The Theory of Competence in Verdross*

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1. While Radnitsky may be regarded as the founder of the theory of competence[1] it is only with Kelsen, and particularly with Verdross, that the theory is developed, and applied to all cases of exercise of State jurisdiction both inside and outside the territory.[2]

In Kelsen and Verdross the term 'competence' should be brought into relation with the monistic doctrine of the relations between internal law and international law. Of particular note is the derivation of the former from the latter: State jurisdiction would consist in a competence attributed to the State itself by international law, fixing 'spheres of application' (*Geltungsbereiche*) distinguished into spatial (*räumliche*), personal (*persönliche*), material (*sachliche*) and temporal (*zeitliche*) spheres. In Radnitsky, by contrast, there is no trace of reference to international law; he held that the competence of the State, far from being the creation of a higher order, was nothing but an attribute of State sovereignty (*Kompetenz-Kompetenz*). One difference between Kelsen's thought and Verdross's should further be recalled at the outset, namely that while for the former the State is identified with the State's legal order, for the latter, sticking closer to reality, the State is to be regarded as an organized human community (*staatlich organisiertes Volk*).

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1 Radnitsky, 'Die rechtliche Natur des Staatsgebiets', *Archiv für öffentliches Recht* (1906) XX, at 313ff.

2 H. Kelsen, *Das Problem der Souveranität und die Theorie des Völkerrechts (1920) 72; id., Principles of International Law* (1962) 205ff. (hereinafter cited as *Principles*); A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) 163-223 (hereinafter cited as *Die Verfassung*); *id.*, 'Staatsgebiet, Staatengemeinschaft und Staatengebiet', *Niemeyers Zeitschrift für internationales Recht* (1927) XXXVII, at 294ff. (hereinafter cited as *Staatengebiet*); *id.*, 'Règles générales du droit de la paix', RdC (1929-V) 351-409 (hereinafter cited as *Règles générales*); *id.*, *Völkerrecht* (3rd ed., 1955) 178-301 (hereinafter cited as *Völkerrecht*). Cf. also A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd ed., 1984) 599ff. Also to be referred to with regard to the competence theory are *inter alia*: Schönborn, 'La nature juridique du territoire', *RdC* (1929-V) 85ff.; P. Guggenheim, *Traité de droit international public* (1953-I) 24ff.; C. Rousseau, *Droit international public* (1953) 224ff.; *id.*, *Droit international public* (5 vols.) (1970-1983) Vol. II.

2. Turning our focus exclusively to Verdross's theory, the sphere of spatial application of the State's competence – the sphere of application regarded by all followers of competence theory as by far the most important – has for this eminent author a twofold meaning. First, it indicates the space within which the State can exercise its coercive power, and (in the author's words) where coercive effects (*Zwangsfolgen*) are associated with a particular fact; second, it indicates the space within which the State can simply extend its own normative activity, regulating facts and relations normally regulated by a legal order, as civil-law or criminal-law facts and relations (*'... jener Raum ... in dem die Tatbestände gesetzt werden, die von einer Rechtsordnung geregelt sind – z.B. zivilrechtliche Rechtgeschäfte, strafbare Handlungen ...'*).[3] Under the first formulation, the spatial sphere of application is *exclusive*, that is, impenetrable by the coercive action of other States, whilst in the second, the spatial spheres of application of the various States – as has also been stated by the PCIJ in their well-known *Lotus* judgment – overlap. It follows that the sphere of spatial application has relevance for the purposes of effective delimitation of State powers only in the first formulation.[4]

Spatial competence – which we shall henceforth understand as referring to coercive activity (that is, only the first formulation indicated above) – covers *all* the spaces in which human activities take place. Sometimes this is State territory in the strict sense, in which the coercive activity of a single State is exercised (*Staatsgebiet*), sometimes territories under a group of States as in the case of condominium (*Staatengemeinschaftsgebiet*), and finally, sometimes it is territory under the power of all States, as in the case of the High Seas and of the so-called *terrae nullius* (*Staatengebiet*).[5]

