

Shinkaretskaya G.G., Ryzhov V.B.

Content and Limits of 'Domaine Reserve'

Abstract. *The category domaine reserve, or «domestic jurisdiction», appeared as a means of restricting the right of international organizations or individual States to interfere in the decisions, or the consequences of decisions, taken by a State. The principle of State sovereignty is increasingly realized as a condition essential for the establishment of effective law and order in the world: More and more often the norms of international law are realized at the national level. One of the examples of this is the sphere of economic interests of States. A State takes a decision and international law fixes this fact, or the decision is taken at an international level and then the State fulfills the norm of international law in its internal system in accordance with its own obligations.*

Keywords: *domaine reserve, principle, State sovereignty, effective law, norms, international law, internal system, domestic jurisdiction, national level, international level.*

The problem of the limits of domestic jurisdiction of the State has long been posed in the science and practice of international law – ever since international law took shape and need appeared for differentiating the spheres of the operation of international law and municipal law. There was a time when much was written on the subject, but finally the jurists seem to have lost interest in it, qualifying it as not offering anything substantial for general conclusions. However, in our time it is worthwhile to return to this problem for the following reasons.

The spread of international law regulation to the fields, which in the past were not even called in question, is due to the growing interdependence of the peoples and the realization that there are a number of universal human values, the primary of which is life itself threatened by an incredible stockpile of armaments. There are also a number of global tasks (economics, energy, food, and others) on the solution of which the destiny of the human civilisation depends in the long run. More and more urgently needed is the co-ordination of actions of States and their mutual control in such «sacred» spheres as the level and quality of armaments, management of such natural resources as water and air, etc. A controversial but interdependent, and in many ways integral world is taking shape through the struggle of opposites¹.

The category *domaine reserve*, or “domestic jurisdiction”, appeared as a means of restricting the right of international organizations or individual States to

interfere in the decisions, or the consequences of decisions, taken by a State. It was fixed in Art. 15 para. 8 of the League of Nations Covenant, and was included into Art. 2 para. 7 of the United Nations (UN) Charter and into regional agreements of a general character. A survey of bilateral agreements of a general and political character likewise reveals a rather frequent recurrence of decisions obliging States to refrain from interference. The provision concerning domestic jurisdiction is firmly established also in customary international law as proved by the decision of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua*².

Thus, international law records mutual recognition by States of the existence of fields of jurisdiction which are closed to interference by other States and also other subjects. Clearly, domestic jurisdiction refers to the right of each State to freely – independently of other States and international organizations – exercise its legislative, executive, and judicial jurisdiction. Its existence is the consequence of State sovereignty and the right of nations to self-determination. The principle of State sovereignty as the starting point of international law inevitably requires recognition of a field in which a State retains exclusive domestic jurisdiction. Being a consequence of State sovereignty, domestic jurisdiction is in the *domaine* of the State and is inherent in it alone.

However, neither the documents nor doctrine of international law contain a uniform definition of the concepts “domestic jurisdiction” or “matters that lie

¹ See Gevorgian K.G. Actual Problems of International Law and the Russian Diplomacy//Russian Yearbook of International Law, 2012, p.10.

² Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. US), (Judgment of June 27th, 1986).

essentially within domestic jurisdiction”, or give a clear answer to the question as to the limits of domestic jurisdiction; nor is the term itself quite correct. In English term “domestic jurisdiction” the combination of the words “domestic” and “jurisdiction” gives ground to speak of its tautology,² though it appears logical in the English system of law. However, when the term is taken over by other legal systems and is incorporated into the vocabulary of general international law, the use of the word “jurisdiction” adds to the ambiguity of the term as a whole, due to the growing diversification of the concept “jurisdiction” itself. From this point of view, the Russian term including the word “competence” is more precise. However, taken as a whole, the Russian term is not quite precise either, (literally: “internal competence of a state”), and this lack of precision seems to have played its role in confusing the concepts “matters that lie essentially within domestic jurisdiction” and “domestic matters”.

