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Volume II

Documents of the ninth session including the report of the Commission to the General Assembly

UNITED NATIONS

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INTERNATIONAL LAW COMMISSION

DOCUMENTS OF THE NINTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

ARBITRAL PROCEDURE

[Agenda item [1]]

DOCUMENT A/CN.4/109

Draft convention on arbitral procedure adopted by the Commission at its fifth session

Report by Georges Scelle, Special Rapporteur

(with a "model draft" on arbitral procedure annexed)

[Original text: French]
[24 April 1957]

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CHAPTER I

General observations

1. Arbitral procedure, which was selected by the International Law Commission at its first session, in 1949, as one of the items accorded priority for codification, has been the subject of progressive study: in 1952, the Commission at its fourth session adopted a draft containing thirty-two articles, which was transmitted by the Secretary-General to Governments for their comments [1]; in 1953, at its fifth session, the Commission adopted the final draft, also containing thirty-two articles, with a commentary by Mr. Lauterpacht, who was then Rapporteur to the Commission.[2]

2. This draft which was submitted to the General Assembly at its tenth session (1955), in accordance with article 22 of the Commission's Statute, was prepared with due regard to the observations received from Governments at the time, and was the subject of valuable detailed comments by the Secretariat of the Commission (A/CN.4/92).

3. After consideration by the Sixth Committee, the draft was again referred by the General Assembly to the International Law Commission for further study, in the light of the Assembly's deliberations and of other observations received from Governments. The General Assem-

[1] *Official Records of the General Assembly, Seventh Session, Supplement No. 9,* chap. II.

[2] *Ibid., Eighth Session, Supplement No. 9,* para. 57.

bly, therefore, did not accept the International Law Commission's recommendation, based on paragraph 1 (*c*) of article 23 of its Statute, that the Assembly should recommend its Members to conclude a convention based on the draft.

4. Resolution 989 (X), adopted by the General Assembly on 14 December 1955, reads as follows:

"*The General Assembly,*

Having considered the draft on arbitral procedure prepared by the International Law Commission at its fifth session and the comments thereon submitted by Governments,

Recalling General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

Noting that a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

Believing that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

1. *Expresses* its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

2. *Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session;

3. *Decides* to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

5. It is clear from resolution 989 (X), which was adopted in pursuance of article 23, paragraph 2, of the Commission's Statute, that the General Assembly, although believing that a set of rules on arbitral procedure was likely to inspire States "in the drawing up of provisions for inclusion in international treaties and special arbitration agreements", expressed no view as to the desirability of convening a conference of plenipotentiaries to conclude a convention, and left a decision on that point to its thirteenth session, which was at liberty to declare for some other solution—for example, the preparation of a "model draft" on arbitral procedure, as had indeed been proposed by some members of the Sixth Committee.

6. It emerged from the discussions that, although the objections to the Commission's draft could be classified in four or five categories of varying scope, there was a large majority against merely approving the letter and spirit of the draft; and that the minimum of twenty members, regarded as necessary for a fruitful discussion of a draft convention, would probably be difficult to find. The addition of new members to the United Nations since 1955 is unlikely to have much effect on the General Assembly's views.

7. These views may be briefly summarized as follows: The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, the codification of custom.

8. While recording these facts very objectively, the Special Rapporteur is somewhat relieved to note from the comments on the 1953 draft that several Governments of States with a long democratic tradition and a constant concern for juridical correctitude were, with certain minor reservations, favourably disposed to the adoption of the draft in both its letter and spirit (see, in particular, the observations of Canada, Denmark, Greece, the Netherlands especially Sweden, the United Kingdom and the United States of America). The enthusiastic and full approval accorded the draft by Professor de Aréchaga, who was consulted by the Government of Uruguay,[3] and by the representative of Pakistan, Mr. Brohi,[4] should also be noted; both of the Governments concerned had clearly sensed the attunement of the draft to the conciliatory spirit of the United Nations Charter (Articles 33 *et seq.*) and its progressive character. But the fact must be faced that the attitude of the Governments of States that have newly acquired sovereignty, or of those deeply imbued with the dogma of State sovereignty—particularly of the group of Soviet States that coalesced against the draft and carried the decision—or of certain American States, has remained steadfastly *unshakeable*, and will probably be maintained at the General Assembly's next session, which will be attended by representatives of eighty-one Member States.

9. We should be the last to deny that the draft submitted by the Special Rapporteur and elaborated by a majority—albeit a slight majority—of the Commission, clearly tends towards a juridical and jurisdictional concept of arbitration, although leaving the institution its independence and its purely voluntary character. There is no question of making it, as some of its opponents have suggested, into a kind of first instance subject to appeal to the International Court of Justice. The sole purpose of providing for purely external action by the Court is to cope with the deadlocks which frequently arise in the traditional procedure and the effect of which—it can scarcely be denied—has sometimes been to bring the parties original undertaking to nought;

[3] *Ibid.*, annex I, sect. 11.

[4] *Ibid., Tenth Session, Sixth Committee,* 468th meeting, paras. 1-13.

more or less scandalous examples have been quoted in our earlier reports. The draft was mainly based on the soundest French juridical doctrine—that of jurists like Lapradelle, Politis, Merignhac, and the revered master Louis Renault, who, more than fifty years ago, regretted that arbitral procedure had kept following in the wake of diplomatic practice and who foresaw no prospect of progress unless it was definitely diverted into juridical channels (see A/CN.4/35). The doctrine was given final shape by J. B. Moore, Oppenheim, van Vollenhoven and many others now dead. It is pointed out in the *Commentary on the Draft Convention on Arbitral Procedure* prepared by the Secretariat that "the chief significance of the draft lies in the several means which it provides for ensuring that the obligation to carry out the agreement to arbitrate shall not be frustrated at any point by a subsequent failure by one of the parties to fulfil that obligation" (A/CN.4/92, p. 8). But it was precisely this tendency to make of the mere undertaking to resort to arbitration, and not of the occasionally ambiguous provisions of the *compromis*, the very linchpin of the draft that aroused the most bitter opposition, because it was a threat to the concept of arbitration as a diplomatic extension of the dispute. Hence the twofold objection that the draft was contrary to sovereignty and a departure from established custom.

10. The two arguments must be explained. The sovereignty argument is either too wide or too narrow. Every treaty, every duly recorded and valid international undertaking, entails a renunciation of sovereignty. The objection may mean that the undertaking to resort to arbitration is purely provisional, so long as the judgment is not final and the parties reserve the right to challenge it at every stage of the procedure. If so, the argument is anti-juridical, and actually denies the validity of the undertaking itself and of any arbitration agreement. If the meaning is that the *bare* undertaking or the agreement has no real existence unless a *compromis* has been reached *in every case* on all points, and particularly on the different phases of the procedure, then the settlement of the dispute plainly becomes problematical. The precise purpose of the draft is to ensure that the decision to arbitrate is unaffected by any flaws in the *compromis*, where that decision is beyond all question, and the renunciation of sovereignty, whether immediately or as from some future date, is proved. Whenever the sole, unadorned, argument used is that the draft convention is an impediment to the *sovereign*—i.e. in fact, arbitrary—decisions of Governments, the objection is meaningless. Governments are always at liberty not to "compromise"; but, as soon as they do, their sovereignty no longer exists so far as the arbitrable dispute is concerned.

11. The meaning of the second objection is that the Governments raising it do not admit that the International Law Commission was set up to foster the development of law, and perhaps not even that its task is to unify law; for arbitration practice is far from uniform, often varying from region to region, or from one treaty to another, and perhaps even in each separate case. This aspect of the objection is, of course, particularly impressive, as disputes submitted to arbitration—and, with them, the procedure in each case—may vary infinitely in scope. But, if that is so, and Governments wish to be free to fit procedure to the circumstances and to the nature of the dispute, then it would appear to be *pointless* to prepare a code of procedure, especially in the form of a convention.

12. The Special Rapporteur therefore shares the doubts of certain members of the Sixth Committee as to the advisability, or even the possibility, of pursuing the proposal made in 1953 and submitting a further revised draft convention to the General Assembly. He feels, on reflection, that it would be preferable to submit the draft as a mere "model" for Governments, especially for those that have concluded an arbitration agreement in the form either of an abstract binding arbitration treaty or of an arbitration clause in a treaty on a specific subject. The General Assembly could then confine itself to approval in principle, or theory, of the work done, although such approval is bound once more to meet with stubborn objections to the juridical and jurisdictional approach.

13. On the other hand, it is not easy to advise the Commission to reconsider a draft convention with a view not only to mitigating but to *neutralizing* the very varied criticisms directed against it. For these criticisms went beyond a mere rejection of the present draft; they repudiated both previous efforts to put arbitration on a jurisdictional basis and their results, and thus represented a *retreat* from what could have been regarded as achieved, not only by the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949,[5] but by the Convention for the Pacific Settlement of International Disputes (1907).[6] It should be noted as symptomatic that the General Act, which was ratified by twenty-four States some thirty years ago, has been ratified by only four since the United Nations assumed responsibility for it. The time would therefore appear to be rather ill-chosen to ask Governments to discuss the possibility of undertaking new juridical obligations. Despite the reasons for the retreat referred to, as briefly outlined above, we think the International Law Commission should decline, as it were, to abdicate, or to register the proven present weakening of the law.

14. It lies, of course, with the Commission to determine its own line of conduct. But one point should be noted: if well-intentioned Governments are to be offered an ordinary model draft that they can freely accept in whole or in part, then the *basic* elements and original tenor of the 1953 draft can stand; whereas the offering of a new draft convention can be—we repeat—but a surrender that would, in our view, be valueless and even likely to be damned with faint praise.

15. Having made the above points, we shall now look more closely at: (1) the study made of the provisions of the Commission's draft in the General Assembly, in the light of the powers granted to the Commission under article 1 of its Statute; (2) the amendments made in certain of the articles of the draft to meet criticisms of them

[5] Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949. See United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

[6] *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., James Brown Scott (ed.) (New York, Oxford University Press, 1915), pp. 41 ff.

in the Assembly; (3) certain new articles, mostly borrowed from part IV of The Hague Convention for the Pacific Settlement of International Disputes (1907), which will this year attain its fiftieth anniversary.

16. The new text is annexed to this report.

CHAPTER II

Consideration of the Comments of Governments

A. OBSERVATIONS ON THE MAIN ARTICLES OF THE DRAFT

1. The undertaking to arbitrate (former article 1)

17. Article 1 contains three paragraphs which set the tone for the whole draft. Its purpose is to emphasize that every undertaking to resort to arbitration constitutes *per se* a legal obligation which must be met, whether it be an abstract undertaking contained in an arbitration agreement, or an arbitration clause, or an undertaking concluded in connexion with an actual dispute, the material facts of which are known at the time the undertaking is signed. This article merely repeats a stereotyped formula that has been in use since 1907; but adds the provision that, if it is to be deemed legally valid, the undertaking must result from a *written instrument*, which may or may not be what it has been agreed to call a "*compromis*".

18. The word "*contestation*" in the French text has been criticized. It can be replaced by "*différend*". The reference is, of course, only to disputes between States (comment by Yugoslavia).

19. The exclusion of political disputes has been proposed—as if all disputes did not have a political background, and as if arbitration were not particularly indicated in the case of political disputes! Also proposed has been the exclusion of disputes within the "sole jurisdiction" of a State—as if such exclusion could be any more clearly defined, considering the difficulty of knowing the exact meaning of "sole jurisdiction", than the expression "essentially within the domestic jurisdiction of any State" used in Article 2, paragraph 7, of the United Nations Charter! Such formulae are liable to provide all sorts of loopholes (objections by Argentina, France, Guatemala, Iran and Peru). Honduras proposes the exclusion of disputes that are within the purview of regional agencies, although it is not clear what difficulty there can be in reconciling arbitral procedure with Articles 52 to 54 of the Charter. Indeed, paragraph 4 of Article 52 explicitly refers to Articles 34 and 35, which mention arbitration among the methods of pacific settlement of disputes.

20. Lastly, it has been recommended that the draft exclude future disputes, or disputes arising *after* the signature or entry into force of the convention (Argentina, Canada, Guatemala, Honduras, Norway and Yugoslavia). This is the "non-retrospective" aspect. It may have its value as a legitimate precaution; but why it should conflict with the freedom of will of States that see fit, even then, to agree to arbitrate, is hard to see.

21. There is, however, one case in which the exclusion of recourse to arbitration might be considered—namely, where the dispute has already been settled by a judgment against which there can be no appeal for review or annulment. The "finality of the arbitral award" is traditional in customary law, as the means of putting a permanent end to the dispute which has arisen. This is the "conciliatory role" of arbitration, which is sometimes regarded as preferable even to its juridical role. Chapter V of the draft appears to explain it, but it does not explicitly refer to it. It might be worth while to mention it unambiguously in article 24, paragraph 5, in the traditional terms: "The arbitral award settles the dispute definitively, and without appeal, with due regard to the articles on review and annulment".

2. Order of the articles

22. That said on *the scope* of arbitral procedure, it might be possible to give the traditionalists some satisfaction, at least as to form, by merely altering the order of the articles: the apparently minor place given to the *compromis* (article 9) could be changed by assigning article 2 to it. This would mean reverting to the method used in the 1907 Convention (article 52) instead of following the order adopted in the General Act, which dealt with the constitution of the tribunal before the *compromis* (article 25).

23. This order of priority—the point was apparently not made clear to the General Assembly—was adopted in the Commission's draft to indicate that the aim in making the constitution of the tribunal the first and immediate duty of the Governments bound by the undertaking to arbitrate was to ensure that observance of that undertaking would be controlled, not by a permanent "institutional" tribunal, but by a juridical body qualified by its binding competence to complete the *compromis*—or even to draw it up, should the parties be unable to do so (article 10)—and to assist the procedure with its real, if delegated, authority. That was also the ultimate purpose of the General Act; but it was also what aroused the instinctive opposition of the staunch supporters of "sovereignty" as an absolute concept.

3. The compromis *(former article 9)*

24. It must be stressed that a *compromis* can contain many other points which are to be found in the former article 9 of the draft. For example, the power to arbitrate can be vested in an already existing tribunal, even a State judicial body, as has sometimes happened (Yugoslavia); the names of the arbitrators can be included in the *compromis* (Netherlands); reference can be made, not only to the "law" applicable, but to the general principles of law (Brazil); the points on which the parties are or are not agreed can be listed; the way in which costs are to be shared can be laid down; the services that may be required of the International Court of Justice can be mentioned (Netherlands), etc. Anything can be put in a *compromis*, even if it is doubtful whether the agreement between the parties can in practice cover all the difficulties that might arise during the procedure.

25. But *what is unacceptable* is that a *convention* on procedure should allow flaws in the *compromis* that may hinder or block the course of the procedure, and above

all implicitly or explicitly result in extinguishing the obligation. In other words, the tribunal cannot be " the slave of the *compromis* ", and must retain control of the proceedings until the award. Otherwise—we repeat—it is no longer the provision prescribing arbitration that is intrinsically binding, but only the *compromis*. The undertaking ceases to exist if it contains a purely optional clause that may paralyse the procedure. Where a " convention on procedure " is concerned, there is a basic contradiction in not making provisions *essential* to its efficacy and to the settlement of the dispute compulsory. They cannot be made subject to free agreement between the parties by inserting reservations like: " Unless the parties have agreed otherwise . . .".