It has been objected to the theory of competence in relation to State territory in the strict sense that it does not explain all the manifestations of practice that take account of territory as a good, such as acts of cession of parts of the territory itself, rental and administrative concessions, active and passive servitudes etc. Similar objections can be found particularly in Italian doctrine between the wars, faithful to the so-called theory of the territory as object and tending to regard territory as the object of a sort of dominion or property of the State.[6] To take account of these objections without, however, repudiating the theory of competence, Verdross constructs, in relation to State territory in the strict sense and alongside normal spatial competence, a special territorial competence, consisting in the power to dispose of the territory or its parts. The State could renounce its normal spatial competence – for instance, by allowing another State to exercise its own coercive power on its territory – without losing its special territorial competence. In the case

3 *Völkerrecht*, *supra* note 2, at 179.
4 Ibid., at 180.
5 *Die Verfassung*, *supra* note 2, at 178ff.; *Staatsgebiet*, *supra* note 2, at 295ff.
6 The major exponent of this doctrine is Donati; see in particular, 'State and Territory', *RDI* (1914) 355ff., esp. at 360ff. Cf., more recently, G. Balladore Pallieri, *Diritto internazionale pubblico* (8th ed., 1962) 415ff.

of wartime occupation, to give another example, spatial competence (exercised by the occupying State) and territorial competence (conserved by the occupied State) are held to be separate.[7] The author denotes these two competences as *Gebietshoheit* and *Territoriale Souveränität* respectively.[8]

It is curious to note that, in order to eliminate any patrimonial element from the State-territory relation, Verdross maintains that even in private law property is competence, that is, insofar as it is not a 'right over an object' but the 'right to exercise particular activities in relation to a thing' (*'das Recht zur Vornahme von bestimmten, eine Sache betreffenden Handlungen'*).[9] Even servitudes, both in international law and in private law, and for the same reasons, are regarded as referable to the notion of competence.[10]

3. As already mentioned, the High Seas and all other territories not subject nor subjectible to the power of individual States (*terrae nullius*) are held by Verdross to be territories of all States, or to delimit the spatial competence of all States.[11]

As far as the High Seas are concerned, the sphere of collective spatial competence is held to coexist with the power that every State has, to exercise its exclusive jurisdiction over vessels, both naval and mercantile, flying its own flag. The power exercised over ships is similarly regarded by the author as a spatially delimited competence, given that he includes it (and power over aeroplanes) in the section on spatial competence.[12] But it is not clear how this competence is to be reconciled with the collective one. To complicate matters further, the author also speaks of ships and aeroplanes as having the 'nationality' of the flag State, in connection with the personal sphere of application of State competence.[13]

Similarly where *terrae nullius* are concerned, the sphere of collective competence is held to coexist with the coercive power exercised by each State within the framework of a particular community; for instance, a scientific expedition organized by a particular State. In order to protect such a community, the State may exercise its own power over both its own subjects and foreigners forming part of it.[14] However, here too it is not very clear how the author envisages this power

7 *Die Verfassung, supra* note 2, at 184ff.; *Völkerrecht, supra* note 2, at 192ff.

8 *Völkerrecht, supra* note 2, at 192. Initially, particularly in *Staatsgebiet, supra* note 2, at 300ff., the author gave *territoriale Souveränität* the name of material competence (*sachliche Kompetenz*), with manifest terminological confusion in relation to the material delimitation of the State's power which, as we shall see, concerns other matters. It should further be noted that Verdross can reach twofold competence in relation to State territory in the strict sense insofar as, as we have already had occasion to note, he regards the State as an organized human community. For Kelsen, who instead identifies the State with the State legal order, spatial competence can only be single.

9 *Die Verfassung, supra* note 2, at 185.

10 Ibid., at 189.

11 *Die Verfassung, supra* note 2, at 178 and 215ff.; *Völkerrecht, supra* note 2, at 180 and 231ff.

12 *Völkerrecht, supra* note 2, at 205ff. Explicitly, the power of the State over ships is related by Verdross to spatial competence in *Règles générales, supra* note 2, at 366.

