, relating to marriage.)


as a consequence in the former and voidability in the latter case; and the
general requirement that, except where the prescribed form is lacking, a
void or voidable marriage must be declared invalid by a competent tri-
bunal before it becomes ineffective. Subject to some modifications pre-
ently to be discussed, modern European and Anglo-American law has
adopted these principles.

A form requirement as a threshold condition even for the existence
of a colorable marriage has been generally established either through the
direct reception of the Roman Catholic canon law, legislation implement-
ing a substantially similar canon law of another church (e.g., that of the
Church of England in Lord Hardwicke’s Act),160 or secular enactments.
The latter were generally intended, at least originally, to provide for an
alternative form of marriage in states with more than one recognized re-
ligion. Starting with the French Revolution, however, there have been
some anticlerical motivations in the imposition of the requirement of a
civil ceremony. In some areas, the pendulum has swung violently back and
forth between the requirement of a civil or a religious ceremony; in some
states it has come to rest with the recognition of either.161 Whatever the
details,162 the end result is that all European states now require the ob-
servance of some prescribed ceremony as a condition precedent for the
existence of a colorable marriage; where such minimum compliance with
formalities is lacking, the parties are free to go their own ways. In some
states of the United States, informal (“common law”) marriages can still
be entered into, and Scotland still recognizes marriages by habit and
repute.163 With these exceptions, however, Anglo-American law as to
essential form requirements is substantially identical with European law.

The distinction between diriment impediments going to the validity
of the marriage and merely directive impedent impediments is also well
known to modern marriage law. The latter usually include, but are not
necessarily limited to, steps to be taken prior to the marriage ceremony,
such as obtaining blood tests, procuring a marriage license and publishing
banns, or details of the ceremony itself, such as the reading of a section
of the civil code.164 In this respect, there appears to be no substantial

160. 1753, 26 Geo. 2 c. 33.
161. For a brief summary of developments in Italy, see, e.g., 1 RUGGIERO & MAROI,
162. SOHN, DAS RECHT DER EHESSCHLIESSUNG AUS DEM DEUTSCHEN UND CANONIS-
CHEN RECHT GESCHICHTLICH ENTWICKELT 197-283 (1875) describes developments in the
Protestant parts of Germany, where the requirement of a formal ceremony came to pre-
vail by the end of the eighteenth century. See also generally Schwelb, Marriage and Hu-
163. Id. at 357, with further references.
164. See, e.g., 1 PLANOL, RIPERT & BOULANGER, op. cit. supra note 120, at 360-61;
difference between European and Anglo-American law. But European
marriage legislation has, in general, distilled the difference between the
two types of impediments to a clear-cut rule that as yet has no exact
parallel in Anglo-American law, which favors a more casuistic approach.
This rule, originally developed in French law on the basis of the Code
Civil of 1804, is summed up in the adage, "pas de nullité sans texte." It
means that in the absence of a clear statutory provision entailing nullity,
a marriage that meets the threshold requirements as to form is valid.165
Thus, the general civil law rule that a prohibited transaction is invalid in
the absence of provision to the contrary166 is converted into its exact op-
posite in the law of marriage; illegality is equated to invalidity only by
specific provisions derogating from the general rule.

Largely untroubled by theological dogma, modern marriage law quite
generally employs the categories of void and voidable marriages. The
former usually include both the principal cases of defective intent (i.e.,
fraud, duress) and the typical cases of deficient capacity (i.e., nonage
and absence of parental consent where required).167 This again derogates
from the general law, for private law transactions by minors are as a rule
invalid, at least unless confirmed by the competent parent or guardian.
On the contrary, a voidable marriage is valid unless avoided by the party
aggrieved within the relatively short period prescribed by law. Furth-
ermore, the criterion for fraud sufficient to avoid a marriage is generally
substantially narrower than the corresponding criterion of general con-
tract law.168

The typical cause for "nullity" (rather than avoidability) of mar-
riage is absolute incapacity, usually due to prior existing marriage. Up
to this point, there has been substantial identity between Anglo-American
and Continental law, but a rather basic difference is now encountered.
Continental law has generally taken over the canon law rule that, once
there has been a colorable ceremony, the legal effectiveness of a marriage
can only be destroyed by a judicial determination of nullity. "Pas de
nullité sans texte" thus has the additional significance that only a judg-
ment will nullify a marriage; until so nullified, even a bigamous marriage

165. For a critical analysis of this adage, see 1 Planiol, Ripert & Boulanger, op.
cit. supra note 120, at 357-59.
166. See text at notes 136-37 supra.
167. Cf. Bliesbach v. MacEwen, 1959 S.C. 43 (Court of Session 1954); see Anton &
Francescakis, Modern Scots "Runaway Marriages," 3 Juridical Rev. (n.s.) 253, 262-
67 (1958), with discussion of French, Belgian, Netherlands and German law relating to
parental consent and to marriages celebrated in the absence thereof.
168. New York, of course, is the famous exception. See Franck, The Annulment of
Marriage in New York, 1 U.B.C. L. Rev. 470 (1961). For the law of a more typical
state, see 1 Lee, North Carolina Family Law 113-25 (1963).
nullity and avoidance

is "valid." Anglo-American law, on the other hand, was late in adopting what may here be called the constitutive theory of adjudication of matrimonial status even as regards voidable marriages: at common law, a marriage that was voidable for non-age could be nullified by extrajudicial repudiation. This is now generally no longer the case; the statutory scheme of annulment jurisdiction and procedure is taken to be exclusive. Nevertheless, the same conclusion is very definitely not drawn as regards absolutely void, e.g., bigamous, marriages. While in regard to the latter a judicial declaration of nullity is increasingly becoming available, such a declaratory judgment is not required in order to efface the civil effects of a void marriage. The latter is treated in Anglo-American law in the same manner as the inexistent marriage (non-marriage) under civil law; the parties are free to regard it as ineffective without resorting to judicial recourse.