26. Now, that *logical necessity* has been rejected by a large majority of States with a view to toning down the draft—from which we conclude that, if its spirit and scope are to be preserved and it is to be submitted as a model for the consideration of the parties, it must not be deprived of its intrinsic qualities, including the binding nature of the provisions essential to its efficacy.

4. Arbitrability of the dispute (former article 2)

27. The first of these provisions concerns the *arbitrability of the dispute*. Some Governments, not among the least important, have agreed that this preliminary question must be settled if the contract of record is not to be brought to nought. According to paragraph 1 of the former article 2:

> " If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, such preliminary question may, in the absence of agreement between the parties upon another procedure, be brought before the International Court of Justice by application of either party. The decision rendered by the Court shall be final."

The very existence of the obligation to arbitrate may indeed be challenged in very good faith, especially where it is a question of applying an arbitration treaty or arbitration clause.

28. The draft requests the International Court of Justice to decide this issue, and this is the point on which the opposition aroused by the novelty of the obligation has perhaps been most bitter. It has been said that this is an indirect way of extending the area of the Court's compulsory jurisdiction, especially as applied to States which have either not subscribed to the optional clause or subscribed to it with reservations that make it illusory (for instance, Argentina, Byelorussia, Chile, Czechoslovakia, Egypt, Guatemala, Honduras, India, Iran, Israel, Peru, Poland, Turkey, USSR and Yugoslavia).

29. A possible answer is that acceptance of this article may be regarded as equivalent to the optional clause so far as concerns the special purpose in view, and that the Court therefore cannot disavow its jurisdiction, as the Permanent Court of International Justice did in the East Karelia case,[7] since it is a matter of treaty interpretation. The preliminary obstacle to the observance of the undertaking to arbitrate is thus completely removed.

30. And we can here invoke the precedent created by resolution 171 (II) of the General Assembly, adopted on 14 November 1947, which states:

> " *Considering* that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law,
>
> . . .
>
> " *Considering* that the International Court of Justice could settle or assist in settling many disputes in conformity with these principles if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services."

After urging States Members—in paragraph 1 of the operative part of the resolution—to accept the compulsory jurisdiction of the Court in accordance with Article 36 of the Statute of the Court, the General Assembly:

> " 2. *Draws the attention* of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice;
>
> " 3. *Recommends* as a general rule that States should submit their legal disputes to the International Court of Justice."

31. This resolution seems to have been drafted with special reference to arbitration treaties. Article 2, of course, entails no widening of the compulsory jurisdiction of the Court, but only the application of an agreed undertaking freely entered into by the parties.

32. The resolution adopted by the General Assembly on 14 November 1947 applies to all cases in which it was felt that the draft convention should provide for recourse to the services of the International Court of Justice. Some ten years ago there was at any rate less sign of reluctance on the part of Governments to use those services. A possible cure for their distaste, should it continue, might be to submit the question of arbitrability to another international legal organ, for example, the Permanent Court of Arbitration. But that method would involve substantial delays and complications, particularly as regards the constitution of the court to settle the preliminary issue, even if the summary procedure prescribed in article 86 and following articles of the 1907 Convention were to be used. Thus arbitration would be provided at two levels, which might arouse fewer misgivings.

33. This solution, although dilatory, would at any rate enable account to be taken of a sound objection to be found in the ever-apt observations of the Netherlands Government, which we ourselves are very often inclined to support: Would the decision of the International Court

[7] See Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 5.

of Justice on the arbitrability of the dispute not be liable to conflict, indirectly at least, with any application for annulment of the arbitral award submitted to the same Court (article 31 of the draft)? A solution advocated in the observations of the Netherlands Government is that the International Court of Justice should decide merely whether or not the arbitral tribunal should be constituted—which would remove any risk of conflicting judgments. The Court's decision would amount to a kind of presumption that a dispute probably exists and that the initiation of arbitration proceedings is " recommended ". The " recommendation " concerned would leave the arbitral tribunal itself complete freedom of action. But the International Court of Justice might then be reluctant to assume what would in that case be an *extra-judicial* responsibility, instead of giving a legal ruling on the scope of the initial undertaking to arbitrate.

34. The possibility might also be considered of providing for resort to another court designated by the parties themselves, and, finally, if the arbitral tribunal has already been constituted, of referring the question of arbitrability to it. But here we are once more faced with the difficulties that will arise in constituting that tribunal, and with the danger—unfortunately not imaginary—that if its members are in the service of the parties, its very judgment on the question of arbitrability will be particularly open to question. We should therefore prefer to leave the article under review almost unchanged, in the following terms:

> " If the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question shall, failing agreement between the parties within a period of three months upon another method of settling the question, be referred, by application of either party, to the International Court of Justice either for summary judgment or for an advisory opinion."

The last phrase has been added as we think it unlikely that an advisory opinion of the Court on the preliminary question of arbitrability can be ignored by any Government concerned about its legal commitments.

35. As to paragraph 2 of this article, concerning protective measures, we regard it as the necessary complement to action on the preliminary question, whatever the court to which the dispute is referred for settlement.

5. Constitution of the arbitral tribunal (former articles 3 and 4)

36. This is the second stumbling block in arbitral procedure; but it is a subject which has traditionally received closer study, since the choice of judges has always been regarded as the main difficulty in the *compromis*. Yet the method proposed for solving that difficulty has met with roughly the same criticisms as in the past, further aggravated by the fact that it would vest power " in one man ", although an eminent person, i.e. the President or Vice-President of the International Court of Justice. It has been suggested that the party which has opposed the constitution of the tribunal should be entitled to appeal to the Court against the decision referred to in paragraph 2 of article 3 of the draft (Costa Rica). The Netherlands Government has emphasized the need to mention cases in which the parties have arranged for the assistance of a third party in the appointment of the arbitrator(s). The Special Rapporteur would have absolutely no objection to the text proposed in the Netherlands observations, among the advantages of which is the stipulation that the tribunal should be composed of an uneven number of arbitrators—as indeed he himself had originally proposed.

37. The draft would then read as follows:

> " 1. Immediately after the request made for the submission of the dispute to arbitration, or after the decision of the International Court of Justice on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps in order to arrive at the constitution of the arbitral tribunal.
>
> " 2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice, the appointment of the arbitrators not yet designated shall be made by the President of the Court at the request of either party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.
>
> " 3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate and after consultation with the parties. In so far as the relevant text contains no rules with regard to the composition of the tribunal, that composition shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place, it being understood that the number of the arbitrators must be uneven."

38. Long before the 1953 draft came into existence, continuous efforts had been made to ensure the constitution of the tribunal, despite the ill will or default of the parties (1907 Convention, articles 45 and 87; Treaty of Versailles, article 304 regarding mixed arbitral tribunals;[8] General Act, article 23). A draft convention on arbitral procedure cannot appear to ignore these precedents and fall more than fifty years behind the times. It lies with the Commission to decide which, in its view, is the wiser course: to accept this retrograde step or to abandon its ambition to draft a convention. The need for intervention by the President of the Permanent Court of International Justice was first laid down in article 23 of the General Act of 1928. The Commission adopted this solution; but it was to be applied *omisso medio*, i.e. without recourse to third Powers.

[8] *The Treaty of Peace between the Allied and Associated Powers and Germany* (London, H.M. Stationery Office, 1925), pp. 169-171.

39. The reader will note, not without some surprise, that the next article (article 4), which states that " subject to the circumstances of the case, the arbitrators should be chosen from among persons of recognised competence in international law ", was objected to by one Government as depriving the parties of a free choice of arbitrators!

6. Immutability of the tribunal (former articles 5 to 8)

40. The following articles, concerning the immutability of the tribunal once constituted, were bound by their comparative novelty to arouse serious objections also.

41. Here also the two conceptions of arbitration came into conflict. In the traditional or diplomatic conception, the arbitrators appointed by either party are the representatives of the party appointing them. They are not so much judges as counsel briefed to put forward their principals' claims, so that—except where there is only one arbitrator—the umpire is in fact the sole judge. In this conception, " national " judges never lose their national status and can be replaced at any time by the Government which appointed them. They may also, under that Government's pressure, exercise their right to resign or " withdraw " to indicate their disagreement with the way they think the case is going. By agreement with agents and counsel, with whom they maintain close and uninterrupted contact, they continue their diplomatic activity throughout the whole course of the procedure, and have, in fact, no independence. Their role may be compared with that of the *ad hoc* judge in the International Court of Justice, who, in the words of the first President of the Permanent Court of International Justice, must be regarded " as a sop to the juridical weakness of international litigants ".

42. The jurisdictional conception, on the contrary, is designed to ensure the independence of all members of the arbitral tribunal, not merely of the umpire. The basic idea is that " national " judges cease to be so—at least as far as possible—from the time when the tribunal is finally constituted, and that the mere fact of their acceptance by both parties or of their designation by an impartial authority makes them appointed judges, members of a " judicial organ " that is international, though temporary and destined to disappear as soon as its award is rendered. This jurisdictional conception has admittedly not been very popular with Governments anxious to maintain, throughout the entire proceedings, not only contact with but influence over the judges they have appointed.

43. Paragraph 2 of article 5 of the draft represents a compromise between the two conceptions. Under that paragraph, each party retains the right to replace an arbitrator appointed by it, so long as the tribunal constituted has not yet begun its proceedings. Once the proceedings have begun, i.e. when the President has made his first order, the replacement of a " national " arbitrator can only take place by agreement between the parties. Hence, as a rule, the composition of the tribunal should remain the same until the award is rendered.

44. The following articles of the draft (articles 6, 7 and 8) were designed as far as possible to curb activities of either party calculated to lessen the tribunal's authority or freedom of action. They deal with vacancies that may occur on account of the death or incapacity of arbitrators (article 6) and with the resignation of arbitrators under varying degrees of pressure (article 7) after the proceedings have begun. As was to be expected, several Governments objected to the proposed application in such cases of the methods prescribed for the initial formation of the tribunal, and in particular against the right vested in the tribunal itself to apply those methods and to consent to " withdrawals ". It was maintained that this would make the tribunal into a supra-national body (Czechoslovakia) and that it should lie with the parties which appointed the arbitrators to replace them (India, Yugoslavia). The opposition always takes the same form.

45. Article 8, on disqualification, aroused the same objections, with regard to the limitation of the freedom of States and the power of decision given to the arbitral tribunal. Yet it is clear that abuse of the right of disqualification may suffice to impede, if not to ruin, the development of the procedure, and that, in view of the difficulties made and the meticulous care taken at the *compromis* stage in selecting the arbitrators, any such occurrence during the proceedings should be regarded as exceptional.

46. Article 8, paragraph 1, provided that:

> " A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal."

47. It will be noted that, if the arbitrator concerned was one appointed by the President of the International Court of Justice, it may seem unusual to leave the decision to the arbitral tribunal. Paragraph 2 of the same article stipulates that, in the case of a sole arbitrator, the question of disqualification shall be decided by the International Court of Justice on the application of either party. The Governments of Canada, India and the Netherlands thought that in all cases of disqualification the decision should be taken by the International Court of Justice, not the arbitral tribunal [at least if the arbitral tribunal is equally divided on the question (Canada)].

48. The Special Rapporteur would accept this view and agree that intervention by the International Court of Justice is warranted in such an exceptional case as that of a proposal for disqualification. But, again, there is reason to think that its intervention would be distasteful to the supporters of the political conception of arbitration, and that reservations would be made that would nullify all these provisions if they were stipulated in a draft convention.

7. Powers of the tribunal (former articles 9 to 21; additional articles 1 to 7)

49. The same would probably apply to the other powers vested in the tribunal: for example the right, under article 10, to decide whether the essential elements of the

undertaking to arbitrate are sufficient as a basis for a judgment by the tribunal, even if such elements do not take the form of a *compromis* proper; and the right of the tribunal itself to complete or to draw up a *compromis* should the parties fail to do so after being called upon by the tribunal to conclude the *compromis* within such time limit as the tribunal will consider reasonable.

50. Article 10 of the draft reads as follows:

"1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. [There were no objections to this sentence.] If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 9 to enable it to proceed with the case. [On this point, the provision may seem a little bold.] In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case, the tribunal shall order the parties to conclude a *compromis* within such time limit as the tribunal will consider reasonable.

"2. If the parties fail to agree on a *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

"3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and the parties fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*."

51. To the usual objections regarding sovereignty and free will, and the transformation of the arbitral tribunal into a "supra-national" court, some States (Peru, Turkey) added the criticism that this article confers unprecedented powers on the tribunal. They forget that assistance by the tribunal in the drawing up of the *compromis* was already prescribed, though in less clear terms and in less detail, in the 1907 Convention (article 54), the General Act (article 27) and the Pact of Bogotá [9] (article XLIII), which provides for intervention by the International Court of Justice.

52. It may also be pointed out that under article 13, paragraph 2, of the draft, the tribunal has the power to formulate its rules of procedure, if the parties have not agreed on the subject and are not bound by the Convention.

53. The powers given the tribunal to interpret the *compromis* when it has been drawn up by the parties (article 11) have also been much criticised. To begin with, the everyday statement that a judicial body is always "the judge of its own competence"—which may have been confusing—was regarded as offensive and even unacceptable (Afghanistan, Brazil, Czechoslovakia, Egypt, Greece, Iran, Peru, Syria, etc.). It does not mean, however, that the tribunal has the right to deem the *compromis*—which is the very source of its competence—null and void. On the contrary, the tribunal is obliged to apply the *compromis*. All that is meant is that, when the rules adopted need interpretation, it is the tribunal that must give the interpretation after hearing the parties, not the parties themselves. Otherwise, the procedure might be permanently interrupted in the event of disagreement between the litigants on the interpretation. If the expression "judge of its own competence" is considered incorrect, the intervening clause can be deleted and the article simplified and toned down as follows: "The tribunal possesses the necessary competence to interpret the *compromis*." What matters is that there should be no possible doubt on the subject.

54. It goes without saying that this provision in no way impairs the economy of the draft as regards either the decisions of the International Court of Justice concerning the arbitrability of the dispute (article 2) or that Court's competence to give a finding on the possible nullity of the award, particularly in the event of its being informed that the tribunal has exceeded its powers, or that there has been a serious departure from a fundamental rule of procedure (articles 30 and 31) (observations of Canada, Greece, the Netherlands and Pakistan).

55. As to the rules of law to be applied by the arbitral tribunal, the draft provides that the parties may agree on this point in the *compromis*, and that only in the absence of such agreement shall the tribunal be guided, though not strictly bound, by Article 38, paragraph 1, of the Statute of the International Court of Justice. This provision of article 12 of the draft seems as liberal as may be. Nor would there be any objection to mentioning (as requested by Brazil) the rules of international law in general as well as those set forth in the said Article 38, or to empowering the tribunal (as proposed by Sweden) to decide non-legal disputes *ex aequo et bono*—which is an aspect of the arbitral institution's conciliatory role.

56. On the other hand, it would appear necessary, at any rate in a model draft on arbitral procedure, to keep the provision (accepted by a substantial majority of the Commission) that the tribunal may not bring in a finding of *non liquet*. Like the tribunal's right to judge *ex aequo et bono* should it have any difficulty in finding a legal basis for its award, this strikes us as a necessity in view of the conciliatory nature of arbitral procedure, designed as it is to settle definitively disputes entailing an undertaking to arbitrate. To leave the parties a free choice in deciding this question (as proposed by Brazil, Czechoslovakia, India and Peru) might fit in with a "circumspect" *compromis*; but it strikes us as out of tune both with a model convention and with the traditional spirit of the institution.