And so, what is domestic jurisdiction? The easiest way of answering the question, it would seem, is to enumerate matters belonging to domestic jurisdiction. However, the inevitable failure of this attempt was recognized back in 1954,³ and the view was established among jurists that the field of domestic jurisdiction is juridically indeterminate and indeterminate. Nonetheless, from a number of documents it is possible to deduce an approximate range of matters in relation to which States assume the pledge to refrain from interference. The richest material can be gathered from the 1970 Declaration on Principles. It recognizes as unlawful actions as follows: (a) violating the sovereignty of a State and its political, economic, and cultural foundations; (b) limiting sovereign rights; (c) aimed at changing the system, or (d) depriving the people of the form of its national existence; (e) having the aim of depriving the State of its inalienable right to choose its political, economic, and cultural systems. Though the resolutions and declarations of the UN General Assembly, strictly speaking, are no treaties, the provisions of the Declaration on Principles have special juridical force as repeatedly pointed out in literature. These provisions of the Declaration, however, are usually reproduced in other international documents dealing with the question of non-interference in domestic jurisdiction.

It is not difficult to see that matters interference into which is declared unlawful in the Declaration concern questions bearing on the independence of States

and their very existence. New elements of the problem appeared in the last decades, when States gaining political independence realized the special importance of upholding their economic independence. Art. 1 para. 1 of the Charter of Economic Rights and Duties of States specifies:

Each State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion, or threat in any form whatsoever.

Further on, the Charter says directly that each State has authority over foreign investment and the operation of foreign companies within its national jurisdiction, each State has the right to nationalize foreign property, and that itself regulates its external economic activity.

In our time the struggle for natural resources has branched out from the general problem of the struggle for economic independence, though the importance of natural resources was felt long time ago.⁴ The importance of protecting natural resources from plunder by foreign companies was reflected in the UN General Assembly Declaration on Permanent Sovereignty over Natural Resources, adopted in 1962. Jurists of developing countries stress that the 1962 Declaration gives grounds for regarding questions connected with the exploitation of natural resources as belonging to the domestic jurisdiction of the State, the sovereign, and in support they invoke Art. 2 of the Charter of Economic Rights and Duties of States⁵.

The preoccupation with the problem of authority over natural resources was clearly seen in the course of the UN Third Conference on the Law of the Sea and is evident in the major legal instrument of our time – the UN Convention on the Law of the Sea of 1982. The Convention contains carefully formulated provisions determining the rights and prerogatives of States in relation to natural resources. This is clearly seen in the Articles referring to the continental shelf and the exclusive economic zone. The rights to explore for and exploit living and mineral resources in these areas of the World Ocean are exclusive and have a two-fold nature: On the one hand, they are a consequence of sovereignty (since

⁴ 250 years ago, M. V. Lomonosov wrote that “Russia’s wealth would multiply owing to Siberia”, having in mind Siberia’s natural resources, and in 1835, de Tocqueville prophesied that the USA and Russia would become the mightiest powers of the world owing to their natural treasures.

⁵ See, for instance, S. Azadon Tiewul, The Evolution of the Doctrine of Permanent Sovereignty, in: University of Ghana Law Journal 15 (1978–81), 55–84.

³ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. US), (Judgment of June 27th, 1986).

they belong *ipso facto* to States and only to States)⁶ and, on the other hand, they originate in international law (being the product of a treaty). The Convention contains one more provision which confirms the exclusive character of the sovereign rights of a coastal State, and actually leaves it for this State to decide whether it regards these rights as lying within domestic jurisdiction. As laid down in Art. 297, in the event of a dispute, with regard to a coastal State's exercise of its sovereign rights or jurisdiction over natural resources of the continental shelf and exclusive economic zone, it may refuse to submit it for judicial consideration or arbitration. No other act, apart from the Convention on the Law of the Sea, seems to contain such a clear regulation concerning both the distribution of the rights of States, and the appropriate definition of the subject of jurisdiction of international court organs.

The view of States on the volume of domestic jurisdiction is clearly expressed in cases where it is a question of the right of international courts to deal with a specific case. The Permanent Court of International Justice and the International Court of Justice of the United Nations have built up an imposing record in this respect. It has been analysed in detail in literature, so that we can confine ourselves to a few remarks.