3. Administrative Law. A by-product of the modern bureaucratic service state, administrative law is a relative newcomer to the legal scene. As a distinct body of principles and rules, and more particularly, a separate legal discipline, it is not much over a century old on the Continent, and considerably less than that in the United States or Great Britain. Yet despite its recent vintage and common function—and in spite of a substantial amount of cross-fertilization—administrative law is not generally regarded as an area where comparative study will reveal much in the way of general principles. Indeed, in its submissions in the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal case, the United States roundly denied that the legal relationship of the Administrative Tribunals of the United Nations or the League to their respective assemblies could be explained in terms of the legal sys-

169. See, e.g., Tuor, op. cit. supra note 164, at 135-38.
173. Otto Mayer, who might be called the "father" of German administrative law, derived much of the inspiration for his conceptual system, which is still dominant in Germany, from French administrative law, which he knew intimately. See Forsthoff, op. cit. supra note 172, at 49 et seq. Ernst Freund's thinking, in turn, seems obviously influenced by German notions of administrative law. See generally Comment, supra note 172.

tems of member states: "Not only have different results been produced in the same and among different countries by different political problems, but there is no automatic correspondence of United Nations problems—international organization problems—and those of particular municipal systems."174

A virtually identical statement can be found in an excellent recent survey of the subject here under discussion, which concludes that in twenty years it probably would have to be written in a completely different manner.175 Therefore, substantial caution is indicated in the use of administrative law notions in public international law, and the blanket reception of a present Continental European system, in the manner implicitly suggested by Judge Morelli, is open to serious objection.176 Nevertheless, it will presently become apparent that despite some fundamental differences, particularly between the civil law and common law prototypes, there are some pervasive similarities in the treatment of defective administrative actions. In any event, nascent international administrative law will have to reflect, to a substantial degree, the experience, the similarities and, perhaps, the discords of Continental and Anglo-American administrative law.

Continental administrative law has been decisively influenced by the French model, which has its roots in the separation-of-powers scheme produced by the French Revolution. This furnished two relevant ground rules: (1) the principle of the interdiction of judicial interference in the operation of administrative organizations, expressed in classical terms in the Judiciary Act adopted by the Constituante on August 16, 1790, and (2) the legality principle, which signifies that human freedom can be limited only in accordance with legislative enactments.177 In practical operation, these two principles have a tendency to conflict with each other, for while the administration is duty-bound to observe legality, the individual has no judicial remedies against illegal administrative action. The history of the Continental system of administrative justice has centered mainly around this conflict. A solution has been sought in terms of administrative redress by way of complaint, and, subsequent to the standardization of internal means of relief, by the creation of a separate system of administrative courts with power to grant the relief that is not avail-

176. See text at notes 103-05 supra.
177. See generally Waline, Droit administratif 18 et seq. (8th ed. 1959).
nullity and avoidance

able in courts of general jurisdiction. It might be somewhat bold to speak of a consistent historical development in this direction, but the overall trend of continental administrative law has been the enlargement of the machinery for internal and administrative-judicial relief against defective administrative actions, with the ultimate goal of complete justiciability.\textsuperscript{178}

The focal point of the specifically Continental European "style"\textsuperscript{179} of administrative law created by the interplay of the principles of separation and legality with their offshoot, administrative adjudication, is the notion of administrative action or the administrative act (\textit{acte administratif}; \textit{Verwaltungsakt}). Definitions in this area are highly controversial, but broadly speaking, the term refers to any individualized administrative action that creates, modifies, terminates or otherwise determines rights and obligations in such a manner as to directly affect individuals. It thus excludes "quasi-legislative" acts (or rule-making), but overlaps in both directions with "quasi-judicial" acts (or adjudication) because it excludes "quasi-judicial" remedies other than internal relief within the agency or ministry itself while including virtually all individualized first-level acts.

Since administrative acts thus defined virtually cover the whole gamut of the activities of a modern service state from naturalization to the dedication of roads, attempts to develop general rules for their validity in terms of categories such as capacity, object, intent, legality and form have generally proved to be overambitious. Each area of activity has, to a greater or lesser extent, its own relevant rules.\textsuperscript{180} Nevertheless, a pervasive general scheme can clearly be discerned. Its basic rules are that any administrative act issuing colorably in due form from any administrative organ is prima facie valid and subject to immediate execution, that its validity can only be attacked in the prescribed manner by internal complaint and, ultimately, administrative adjudication, and that unless and until so annulled, it is deemed valid and binding not only upon the individuals affected, but also upon courts of general jurisdiction and the administration itself. That is, once the threshold separating non-acts from colorable acts has been crossed, administrative acts are at most

\textsuperscript{178} For a concise summary of this development in Germany, see Forsthoff, \textit{op. cit. supra} note 172, at 461-78.

\textsuperscript{179} The "style" of legal techniques seems to be the best criterion so far developed for the differentiation of legal systems. See Zweigert, \textit{Zur Lehre von den Rechtskreisen, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW, LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 42, 46 et seq.} (1961).

voidable, not void.\footnote{181}

As already remarked, this general scheme is usually subject to substantial variations as to the type of action involved. Furthermore, there are some differences in this respect between the various European legal systems. There is always a tendency to establish a category of void acts, \textit{i.e.}, acts emanating from an administrative organ in ostensibly due form but nevertheless patently invalid on their face, and probably all legal systems recognize that, at least in some instances, such acts may be disregarded without resort to annulation procedure. Furthermore, questions as to the validity of administrative actions do, of course, arise in civil or in criminal cases; especially in the latter, there is a strong tendency to permit courts of general jurisdiction to decide the incidental or preliminary question of the validity of a potentially relevant administrative act.\footnote{182}

Since the issue of invalidity can often be raised as a defense after the period of affirmative relief by way of annulation has expired, there are some limits to the principle of conclusiveness, and the res judicata doctrine does not generally apply to administrative acts. The overriding principle of legality requires that at least in some areas, an administrative organ be empowered to "withdraw" its own action even after it has become final and subject to execution.\footnote{183} But still, the basic rule of Continental European administrative law remains \textit{pas d'annulabilit\'e sans instance}.