57. The power vested in the tribunal under article 15 with regard to evidence has aroused no serious criticism. The Governments of Costa Rica, the Netherlands and Yugoslavia even proposed the exclusion of all reservations, particularly as regards the decision to visit the scene.

[9] American Treaty on Pacific Settlement, signed at Bogotá, on 30 April 1948. See United Nations, *Treaty Series*, vol. 30, 1949, No. 449.

58. In this connexion it is to be noted that provisions concerned with pure current and traditional procedure—such as those contained in article 13, paragraph 1, and articles 14, 18, 19 (apart from a slight comment by the Netherlands concerning the presence at the deliberations of all the arbitrators) and article 21 (on discontinuance of the proceedings)—called forth only minor observations. Some States would even appear to be in favour of including other similar points in the draft, for instance, as regards the role of agents and counsel, pleadings, the order of proceedings, etc. It would suffice for this purpose to take instruments like the 1907 Convention and the General Act as models in amplifying, and no doubt improving, the purport of the document, while avoiding further difficulties.

59. But difficulties arose again when Governments sensed a threat to their arbitrary prerogatives and their freedom of action, for instance in the case either of incidental or additional claims or counter-claims (article 16) or of provisional measures prescribed by the tribunal for the protection of the rights of the parties (article 17).

60. In the latter case, certain Governments were so suspicious of the tribunal that they feared it might take advantage of the powers vested in it to prejudge the interests at issue, and compromise the subject-matter of the dispute in advance. They forget that the tribunal would then be flagrantly exceeding its powers and there would be every reason for bringing an action for nullity. In another sense, the arguments suggest that a powerful litigant may be suspected of proposing to take advantage of the situation, and, for example, to refuse to abandon the action whatever the nature of the award. In such a case, it is the *bounden duty* of a tribunal to apply the protective measures.

61. The other case, that of incidental claims (or additional claims or counter-claims) is more calculated to provoke discussion. The whole question revolves round the decision to be taken on the role that should be assigned to the arbitrator or to the arbitral tribunal. Should the Governments concerned be left free to narrow the dispute down to the aspects to which they have agreed to confine it, or should it be accepted that the main function of the arbitral institution is to *settle the dispute in its entirety*, to liquidate it for the future, and that the tribunal must therefore be given the power to decide on the scope of the subject-matter of the dispute?

62. Once again a choice must be made between the conciliatory role played by arbitration and the reluctance of Governments to " go to law ". In the English text of article 16, the tribunal's competence to decide on incidental claims is restricted to claims " arising directly out of the subject-matter of the dispute ". This formula is preferred by the Netherlands Government to the French text, which refers to claims that the tribunal " *estime en connexité directe avec l'objet du litige* ". Argentina would prefer the article to deal only with " counter-claims relating to questions which necessarily arise out of the subject-matter of the dispute ". India takes the view that both parties should at any rate give their consent—which does not settle the question.

63. It is, in our opinion, scarcely permissible that, as an aftermath of arbitration, a situation has to be reviewed that is legally cleared up in principle, though still only partially so. A distinction may have to be drawn between counter-claims and additional claims. A counter-claim raises a question of justice, and finds its warranty in the principle that States are equal before the law; but the parties may wish to exclude it by agreement if it is not directly linked with the main claim. As to additional claims, they can of course only be recognized by the tribunal if they are *intimately connected* with the merits of the case and *necessary to justify the judgment* in law. Moreover, an action for nullity on the ground that the tribunal exceeded its powers may be raised later. Hence it would appear necessary to use terms that are somewhat vague, but that leave some latitude to the arbitral tribunal.

64. It should be noted that the arbitral tribunal is thus, in fact, to some extent empowered to decide on the scope of the subject-matter of the dispute, its competence in this respect being akin to that vested in the International Court of Justice as regards the arbitrability of the dispute. The Court may already have " suggested " in its preliminary judgment or advisory opinion (article 2) what the scope of the subject-matter of the dispute should be, so that some divergence of opinion may arise between the Court and the arbitral tribunal. Despite that risk, the Special Rapporteur thinks that the judgment rendered by the arbitral tribunal must not be made inadequate to the dispute it is supposed to settle, through Governments being left free to make it inoperative by the unwarranted exclusion of all incidental claims.

8. Force of the award (former articles 20 to 27; additional articles 8 and 9)

65. The basic classical article on this subject is article 26, which runs: " The award is binding upon the parties when it is rendered. It must be carried out in good faith ". The observations of Costa Rica suggest that the tribunal may, if it considers it necessary to do so, specify the date or dates on which the award or any of its provisions are to enter into force. That is self-evident. Honduras adds that, if either party to a dispute fails to comply with its obligations under the award, the other party may appeal to the Security Council, which may, if it considers it necessary to do so, make recommendations or decide on the measures to be taken with a view to ensuring that the terms of the award are observed. This may be regarded as an application to arbitration of Article 94 of the United Nations Charter —an application justified and necessary on the same grounds.

66. There is, we think, no need to stress *how necessary* for the effectiveness of the arbitral procedure it is to maintain the article on judgment by default (article 20). However, to satisfy certain States, a provision might be added to the effect that the arbitral tribunal may grant the defaulting party a sort of period of grace before judgment is pronounced (Argentina).

67. Article 21, under which there can be no *discontinuance of proceedings* by the claimant party without the consent of the respondent, has the same purpose in view, i.e. not to put the success of the arbitration at the mercy

of the ill will of one litigant. This article, it may be added, provoked no criticism.

68. Article 22, which concerns the possible embodiment in the award, as *res judicata*, of a settlement reached by the parties, is not binding on the tribunal. Guatemala has rightly proposed that it be specified that the tribunal is free to give or to withhold its consent.

69. As to the extension of the period fixed by the *compromis* for the rendering of the award (article 23), the proposal has been made that the tribunal should be able to grant it only with the consent of the parties. In our view, the choice should lie entirely with the tribunal itself, which should alone decide whether or not it is sufficiently informed by the procedure. But that, we consider, is the only ground on which it may infringe the *compromis*.

70. Lastly, as regards the signing of the award (article 24), the Netherlands comment that the signature of the president of the tribunal would be sufficient—and those of the arbitrators who voted for the award superfluous—appears to conflict with article 25, under which any member of the tribunal may express his separate or dissenting opinion, i.e. indicate how he voted. If, however, the arbitrators are debarred in advance by the *compromis* from stating their opinions, the fact that the president alone signs is likely to endow the award with, if not more unquestioned, at any rate more "unquestionable" and more final authority, since officially backed comments are excluded. Perhaps the Commission should reconsider this question.

71. The arbitral award is not a ukase. The reasons for it must be stated if it is not to be null and void. Some States, (Argentina for example), took the view that the reference in article 24, paragraph 2, which is repeated in article 30, sub-paragraph (*c*), is too vague, and that the arbitral tribunal should state the reasons on which the award is based separately for each question submitted to it. The mere obligation to give reasons would appear to imply, in fact, that all the reasons must be given. There is no objection to including the following clarification in the article: "The award shall state the reasons on which it is based for every point on which it rules".

B. Objections hardly to be entertained

72. Three questions have still to be considered: (1) interpretation, where necessary, of the award; (2) action for annulment of the award; and (3) action for revision of the award. The objections to the provisions of the draft on these questions can hardly be entertained, although they emanate from a compact majority of States.

1. Interpretation (former articles 28 to 31)

73. It has been argued, surprisingly enough, that the arbitral award, even if open to various interpretations, even if lacking in clarity, even if incomprehensible in certain respects, must be regarded as final and ending the dispute once for all. In such circumstances, it might rather be asserted that there is no award, either in whole or in part (Brazil, Egypt).

74. Nevertheless, there is point to the protests aroused by the proposal to leave any necessary interpretation of the award to the International Court of Justice, if the arbitral tribunal cannot act. The States that, on the whole, fear such intervention by the Court were again at one in describing it as second-degree and compulsory jurisdiction (Afghanistan, Argentina, Chile, India, Israel, Turkey, Yugoslavia, etc.). The Netherlands Government, although of the opinion that the request for interpretation should be made, proposes submission of the request to the Court only when the parties have not adopted some other solution. That view could be accepted, if need be; one might go even further and drop the idea of submission to the Court, since it may arouse the fear already mentioned, i.e. the fear of the possibility of, at least implicitly, conflicting judgments.

75. The Special Rapporteur would be prepared to agree that every request for interpretation should as a rule be submitted, if possible, to the tribunal that rendered the award, and to that tribunal alone; and that the latter should act very expeditiously, lest it be unable to function through being already dissolved. The Commission had adopted a time limit of one month. That we regard as a maximum, and we should be disinclined to extend it to three months, as proposed by the Netherlands Government. Instead, provision might be made for, where necessary, extending the competence of the arbitral tribunal for that period of one month, to enable it to deal with the request for interpretation. There is little likelihood that the composition of the tribunal would have changed in that short period, or that vacancies could not be filled by the method laid down for its original constitution. The parties would, moreover, still be free to adopt some other solution, so long as it was an agreed solution and the interpretation achieved a real settlement of the dispute. Particularly recommended would be appeal to the Permanent Court of Arbitration.

2. Annulment of the award (former articles 30 to 32)

76. Here again we find the same doctrine: that the arbitral award is final, even if it turns out to be morally unacceptable or, in fact, inapplicable. Once more we refuse to consider this ostrich-like policy, as it is inconsistent with the elementary principles of law. Its adoption would spell condemnation by negative absolutism of a copious literature that is consistent at least in its principles, if not always in its practical applications. The articles relating to the annulment of the award must perforce appear in a model draft on procedure, despite the reservations of certain Governments (for example, the United Kingdom), which may have considered the grounds listed in article 30 too vague or too wide, and were particularly averse to accepting corruption on the part of one of the arbitrators as a reason for annulment, while others (for example, Costa Rica) proposed the addition to the list of "coercion" of the tribunal. In our view, intervention by the International Court of Justice must be maintained in this case as the only acceptable solution, since the Court's prestige, as also the exceptional nature of the proceedings, is likely to prove reassuring. Here again, the time limit for initiating the proceedings must still be fairly short.

3. Revision article 32 [former article 29]

77. The objections that have developed around this subject are, as before, in sharp contradiction with the legal proverb dear to the Anglo-Saxons which says: "Nothing is settled until it is settled right". At times, too, they reveal a certain confusion between the different types of further action that a judicial award may suggest: appeal, cassation, revision. Yet the quite distinctive concept of the "new fact", which is clearly defined in article 29 itself, is long-established and hardly to be obscured except by inveterate political considerations. This is surprising if it be remembered that the adoption of the principle of revision goes back to the Convention of 1907 (article 83), that a famous application of it occurred in 1910 in the *Orinoco Steamship Company* case,[10] that the principle is laid down in Article 61 of the Statute of the Permanent Court of International Justice, etc. The principle of appeal and the appeal itself must therefore be regarded as normal; to abandon the principle would—we reiterate—be retrograde beyond words.

78. We had occasion, in 1950, in our first report on arbitral procedure (A/CN.4/18) to stress that it was impossible to maintain the common assumption of the "irrefragable" force of *res judicata* which normally attaches to every court finding, because it had become a matter of common knowledge after the new fact had arisen that the arbitrator had been materially unable to render his judgment with full knowledge of the facts, since he was not in possession of the necessary elements on which to base his conclusions. The characteristic of the new fact is, indeed, that it was unknown to the judge or judges when the proceedings closed, and was calculated to exercise a *decisive* influence upon the award (A/CN.4/18, para. 95). We added that the importance of revision was all the greater in that what was concerned was the award rendered by an international court in a suit between States involving powerful collective interests, and not only private interests that might become lost among the host of other lawsuits brought in a particular State. What is at stake here is not a need of public order but a need of "*international* public order". Today we might say "world order", considering the potential universality of the world-wide society embodied in the United Nations.

79. The four paragraphs of article 29, the contents of which were meticulously examined and re-examined by our Commission, carefully describe the application procedure, the time limits within which the application must be made, and the two findings required: on the existence of the new fact and the admissibility of the application; and on the merits of the case. As with the request for interpretation, it goes without saying that the application should normally be made to the tribunal which rendered the award, since it can in no way be made responsible for its award's imperfections. Not until it proves impossible to reconstitute the arbitral tribunal are the parties advised to apply to the International Court of Justice or to another court agreed between them. Here again we should be in favour of the special reference to the Permanent Court of Arbitration which we proposed in 1950, following the 1910 precedent. More liberal provisions than those contained in this text are hardly conceivable.

80. Let us mention in conclusion the Netherlands Government's proposal to add a paragraph to article 29 whereby "the application for revision shall stay execution unless otherwise decided by the tribunal or the Court". This is the same solution as should be adopted in the case of requests for interpretation.

CHAPTER III

Conclusions

81. Such are the reflections suggested by a further study of the draft adopted by the International Law Commission at its fifth session, and of the deliberations in the Sixth Committee and in plenary meetings at the tenth session of the General Assembly.

82. It will doubtless be noted that, despite the observations of most Governments and the fact that the draft was referred back by the Assembly to the International Law Commission, we have preserved the general economy of the draft, and, broadly speaking, the wording of texts already amended—in the light of the first comments received from Governments—at the fifth session of the Commission. As we have said, a new draft convention could win the fairly general support of Governments only if it represented an almost total *abandonment* of the progress made over the last fifty years or more in the theory and practice of arbitration by those chancelleries most traditionally devoted to the *juridical* solution of international disputes. Such a convention, reduced to a series of purely formal articles and procedural references—in the hope, perhaps, of avoiding protests against any obligation designed to ensure the effectiveness of the undertaking to arbitrate and to prevent arbitrary decisions by Governments—would in our opinion be without real value. It is even questionable whether it could produce a sound synthesis of arbitration practices, adapted to the multifarious cases that may arise and to the divergent views of Governments.

83. Indeed, the fact that international organization is now passing through a period of transition and the contradictory social and constitutional conceptions of the various groups of States—among them those which have most recently attained to major international competence, i.e. to full sovereignty—should warn against harbouring disappointing illusions. Hence we have thought it wise to propose that the International Law Commission do no more than submit to the General Assembly a mere model of arbitral procedure adapted to the stage now reached in the development of law in those States that are manifestly prepared to accept juridical *and judicial* obligations consistent with the spirit of concord and conciliation which informs the Charter of the United Nations. This new draft, *although in itself entailing no treaty obligation,* may nevertheless be of value to all chanceries desirous of using it, in whole or in part, as a basis for the final settlement of disputes that may disturb their mutual relations.

[10] *The Hague Court Reports,* James Brown Scott (ed.) (New York, Oxford University Press, 1916, p. 226.

Annex

Model draft on arbitral procedure

Article 1

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future (arbitration treaty - arbitration clause).

2. States parties to an undertaking to arbitrate may decide that it shall not apply to disputes arising, or due to circumstances arising, prior to its conclusion.

3. The undertaking shall result from a written instrument, whatever the form of the instrument may be.

4. The undertaking constitutes a legal obligation which must be carried out in good faith.

Article 2 (former article 9)

Unless there are prior agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify:

(*a*) The subject-matter of the dispute;

(*b*) The method of constituting the tribunal and the number of arbitrators;

(*c*) The place where the tribunal shall meet.