13 Ibid., at 246.

14 Ibid., at 232ff.

being delimited, that is, whether it is *spatially* delimited, with the space coinciding with the community, or whether a sort of nationality is to be attributed to the community, thus bringing it within the category of the sphere of *personal* application of the State's competence.

4. In addition to spatial competence (*Gebietshoheit*), international law is said further to attribute to the State a personal competence (*Personalhoheit*), covering the exercise of the State's coercive power over its own subjects, whether physical or legal persons. The two competences ought not to be confused: personal competence may subsist independently of spatial or territorial competence.[15] One example would be governments in exile, which continue to exercise power over their own citizens in the territory where they have their seat, without having *Gebietshoheit*, but acting through the authorization of the local State. In a normal situation too, however, *Personalhoheit* is said to have its own autonomy. Given that if the subject is not on the territory or another space delimiting the *Gebietshoheit* of his own State, the State is not capable of subjecting him to its coercive power, in what sense can *Personalhoheit* be said to have its own autonomy? According to Verdross, the autonomy derives from the fact that in the event of a breach of *any duty whatsoever* by the subject when abroad, the State can always act against him indirectly on the territory, for instance by acting coercively on his property wherever it exists. The State could not however do the same towards foreigners, who can be directly or indirectly acted against only in *definite, limited cases.*[16]

As we have already had occasion to note, in the sphere of *Personalhoheit* the author also includes the State's power over its own ships and aeroplanes, both war and private, inasmuch as they too have a nationality.

5. The material (*sachliche*) competence of the State is said to concern the possibility for the State to regulate facts and relations, or, more precisely, to 'associate facts with legal consequences'. This may seem to leave the State free to associate such consequences with any fact whatever ('*... jeder Staat alle beliebigen Tatbestände, wo immer sie auch gesetzt wurden, mit Rechtsfolgen verknüpfen könnte*').[17] In reality, international law is said to limit the material competence in various ways; by establishing in principle that the State cannot regulate facts having no link with it; by preventing sovereign acts of foreign States being subject to regulation, and by setting limits to criminal jurisdiction, etc.[18] Verdross, it would seem, also refers the question of the treatment of foreigners to that of the limits of material competence.

15 For Kelsen, by contrast, personal competence is held to result indirectly from spatial competence, and the State order can be applied coercively only to individuals on the 'territory', in the broad sense, that is, on all spaces delimiting the coercive power of the State (cf. *Principles, supra* note 2, at 288).

16 *Völkerrecht, supra* note 2, at 244ff.

17 Ibid., at 247.

18 Ibid., at 247ff.

We say 'it would seem' because the author, though giving examples of limits to material competence, in particular in terms of criminal jurisdiction, from the obligation relating to treatment of foreigners, does not explicitly state that they are connected and deals with the 'international law of foreigners' (*völkerrechtliches Fremdenrecht*) in another, independent part of his work.[19]

6. The spheres of spatial, personal and material competence concern, as we have seen, the delimitation by international law of the power of a State *in relation to the power of other States*. A different function is, by contrast, according to competence theory, met by the sphere of temporal competence, similarly defined by international law, but intended to indicate at what point in time (*Zeitpunkt*) a State legal order is in force and is effective, at what point in time, in other words, a State may operate as a subject of international law. This is, in short, the realm of the birth, recognition, continuity and extinction of States.[20]

7. Turning to a critical assessment of the Verdrossian theory of competence, and confining ourselves to spatial, personal and material competence, we must first recognize the considerable contribution that it has made to systematizing the international norms relating to the exercise of State jurisdiction and its limits. Its chief merit is undoubtedly that of having definitively eliminated any patrimonial notion of State territory and doing justice to the theories of territories as object or territory as property. A State is an entity endowed with the power of *imperium*, and figures as such also in relation to enjoyment of the territory as a good: in any case, the State does not enjoy, but *regulates* the enjoyment!