An important corollary of this rule is that once an administrative act has been annulled or withdrawn by the proper organ, it is not only invalidated as to the complaining party, but totally effaced. The basic rule and its corollary are also reflected in the technique of the judicial review of the constitutionality of legislative acts that was developed after the Second

\footnote{181. According to the Court of Justice of the European Coal and Steel Community (now the Court of Justice of the European Communities), this is so in France, Germany, Italy, the Netherlands and Belgium: "De l'avis de la Cour, l'ill\'egalit\'e d'un acte administratif individuel n'entra\^ne sa nullit\'e absolue que dans certains cas. . . . Abstraction faite de ces cas exceptionnels, la doctrine et la jurisprudence des Etats membres n'admettent qu'une annulabilit\'e et r\'evocabilit\'e. L'intervention d'un acte administratif cr\'ee la pr\'esomption de sa validit\'e. Celle-ci ne peut \^etre infirm\'ee que par annulation ou par retrait, pour autant que ces mesures sont admises." Algera v. Common Assembly, 3 Recueil de la Jurisprudence de la Cour 80, 122 (Judgment of July 12, 1957). See generally 1 Forsthoef, \textit{op. cit. supra} note 172, at 202 \textit{et seq.}; Waline, \textit{Droit administratif 410 et seq.} (8th ed. 1959); 1 Zanobini, \textit{Corso di Diritto Amministrativo 243 et seq.} (6th ed. 1952); 1 Vitta, \textit{Diritto Amministrativo 451 et seq.} (4th ed. 1954).

182. See, \textit{e.g.}, 1 Vedel, \textit{Droit administratif} 91-93 (1958).

183. In the \textit{Algera} case, the Court of Justice of the European Coal and Steel Community had to decide whether (and if so, under what conditions) administrative acts of Community organs conferring benefits upon individuals could be revoked by the issuing authority. The court, finding no treaty provision in point, sought inspiration from the law of the member countries. It found that "Si . . . l'acte administratif est ill\'egal, le droit de tous les Etats membres admet la possibilit\'e d'une r\'etraction." Algera v. Common Assembly, 3 Recueil de la Jurisprudence de la Cour 80, 115 (Judgment of July 12, 1957). For a discussion of French, Belgian, Luxemburg, Netherlands and German law, see \textit{id.} at 115-16.
NULLITY AND AVOIDANCE

World War in Austria, Italy and the Federal Republic of Germany. In each of these states there is a special constitutional court with exclusive competence to adjudicate disputes as to the constitutionality of statutes either in original proceedings or by referral or special appeal from courts of general jurisdiction. A decision against the constitutionality of the statute challenged has the effect of nullifying it and is published in the manner of a legislative enactment in the Official Gazette. 184

The judicial review of the constitutionality of legislation, at least after its enactment, 185 is still regarded as incompatible with the traditional French scheme of the separation of powers. Nevertheless, there is precedent for this quasi in rem technique in recent French constitutional history as well. A decree of the provisional government of the French Republic, enacted on August 9, 1944, specifically reaffirmed the Republican form of the government of France and declared all constitutional, legislative or regulatory acts of the Vichy régime, and all decisions taken in accordance therewith, to be "nul et de nul effet." It nevertheless continued, virtually in the same breath, to provide that such nullity was only to occur where it had been expressly provided for in this and in subsequent ordinances. Unless and until expressly annulled in such manner, the acts of the de facto government were "temporarily" to be applied. 186

It seems rather difficult to find many surface similarities between the European system thus described and Anglo-American law on the validity of administrative actions. The basic difference between the two systems already becomes apparent on the terminological level: while the notion of administrative action is increasingly employed as a criterion of ripeness for judicial review, 187 the European concept of the acte administratif is as yet virtually unknown to Anglo-American law. The latter has not entered the era of the modern service state with a basic anti-judicial


185. The constitutions of both the Fourth and Fifth Republics and the constitutions of several member states of the French Community have introduced a procedure by which a specific organ of state (e.g., the President of the National Assembly) can on his own motion refer the question of the constitutionality of a bill before its enactment to a special Constitutional Committee or Tribunal for decision. If the latter decides that the bill is "unconstitutional," it can only be enacted by the procedures required for constitutional amendments. See generally Eisenmann & Hamon, La Juridiction Constitutionnelle en Droit Français (1875-1961), VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 231 (Mösler ed. 1962).


bias. Quite to the contrary, it has until recently been a fundamental principle of American and British law that the legality and the validity of just about any action of a public official can be reviewed by courts of general jurisdiction, be it in injunctive proceedings or actions for damages against public officers, review as to jurisdiction of administrative organs by special writs such as certiorari, or merely a passive challenge through disobedience, followed, if need be, by a defense of illegality and invalidity in an action for compliance. The latter was all the more effective since it is still a general rule of both English and American law that coercive administrative measures are not executory but must be forced through judicial proceedings.