In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

(1) The law and the principles to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono;*

(2) The power, if any, of the tribunal to make recommendations to the parties;

(3) The procedure to be followed by the tribunal, on condition that, once constituted, the tribunal shall remain free to remove obstacles which may present it from rendering its award;

(4) The points on which the parties are or are not agreed;

5) The number of members constituting a quorum for the conduct of the proceedings;

(6) The majority required for the award;

(7) The time limit within which the award shall be rendered;

(8) The right of members of the tribunal to attach or not to attach dissenting opinions to the award;

(9) The appointment of agents and counsel;

(10) The languages to be employed in the proceedings before the tribunal;

(11) The manner in which the costs shall be divided;

(12) The division of expenses; and

(13) The services which the International Court of Justice may be asked to render, etc.

Article 3 (former article 2)

1. If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question may, failing agreement between the parties upon another procedure, be brought either before the Permanent Court of Arbitration for summary judgment or, preferably, before the International Court of Justice, by application of either party. The decision rendered by either of these Courts shall be final.

2. In its decision on the question, either Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

[*Variant of article 3*

If the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is wholly or partly within the scope of the obligation to have recourse to arbitration, such preliminary question shall, failing agreement between the parties within a period of three months upon another method of settling the question, be referred by application of either party, to the International Court of Justice either for summary judgment or for an advisory opinion.]

Constitution of the tribunal

Article 4 (former article 3)

1. Immediately after the request made for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps in order to arrive at the constitution of the arbitral tribunal.

2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice, the appointment of the arbitrators not yet designated shall be made by the President of the Court at the request of either party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate, and after consultation with the parties. In so far as the relevant text contains no rules with regard to the composition of the tribunal, that composition shall be determined, after consultation with the parties, by the President of the International Court of Justice or by the judge acting in his place, it being understood that the number of the arbitrators must be uneven.

4. Where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed constituted when the president is selected. If the president has not been chosen within two months of the appointment of the other arbitrators, he shall be designated in the manner prescribed in paragraph 2.

5. Subject to the circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law.

Article 5 (Immutability of the tribunal)

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator may not be replaced during the proceedings before the tribunal except by agreement between the parties.

3. The proceedings are deemed to have begun when the president of the tribunal, or the sole arbitrator, has made the first order concerning written or oral proceedings.

Article 6

Should a vacancy occur on account of the death or incapacity of an arbitrator or, prior to the commencement of proceedings, the resignation of an arbitrator, the vacancy shall be filled by the method laid down for the original appointments.

Article 7

1. Once the proceedings before the tribunal have begun, an arbitrator may withdraw only with the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointments.

2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in the manner prescribed in paragraph 2 of article 4.

Article 8

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In all cases, and particularly in the case of a sole arbitrator, the decision shall be taken by the International Court of Justice on the application of either party.

2. The resulting vacancies shall be filled in the manner prescribed in paragraph 2 of article 4.

POWERS OF THE TRIBUNAL

Article 9 (former article 10)

1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2 to enable it to proceed with the case. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case, the tribunal shall order the parties to conclude a *compromis* within such time limit as it deems reasonable.

2. If the parties fail to agree on a *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.

3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and the parties fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*.

Article 10 (former article 11)

The arbitral tribunal shall be fully competent to interpret the *compromis*.

Article 11 (former article 12, paragraph 1)

In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice and, in general, by international law, unless it has been vested with the power to adjudicate *ex aequo et bono*.

Article 12 (former article 12, paragraph 2)

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*.

Article 13

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the tribunal is unable to arrive at an award on the basis of the *compromis*, the tribunal shall be competent to formulate its rules of procedure.

2. All questions shall be decided by a majority of the tribunal.

Article 14

The parties shall be equal in any proceedings before the tribunal.

1st additional article

When a sovereign or head of State is chosen as arbitrator, the arbitral procedure shall be settled by him.

2nd additional article

If the languages to be employed are not specified in the *compromis*, this shall be decided by the tribunal.

3rd additional article

1. The parties shall have the right to appoint special agents to attend the tribunal to act as intermediaries between them and the tribunal.

2. The parties shall also be entitled to retain for the defence of their rights and interests before the tribunal counsel or advocates appointed by them for the purpose.

3. The agents and counsel shall be entitled to submit orally to the tribunal any arguments they may deem expedient in the defence of their case.

4. The agents and counsel shall have the right to raise objections and points of law. The decisions of the tribunal on such objections and points of law shall be final.

5. The members of the tribunal shall have the right to question agents and counsel and to ask them for explanations. Neither the questions put nor the remarks made during the hearing may be regarded as an expression of opinion by the tribunal or by its members.

4th additional article

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of statements, counter-statements and, if necessary, of replies; the parties shall attach all papers and documents referred to in the case.

3. The time fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.

4. The hearing shall consist in the oral development of the parties arguments before the tribunal.

5. A certified true copy of every document produced by either party shall be communicated to the other party.

5th additional article

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decide with the consent of the parties.

2. Records of the hearing shall be kept by secretaries appointed by the president. The records shall be signed by the president and by one of the secretaries: only those so signed shall be authentic.

6th additional article

1. After the pleadings are closed, the tribunal shall have the right to reject any new papers or documents which either party may wish to submit to it without the consent of the other party.

2. The tribunal shall remain free to take into consideration any new papers or documents which the agents or counsel of the parties may bring to its notice. In this case, it shall have the right to require the production of these papers or documents, but is obliged to make them known to the other party.

3. The tribunal may also require the agents and parties to produce all documents and to provide all necessary explanations. It shall take note of any refusal to do so.

Article 15

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.

2. The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power, at any stage of the proceedings, to call for such evidence as it may deem necessary.

4. At the request of either party, the tribunal may decide to visit the scene connected with the case before it.

7th additional article

1. In the case of any notice which the tribunal may have to serve in the territory of a third Power, the tribunal shall apply direct to the Government of that Power. Any such application submitted shall be dealt with by whatever means the Power applied to has at its disposal under its domestic legislation. Applications may be rejected only if the said Power deems them liable to impair its sovereignty or security.

2. The tribunal shall also have at all times the right to act through the Power in whose territory it sits.

Article 16

The tribunal shall decide on any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute.

Article 17

The tribunal, or in case of urgency its president, subject to confirmation by the tribunal, shall have the power to prescribe, at the request of one of the parties and if circumstances so require, any provisional measures to be taken for the protection of the respective interests of the parties.

Article 18

When, subject to the control of the tribunal, the agents and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

Article 19

The deliberations of the tribunal, which shall be attended by all of its members, shall remain secret.

Article 20 (former article 21)

1. Discontinuance of proceedings by the claimant party may not be accepted by the tribunal without the consent of the respondent.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

Article 21 (former article 22)

The tribunal may, if it thinks fit, take note of a settlement reached by the parties and, at the request of the parties, embody the settlement in an award.

THE AWARD

Article 22 (former article 23)

The award shall be rendered within the period fixed by the *compromis*, unless the tribunal decides to extend the period fixed in the *compromis* in order to be able to render the award.

Article 23 (former article 20)

1. Whenever one of the parties has not appeared before the tribunal, or has failed to defend its case, the other party may call upon the tribunal to decide in favour of its claim.

2. The arbitral tribunal may grant the defaulting party a period of grace before rendering the award.

3. On the expiry of this period of grace, the tribunal may render an award if it is satisfied that it has jurisdiction and that the claim is well-founded in fact and in law.

Article 24 (former articles 24 and 25)

1. The award shall be drawn up in writing. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it, unless the *compromis* excludes the expression of separate or dissenting opinions.

2. Unless otherwise provided in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

3. The award shall be rendered by being read in open court, the agents of the parties being present or duly summoned to appear.

4. The award shall immediately be communicated to the parties.

Article 25 (former article 24, paragraph 2)

The award shall state the reasons on which it is based for every point on which it rules.

Article 26

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has fixed a time limit within which it must be carried out in whole or in part.

8th additional article

Should either party fail to observe its obligations under an arbitral award, the other party may inform the Security Council of the United Nations, which shall make whatever recommendations it thinks fit or shall decide on the measures to be taken to ensure the enforcement of the award, it if deems it necessary to do so.

Article 27

For a period of one month after the award has been rendered and communicated to the parties, the tribunal, either of its own accord or at the request of either party, may rectify any clerical, typographical or arithmetical error or any obvious material error of a similar nature in the award.

9th additional article

The arbitral award shall settle the dispute definitively and without appeal.

INTERPRETATION

Article 28

Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within one month of the rendering of the award, be submitted to the tribunal which rendered the award. A request for interpretation shall stay execution of the award pending the decision of the tribunal on the request.

ANNULMENT OF THE AWARD

Article 29 (former article 30)

The validity of an award may be challenged by either party on one or more of the following grounds:

(*a*) That the tribunal has exceeded its powers;

(*b*) That there was corruption on the part of a member of the tribunal;

(*c*) That there has been a serious departure from a fundamental rule of procedure, including total or partial failure to state the reasons for the award.

Article 30 (former article 31)

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

2. In cases covered by paragraphs (*a*) and (*c*) of article 29, the application must be made within sixty days of the rendering of the award, and in the case covered by paragraph (*b*) within six months.

3. The application shall stay execution unless otherwise decided by the Court.

Article 31 (former article 32)

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 4.

REVISION

Article 32 (former article 29)

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact, and in any case within ten years of the rendering of the award.

3. In the proceedings for revision the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.

4. If the tribunal finds the application admissible, it shall then decide on the merits of the dispute.

5. The application for revision shall normally be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to that tribunal, as reconstituted, the application may, unless the parties agree otherwise, be made by either party either, and preferably, to the International Court of Justice or to the Permanent Court of Arbitration.

LAW OF TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/107

Second report by G. Fitzmaurice, Special Rapporteur

[*Original text: English*]
[*15 March 1957*]

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GENERAL INTRODUCTION

1. In 1956, the Special Rapporteur presented a first report on the law of Treaties,[1] dealing principally with the subject of the framing and conclusion of treaties; and, in section B of the introductory observations to that report, he indicated briefly the future scope of the work, while drawing attention to possible alternative methods of arrangement. According to the scheme then provisionally adumbrated, there was to be a first, and a second, chapter of a code on treaty law, the first chapter covering the general topic of " Validity " in all its aspects, and the second chapter the topic of " Effects ", within which would be grouped all such matters as interpretation, operation, enforcement, penalties for non-performance, conflicts between different treaties, effects as regards third parties, etc. Whether or not this arrangement was ideal, it offered a *modus operandi;* it could if necessary be altered later; and no final decision need be come to at the present stage.

2. On this basis, the first chapter, on " Validity ", would cover that subject in three main divisions: Part I - Formal validity (framing and conclusion of treaties); Part II - Essential validity (substance of the treaty);[2] and Part III - Temporal validity (duration, termination, revision and modification). Accordingly, having dealt with part I in his first report, the Rapporteur should now, in his second report, be dealing with part II; whereas in fact the present report is concerned with part III (temporal validity), covering, in particular, the subject of termination. It is not the Rapporteur's intention, by proceeding in this way, to suggest that the order of these two parts should be inverted in the final draft of the Code, as it may be approved by the International Law Commission, or even that the Commission should necessarily take them in this inverted order (for, by the time the Commission is ready to deal with the subject of the present report, the Rapporteur will probably have presented a third report covering the missing part II, which the Commission can then take first if it pleases). But the Rapporteur has nevertheless felt it desirable to make the subject of termination his next task, after dealing with that of conclusion, for two main reasons:

[1] Document A/CN.4/101 in *Yearbook of the International Law Commission 1956,* vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), pp. 104-128.

[2] Capacity of the parties, the effect of fraud, error, duress, legality of the object, etc.

(*a*) There are certain affinities between the two topics. Termination is, both in substance and considered as a process, the reverse of a coin of which conclusion is the obverse. Each has a procedural as well as a substantive aspect,[3] and has elements which include matters that are matters of protocol, rather than of strict law—and yet are such as ought to be covered by any comprehensive code on treaties. Some of these matters are very similar in both subjects, and almost common to them.[4] It is therefore, up to a certain point, convenient to consider these subjects either together or successively. At least it may be useful for the Commission to have reports on both, for purposes of reference and comparison, whether they are actually considered in succession or not.

(*b*) More important still is the fact that, contrary to a very general belief, the subject of termination is not at all a simple one. It is indeed full of difficulties and complexities. In addition to involving one or two major questions (such as the vexed question of the doctrine of *rebus sic stantibus*), it presents serious problems of classification and arrangement. Such problems can be ignored with impunity by textbook authorities who are not under any compulsion to establish definite distinctions between the procedural and the substantive aspects of termination—between termination considered as a process (*opération à procédure*) and as a substantive act or event. But a Code cannot ignore such distinctions—on the contrary it is bound to establish them as clearly as is reasonably possible (the words "as is reasonably possible" are used because, in fact, it is not possible—or it is very difficult—to establish all the necessary distinctions in an entirely satisfactory manner, on account of the double element in so much of treaty law, to which attention was drawn in paragraph 5 and elsewhere in the introduction to the 1956 report).[5] For all these and similar reasons, the Rapporteur thought there would be advantage in presenting a report on this part of the subject of treaties well in advance of the time when the Commission would be likely to have to consider it. This would have two advantages: it would give the Commission more time to study a far from easy subject; and it would also enable the Rapporteur to review the matter, and perhaps to revise his ideas on certain points—if necessary presenting a further and amended report.

3. The present report must therefore be regarded as a provisional one, and as not necessarily representing the Rapporteur's final views. His object in this report (and not least for his own benefit) has been, first and foremost, to accomplish a work of analysis—to uncover the anatomy of the subject, so to speak—in a manner which has not, in general, been done or even attempted by previous writers or codifiers.[6] Such an analysis is an essential preliminary to an eventual synthesis—that is to say to any final decision as to the best method of arrangement for a codification of this part of treaty law. The Rapporteur's aim, for the moment, has been to present a *schema* survey of the field. He is already conscious of the many imperfections in the work, which he hopes to remedy or improve in due course. But, if there are imperfections, there are probably not many gaps. The scheme is, in fact, by far the most complete and comprehensive of which the Rapporteur has knowledge. In endeavouring to make it so, he has, as in the case of the topic of the framing and conclusion of treaties, drawn very largely on his own personal experience (see A/CN.4/101, introduction, para. 4), since there are many points that are not dealt with by the authorities, or only touched upon.

4. Such are the principal considerations that have actuated the Rapporteur, and he would stress once more the provisional character of the present report. A number of points of detail remain, to which attention should be drawn:

(*a*) As the present set of draft articles does not follow consecutively the articles presented in 1956, the numbering has been started again from 1 onwards. It may well be convenient to do this for each section of the work as it is prepared, leaving the final order and numbering to be settled at the end, when the whole can be reviewed. Thus the present articles can be known for the time being as "Article—in part III".

(*b*) At a later stage, it will also no doubt be possible to cut down both the total number and the individual length of the articles. However, the Rapporteur draws attention (as he did in paragraph 3 of the introduction to his 1956 report) to the need for a somewhat more detailed treatment than is often given to the subject in standard works. Even

[3] See A/CN.4/101, introduction par. 8. This is even more strikingly the case with termination than conclusion, for if a treaty is regularly drawn up and concluded it will normally possess formal validity; but with termination, the regularity of the process or procedure employed may be quite independent of the question whether any valid grounds exist for terminating the treaty at all, by whatever process.