Properly considered, the theory of competence, for those willing to accept it, is not even bound to a monistic conception of the relationship between international law and internal law. To adapt it to a dualist conception, and hence to a conception founded on the separation between international law and internal law, it is sufficient to replace the idea (one might almost say the term) of competence, that is, of *powers attributed* by international law, with the idea of a *subjective right* of the State. Suffice it to say that the State, according to international law, *has the right* to exercise its own jurisdiction within definite spatial, personal and material limits.

But is the theory of competence acceptable, irrespective of whether it is professed in a framework of a monistic conception or adapted to a dualist one, and, if so, up to what point? To answer this question, it is appropriate to distinguish the three types of competence indicated above.

In our opinion one must share the position that the coercive power – and only the coercive power – of the State is spatially limited. This applies, however, only to what Verdross calls State territory in the strict sense, obviously including the territorial sea and the overlying airspace. The territory delimits the sphere within

19 Ibid., at 285ff.
20 Ibid., at 180ff.

which the State is in principle free to exercise its own coercive power in all directions, free in principle to do what it wants (we say 'in principle' because today there are increasingly numerous limitations on the power of the territorial State, in relation not only to foreigners but also to its own subjects). Nor do we feel any need to construct, still in relation to territory in the strict sense, a second legal situation consisting in the power to dispose of the territory. This duality sustained by Verdross finds no echo in international practice, where territorial sovereignty has always, in cases of denunciations of its violation, been considered as unitary. On the other hand, all manifestations of practice the author refers to in speaking of *territoriale Souveranität* as distinct from *Gebietshoheit* can also be explained by regarding territorial sovereignty solely as the competence (or right) of the State to exercise jurisdiction within the framework of the territory. As Quadri has convincingly argued, the cases of administration, occupation and exercise of jurisdiction on parts of others' territory are nothing but cases of exercise of the State's territorial sovereignty, albeit qualified by particular international obligations in relation both to the actual exercise and to withdrawal from the territory after a certain time.[21]

Not so convincing, however, is treating as spatial competence the coercive power of the State beyond its territory, that is in the case of the High Seas, the airspace overlying the High Seas and *terrae nullius* (e.g. the Antarctic).[22] Firstly, it cannot be understood how in such areas the coercive powers of individual States coexist; but more importantly, it is difficult to see, as we have already said, how these powers can coexist with the powers (based by Verdross on an autonomous sphere of spatial competence as well as the sphere of personal competence) over ships and over aeroplanes. The fact is that in spaces other than territory human communities are moving, such as the communities on ships and aeroplanes, or at least isolated individuals. If this is taken into account, there is no need for the spaces themselves (nor for the ships and aeroplanes) to construct a spatial competence, since personal competence suffices.

Nor does the reconstruction Verdross gives of personal competence convince. If by *Personalhoheit* one understands, as Verdross does and is correct to do, the power to act coercively over one's own subjects, there is no sense in making a general category of it. The relationship between the State and its own subjects is, in the coercion perspective, best defined negatively, as being the limit to the territorial competence of another State (in relation to the treatment of foreigners on its own territory, of others' ships in the territorial sea, of a foreign aircraft, etc.). Nor are the reasons which, as we have seen, Verdross adduces to justify a general *Personalhoheit* convincing, apart from the example of governments in exile, whose

21 R. Quadri, *Diritto internazionale pubblico*, (5th ed., 1968) 633ff.

22 For obvious reasons, we here ignore extra-atmospheric space. What is to be said in connection with ships at sea applies *mutatis mutandis* to cosmic vehicles in such space.

capacity as international subjects is rather dubious.[23] It seems to us very artificial to consider as manifestations of such *Personalhoheit*, in relation to subjects abroad, the possibility for the State to act against their goods found on its territory. This has to do with nothing other than territorial competence and its limits.[24] And we feel that one may speak of a competence (or, if one wishes to remain faithful to dualism, a right to exercise coercive power) in a personal sense only when it constitutes an autonomous title that can be invoked where no territorial competence exists.