So long as courts of general jurisdiction retained comprehensive powers of review and their intervention was necessary for the enforcement of administrative orders, the development of separate standards for determining the validity of administrative acts was highly unlikely. To be sure, courts could, and did, distinguish between "mandatory" and "directive" requirements, thus carving out an area of minor irregularities not fatal to the administrative action taken. But so long as a court ultimately had to decide the whole matter de novo, a distinction between void and voidable administrative acts made little sense. As was stated by Lord Morris in the recent case of Ridge v. Baldwin:

It was submitted that the decision of the watch committee was voidable but not void. But this involves the inquiry as to the sense in which the word "voidable," a word deriving from the law of contract, is in this connection used. If the appellant had bowed to the decision of the watch committee and had not asserted that it was void, then no occasion to use either word would have arisen. When the appellant in fact at once repudiated and challenged the decision, so claiming that it was invalid, and when in fact the watch committee adhered to their decision, so claiming that it was valid, only the court could decide who was right. If in that situation it was said that the decision was voidable, that was only to say that the decision of the court was awaited. But if and when the court decides that the appellant was right, the court is deciding that the decision of the watch committee was invalid and of no effect and null and void. The word "voidable" is therefore apposite in the sense that it became necessary for the appellant to take his stand; he was obliged to

take action, for unless he did, the view of the watch committee, who were in authority, would prevail. In that sense the decision of the watch committee could be said to be voidable.\textsuperscript{190}

It is probably for this reason that "although there are clear examples showing that the notion of an act being absolutely void is well known to English law, the distinction between acts, which are absolutely void and others which are only \textit{voidable}, has not been evolved in English law, at least in such a clear-cut way as in Italian law."\textsuperscript{191}

However, the distinction between void and voidable administrative action has recently assumed growing significance in England and in the United States. There is a growing tendency in both countries to make certain public burdens and benefits contingent upon initial action by an administrative agency,\textsuperscript{192} to provide for specified forms of redress against such administrative action before the agency itself or before a statutory tribunal, and to preclude those who have not exhausted their administrative remedies from subjecting the action complained of to collateral attack in courts of general jurisdiction.\textsuperscript{193} Broadly speaking, preclusion applies only to voidable actions or, more precisely, to actions the defects of which can be cured by assent, waiver or prescription. Where subsequent conduct will not repair the deficiency, on the other hand, administrative remedies need not be exhausted, and the general courts retain power to disregard the act in question or to refuse to sanction its enforcement.\textsuperscript{194}

It is as yet too early to discern whether the category of "voidable" administrative acts, \textit{i.e.}, acts subject to timely direct attack but not to collateral impeachment, is destined to assume a significance in Anglo-American law comparable to its importance in the Continental administrative law system described above. Quite clearly, this is not so at the present.\textsuperscript{195}

\textsuperscript{190} [1964] 40 A.C. 102, 125 (H.L. (E.) 1963). Ridge, the chief constable of the Brighton police force, had been dismissed by the Watch Committee, an organ of municipal administration, for dereliction of duty. This decision had been taken without prior notice or a hearing. After unsuccessfully exhausting administrative remedies, plaintiff eventually obtained a decision restoring his pension rights. See generally Bradley, \textit{A Failure of Justice and Defect of Police}, 1964 CAMB. L. J. 83.

\textsuperscript{191} Galeotti, \textit{op. cit. supra} note 173, at 106-07.

\textsuperscript{192} Jaffe, \textit{Primary Jurisdiction}, 77 HARV. L. REV. 1037 (1964).


\textsuperscript{194} See generally Jaffe, \textit{The Exhaustion of Administrative Remedies}, 12 BUFFALO L. REV. 326 (1963).

\textsuperscript{195} The category of "voidable" acts in English administrative law, for instance, would appear to be quite small, and generally limited to actions of statutory tribunals. See De Smith, \textit{Judicial Review of Administrative Action} 77-79, 99-100, 162-63, 407-09 (1959). In the United States, there is a marked tendency to restrict the reviewability of administrative action and to enlarge the granting authorities' powers of modification or retraction where not burdens but benefits are at issue. For details and criticism, see F. Davis, \textit{Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government}, 39 IND. L.J. 183 (1964); Gordon, \textit{The Finality of Immigration and
and it would seem that while there is a clear trend towards increased insistence upon the exhaustion of administrative remedies, the basic Anglo-American tradition of entrusting a system of courts of general jurisdiction with the exclusive power to sanction deprivations of liberty or property will in the long run prove to be an insuperable obstacle to the complete assimilation of this sector of Anglo-American law to the European prototype.

4. Judgments. In its advisory opinion in the *U. N. Administrative Tribunal* case, the International Court of Justice stated: "According to a well-established and generally recognized principle of law, a judgment rendered by (an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions) is *res judicata* and has binding force between the parties to the dispute." It might perhaps have been more advisable to limit the operation of this principle to valid decisions not subject to ordinary or extraordinary remedies; for plainly, an invalid judgment is not *res judicata*, nor is a judgment that is annulled. This will be borne out and illustrated by the following brief historical and comparative discussion of the validity of judgments rendered in civil controversies.

While in principle recognizing the doctrine of *res judicata*, classical and even post-classical Roman law applied its general rules governing the validity of legal transactions to judgments as well. This meant that a judgment rendered by an incompetent judge or tribunal, for or against a party without the requisite procedural capacity, not in proper form prescribed, in violation of prescribed procedure, or in violation of a fundamental rule of substantive public law, was absolutely void. Even when regular appellate procedures became available, a void judgment need not be attacked by appeal; the issue of its validity could be raised at any time, either affirmatively or as a defense. On the other hand, as in general law, defective intent made a judgment merely voidable, not void. A party disadvantaged by a judgment obtained by fraud had to seek restitution, *i.e.*, the restoration of the situation that existed before judgment, through an independent action.