[4] For example, the mechanics of giving notice of termination has points of contract with those of giving notice of accession; again, a certain number of ratifications or accessions may be necessary to bring a treaty into force, and equally it may terminate if, by successive withdrawals, the number of parties falls below that figure; a party may ratify a multilateral treaty without the treaty thereby being brought into force, and similarly a party may withdraw without the treaty being thereby terminated; the *conclusion* of a new treaty may itself and simultaneously be the *termination* of an existing one, etc.

[5] A treaty is both a text and a legal transaction. Signature of it validates the text, but also completes the transaction in those cases in which it brings the treaty into force. Termination is both a process and a legal act or event. It is effected through, or takes place by means of a process of some kind (expiry, lapse, notice, denunciation), but requires also to be based on valid legal grounds. The two things are juridically distinct, though they may coincide. Thus, to take a simple case, a notice of termination may be regular as to the manner of its communication and the period named in it, but be given in circumstances, or on grounds, which, under the treaty, do not afford a valid basis for termination. But if the parties agree to terminate a treaty then and there, such agreement is both ground and method.

[6] Charles Rousseau. *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. I, contains an arrangement that is both comprehensive and topical; but Rousseau does not discuss the *subject* of arrangement as such.

Fiore's draft code is fairly full, but it makes no attempt at any scheme of classification or arrangement for the topic of termination. For the relevant parts of the draft code see Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to *The American Journal of International Law*, vol. 29, No. 4 (1935), pp. 1220-1222.

so scholarly a production as the Harvard Research Convention does not devote more than five articles to the topic of termination, of which three relate to the highly specialized questions of war, fundamental breach, and essential change of circumstances (*rebus sic stantibus*), so that only two articles deal with the general aspects of the subject. This may be a sufficient peg on which to hang the extremely full and informative commentary that constitutes such a valuable feature of the Harvard draft. But considered as a constituent element of a code on treaty law, it hardly seems enough.

(*c*) To abbreviate too much would also be to lose some of the advantages of casting the work into the form of a code rather than of a convention. This method not only makes a certain informality and discursiveness in the drafting permissible, but even positively advantageous, since it enables a large proportion of the articles to be made more or less self-explanatory, thus reducing the extent to which comment is required—a reduction the more desirable and acceptable inasmuch as it would be difficult to improve in that respect on the work already done in the Harvard volume and elsewhere.

5. Attention may also be drawn to certain particular difficulties that arise when it is attempted to codify the law as to the termination of treaties, in addition to the difficulties of classification and arrangement already referred to:

(i) The subject is, at a number of points, involved with, or impinges on, other subjects, such as State succession, recognition and capacity of States and Governments,[7] the legal effects of war and hostilities, and the position and rights of third States or parties. Where this occurs, should the matter be referred to the subject in question, to be dealt with as part of that subject if and when codified, or should it be brought into the present Code, but form (or be part of) a different section; or again, should it figure in the present section itself? Different answers are possible, and may vary with the particular matter. The Rapporteur has given some provisional indication of his views at the various points where these questions arise, but will wish to submit further views at a later stage.

(ii) In the introduction to his 1956 report, the Rapporteur drew attention to the inherent difficulty of dealing with all international agreements, whatever their form and character, under the one common appellation of "treaties", and of drafting articles in such a way as to apply indifferently, and with equal appropriateness, to all these kinds of instruments. This difficulty is particularly prominent in the sphere of termination, as regards the position respecting bilateral treaties, on the one hand, and multilateral treaties on the other. In the case of bilateral treaties, the issue is always the termination of the treaty itself; whereas, in the case of multilateral instruments, it is more usually a question of the termination of a particular party's obligation under the treaty, or of the withdrawal of that party from further participation. This gives rise to certain special considerations requiring separate treatment on some points. What makes it still more difficult is the fact that the purely numerical element is not always conclusive in determining the character of the treaty. Thus, a treaty with three or four parties only may be nearer to a bilateral than to a multilateral treaty in its real character. There are even (as can be seen from article 19, paragraph 1, and the comments thereon in paragraphs 124 to 128 of the commentary) some fully multilateral treaties of which it can be said that the withdrawal of even one party would have the same effect—or at any rate would lead to the same result as in the case of a bilateral treaty—namely the termination of the whole treaty.

(iii) An unexpected difficulty arises from the fact that the subject of termination is peculiarly one in commenting on which it is desirable to be able to give illustrations of the various principles, rules, and special cases involved. Yet the nature of the subject is such, that to refer to actual treaties might well give rise to embarrassment if any issue subsequently arose between the parties. For this reason, the Rapporteur has, with a very few exceptions, avoided citing actual and extant treaties. However, the difficulty does not end there; for it is virtually impossible to deal with some parts of the subject without having recourse at least to abstract and imaginary illustrations. Yet here again it may be difficult to avoid some oblique allusion to, or discussion of, an actual case, or one which could arise in concrete form. The Rapporteur has tried to make his illustrations as general and as little pointed as possible, but he cannot guarantee that he will not sometimes have cited facts that might fit a concrete situation. If so, it is by accident and not by design, and because the better the illustrations, the nearer the approach to reality is likely to be.

6. In concluding this introduction, it may be observed that the essence of the subject of termination could be summed up in one sentence: is any right of unilateral denunciation to be presumed to exist in cases where the treaty does not provide for one, and, if so, when, to what extent, and on what grounds? Therefore, the crux of the matter lies in those sections of the work that deal with termination by operation of law. A number of the Members of the International Law Commission may feel that the Rapporteur has gone too far in recognizing grounds on which this may validly occur or be effected. The Rapporteur, on further review, may think so too. But he wanted to test within what limits it would be possible to adopt a liberal attitude on the matter, while not seriously derogating from the principle that is and must remain the basis of all treaty law: *pacta sunt servanda.*

I. TEXT OF ARTICLES OF CODE

First chapter. The validity of treaties

[(*Part I. Formal validity (framing and conclusion of treaties*) was dealt with in the Special Rapporteur's first report on the law of treaties (hereinafter referred to as document A/CN.4/101).

Part II. Essential validity will be dealt with in a subsequent report.]

[7] Thus, what is the position when a Government recognized by some of the parties to a treaty, but not by others, purports to denounce it on behalf of the State concerned?

Part III. Temporal validity (duration, termination, revision and modification of treaties) [8]

A. General conditions of temporal validity or duration

Article 1. Definitions

1. For the purposes of this part of the present Code the following terms have the meaning respectively assigned to them hereunder:

[Left blank for the present for the reasons given in the commentary.]

2. Unless the contrary is stated or necessarily results from the context:

(i) The provisions of the present Code regarding the termination of a treaty, or of any particular obligation under it, relate also to its suspension, or to suspension of performance; and the rules governing the termination of treaties are to be understood as being in general, and *mutatis mutandis*, applicable to the case of suspension of performance;

(ii) References to treaties are to be understood as relating also to parts of treaties, or particular obligations thereunder; and the rules applicable to the termination or suspension of treaties as a whole are, in general, *mutatis mutandis*, applicable to the termination or suspension of parts of treaties, or of particular obligations thereunder;

(iii) References to a party (or to the "other party") to a treaty, are to be regarded as being equally references to the parties (or the "other parties") under plurilateral or multilateral treaties;

(iv) Termination or suspension in the case of plurilateral or multilateral treaties, considered in relation to individual parties to the treaty, is *prima facie* to be regarded as meaning—not the termination or suspension of the treaty itself—but the withdrawal of the party in question from further participation in it, or cessation or suspension of that particular party's obligations under the treaty.

In relation to each of the foregoing cases, the fact that certain provisions of this part of the present Code deal especially with, or make particular mention of, suspension, parts of treaties or particular obligations thereunder, parties to treaties, or the withdrawal of individual parties, as the case may be, is not in itself to be regarded as a ground for reading provisions that refer, as the case may be, only to termination, treaties as a whole, a single party to a treaty, or the termination of a treaty as such, as not also respectively covering the former cases, unless the contrary is clearly required by the context.

Article 2. Legal character of temporal validity or duration

1. In order to be valid (i.e. in the present context, operative) a treaty, in addition to possessing formal validity arising from its regular framing, conclusion and entry into force (see part I, in A/CN.4/101), and essential validity arising from its inherent legality and conformity with the relevant general rules of law (see part II, to be submitted later), must also possess temporral validity, or extension in time—i.e. duration.

2. A treaty possesses extension in time, i.e. duration, so long as it has come into force and still remains in force, i.e. has not expired or lapsed, or been terminated. Expiry or lapse brings the treaty to an end *ipso facto* and for all parties. But termination has a double aspect: the treaty itself may be terminated; or, in the case of plurilateral or multilateral treaties, its operation for a particular party may be terminated.

3. It follows that a treaty retains its validity and operative effect for any party to it so long as it remains in force, both in itself and for the party concerned.

4. A treaty remains in force in itself so long as it has not come to an end in one of the ways specified in section B.2, below.

5. A treaty remains in force for any individual party to it, so long as both (*a*) the treaty in itself remains in force, and (*b*) that party has not ceased to be a party to the treaty in one of the ways specified in section B.2, below.

6. So long as a treaty remains in force, both in itself and for any particular party to it, the obligations specified in the treaty remain incumbent on that party, which is also entitled to receive the corresponding rights and benefits, and to claim the observance of the treaty by the other party or parties.

7. Changes in the text of a treaty brought about by revision, modification or amendment, do not in themselves affect the validity or existence of the treaty, which indeed they only serve to confirm. However, a revision that takes the form of a new treaty intended by the parties to replace, and to operate in substitution of, the old treaty, has the effect of terminating the latter, as provided by article 13 below.

8. Revision, modification and amendment, considered as acts altering but not terminating the treaty, have their own legal effects and modalities which are dealt with in section C.[9]

B. Termination and suspension

Section 1. General principles

Article 3. General legal character of termination and suspension

1. The termination or suspension of a treaty is a juri-

[8] This part is arranged as follows:

A. General conditions of temporal validity or duration;

B. Termination and suspension;

Section 1. General principles;

Section 2. Grounds and methods of termination and suspension;

Sub-section i. Classification;

Sub-section ii. Legal grounds of termination and suspension;

Sub-section iii. The process of termination;

Section 3. Effects of (*a*) valid termination; (*b*) purported termination;

C. Revision and modification.

[9] This section is held over for the present. See paragraph 227 of the commentary.

dical act or event. Whether or not a treaty may in certain circumstances come to an end in fact, it cannot, in the juridical sense, terminate or be terminated or suspended except in accordance with law—that is on grounds, or by methods recognized by international law, as set out in the present Code. An illegal, invalid, or irregular act in purported termination or suspension of a treaty, or a repudiation of the obligation, does not, in the juridical sense, terminate or suspend the treaty.[10]

2. From this, and from the inherent character of a treaty as an instrument binding on the parties during the full period of its validity and duration, it follows that termination or suspension, or withdrawal from participation in it, once the treaty has been duly concluded and come into force, is not an inherent or automatic right of the parties. Unless provided for in the treaty itself, or otherwise by special agreement between the parties, it cannot take place at the sole will of any party, except on grounds and in conditions specifically recognized by international law as justifying unilateral termination, suspension, or withdrawal. Accordingly, a treaty can be denounced by a party, acting unilaterally, or its obligation can be terminated by unilateral notice or other act, only if the treaty or a special agreement between the parties so provides, or all the parties give their assent *ad hoc*, or a rule of general international law so permits.

Article 4. General conditions of validity of termination and suspension

The grounds and methods of termination recognized by the present Code as being in conformity with international law are set out in section 2 below. They fall under three main heads, according to their source: A. provision made by the parties in the treaty itself; B. provision made by the parties outside the treaty; C. grounds arising from general rules of international law (hereinafter referred to as grounds arising by operation of law). With reference to each source, three situations may be envisaged, namely, that termination or suspension, or some particular ground or method of it, is (i) provided for or admitted; (ii) not provided for or covered; (iii) specifically excluded:

A. *The treaty*

(i) *Case of inclusion*: The treaty makes provision for termination or suspension. This case is regulated by the relevant provisions of section 2 below. The inclusion of any particular ground or method necessarily operates to exclude the use of any other ground or method on the basis of the treaty as such, but does not *per se* preclude additional possibilities of termination or suspension arising from subsequent agreement between the parties or by operation of law.

(ii) *Case of non-inclusion*: Absence of any provision for termination or suspension in the treaty. Where this is the case, it is to be assumed, *prima facie*, that, subject to any rule of law operating to terminate it in certain events, the treaty is intended to be of indefinite duration, and only terminable (whether in itself or as regards any individual party) by mutual agreement on the part of all the parties. This assumption may, however, be negatived in any given case (*a*) by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; (*b*) should the treaty belong to a class in respect of which, *ex naturae*, a faculty of unilateral termination or withdrawal must be deemed to exist for the parties if the contrary is not indicated—such as treaties of alliance, or treaties of a commercial character. In these cases, (*a*) or (*b*), termination or withdrawal may be effected by giving such period of notice as is reasonable, having regard to the character of the treaty and the surrounding circumstances.

(iii) *Case of exclusion*: The treaty actually or by necessary implication excludes termination or suspension, either entirely or in certain cases, or as regards certain particular methods of effecting it. Subject to the requirement that the exclusion of any ground or method arising by operation of law must be effected expressly, exclusion under the treaty will operate to prevent termination or suspension, or the particular ground or method concerned (whatever it may be), unless all the parties subsequently agree otherwise.

B. *Special agreement of the parties (outside the treaty)*

(i) *Case of agreement*: There is an agreement providing for termination or suspension, made collaterally with, or subsequent to, the coming into force of the treaty, or by means of another treaty. This case is regulated by the relevant provisions of section 2 below. If there is such an agreement, it may fill any gap in the treaty, or supplement or override any of its provisions, in regard to termination or suspension; but will not of itself preclude additional possibilities arising by operation of law.

(ii) *Case of absence of any agreement*: There is no agreement outside the treaty. In such case the treaty prevails, or, if it makes no provision for termination or suspension, the position will be as in A. (ii) above. Unless expressly excluded by the treaty, there may also be termination or suspension by operation of law.

(iii) *Case of exclusion*: There is a separate agreement, or other treaty, excluding termination or suspension, or some particular instance, ground, or method of it. In this case, the position is the same as in A. (iii) above.

C. *Operation of law*

(i) *Case admitted*: General international law specifically provides for, or permits, termination or suspension in particular circumstances, or on some particular ground. This case is regulated by the relevant provisions of section 2 below. It may operate whenever the ground or method concerned is not actually excluded by the treaty, or by the separate agreement of the parties.

(ii) *Case not covered*: The ground or method concerned is one as to which general international law is silent, and for which it makes no provision either affirmatively or negatively. In that case the ground or method concerned must be regarded as inadmissible, unless provided for by the treaty or by special agreement of the parties.

[10] See also articles 30 and 31 page 41-42.

(iii) *Case excluded*: The ground put forward is one of those which general international law specifically indicates, for reasons of principle, as being invalid and inoperative *per se* to bring a treaty to an end, or to suspend it, or to give a right of unilateral termination, suspension or withdrawal. These grounds are set out in article 5 below. In any such case, unless there is a clear provision in the treaty or special agreement of the parties to the contrary, admitting it, the ground concerned is inadmissible.

Article 5. Grounds of termination or suspension that are excluded by general international law

1. Since the termination or suspension of a treaty, either in itself or with respect to a particular party, can only validly be effected on the grounds and in the conditions set out in this part of the present Code, it follows that any purported termination, suspension, or withdrawal whatsoever, that does not conform to these requirements, or which is contrary to or excluded by the treaty or by any special agreement of the parties, is invalid and inoperative, and does not constitute or give rise to termination or suspension. The character and legal consequences of such acts is set out in articles 30 and 31 below.