Thus understood, personal competence ultimately possesses a rather limited scope. It can be reconstructed only in relation to those individuals or communities of individuals (ships, aircraft, scientific expeditions, etc.) that are located in areas other than the territory of the State, and are subject to the coercive power of the State whose nationality they, in a broad sense, possess.[25]

Finally, with regard to the sphere of material competence, it may be said that, where the exercise of coercive power is concerned, it has *no autonomy*. According to Verdross, the area that it covers simply concerns the limits that the State encounters in the exercise of its spatial and personal competence. It does not therefore seem to us to deal with an attribution of powers to the State by international law, an attribution which characterizes, or for the sake of consistency ought to characterize, the theory of competence.

8. In our examination many years ago of the law of the sea, we stressed the inability of the theory of competence to explain cases in which the State is exceptionally entitled to exercise its own coercive power over *foreign* vessels on the High Seas, and more generally, in sea areas not subject to its territorial sovereignty. Such power, properly considered, cannot be related to any of the three competences – spatial, personal or material – constructed within the framework of the foregoing theory, in particular by Kelsen and Verdross. In the same study, we sought to reconstruct for the aforesaid cases a functional competence (or in dualist terms, a right to the functional exercise of jurisdiction) of the State.[26] We feel that this category is still valid today, and indeed can explain new manifestations of practice connected with development of international law, not only of the sea but also of the air and of space.

It is typical of the functional delimitation of State jurisdiction that it is exercisable only, and within the limits of which it is necessary, in order to reach a *definite* object, to satisfy a *definite* interest. By contrast with spatial and personal

23 Cf. R. Quadri, *supra* note 21, at 432ff., who holds that such governments, when they have exercised powers, have done so, from the viewpoint of international law, as organs of the host State.

24 Kelsen's position on this point seems more consistent: *supra* note 2 above.

25 We say 'in a broad sense' to include the cases of human communities in *terrae nullius*, for instance States' Antarctic bases, of whom it may be said that they have the nationality of the State organizing them.

26 Cf. B. Conforti, *Il regime giuridico dei mari* (1957) Chapter III.

power, which entitles the State to exercise its own power, at least in principle, in any direction – in short – to exercise a generic power in every way and respect, in functional competence it is the purpose, the interest, that sets the measure, or the dimension of a State's jurisdiction, and accordingly conditions its scope and extension. One of the consequences is that in the case of spatial and personal competence the presumption exists that the State's jurisdiction may, in case of doubt, be exercised; in the case of functional competence by contrast, since State power has to be kept within the limits strictly necessary to satisfy a particular interest, it should be presumed, again in case of doubt, that such an exercise is not possible.

Without wishing to go into detailed considerations of functional competence,[27] we will indicate a number of situations (some of which arose subsequent to Verdross's writings on the subject) which can be referred to this category of competence: the power of the coastal State over the so-called contiguous zone; over the continental shelf; over the exclusive economic zone; in the exercise of rights of pursuit; interventions that all States may engage in on foreign vessels in the event of piracy or hijacking; interventions exceptionally permitted on foreign aircraft in the airspace overlying the open sea (the case of Air Defence Identification Zones); and any other intervention on foreign ships, aircraft and space vehicles allowed by customary or conventional international law.

9. Summarizing what has been said so far, we feel that the thought of the distinguished Viennese master, to whose memory these notes are dedicated, should be followed in part. Firstly, his reconstruction of spatial competence (*Gebietshoheit*) should be retained, albeit limited to the State's jurisdiction within the framework of the territory. The notion of a personal competence (*Personalhoheit*) should also be preserved, albeit confined to jurisdiction exercised over individuals and over national communities outside the territory. These two competences should, in our view, be augmented by the functional competence, understood in the sense just indicated. We feel that these three competences *exhaust* the cases of delimitation of State jurisdiction, provided that the term competence is, as would seem consistent, defined as *independent title to exercise coercive powers recognized by international law*. As we have shown, the theory of competence can, undoubtedly, also be adapted to a dualist vision of the relations between international law and internal law.

27 For this, apart from the study cited in the previous note, see Conforti, 'Cours général de droit international public', *RdC* (1988-V) 152ff. (English version: *International Law and the Role of Domestic Legal Systems* (1993) 140ff.).