This basic scheme, described here in somewhat more precise terms than seems justified by the sources, underwent substantial modifications in the later Middle Ages when the rediscovered Roman sources came into

---


197. See Wenger, *Institutes of the Roman Law of Civil Procedure* 211-12, 308-09 (Fisk transl. 1940). Standard sources are D. 49,8,1 (Macer); C. 7,44,4 (A. Severus, 229 A.D.), and generally C. 7,64.
conflict with the Germanic tribal laws then prevailing—a conflict ultimately resolved by the general victory of an updated version of Roman law. The Roman principle of the unrestricted impeachability of defective judgments was diametrically opposed to German tribal law, especially Lombard law, which assigned absolute finality to formal verdicts of the Thing. Seemingly as early as the twelfth century, the statutes of Northern Italian cities struck a compromise between these two conflicting principles by creating a new action, the quærela nullitatis. This action, sharply distinguished from ordinary appeals by thirteenth century commentators, was to become the only means for attacking "void" judgments.

Gratian's Decretum more or less faithfully reproduced the substantially conflicting Roman and medieval sources on the nullity of judgments without arriving at a definite solution. Nevertheless, especially in reliance on the statement of Pope Innocent III that "multa fieri prohibentur, quae si facta fuerint, obtinent roboris firmitatem," canon law procedure soon received the quærela nullitatis and the basic rule that the invalidity of a judgment which is not subject to appeal can only be established in special judicial proceedings. However, this rule was subjected to some further refinements by the decretalists who distinguished between two distinct groups of causes for the nullity of judgments: those going to the essentials of the proceeding itself, and those merely involving infractions of technical rules of procedure. Seventeenth century legislation of the Holy Roman Empire referred to the former as incurable and to the latter as curable nullities (nullitates insanabiles and sanabiles); this terminology has been adopted by canon law where it still can be found today. In the treatment of these two categories, however, canon law has parted company with modern European civil procedure.

In present-day canon law, there are three main grounds of incurable nullity: absolute lack of competence of the judge or improper composition of the tribunal, lack of procedural capacity by one of the parties, and lack of valid powers of attorney. Curable grounds of nullity are defective service and irregular form of judgment (i.e., lack of a statement of

198. See generally Koschaker, Europa und das römische Recht (1947).
199. The leading study of the subject here discussed is Skedl, Die Nichtigkeitsbeschwerde in ihrer geschichtlichen Entwicklung (1886). For succinct summaries, see Nussbaum, Die Prozesshandlungen, ihre Voraussetzungen und Erfordernisse 4-7 (1908); Ewers, Die Nichtigkeitsbeschwerde in dem kanonischen Prozessrecht 1-2; Engelmann, A History of Continental Civil Procedure 504, 569-71 (Millar transl. & ed. 1927).
201. C. 16 X de regularibus et transeuntibus ad religionem III, 31 (1189); see text accompanying note 153 supra.
grounds, of the prescribed signature, or of indication of the date and place of rendition). A judgment that is curably invalid can be attacked by a quarela nullitatis only within three months of publication; unless successfully so attacked, it becomes unimpeachable. On the other hand, an incurably invalid judgment can be set aside by such an action within thirty years after publication, and the defense of incurable nullity can always be raised in collateral proceedings. This latter provision is the only remaining relic of Roman law in this area.\(^2\)

Modern European law, however, has generally merged the procedural defects formerly classified as nullitates sanabiles with the general category of error giving rise to appellate redress. There still remains the category of incurable nullity, but here, too, the last vestiges of Roman law have disappeared. The West German Code of Civil Procedure, for instance, preserves the quarela nullitatis (Nichtigkeitsklage) for substantially the same defects now classified as nullitates insanabiles by the Code of Canon Law. However, a judgment that is subject to these defects can only be set aside by an action brought within one month after knowledge of grounds for nullity, and generally not later than five years after rendition. Unless and until so set aside, it remains for all intents and purposes a valid judgment.\(^3\)

However, the European prototype of the law governing the validity of "final" judgments is not completely reflected by the evolution and the present status of the quarela nullitatis. Only a judgment can be so defective as to be subject to this action; and conversely, a valid judgment can still be set aside under certain circumstances. If, for instance, the purported judgment lacks the minimum requirements as to form and mode of publication, if it emanates from a person who is not a judge or from a judge not acting in his official capacity (e.g., in a moot court competition), or if it orders something that is utterly incompatible with the existing legal order (e.g., the specific performance of the obligation to marry), it is a non-judgment. It can be ignored by those potentially affected without need of resort to judicial proceedings, and the defense of invalidity can be raised at any time. In other words, before a judgment can be even incurably invalid, it has to meet certain minimum threshold requirements as to form, provenience and contents.

On the other hand, a valid and final judgment (i.e., a judgment that meets these threshold requirements, is no longer subject to appeal, and can no longer be effaced by a quarela nullitatis) can still be set aside by


special proceedings for restitution. Generally speaking, and subject to extremely stringent requirements as to proof, a judgment procured by perjured or manufactured testimony, corruption of the court, or sharp practice as regards the other party and its counsel can be set aside in a timely proceedings for restitution of the status quo ante. There is also a distinct tendency at least in some countries to grant relief in tort actions against those who have illegally obtained substantively incorrect judgments where the more or less narrowly prescribed grounds for restitution are not available. However, this trend finds its obvious limitation in the general rule that even an erroneous judgment is binding between the parties once the procedural means for redress have been exhausted.

A comparison of the European prototype described above with the corresponding rules of Anglo-American law shows some basic similarities, but also a remarkable divergency. For purposes of brevity and convenience, the following account is based on the Restatement of the Law of Judgments, adopted by the American Law Institute in 1942. It is not, of course, suggested that this Restatement is a complete and accurate summary of the present state of the law in all legal systems based on the common law, but in the area with which this paper is concerned, it appears to offer a succinct statement of the guiding principles of Anglo-American law.