The first case in which the question of domestic jurisdiction arose dates back to the early 1920s, immediately after the formation of the Permanent Court of International Justice, when it was to give its advisory opinion on the Anglo-French dispute in connection with the nationality decrees in Tunisia and Morocco⁷. The Court's argumentation and position became characteristic of the activity of the Court itself and, later, the International Court of Justice. In literature this Case and the Advisory Opinion are qualified as classical instances and are frequently quoted. Indeed, it was the first inquiry into the relationship of the prerogatives of an international organization, international court, and a State in setting the limits of domestic jurisdiction. In the course of this investigation the theory of "provisional approach" to domestic jurisdiction took shape, considerably influencing the procedural aspects of the activity of the Permanent Court of International Justice and the International Court of Justice. The quoted opinion also formulated the conception of the primacy of international law in determining domestic jurisdiction.

⁶ According to the Convention, these rights may belong also to nations that have not yet gained statehood.

⁷ Nationality Decrees issued in Tunis and Morocco (Advisory Opinion of February 7th, 1923), P.C.I.J. 1923, Series B, no. 4, 7 et seq.

The cases that followed: *Treatment of Polish Nationals in Danzig*,⁸ *Losinger and Co.*,⁹ *Electricity Company in Sofia and Bulgaria*¹⁰ – all concerned questions as matters belonging to domestic jurisdiction, which had to do with relations between the State, on the one hand, and physical and juridical persons, on the other. The view became established in literature that relations between the State and the population constitute an indisputable field of domestic jurisdiction¹¹.

After World War II the picture became more varied. Questions concerning physical and juridical persons continued to remain among cases referred to domestic jurisdiction. Such was the argumentation of the USA in the *Interhandel Case*¹². We should not, of course, overlook the fact that in another case the position of the USA was quite different. We mean the US' initiative with the inquiry of the UN General Assembly on fulfilment of the peace treaties with Bulgaria, Hungary, and Rumania in 1947¹³. Although a purely procedural question seemed to be raised before the International Court of Justice, its political load was quite visible. But, the important thing for us now is, that the USA indicated the following position: relations of the State, not only with foreigners, but also with its own citizens, cannot be exclusively a matter of domestic jurisdiction.

In the post-war period a series of new phenomena on the question of domestic jurisdiction appeared in international law. Thus, in the *Certain Norwegian Loans Case*¹⁴ Norway insisted on its right to determine the forms of loan repayment. A completely new category of cases belonging to domestic jurisdiction was made up of cases connected with the struggle of the young States against the colonial legacy. In the *Anglo-Iranian Oil Company Case*,¹⁵ Iran, applying *Alberic Rolin's* concep-

⁸ *Treatment of Polish Nationals in Danzig* (Opinion of 4 February 1932), P.C.I.J. 1932, Series A/B, no. 44, 4.

⁹ *Losinger and Co. Case*, P.C.I.J. 1936, Series C, no. 78.

¹⁰ *Electricity Company of Sofia and Bulgaria Case*, P.C.I.J. 1939, Series A/B, no. 77, 64 (Judgment – Preliminary Objection – of April 4th, 1939).

¹¹ See Charles Rousseau, *L'indépendance de l'état dans l'ordre international*, in: *Recueil des Cours* 73 (1948/11), 167–253 (239–246).

¹² *Interhandel Case*, I.C.J. Reports 1957, 15.

¹³ *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania* (Advisory Opinion of March 30th, 1950), I.C.J. Reports 1950

¹⁴ *Certain Norwegian Loans Case* (Fra. v. Nor.), (Judgment of July 6th, 1957), I.C.J. Reports 1957, 9.

¹⁵ *Anglo-Iranian Oil Company Case* (Judgment – Preliminary Objection – of July 22th, 1952), I.C.J. Reports 1952.

tion of “three zones”, declared that the nationalization of a foreign private company is a matter of its domestic jurisdiction and stems from the exercise of its sovereignty. In this instance, though in form it was a question of Iran’s relations with a foreign private company, Iran in fact asserted its right to self-determination and economic independence.¹⁶

Of interest to our investigation is also the Case *Concerning Military Activities in and Against Nicaragua*,¹⁷ in which the International Court of Justice devoted much attention to non-intervention,¹⁸ and declared that the interference of the USA in Nicaragua’s affairs on the pretext of preventing the establishment of a “communist dictatorship” was contrary to international law. In its decision the Court stated that the attachment of a State to any specific doctrine is not a breach of international law. A different approach, it said, would make nonsense of the fundamental principle of State sovereignty on which international law rests as a whole.