2. The following grounds in particular can never *in themselves* (that is, in the absence of other sufficient grounds, or unless the case is expressly provided for in the treaty or by special agreement of the parties) justify a purported termination of or withdrawal from a treaty, or a repudiation of its obligations:

(i) *By reason of the principle of the continuity of the State (but without prejudice to any question of State succession):*

(*a*) That there has been a change (whether occurring constitutionally or not) of sovereign, dynasty, régime, administration, government, or social system, in the State concerned;

(*b*) That a diminution in the assets of a State, or territorial changes affecting the extent of the area of the State by loss or transfer of territory (but not affecting its existence or identity as a State), have occurred; unless the treaty itself specifically relates to the particular assets or territory concerned.[11]

(ii) *By reason of the principle of the primacy of international over national law in the international sphere:*

(*a*) That the treaty has proved inconsistent with the constitution or municipal law of the State concerned, or that it has proved impossible to amend these so as to ensure conformity with the treaty;

(*b*) That subsequently to the conclusion of the treaty, changes have occurred in the constitution or the municipal law of the State concerned, such as to cause a resulting inconsistency with the treaty.

(iii) *By reason of the principle* pacta sunt servanda:

(*a*) That there is a dispute or disagreement between the parties, or a state of strained relations, or that diplomatic relations have been broken off;

(*b*) That the treaty has become difficult or onerous of execution for the party concerned, or that its performance causes inconvenience or embarrassment, or is felt by the party to be, or to have become, inequitable or prejudicial to its interests.

(iv) *By reason of the principle* res inter alios acta:

(*a*) That the treaty is discovered by one of the parties to be incompatible with an already existing treaty to which it is a party, concluded with a third party or parties;

(*b*) That the party concerned has subsequently become bound by another treaty, concluded with a third party or parties, and incompatible with the existing treaty.

SECTION 2. GROUNDS AND METHODS OF TERMINATION AND SUSPENSION

Sub-section i. Classification

Article 6. Analysis

1. The termination of treaties involves two concepts: *provision* for termination, which may be made by the parties themselves in the treaty or other separate agreement, or else by law; and *termination itself* as an act or event. Hence the subject of termination may be subdivided into the *grounds* of termination and the *methods* of termination. The methods (which, in the present article, are formulated first) are the processes by which the termination actually occurs; the grounds are the juridical bases which give validity to those processes, and permit them to operate so as to bring the treaty to an end.

Methods

2. The principal methods of termination are two, namely:

(i) *Automatic*—termination occurring automatically by expiry or lapse; and

(ii) *Specific*—termination brought about by the act either of one party only (notice or denunciation), or of both or all acting jointly (agreed decision to terminate, or replacement by new treaty).

Treaties therefore either come to an end, or are brought to an end; terminate or are terminated (or determined). By whatever method the treaty comes to an end, it can do so on a variety of juridical *grounds*. Thus, automatic expiry may have as its juridical foundation a provision of the treaty itself, according to which it terminates after a certain period of years; or it may result from the operation of a rule of law independently of the treaty. Similarly, a notice given by one of the parties (case of termination by specific act) may be founded on a faculty given by the treaty, or on a faculty given by law independently of the treaty. A notice not given on a recognized ground is invalid and, in itself, ineffective to terminate the treaty, and may amount to a repudiation of the treaty.

3. The methods of termination may also be classified, or redescribed as:

[11] But in that case (see commentary), although the obligation may subsist, it may devolve on another country. This is a question of State succession in the matter of treaties, and will be dealt with separately.

(i) Termination taking place independently of the will of the parties (automaticity);

(ii) Termination at the will of the parties (act).

However, the coincidence is not complete, because (*a*) termination may in some cases be automatic, and yet not take place independently of the will of the parties, but by their will; (*b*) termination may take place by specific act and not automatically, but the act may be that of one of the parties only, not both. It is therefore necessary, if using the criterion of the presence or absence of the will of the parties, to classify the methods of termination as termination taking place at the will (i) of both or all parties, (ii) of one of them only, (iii) of neither party. Case (iii) is always a case of automatic termination, case (ii) never, case (i) sometimes.

4. Additional methods of termination are:

(i) *Ad hoc* assent by a party to a request for termination by the other, or acceptance of an invalid or irregular act in purported termination of the treaty or in repudiation of it—these being, in the last analysis, special cases of agreement under method 2 (ii) above;

(ii) The pronouncement of a competent tribunal in those cases where the termination dates from the pronouncement and not from an anterior date on which the tribunal finds it to have occurred.

Grounds

5. The grounds of termination are various, but may be classified under two heads, namely:

(i) Grounds provided by the parties themselves, by agreement, either (*a*) in the treaty itself, or (*b*) by a separate agreement outside the treaty;

(ii) Grounds not provided by the parties but by the general rules of international law (operation of law).

6. The grounds of termination may also be classified by contrasting sub-paragraph (i) (*a*) in paragraph 5 above, with sub-paragraphs (i) (*b*) and (ii) with the following result:

(i) Grounds provided in the treaty itself;

(ii) Grounds not provided in the treaty, but either (*a*) provided by a separate agreement of the parties, or (*b*) arising by operation of law.

7. It calls for notice in relation to the categories described in paragraphs 2 to 6 above that:

(i) *Agreement* is both a method and a ground or source of grounds: a method if there is a specific agreement to terminate, or an *ad hoc* assent to or acceptance of termination; a ground, or source of grounds, if an agreement between the parties provides for or permits termination in certain events;

(ii) *The will* of the parties means their will (or that of one of them) as manifested in the actual terminating act, deed or event: if the parties agree upon or provide for permissible grounds or methods of termination, they will the *possibility* of it, but not necessarily the actual termination itself, which may occur independently of their will.

8. It follows that in every case of termination there are four main ingredients, drawn in different combinations from the categories specified in paragraphs 2 to 6 above, according to whether:

(i) The termination is automatic or not;

(ii) It is willed by one of the parties, by both, or by neither;

(iii) It is based on grounds provided by the parties themselves (i.e. results from agreement), or on grounds provided by law (i.e. takes place independently of agreement);

(iv) It is based on grounds provided in the treaty itself, or on grounds provided outside the treaty (i.e. by separate agreement of the parties or by operation of law).

9. A *synthesis* of the above categories (see paragraph 10 below) may be arrived at on the basis of the three cases arising out of paragraph 3, namely, termination by the will of both or all the parties, by the will of one party only, or by the will of neither, restated as follows:

(*a*) *Termination by the joint will of the parties* takes place where the will of the parties is manifested not merely in making provision for termination, but also, or alternatively, in the actual process or act of termination itself. It may therefore occur (i) by pre-manifestation of will, resulting from a term of the treaty itself or of any separate agreement between the parties, providing for automatic expiry on a specified date or after a fixed period, or on the occurrence of an event certain to occur; or (ii) *ad hoc*, either by a specific agreed termination of the treaty, or by the conclusion of a new treaty in replacement of the previous one, or by the joint performance of some act, or the bringing about of some event, indicated in the treaty or other specific agreement of the parties as being one the occurrence of which will cause the treaty automatically to expire.

(*b*) *Termination by the will of one of the parties only* takes place where the will of only one party is manifested in the actual process or act of termination, whether or not there has been agreement between the parties envisaging such process or act. It may therefore result (i) from agreement—if the parties include a provision in the treaty, or other separate agreement between them, giving a faculty of unilateral termination or withdrawal, or if they provide for the automatic expiry of the treaty on the performance of some act by, or the occurrence of some event under the control of, one of the parties only—or (ii) from operation of law—in those cases where international law confers a unilateral right of termination or withdrawal on a party, even though no provision to that effect is included in the treaty.

(*c*) *Termination independently of the will of either party* takes place where the will of neither party is manifested in the actual process or act of termination, even though such process or act may have been envisaged in the treaty or other agreement between them. It may therefore result (i) indirectly from the agreement of the parties—in those cases where the treaty, or other separate agreement between the parties, includes a provision for expiry upon some act to be performed by a third party or parties (e.g., the termination or another treaty), or the occurrence of

some event over which the parties have no control—or (ii) from operation of law—in those cases where international law causes a treaty automatically and *ipso facto* to lapse or determine, irrespective of any provision to that effect in the treaty itself.

10. *Resulting synthesis.* The foregoing systems of classification, as given in paragraphs 2 to 6 above, if related to the cases given in paragraph 9, lead to the following results, showing that each case embodies four elements in different combinations, as indicated in paragraph 8.

Case (a) *(i)* consists of termination by automatic expiry willed by both the parties, and resulting from their joint consent, embodied and set out in the treaty or other specific agreement between them;

Case (a) *(ii)* consists of termination by specific act, willed by the parties, and resulting from agreement between them, but not provided for in the treaty or otherwise;

Case (b) *(i)* consists of termination by specific act, willed by one of the parties only, but resulting from the original consent of both, embodied in the treaty or other specific agreement between them;

Case (b) *(ii)* consists of termination by specific act, willed by one of the parties only, and resulting from a faculty given by operation of law, not from agreement or provision in the treaty or otherwise;

Case (c) *(i)* consists of termination by automatic expiry, not specifically willed by the parties, but resulting from their original joint consent, embodied in the treaty or other specific agreement between them;

Case (c) *(ii)* consists of termination by automatic expiry, not willed by the parties, and resulting from operation of law, not agreement or treaty provision.

11. For the purposes of the present Code, the classification adopted is that set out in article 7 below, representing a combination in a modified form of the categories mentioned in paragraphs 2 and 5 above.

Article 7. Classification adopted for the purposes of the present Code by reference to the source of the right

1. Treaties terminate or become suspended by reference to the source of the right of termination or suspension:

(i) In accordance with their own terms, where these (expressly or by necessary implication) provide for termination, and by such methods or in such circumstances as may be therein specified or clearly implied;

(ii) In accordance with the terms of any separate agreement between all the parties, outside the treaty, which may be effected directly by one act, or by successive acts, or by the conclusion of a new treaty; and in each case either (*a*) where the original treaty contains no provision for termination, or (*b*) where, although there is such a provision, the parties are mutually agreed to vary or supplement it;

(iii) By operation of law, either causing the treaty to terminate or become suspended automatically and *ipso facto* in certain events, or giving one or more of the parties the right to terminate or suspend it unilaterally.

2. In each of the above cases, the process of termination may, according to what is provided by the parties, or permitted by law, be either (i) automatic; (ii) the result of a notice given by one of the parties; (iii) brought about by joint or mutual terminating act or acts on the part of the parties. The special considerations affecting the process, as distinct from the grounds of termination, are set out in sub-section iii, articles 24 to 27 below.

Article 8. System of priorities in the exercise of any right of termination

1. Any right of termination arising from the sources mentioned in article 7, paragraph 1, operates on the basis of the following system of priorities:

(i) If the treaty makes provision for termination, this can *prima facie* only take place as so provided, unless the parties subsequently agree otherwise, or assent *ad hoc* to a termination, or unless a case arises causing or justifying termination or suspension by operation of law and not expressly excluded by the treaty.

(ii) In the absence of any treaty provision for termination, then, unless the case is one of those described in article 4 A. (ii), (*a*) or (*b*), above, termination can only take place under or by reason of a subsequent agreement or assent *ad hoc*, or else by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

(iii) In the absence both of any treaty provision and of any subsequent agreement of the parties providing for or effecting termination, and unless the case is one of those described in article 4 A. (ii), (*a*) or (*b*), termination or suspension can only take place if caused or justified by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

(iv) It follows from the three foregoing sub-paragraphs that the unilateral denunciation of, or withdrawal from, a treaty by any party, can only take place in one of three classes of cases, namely, (*a*) if the treaty so provides; (*b*) if all the parties so agree, either generally or *ad hoc*; (*c*) if the circumstances are such that a faculty of unilateral denunciation, withdrawal, or suspension of performance arises by operation of law in one of the cases specified in articles 17 to 23 below, and in accordance with their terms.

2. Even where legitimate in principle, the ground or mode of termination or suspension must, in order to be valid in any given case, be of the character and conform to the conditions and requirements specified in sub-sections ii and iii, and in section 3, below (articles 9-31).

Sub-section ii. Legal grounds of termination and suspension

Article 9. Termination in accordance with the terms of the treaty (types of such provision)

1. Where the treaty itself, expressly or by necessary implication, provides for the circumstances or method of its termination, these matters will depend *prima facie* on the relevant terms of the treaty, the meaning and effect of which will be a matter of interpretation, in the same way as for any other clauses of the treaty.

2. Without prejudice to the rights of the parties to specify in the treaty itself, or thereafter to agree upon, any ground or method of termination that may seem good to them, the following are the principal grounds and methods normally included in treaties:

(i) Expiry automatically and *ipso facto* (*a*) on a specified date, (*b*) after a specified period from the date of the coming into force of the treaty, (*c*) by virtue of a condition subsequent (resolutory condition) i.e. in its widest sense, the occurrence or non-occurrence of a specified event, or cessation or non-cessation of certain circumstances, or the realization or non-realization of specified conditions—any of which may be certain both as to event and date; or certain as to event, but uncertain as to date; or uncertain both as to event and date;

(ii) A fixed initial period of validity and, in the absence of any notice of termination taking effect at the expiry of this period, an indefinite period of duration thereafter, continuing until such time as a notice of termination or withdrawal is given by a party and takes effect;

(iii) A fixed initial period as in (ii), at the end of which notice of termination or withdrawal, if given, takes effect; in the absence of any such notice (or for any party not having given one), this initial period shall be followed by a second fixed period of validity, of the same or some other duration, on the conclusion of which the treaty will definitively expire;

(iv) A fixed initial period of validity and, failing any notice of termination or withdrawal to take effect at the end of this period, automatic renewal or continuance (tacit reconduction) of the treaty itself (or for the remaining parties), for an indefinite number of equal fixed periods, until such time as a notice of termination or withdrawal takes effect at the end of the current period.

3. In cases (ii), (iii) and (iv) the treaty specifies whether notices of termination take effect immediately or only after the expiry of a certain period, and, if so, of what duration. In those cases where a faculty to give notice is provided, but nothing is said as to the period of notice required, it is to be assumed that a notice can only take effect after such period as is reasonable, having regard to the character of the treaty and the surrounding circumstances, unless it can properly be inferred from the character, terms and circumstances of the treaty, that a right of immediate denunciation was intended.

4. Where the system adopted is that of tacit reconduction, i.e. validity for an initial period followed by automatic renewal, or further validity for further successive periods of the same length, or of such other length as may be specified, but no express provision for denunciation or withdrawal upon notice is made, it is to be regarded as an implied term of the treaty that such denunciation or withdrawal can be effected by an appropriate notice taking effect at the end of the initial period, or of any succeeding period of validity. In cases of tacit reconduction, it is equally assumed that the length of the successive periods of renewal or further validity is the same as that of the initial period, unless otherwise provided.