The Restatement lists four grounds for the nullity of judgments: lack of jurisdiction over the parties and the subject matter, lack of reasonable notice and opportunity to be heard, lack of judicial competency, and noncompliance with such requirements as are necessary for the valid exercise of judicial power. The first ground is explainable mainly in the light of the peculiarities of the limitations placed by the Constitution of the United States upon the assertion of jurisdiction by the various states of the American Union; the remaining three bear a remarkable resemblance to the grounds for the nullity of judgments recognized by European law before the more restrictive codifications of the last century. There is, however, one quite basic difference between Anglo-American and Continental European law on the validity of judgments. While the latter generally permits the impeachment of a colorably regular final judgment only by means of a special action modelled after the querela nullitatis,

204. See, e.g., West German Code of Civil Procedure §§ 580-81; CIC can. 1905-07. As to the latter, see 3 EICHMANN, LEHRBUCH DES KIRCHENRECHTS 198-202 (9th ed. Mörsdorf 1960).
205. E.g., in Germany; for a critical summary, see ROSENBERG, op. cit. supra note 203, at 785-87.
Anglo-American law knows no such restrictions. Where one of the grounds for nullity enumerated above is present, a judgment may both be impeached directly, if there are appropriate procedures available, and indirectly (i.e., collaterally) in any court at any time, either by attack or defense. In other words, the Anglo-American law on the nullity of judgments is substantially similar to Roman law before the rise of the querela nullitatis.207

Again, this is not the end of the story. Continental European law grants the extraordinary remedy of restitution in certain limited cases where an otherwise final and valid judgment is tainted by defective intent, notably deceit and corruption. In a like manner, Anglo-American law grants equitable relief against valid judgments procured by fraud, corruption or duress. This remedy is discretionary and not generally available where the disadvantaged party has failed to use care to protect his interests or has not acted promptly after ascertaining the facts.208 As in European law, stringent proof is required to overcome the strong presumption of the correctness of a judgment of record. A peculiarity of Anglo-American law is that relief from the court rendering the judgment might be had more readily on motion in the cause filed during the term in which the judgment was rendered, as all judgments are to some extent subject to the disposition of the court during this period. Finally, one variant, possibly representing the majority view, limits relief for deceit to so called extrinsic fraud that deprives a party of his day in court and refuses to interfere with judgments based on perjured testimony.209

Subject to the exceptions enumerated above, both modern European and Anglo-American law observe the basic principle implicit in the doctrine of res judicata that a final judgment is valid and binding, no matter how erroneous as to its factual determinations or legal holdings or both. The emphasis, of course, is on "final." In the field of judgments, the balance between individual justice and public certainty is struck mainly by affording the party disadvantaged by improper procedure or erroneous findings or holdings relief by way of appeal. Most of the former causes of nullity have been transformed into grounds for appellate relief, and doctrines of waiver, preclusion and invited error further work to achieve

207. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 413-14 (1952).
209. This is the so-called Throckmorton Rule, laid down in United States v. Throckmorton, 98 U.S. 61, 95 (1878). For a more flexible approach, see, e.g., Chermak v. Chermak, 227 Ind. 625, 88 N.E. 2d 250 (1949).
the basic aim of the judicial process: the final and authoritative determination of legal disputes.

IV. SOME PROVISIONAL CONCLUSIONS

Before applying the theoretical framework developed above to the case material, it would seem appropriate to briefly mention three main characteristics of the international legal order that distinguishes it fundamentally from other legal orders and place severe limits upon analogies drawn from internal law. First, only states and (by the authorization of states) international organizations are the subjects of international law in both the philosophical and the legal sense of that term. Only they make the law, and only they are primarily bound by it. Secondly, as a result of both the relatively recent origins of international law and the strict limitations upon "subjectivity" just described, public international law imposes hardly any requirements as to form and few, if any, limitations upon "contractual" power. Thirdly, while all states and international organizations are "bound" by international law, no state or international organization is, in the absence of a specific manifestation of will to the contrary, obliged to submit any international dispute to adjudication by any tribunal, let alone a really neutral forum. A factual—though not a necessary—corollary of this last factor is that the process of international adjudication as it exists today subsists largely on an ad hoc basis, and that appellate judicial procedures are almost entirely unknown in international adjudication.

Recalling our four basic categories (non-acts, invalid acts, voidable acts, and valid acts) and the five formative elements of legal transactions (subject, object, legality, intent, and form), the theoretical framework developed above will be first applied to general international law.

A. Nullity and Avoidance in General International Law

Since subjectivity is absolutely essential in public international law, a reasonable initial reaction would seem to be that an act as defined for the purposes of this study, i.e., an act designed to create, modify, or abolish rights or obligations arising under public international law, will be a non-act if not emanating from a subject of international law. The survey has already revealed, *en passant*, one such case: the "occupation" of Eastern Greenland on behalf of Norway by some Norwegian hunters, which the Norwegian government initially termed "an entirely private act, which will not influence our policy." But the subsequent development of the case should make clear that caution is indicated. For when

211. See text at note 18 supra.
Norway did eventually ratify the act of occupation and adopted it as a public action, it became a potentially valid act of a sovereign state, designed to create rights arising under public international law. Careful research will probably reveal many instances where an initially private action, a non-act in international law, was validated through adoption by a state. Examples that readily come to mind are "treaties" between explorers and native chiefs and princes, conquest of territory by the private armies of the great chartered companies, and, more recently, "spy-swapping" negotiations initiated by private defense counsel. Thus, while an act by a non-subject of international law is a non-act, such non-acts generally are capable of subsequent validation through ratification and adoption by a subject of international law.