The question of the limits of domestic jurisdiction of the State is traditionally posed as the alternative: international law *versus* municipal law. But who defines this boundary?

In the literature, to this day most popular, it seems, is the reply which originated in English law and was formulated by C. H. M. Waldock back in the early 1950s: The domain of domestic jurisdiction begins where international law ends¹⁹, and it is international law that decides where it should come to an end and give way to domestic jurisdiction. *Ian Brownlie* writes: “The limits of this domain depend on international law and change with its development.”²⁰ Such approach leads the limits of domestic jurisdiction into diffusion, and it seems that it is based on the notion of absolute power of international law in the process of advancement towards a world law. But this is merely so at first glance. In real-

ity, this approach perceives both international law and domestic jurisdiction as being absolute²¹.

Before World War II, and even after it, the balance between international law and national legislation reflected the opposition of the interests of one State to the interests of another State, or even all other States.

International life of the XXI century poses many problems in a new way. The situation in the world is such that we should not speak of the opposition of interests, but their merging. Theorists of science say that the time of change in the scientific paradigm, replacement of the earlier established system of axioms, has come, and that one universal human value must lie at the basis of the whole of international law and law in general for that matter.

The reflection of this we can see not only in such rather elusive notions as globalization, but in a number of peculiar concepts, common heritage of mankind being one example and quite definite legal regimes, like the regime of exploration and exploitation of the deep seabed²². A new concept has emerged, that is the concept of “mankind”. There is not a single explanation in the UNCLOS as to the meaning of the concept, yet a new legal relationship is created in the Part XI: mankind who is the master of all mineral riches of the vast deep seabed of the whole Earth vis-à-vis separate States whose obligation is to take into account the interests of the mankind. No other detailed document as to the legal rights of mankind can we find, yet the reflections of these are quite noticeable everywhere.

Environmentalists say, that at the basis of everything must be the concern for the preservation of such conditions on our planet which would ensure the existence of humanity. Disarmament specialists say, the paradigm of international law must be the right to freedom from mass destruction weapons.

Thus the idea of human life as a universal value is common. Be it as it may, the time has come for solving all international problems from the viewpoint of all interests of mankind as a whole. This means, that many questions to which international law was indifferent in the past are becoming meaningful. A vivid example is the problem of the level of armaments. Though the level of armaments is traditionally referred to the internal matter of State, we see how many types of weapons

¹⁶ See Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, in: *Recueil des Cours (RdC)* 159 (1978/1), 1–344 (297).

¹⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. US)*, (Judgment of June 27th, 1986).

¹⁸ Stuby sees the analysis of this question as a part of the Court’s general contribution to the development of international law; see Gerhard Stuby, *Staatliche Souveranitat und internationale Gerichtsbarkeit: Zum Urteil des Internationalen Gerichtshofes in Haag vom 27. Juni 1986 in der Sache Nicaragua / USA*, in: *Demokratie und Recht* 14 (1986), 401–408 (407).

¹⁹ C. H. M. Waldock, *The Plea of Domestic Jurisdiction before International Tribunals*, in: *British Yearbook of International Law* 31 (1954), 96–142 (142).

²⁰ Brownlie (note 2).

²¹ Waldock wrote for one that domestic jurisdiction is “one of the last refuges of the dogma of absolute sovereignty;” Humphrey Waldock, *General Course on Public International Law*, in: *RdC* 106 (1962/11), 1–251 (173).

²² See: *United Nations Convention on the Law of the Sea 1982*, Part XI.

are becoming subject to international law regulation, namely, all types of mass destruction weapons.