5. The foregoing provisions apply equally to bilateral, plurilateral and multilateral treaties, except that in cases (ii), (iii) and (iv) in paragraph 2, notice of termination will, in principle, only terminate the treaty in respect of the party giving the notice (i.e. it will constitute a withdrawal by that party), and will not terminate the treaty itself unless (*a*) the treaty so provides, or it is a necessary inference from the terms or character of the treaty that its continuance in force depends on the participation of all the original parties; or of the party giving the notice; (*b*) the notice causes the number of parties to the treaty to fall below a specified number (either that which was necessary to bring the treaty into force, or another number, as may be indicated); (*c*) if, although no number is specified, the notice in fact causes the number to fall below two. In connexion with (*b*), the fact that the treaty required the participation of a specified number of parties before it could come into force does not of itself (and in the absence of a specific provision to that effect) entail the consequence that the treaty expires if successive withdrawals cause the number of parties to fall below the number in question.

6. Where a treaty makes no express provision regarding its expiry or termination, the position will be governed by the provisions of article 4 A. (ii) above.

7. Except where it is automatic (on the arrival of a specified date, the lapse of a fixed period, the happening of an event, or the realization of certain conditions), termination under a treaty takes place by a notice of termination or withdrawal given by a party, relating either to the treaty itself or to the participation of that party. Since this method of termination is also applicable in the case of termination provided for by separate agreement of the parties, and in certain cases of termination by operation of law, its modalities are dealt with in sub-section iii, article 26 below.

Article 10. Termination by agreement outside the treaty

A. The agreement considered as an enabling instrument

1. Notwithstanding anything that may be provided in the treaty as regards its termination or non-termination, or the fact that nothing is provided, it is at all times open to the parties, by mutual agreement (either contemporaneously or collaterally with the treaty, or subsequently), to make provision for termination in the same way, and by the same means, as they might have done in the treaty itself, either supplementing or varying its terms.

2. Such an agreement may specify any of the methods of termination described in article 9 above, and the provisions of that article will apply *mutatis mutandis* to the case of provision for termination made by agreement outside the treaty.

Article 11. Termination by agreement outside the treaty

B. The agreement as a terminating act

1. In addition to its enabling function, by which the separate agreement of the parties outside the treaty may make provision for eventual termination, and specify the methods by which this can be brought about, such agreement may itself actually terminate, or cause the termination of the treaty:

(i) By means of clauses having direct and specific terminative effect;

(ii) In the form of a new treaty terminating, replacing, revising, or amending the existing treaty;

(iii) *Ad hoc,* through assent to, or acquiescence in, a request for termination or withdrawal on a voluntary basis, or to a purported unilateral, and invalid or irregular, termination or withdrawal, or repudiation, which would otherwise be inoperative to effect termination or withdrawal;

(iv) In certain special cases described in article 15 below.

2. The above-mentioned possibilities are further considered in articles 12 to 15 below. Subject, however, to anything therein stated, the agreement, consent, assent, or acquiescence of both parties in the case of a bilateral treaty, and of all the parties in the case of a plurilateral or multilateral treaty, is invariably required in order to bring termination about.

Article 12. Agreement as a terminating act (i) Case of direct terminative clauses

1. It is open to the parties to a treaty at any time, in any circumstances, and on any ground, to put an end to it, or any part of it, by express agreement having that intention and effect, even in those cases where the treaty specifically provides that it is to continue indefinitely, or perpetually, or without limit of time, and *a fortiori* in any other case.

2. Unless the contrary is clearly expressed or implied, such an agreement takes effect immediately it comes into force, and brings the treaty (or such part of it as is affected) to an end then and there.

3. Although the parties may, for domestic reasons of a constitutional character, desire that any instrument terminating an existing treaty should take a specific form, and should, for instance, be subject to ratification (and, if so, are at liberty so to provide), there is, on the international plane, no rule of treaty law requiring any particular form for this purpose, so long as the character of the instrument is unmistakable, and it clearly embodies the intention of the parties. Thus, a bilateral agreement in treaty form may appropriately be terminated by a simple exchange of notes between the parties, and a general multilateral convention may be terminated or amended by a protocol.

4. Although it is usual, and *prima facie* desirable, that any agreement terminating, replacing, revising or modifying a treaty, should take the form of a single instrument or a single exchange of notes, duly subscribed to, there is in law nothing to prevent it taking other forms, for example, a series of communications passing between a headquarters government or international organization and the parties to the treaty, or, in appropriate cases, a unanimous vote taken at an assembly of an international organization and recorded in the minutes, provided the delegates are duly authorized to that effect.

Article 13. Agreement as a terminating act. (ii) Case of termination by means of a new treaty

I. *Case of unanimous action*

1. A treaty may be terminated by the conclusion of a new treaty between the same parties on the same subject. In such cases, the new treaty will usually contain an express clause terminating the old one, or declaring that it is replaced by the new treaty. Even in the absence of such a clause, however, the same effect may (depending on the correct interpretation of the two treaties) be produced tacitly or by implication, where it is clear that such was the intention of the parties, or if the second treaty sets up a new system in relation to the same subject matter, in such a way that it would be impossible for the parties simultaneously to apply both treaties in their relations *inter se.*

2. In both the cases mentioned in the preceding paragraph, the old treaty will, unless a different date is indicated in the new treaty, terminate on the date when the latter comes into force; or, in the case of multilateral treaties, it will terminate for each party on the date when the new treaty comes into force for that party, by ratification, accession, or other recognized means.

3. The provisions of the preceding paragraphs apply equally *mutatis mutandis,* to the case where a new treaty or agreement does not replace the old one entirely, but only terminates or replaces some of its clauses, or introduces amendments.

II. *Case of majority action*

4. In general, a treaty, or any part of it, can only be terminated or replaced by a new one if all the parties agree, either by actual participation in the new treaty, or, without such participation, by assenting to the termination when the new treaty comes into force.

5. In some cases, however, a treaty will itself provide for the possibility of its termination, replacement, revision, or modification by a decision of a specified majority of the parties to it. In such case, the whole matter, its processes, conditions and modalities, and also its exact effects on the treaty, and the resulting position and status of the parties of the majority, and those of the minority, and their relations *inter se,* will be governed by the correct interpretation of the relevant provisions of the treaty.

6. Where no provision of the kind contemplated in the preceding paragraph is made, majority action, if taken, can have no direct effect on the previous treaty as such, which will remain intact, subsisting unmodified and binding on the parties. In such a case, the result may be to bring a new régime into being for application between the particular parties subscribing to it, terminating or modifying the existing treaty in the relations between them, but leaving the régime of the existing treaty to continue as between those parties and the parties not subscribing to the new one, as also between the latter parties themselves.[12]

[12] This question belongs to the topic of the effects of treaties, to be considered in the second chapter of the present Code.

Article 14. Agreement as a terminating act. (iii) Case of ad hoc *acquiescence or assent*

1. A treaty, or the participation of a party in it, may, in effect, come to an end by agreement, but without the conclusion between the parties of any terminating instrument or protocol, or the negotiation of any new replacing or revising treaty, in those cases where a simple assent is given to a request by a party for the termination of the treaty, or for its own withdrawal; or where the action of a party in purporting illegally or irregularly to terminate or withdraw from participation in a treaty, or to repudiate it, is acquiesced in by the other party or parties.

2. Where termination or withdrawal takes place by means of an assent given by one or more parties to a request made by another, the case is, though arising differently, analogous to that dealt with in article 12, paragraph 4, above, and is governed by similar considerations.

3. Where there is acceptance of an illegal or irregular act in purported termination or withdrawal, or in repudiation of the treaty obligation, there is agreement *de facto* rather than *de jure*, and the termination or withdrawal springs from and has its legal foundation in the acceptance rather than in any common act of the parties. This case is governed by articles 30 and 31 below.

Article 15. Agreement as a terminating act. (iv) Special cases of renunciation of rights and of mutual desuetude

1. *Renunciation of rights.* While no party to a treaty can, except as permitted by the treaty or by law, renounce its obligations under the treaty, a party may renounce or waive its rights, or the benefits to which the treaty entitles it, or certain of them. However, although the form of the renunciation itself may be unilateral, it cannot of itself bring the treaty, as such, or any particular part of it, to an end, without the consent of the other party or parties, who may have an interest in continuing to implement it, or else in requiring continued performance of the obligations corresponding to the rights renounced, where these are not merely due to the renouncing party.

2. If consent is not given, the renouncing party has the option of withdrawing its renunciation. If it does not exercise this option, it can no longer claim the benefits concerned as a matter of right, but cannot object if the other party or parties continue to carry out the treaty or to claim performance of it so far as they are concerned. The latter parties may, however, at any time decide to discontinue such performance or claim, in which case the treaty will terminate. The same applies *mutatis mutandis* to a renunciation of the benefits of certain particular clauses of a treaty, as regards its effect in bringing those clauses to an end.

2. [*Alternative text.* If consent is not given, the renouncing party has the option of either withdrawing its renunciation or maintaining it. In the latter event, the treaty or particular obligation will terminate, or, in the case of multilateral treaties, the participation of the renouncing party, or its right to claim performance of the obligation, will terminate; but the renouncing party will be liable to pay compensation to the other party or parties for any direct and juridically proximate loss or prejudice suffered by them or their nationals in consequence of such termination.]

3. *Mutual desuetude.* While there is no general legal principle of prescription or obsolescence *longi temporis* for treaties, according to which they may lapse by the mere passage of time as such, failure by both or all the parties over a long period to apply or invoke a treaty, or other conduct evidencing a lack of interest in it, may amount to a *tacit agreement* by the parties to disregard the treaty, or to treat it as terminated. Such an agreement can, however, only be inferred from the conduct of both sides, or of all the parties, sufficiently long continued; and, as a general rule, only if, in addition, the character of the treaty is such that its application after the lapse of time would be anachronistic or inappropriate.

Article 16. Termination or suspension by operation of law (general considerations)

1. In certain special cases, international law operates either to bring a treaty to an end by automatic lapse, where this would not otherwise have occurred (voidance); or to give a party a right to terminate or withdraw from participation in it, by means of a unilateral notice or denunciation, where such a right would not otherwise have existed (voidability). In such cases, international law necessarily operates independently of the terms of the treaty, or of any special agreement between the parties as to termination, in the sense that it provides grounds of termination or withdrawal that may take effect, although not specifically contemplated by the treaty or by the agreement of the parties. Where, however, such grounds are specifically excluded by the treaty or by special agreement, the latter will prevail. The same will apply in the case of any express agreement the parties may reach after, or specifically in view of, the occurrence which would otherwise lead to termination or give rise to a right to bring it about.

2. In certain other cases, to which, however, *mutatis mutandis*, precisely similar considerations apply, international law operates not to terminate the treaty as such, and as an instrument, but, either temporarily or indefinitely, to suspend performance of the obligations arising under the treaty, or to give a party a right to suspend performance.

3. In those cases where the operation of international law is not to terminate the treaty automatically but to give a faculty to a party to terminate or withdraw from it, such right must be exercised within a reasonable time after it is alleged to have arisen. Failure to do this will entitle the other party or parties to assert the continued existence of the treaty and to claim its execution in full.

4. Similarly, where the event, occurrence, or circumstances giving rise to the ground of termination or suspension by operation of law has been directly caused, or contributed to, by the act or omission of the party invoking it (other than in cases of emergency or *force majeure*), either such party will be precluded from invoking the ground in question, or, if the event, occurrence or circumstances nevertheless in their nature entail the ter-

mination or suspension of the treaty, will incur responsibility for any resulting damage or prejudice, as if for a breach of the treaty, and will be liable to make reparation therefor; provided that in any case of termination or suspension by reason of war, the matter will be governed by the special considerations applicable to that case.

5. The cases referred to in paragraphs 1 and 2 above are set out and classified in article 17 below. Their operation is subject to certain limitations and conditions of effectiveness which are also set out in article 17, or, in the more complex cases, in subsequent articles. International law only recognizes the operation of these grounds of termination or suspension subject to these limitations and conditions of effectiveness, and recognizes no other cases in which a treaty can be terminated or suspended, independently of the terms (express or implied) of the treaty or other agreement between the parties, or the will of both or all the parties. It follows that whenever the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement of any dispute concerning the interpretation, application or execution of the treaty, and any party does not admit that circumstances have arisen terminating or suspending or giving a right to terminate or suspend the treaty on grounds of operation of law, reference to arbitration or judicial settlement in accordance with the terms of the treaty or other agreement is necessarily a condition precedent of any termination or suspension.

Article 17. Classification and enumeration of cases of termination or suspension by operation of law

Subject, where applicable, to the provisions of paragraphs 3 and 4 of article 16 above, and to the further limitations and conditions indicated below and in articles 18 to 23, termination or suspension by operation of law may take place as follows:

I. *Cases of termination of the treaty or of a particular party's obligation under it*

A. *Automatically:*

(i) *Total extinction of one of the parties to a bilateral treaty*, as a separate international personality, or loss or complete change of identity, subject however to the rules of State succession in the matter of bilateral treaties where these rules provide for the devolution of treaty obligations.[13]

(ii) *Reduction of the parties to a treaty to a single State or to none* by means of a denunciation or withdrawal effected by the other party in the case of a bilateral treaty, or by successive withdrawals in the case of other treaties, provided in each case that the denunciation or withdrawal is a legally valid one.

(iii) *Total extinction, disappearance, or destruction, or complete metamorphosis, of the physical object to which the treaty obligation relates* (where such is the case); provided:

(*a*) That the extinction, destruction, or metamorphosis is physical, total and permanent, or irremediable, or has every appearance of so being;

(*b*) That the obligation relates wholly to, and requires the continued existence of, the physical object concerned;

(*c*) That the obligation does not comprise an obligation to maintain the object in existence, or to replace or reconstitute it.

In cases where any one of these three conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation, in so far as it relates to the treatment of, or to dealings concerning, or to transactions regarding the object in question; but the treaty itself will not be terminated.

(iv) *Supervening impossibility of performance,* or prevention by *force majeure,* in cases other than those coming under heads (i) to (iii) above; provided:

(*a*) That the impossibility is total, complete and permanent or irremediable, or has every appearance of so being;

(*b*) That it is a literal and actual impossibility, in the sense of imposing an insuperable obstacle or impediment to performance in the nature of prevention by *force majeure,* and not merely of rendering performance difficult, onerous or vexatious.

In cases where either of these conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation; but the treaty itself will not be terminated.

(v) *Supervening literal inapplicability arising from complete disappearance of the field of application of the treaty,* in such a way that there remains nothing to which the treaty can be applied; provided:

(*a*) That the disappearance is total and permanent;

(*b*) That the necessity for the continued existence of the field of application concerned is manifest on the face of the treaty, in such a way that any attempt at further application would involve either a historical anachronism, or amount to a quasi-impossibility;

(*c*) That no reasonable effect can be given to the underlying purposes of the treaty, within its proper scope, by a re-assessment of its obligations in up-to-date terms—in short that the purposes themselves have disappeared, and for both parties.

In cases where any one of these conditions is not satisfied, the circumstances may justify suspension of the performance of the obligation; but the treaty itself will not be terminated.

(vi) *Supervening illegality arising from incompatibility with a new rule or prohibition of international law* which has come into being since the conclusion of the treaty; provided:

(*a*) That the new rule or prohibition is certain, and generally accepted (or accepted by both or all the parties to the treaty);

[13] This matter is not covered by the present report. It is a question whether it should be dealt with as part of the subject of State succession, or whether under the head of "Treaties". On this question the Rapporteur will submit his views at a later stage.

(*b*) That the further application of the treaty would involve a positive violation of the new rule or prohibition, or an inconsistency so radical as to be equivalent to a violation;

(*c*) That there are no other means, within the scope of the treaty, of giving effect to its purposes without entailing such a violation or inconsistency.