At the other end of the list of basic ingredients of valid legal acts is the requirement of form. As shown by the Temple (Jurisdiction) case, public international law imposes few, if any, such requirements. The only one that readily comes to mind is the registration requirement for treaties under Article 102 of the United Nations Charter. Even here, non-compliance has a rather limited effect which can be effaced subsequently. Whenever other form requirements are to be found (at least outside of the law of international organizations), they are in any event tempered by estoppel. As a general proposition, then, lack of form in public international law does not vitiate the validity of international legal acts.

This leaves the three formative elements of object, legality, and intent. The latter includes questions of fraud, duress and mistake. Simu-

212. Triepel, Die auswärtige Politik der Privatpersonen, 9 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 (1942), still seems to be the only study of this subject.
214. Southern Rhodesia was the last such cases. Id. at 221.
215. For a description of negotiations leading up to the Abel-Powers exchange, see Donovan, Strangers on the Bridge, The Case of Colonel Abel 347-420 (1964).
216. 1. Every treaty and every international agreement entered into by a Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations. U.N. Charter art. 102. See generally Brandon, The Validity of Non-Registered Treaties, 29 Brit. Y.B. Int'l L. 186 (1952); Geck, Die Registrierung und Veröffentlichung völkerrechtlicher Verträge, 22 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 113, 162-79 (1962).
NULLITY AND AVOIDANCE

It seems clear that mistake of law will not as a rule vitiate consent in international treaty law, and that mistake of either fact or law (save, possibly, of specific and clearly intended ad hoc rules of the compromis) will not invalidate international judgments or arbitral awards. After all, it can be said with but little exaggeration that res judicata is intended to protect wrong decisions; correct decisions will stand on their own feet.

Looking at what remains—an act (as here defined) that is prohibited by international law, a defective object, and consent induced by duress—it seems reasonably apparent that, subject to a possible exception to be discussed presently, those acts which are at all vitiated by these defects are merely voidable, not void. The reason is simple: if the party aggrieved does not act to protect its interests, the action is valid. If Denmark had let Norway occupy Eastern Greenland, it would now be Norwegian. If Germany had not occupied the rest of Czechoslovakia in Spring, 1939, and started the Second World War in the Fall of that year, the territorial adjustments made in 1938 and 1939 would stand. By not raising the defense of the nullity of the Award of the King of Spain in time, Nicaragua lost its right to do so now, even for good cause. If the dissenters of the UNEF and ONUC resolutions had paid their assessments, there would be no question of the validity of the expenses incurred.

It can be concluded, therefore, that general international law distinguishes between (1) non-acts which are acts emanating from non-subjects of international law (but these acts can be validated by adoption and ratification); (2) valid acts which also include many instances of non-conformity with requirements of international law regarded as directive or subject to preclusion, particularly in the field of arbitration and adjudication; and (3) voidable acts, that is, provisionally or at least potentially valid acts that can be avoided by an appropriate extra-judicial

218. The only case that comes to mind is Mr. Varé's invention of the nation of "Zembla." He produced a plaque with that name on it and placed it on an empty desk in the League Assembly chamber. For some time, he was thus able to provide his friends with a better-than-ringside seat at League meetings. It is not recorded whether the delegates of "Zembla" ever exercised their country's vote, so that the question of the validity of League resolutions adopted with their participation remains of speculative interest only. See VARÉ, LAUGHING DIPLOMAT 223-25 (1938).

219. See the Temple (Jurisdiction) case, text after note 85 supra.
déclaration. There are, generally speaking, no void acts in public international law.

This conclusion is not quite as radical as it may seem. Former President Winiarski is quite right in his view that "in the international legal system . . . there is, in the absence of agreement to the contrary, no tribunal competent to make a finding of nullity," and that "it is the State which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity." The contrary position has recently been maintained in a report on the essential validity, duration and termination of treaties submitted to the International Law Commission of the United Nations at its fifteenth session by the Special Rapporteur on this subject, Sir Humphrey Waldock. His proposed draft articles contained a provision dealing with procedures for alleging the nullity of a treaty which provided, in essence, that where the other party did not accede to such an allegation, the nullity of the treaty could only be established by resort to international adjudication. While there was some support for this proposal, the ultimately prevailing view was "that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem." The draft eventually adopted unanimously by the International Law Commission provides in part:

1. A party alleging the nullity of a treaty . . . shall be bound to notify the other party or parties of its claim. The notification must:
   (a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;
   (b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the

---


means indicated in Article 33 of the Charter of the United Nations.\textsuperscript{222}

The article quoted above also provides that it is subject to derogation by treaty, and that the defense of nullity can be raised at any time by way of defense, in the absence of waiver or estoppel. It would appear that the possibility of acquiescence should also have been spelled out in this connection.\textsuperscript{223}

As already mentioned above, there might be one exception from the scheme here developed. This concerns acts that violate prohibitive rules of international law not subject to the disposition of the parties (\textit{ius cogens}). Since two or more states traditionally can by appropriate conduct create almost any kind of a new rule of international law binding upon them, such prohibitive rules are likely to be relatively rare. The only example that readily comes to mind is the prohibition of aggressive war and of the use or threat of force. It might be that these rules are of such an overriding importance that any acts done in violation of them, even if otherwise productive of rights and obligations,\textsuperscript{224} are absolutely void in international law. Thus formulated, the principle still appears to be much too broad, for even an illegally commenced state of war is generally assumed to give rise to belligerent rights on both sides.\textsuperscript{225} Nevertheless, conceivably international judicial machinery should not enforce even \textit{inter partes} obligations assumed or imposed in violation of \textit{ius cogens}. Possibly also, some unilateral acts in violation of prohibitive

\footnotesize{222. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

U.N. CHARTER art. 33.