All this leads to the necessary expansion of the sphere of operation of international law and to the commonly accepted limits of domestic jurisdiction. As it is, there can be no exceptional and unilateral determination of domestic jurisdiction. The story of the well-known *Connally* reservation to the US' declaration of acceptance of the International Court of Justice's compulsory jurisdiction is a good example. According to the reservation the jurisdiction of the International Court of Justice does not extend to disputes connected with matters that belong to the domestic jurisdiction of the United States "as determined by the United States". It is known that this reservation was actively criticized by American officials, members of the International Court of Justice, and authors. The main point of criticism is, that the reservation actually means the usurpation by the US of the right to interpret whether particular cases are within the jurisdiction of the International Court of Justice, already after they had been submitted to it, which means the replacement of the Court's jurisdiction by the jurisdiction of the USA²³. In the Encyclopedia of Public International Law it is guardedly stated that a number of ambiguities appear in connection with this reservation²⁴. But more than that, the practice of international adjudication shows that the reservation was not much profitable for US position in many cases.

On the other hand, a thereto directly opposite tendency operates in international relations. The principle of State sovereignty is increasingly realized as a condition essential for the establishment of effective law and order in the world: more and more often the norms of international law are realized at the national level.

A long-lasting and interesting discussion is under way on the question of the relationship between international law and municipal law in the field of protection of human rights. Although we may regard as firmly established the recognition of relations between a State and citizens as a matter belonging to the domestic jurisdiction of a State, on record are attempts to apply the question of human rights to aims that are not quite plausible. *Anthony D'Amato*, reflecting on the possible ways of justifying the US aggression against Nicaragua,

frankly admits that grounds for this activity cannot be found in public international law and if it is possible to find support for the US position, it can only be found in the sphere of international law dealing with human rights.²⁵ Rather popular now is the idea of "transnational protection" of human rights²⁶. However, it is perfectly clear that: human rights are unthinkable and do not exist beyond a State. Each person enjoys only those rights and freedoms – social, economic, political, civil, and cultural – which are envisaged by the constitution and laws of the country where he lives²⁷. The necessity to comply international law of human rights with the principle of *domaine reserve*, has lead to an awkward construction of "international standards".

When an international tribunal decides the question of whether a particular matter should be referred to domestic jurisdiction, the point at issue is not the availability or absence of a respective international norm, but the existence of an international obligation of a State, i. e., the obligation towards other members of the international community voluntarily assumed by this State (otherwise this obligation is insignificant). Of course, a State may subject any of its matters to international law regulation. Rather popular among Western jurists is the judgment of the Permanent Court of International Justice in the Case of nationality acts of Tunisia and Morocco, to the effect that there is no question that could not be regulated by international law. This idea has long been purely theoretical, and for its refutation we would have to seek in international documents not what is said in them, but what is left unsaid. Now, definitely we can say that the States a number of problems either do not subject to international law regulation, or agree not to do so.

The connection between municipal and international law regulation is the same as between State sovereignty and international law. Through its sovereignty, a State demands from international law independence in deciding a variety of questions, while the international law principle of State sovereignty assures the protection of international law for the field of law

²³ See Herbert W. Briggs, Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice, in: RdC 93 (1958/1), 223–366 (328–363).

²⁴ Rudolf Dolzer, Connally Reservation, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, instalment 1, Amsterdam et ah 1981, 55, 56 (55).

²⁵ Anthony D' Amato, Nicaragua and International Law: The "Academic" and the "Real", in: American Journal of International Law 79 (1985), 657–664 (659).

²⁶ Arguments in support of this idea were clearly set out in the paper presented by Professor Shimon Shetreet from the University of Jerusalem. Shetreet, Transnational Protection of Human Rights (Report for the XII Congress of the Academy of Comparative Law), Australia, August 1986.

²⁷ A. P. Movchan, Human Rights and International Relations (in Russian), Moscow 1982, 20; Stephen Hall, International Law, Hong Kong, 2006, p.248.

regulation where the will of the State itself prevails unchallenged. This field lies beyond the limits of international law, though the State may voluntarily subject some of its matters in this field to regulation by international law.

A State takes a decision and international law fixes this fact, or the decision is taken at an international level and then the State fulfills the norm of international law in its internal system in accordance with its own obligations.

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