223. Draft Articles on the Law of Treaties, arts. 47, 51 (5), in 58 AM. J. INT'L L. at 294, 299 (1964). Estoppel does not apply with respect to treaties the conclusion of which was procured by force or the threat of the use of force (article 36), or treaties that conflict with a peremptory norm of general international law (\textit{ius cogens}) (article 37). See note 226 infra. As to acquiescence, see SUY LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 245-60 (1962); MacGibbon, \textit{Customary International Law and Acquiescence}, 33 Brit. Y.B. INT'L L. 115 (1958).

224. For the reasons indicated in note 17 \textit{infra}, the permanent direct impact of illegal acts of war on private rights and obligations is rather insignificant. As for public rights of the offender, the course of non-recognition by third states is always open, for the wrongdoer will generally be precluded from relying on his own wrongs. See, \textit{e.g.}, Judge Anzilotti's individual opinion in the \textit{Eastern Greenland} case, text at notes 23-24 \textit{supra}.

225. See Dunbar, \textit{Act of State in the Law of War}, 1963 JURID. REV. 246, 263-73. There is, however, some question whether the principle of the equality of belligerent rights would apply to United Nations enforcement action. For a detailed case study in point, see Verplaetse, \textit{The \textit{ius in bello} and Military Operations in Korea 1950-1953}, 23 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 679 (1963).}
rules (e.g., the annexation of territory by the aggressor state) should no longer be capable of being recognized as achieving their intended consequences.  

B. Nullity and Avoidance in the Law of International Organizations

A final question to be discussed is whether the rules summarized above apply not only to states but also to international organizations—whether the validity of the latter's acts is governed by the rules presently obtaining in general international law as suggested by Judge Winiarski, by analogies drawn from Continental administrative law as urged by Judge Morelli, or, arguably, by an entirely different body of rules. It seems difficult to disagree with Judge Morelli's contention that the recognition of an unlimited right of member states to challenge unilaterally the validity of acts of international organizations would be highly likely to destroy their power to function. On the other hand, historical and comparative analysis would seem to have shown clearly that what may here be called the constitutive theory of avoidance through adjudication, i.e., the doctrine that the category of voidable acts can only exist where there is a court specifically empowered to annul such acts, is not a general principle of law. Furthermore, even in Continental law, including administrative law, the principle pas d'annulabiliti sans instance is subject to substantial exceptions; and even the specific proposition advanced by Judge Morelli (that a mere violation of competency does not lead to invalidity ipso iure) is somewhat less than compelling.

Yet it might well be contended that there is a general principle of modern public law embodying a narrower concept of the French maxim just quoted: that where the law enumerates the categories of defective acts and at the same time provides for a specific procedure for effacing such acts, the enumeration is exhaustive and the procedure exclusive. In effect, this means that once the minimum threshold requirements for the creation of colorable acts have been met, all acts are deemed valid unless

---

226. See, e.g., Jenks, The Prospects of International Adjudication 500-07 (1964); International Law Commission of the United Nations, Draft Articles on the Law of Treaties, arts. 36-37 with Commentaries thereto, reprinted in 58 Am. J. Int'l L. 262-66 (1964). Of course, recognition could be refused even before the prohibition of annexation became ins cogens. See note 224 supra. But the so-called Stimson Doctrine, rightly understood, merely made the refusal of recognition of illegally achieved territorial changes by third states optional, not mandatory. It may well be that today the principles implicit in the Charter of the United Nations impose a duty not to recognize territorial changes effected in violation of the Charter—except, perhaps, through action of a competent organ of the United Nations itself. For a fuller exposition of these views, see Baade, Die Bundesrepublik Deutschland und die baltischen Staaten, 7 Jahrbuch für Internationales Recht 34 (1957).

227. See text at notes 103-05 supra.

228. See notes 146 & 170 supra and accompanying text.

229. See note 105 supra.
subject to the enumerated defects and until annulled by the prescribed procedure. This common "hard core" of Continental administrative law and the rule of the exhaustion of administrative remedies, if transplanted to the law of international organizations, stands for the proposition that where the constitutional or administrative law of an international organization provides a procedure for annulling acts taken by organs of that organization, this procedure is exclusive as regards the acts subject to it, and that member states have by the mere fact of membership agreed to waive their right to challenge the validity of such acts through the means afforded by general international law.²³⁰

Such specific procedures for the control of the validity of acts of international organizations are today largely limited to the law of the European Communities.²³¹ There are few parallels in other international organizations, and none—so it would seem—as regards action by the politically most important organs, e.g., resolutions of the United Nations General Assembly or the Security Council. In the context of universal international organizations in this divided world, the "tyranny of the majority" is by no means an idle threat. If it is to survive, international organization law will have to find some acceptable solution of the fundamental question of the validity of the acts of international organizations. It is submitted that the answer will have to be found somewhere between the extremes suggested by Judges Winiarski and Morelli, and hopefully this study will at least shed some new light on a basic legal dilemma of our times even if it offers no concrete formula.


²³¹. See generally BEBR, JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES (1962); see also Wengler, op. cit. supra note 230.
INDIANA UNIVERSITY SCHOOL OF LAW
STUDENT EDITORIAL STAFF

Editor-in-Chief
DAVID B. HUGHES
Associate Editor
JOHN E. ALLEN

Articles Editor
ROBERT P. KASSING
Book Review Editor
THOMAS A. COYNE

Note Editors
RALPH A. COHEN
ROBERT P. TINNIN, JR.
JAMES V. McGLONE
CHARLES O. ZIEMER

Associate Editor Indianapolis Division
JOHN C. STARK

TERRILL D. ALBRIGHT
RICHARD L. BESORE
STEVEN E. DEVOE
LEONARD E. EILBACHER

GARY S. GOODPASTER
HUGH L. MOORE
D. REED SCISM
STEPHEN J. WILLIAMS

Copyright © 1964 by the Trustees of Indiana University