In cases where any one of these conditions is not satisfied, the obligations of the treaty will remain unaffected, in the absence of any other arrangement between the parties.

(vii) *The existence of a state of war* may, but only in certain cases and in certain circumstances, cause termination or suspension of treaties between the belligerents, or between them and non-belligerents.[14]

B. *At the instance of the party invoking the ground of termination:*

(viii) *Treaties by their nature inherently finite in character, or not unlimited in duration,* can, even if they contain no provision to that effect, be denounced by a party at any time upon giving a reasonable period of notice of termination or withdrawal, provided that this is not excluded, nor the contrary provided, by the treaty, or necessarily to be inferred from its terms or circumstances. What period of notice will in this case be reasonable must depend on the character of the treaty, the obligations involved, and the surrounding circumstances.

(ix) *Fundamental breach of a treaty by one party* in an essential particular, going to the root of the treaty obligation, may be a ground on which the other party or parties can claim to terminate or suspend it. The circumstances in which, and subject to which, this can be done are separately set out in articles 18 to 20 below.

II. *Cases in which the treaty as such and as an instrument continues to subsist, but the obligations contained in it are terminated or suspended, either temporarily, indefinitely, or permanently*

A. *Automatically:*

(x) *Full and final performance by the parties* of the treaty or of any particular obligation of it will cause the treaty or that obligation to become executed, and the obligation or obligations concerned to become in that sense terminated, because performed; but such performance does not affect the validity of the treaty, which continues to subsist as the basis of the performance, and as the instrument which gave rise to the obligation to carry it out.

(xi) *Satisfaction* aliunde *of the treaty,* or of some particular obligation contained in it (i.e. not performance by the parties, but satisfaction of the objects of the treaty through the occurrence of some outside event, or because of the action of a third party). In such case the treaty or the particular obligation is satisfied, but the treaty as an instrument remains in being, on the same basis as in case (x).

(xii) *The existence of a state of war* may be a cause of suspension, as of termination, of treaty obligations (see case (vii) above).

B. *At the instance of the party invoking the ground of suspension:*

(xiii) *Cases (iii) to (v) in section I. A of the present article,* where the circumstances do not lead to termination, but may justify a suspension of performance.

(xiv) *Essential change of circumstances,* sometimes called the principle of *rebus sic stantibus* (other than such changes as may give rise to grounds of termination or suspension under one of the foregoing heads), but only in the circumstances, and subject to the conditions and limitations, set out in articles 21 to 23 below.

Article 18. Termination or suspension by operation of law. Case of fundamental breach of the treaty (general legal character and effects)

1. A fundamental breach of a treaty (as defined hereafter), or of an essential obligation under it, committed by one party, may, in the case of a bilateral treaty, justify the other party in regarding and declaring the treaty as being at an end; and, in the case of a multilateral treaty, may justify the other parties (*a*) in refusing performance, in their relations with the defaulting party, of any obligations of the treaty which consist of a mutual and reciprocal interchange of benefits or concessions as between the parties; or (*b*) in refraining from the performance of obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance.

2. The case of fundamental breach is to be distinguished from those cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty. In such cases there is no question of the treaty, or of its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself.

3. The principle of termination by fundamental breach is limited in three respects as described in article 19 below: (*a*) as to the types of treaties in respect of which it can be invoked; (*b*) as to the character of the breach which will justify it; and (*c*) as to certain particular circumstances the existence of which will preclude a party from invoking it. In addition, the party invoking the right can only do so in the manner and with the consequences indicated in article 20 below.

[14] Further elaboration of this will be required. Unless it is decided to deal with the matter as part of the general topic of "The legal effects of war", it will form the subject of a separate part or chapter of the present Code, to be submitted later, under the head of "The effect of war on treaties".

Article 19. Termination or suspension by operation of law. Case of fundamental breach of the treaty (conditions and limitations of application)

1. *Limitations in respect of the type of treaty.*

(i) Fundamental breach as a ground, giving a right to the other party to declare the termination of the treaty, applies in principle only in the case of bilateral, not multilateral, treaties.

(ii) Subject to the special case mentioned in sub-paragraph (iii) below, a breach, however serious, of a multilateral treaty by one party does not give the other parties a right to terminate the treaty. However, in the case of obligations of the reciprocal, or interdependent, type, a fundamental breach will justify the other parties:

(*a*) In their relations with the defaulting party, in refusing performance for the benefit of that party of any obligations of the treaty which consist in a reciprocal grant or interchange between the parties of rights, benefits concessions or advantages, or of a right to particular treatment in some field with respect to a particular matter;

(*b*) In ceasing to perform any obligations of the treaty which have been the subject of the breach, and which are of such a kind that, by reason of the character of the treaty, their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties.

(iii) If, in respect of a treaty of the type contemplated by sub-paragraph (ii) (*b*) above, a party commits a general breach of the entire treaty in such a way as to constitute a repudiation of it, or a breach in so essential a particular as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation.

(iv) In the case of law-making treaties (*traités-lois*), or of system or régime creating treaties (e.g., for some area, region or locality), or of treaties involving undertakings to conform to certain standards and conditions, or of any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty as in the cases contemplated in heads (*a*) and (*b*) of sub-paragraph (ii) above, so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions—a breach (however serious) by one party:

(*a*) Can never constitute a ground of termination or withdrawal by the other parties;

(*b*) Cannot even (to the extent to which that might otherwise be relevant or practicable) justify non-performance of the obligations of the treaty in respect of the defaulting party or its nationals, vessels etc.

2. *Limitations implied by the character of the breach justifying the plea of termination.*

(i) The breach must be a fundamental breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty.

(ii) It must therefore be tantamount to a denial or repudiation of the treaty obligation, and such as to either (*a*) destroy the value of the treaty for the other party; (*b*) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (*c*) render abortive the purposes of the treaty.

(iii) If the breach is one that the parties foresaw as being possible, and for which they provided in the treaty or in any other relevant agreement, either it must be regarded as not having the character of a fundamental breach in the circumstances, or its consequences will be governed by the treaty itself, or other agreement, according to its correct interpretation, and not by any general rule of law as to termination by fundamental breach.

3. *Limitations imposed by particular circumstances operating to preclude the pleas of fundamental breach being invoked.*

Even where the breach is fundamental according to the foregoing principles it may not be invoked as a ground for terminating the treaty:

(i) If the treaty, according to its own terms, is due to expire in any event within a reasonable period, or can be denounced by the other party within such a period, or upon giving a reasonable period of notice. What period is to be deemed reasonable for these purposes will depend on the character and purposes of the treaty, the nature of the breach, and the surrounding circumstances.

(ii) If the claim that the treaty is terminated by fundamental breach is not made by the other party within a reasonable time after the occurrence of the breach. Failing this, the other party must be deemed tacitly to have accepted the breach, not as justified, but as not constituting a ground for termination, or else to have waived its right to claim termination. What will constitute a reasonable time will depend on the same considerations as set out in sub-paragraph (i) above. Complaint about the breach itself, even if made within a reasonable time, does not *per se* amount to a claim of termination of the treaty, which, if intended, must be made separately and specifically.

(iii) If the other party has in some manner condoned the breach, or otherwise given clear evidence of an intention to regard the treaty as being still in force, despite the breach.

(iv) If the other party itself bears a direct or proximate responsibility for the breach, by having instigated or connived at it, or by having directly caused or contributed to it.

Article 20. Termination or suspension by operation of law. Case of fundamental breach of the treaty (modalities of the claim to terminate)

1. The question whether there has been a fundamental breach, being as a rule controversial and itself in issue between the parties, the party claiming to make it a basis for termination must set out the grounds for such a claim in a reasoned statement to be communicated to the other

party as soon as possible, and must, pending consideration by that party, take no further action.

2. If the party receiving the statement does not reply within a reasonable time, either accepting or contesting the claim of termination, or replies contesting it, the complaining party may then offer to refer the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, to the International Court of Justice); and only if such offer is made, but declined, or not accepted within a reasonable time, can the complaining party declare the treaty definitely at an end. If the offer is accepted, it will be a matter for the tribunal to decide what temporary measures of suspension or otherwise may be taken by the parties, pending its final decision.

3. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and in the case of any conflict with the preceding paragraphs of the present article, will prevail.

4. Except by the decision of a competent tribunal, neither party will lose any right it might otherwise have to claim damages or other reparation, or to take counter action, whether in respect of breach or non-observance of the treaty, or of its purported termination if the latter is invalid.

Article 21. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(general legal character)*

1. In the case of treaties not subject to any provision, express or implied, as to duration, a fundamental and unforeseen change in essential circumstances which existed when the treaty was entered into, and with reference to which both the parties can be shown to have contracted, may entitle a party to proceed to a suspension of any further performance of the obligations of the treaty pending its revision by agreement between the parties, mutual agreement to terminate it, or an arbitral or judicial decision pronouncing its termination in view of the change of circumstances.

2. Such right of suspension can, however, only be exercised subject to the conditions and limitations specified in article 22 below regarding (*a*) the type of treaty involved; (*b*) the character of the change of circumstances; and (*c*) the circumstances in which a party will be precluded from invoking the change. In addition, the party invoking the change can only do so in the manner and with the consequences indicated in article 23.

3. A fundamental and unforeseen change of circumstances, or the principle of *rebus sic stantibus*, which is in essence a residual ground of termination or suspension, cannot *as such* be invoked in any case where termination or suspension results from, or can be effected under, the terms of the treaty itself or other special agreement between the parties, or on any of the other grounds of termination or suspension by operation of law specified in article 17 above, even where these also involve certain changed circumstances.

4. The principle of *rebus sic stantibus*, which is an objective principle of law, does not involve any " clausula " *rebus sic stantibus* deemed to be implied in all treaties of unlimited duration, and determining them on the occurrence of an essential change of circumstances. If the particular treaty itself, as a matter of its normal and correct legal interpretation, does actually require to be read as containing such an implied provision, the case is not one of termination by operation of law, but of termination provided for by the treaty itself, through an implied resolutory condition.

Article 22. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(conditions and limitations of application)*

The application of the principle *rebus sic stantibus* is subject to conditions and limitations broadly analogous, *mutatis mutandis*, to those set out in article 19 above regarding the case of termination resulting from a fundamental breach of the treaty:

1. *Limitations arising out of the type of treaty involved.*

(i) The principle *rebus* finds its sphere of application mainly in the field of bilateral treaties. As regards multilateral treaties, its application is governed by paragraphs (ii) to (iv) below.

(ii) The principle *rebus* cannot, as such, be invoked in the case of treaties of the kind described in article 19, paragraph 1 (iv) above.

(iii) As regards treaties of the type described in article 19, paragraph 1, sub-paragraph (iii) (*a*) above, the principle " *rebus* " cannot, in the case of an essential change of circumstances affecting one or more parties only, be invoked as a ground for the termination of the treaty itself, but only as a ground for the withdrawal, or for the suspension of the obligations of such particular party or parties.

(iv) In the case of treaties of the type described in sub-paragraph (iii) (*b*) of paragraph 1 of article 19 above, the withdrawal, or the suspension of the obligations of one party, on grounds of *rebus sic stantibus*, may justify the withdrawal of the other parties or a suspension of their obligations.

2. *Limitations as to the character of the change necessary before the principle* rebus *can be invoked.*

A change can only be regarded as being an essential one for the purpose of invoking the principle *rebus* if it has the following character:

(i) The change must be an objective change in the factual circumstances relating to the treaty and its operation, and not merely a subjective change in the attitude towards the treaty of the party invoking the principle.

(ii) The change must relate to a situation of fact, or state of affairs, existing at the time of the conclusion of

the treaty, with reference to which *both* the parties contracted, and the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty, or into the particular obligation to which the changed circumstances are said to relate.

(iii) The change must have the effect either (*a*) of rendering impossible the realization, or further realization, of the objects and purposes of the treaty itself, or of those to which the particular obligation concerned relates; or (*b*) of destroying or completely altering the foundation of the obligation based on the situation of fact or state of affairs referred to in sub-paragraph (ii) above.

(iv) A change in the motives that led a party to enter into the treaty, or in the inducement to that party to continue performance of it, or of any particular obligation under it, is not in itself either an essential change of circumstances, or a change having one of the effects specified in sub-paragraph (iii) above.

(v) The change must not be one that was foreseen by the parties, or be such as they might, by the exercise of reasonable foresight, have anticipated. It must not, therefore, either expressly or by necessary implication, be a change which is provided for in the treaty, or in any other relevant agreement between the parties, for in that case the treaty or agreement would prevail, and the principle *rebus* would, as such, be inapplicable.

3. *Limitations arising from particular circumstances operating to preclude a party from invoking the principle* rebus

Even where the character of the change of circumstances itself is such as to conform to the foregoing conditions, it may not be invoked:

(i) Unless the treaty is of indefinite duration, and contains no provision, express or implied, for its expiry or termination on giving notice;

(ii) Unless the change is invoked within a reasonable time after the date of its occurrence or completion—failing which it must be presumed not to be fundamental;

(iii) If the change of circumstances has been caused, brought about, or directly or proximately contributed to, by the act or omission of the party invoking it.

Article 23. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(modalities of the claim)*

1. In the absence of agreement between the parties, or of an appropriate pronouncement by an international arbitral or judicial tribunal, an allegation of fundamental change of circumstances on the basis of the principle *rebus sic stantibus* cannot, of itself, cause the termination of the treaty, but only suspension of further performance, and then only in accordance with the following procedure.

2. For the same reasons, *mutatis mutandis*, as those given in paragraph 1 of article 20 above, the party invoking the principle *rebus* must set out the grounds of the claim in a reasoned statement to be furnished to the other party or parties, and must request the concurrence of such party or parties in a revision of the treaty, or in its termination, or in the withdrawal of the party concerned.

3. If the request is not acceded to, the party invoking the change may offer to refer the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, the International Court of Justice). If such offer is made, and the other party or parties do not, within a reasonable time, accept it, the party invoking the change may then suspend performance of the obligation or obligations concerned. If the other party or parties accept reference to a tribunal, it will be for the tribunal to decide what temporary measures in regard to suspension or otherwise may be taken by the parties, pending its final decision. If the party invoking the change does not elect to offer reference to a tribunal, the treaty, and the obligations of the parties under it, will continue in full force and effect.

4. In those cases where the treaty itself, or other applicable agreement, contains a provision for reference to arbitration or judicial settlement as contemplated by the final sentence of paragraph 5 of article 16 above, the provisions of that paragraph and of the treaty or other agreement will apply, and, in case of any conflict with the preceding paragraphs of the present article, will prevail.

Sub-section iii. The process of termination

Article 24. General provisions

1. As described in article 6 above, the processes whereby a treaty terminates or is terminated, or by which withdrawal takes place, are (i) by unilateral notice where valid grounds for it exist as provided in sub-section ii above; (ii) by acceptance of an invalid or irregular notice from another party, or of an act in repudiation of the treaty; (iii) by direct agreement of the parties; (iv) by means of a revising, replacing, or modifying treaty; (v) by pronouncement of a competent tribunal; (vi) by automatic expiry.

2. The process of effecting termination or withdrawal (i) by notice, is the subject of articles 25 to 27 below; (ii) by acceptance of invalid or irregular notice, or of repudiation, of articles 30 and 31 below; (iii) by direct agreement, of articles 11 and 12 above; (iv) by a revising, replacing or amending treaty, of articles 11 and 13 above. The process of termination or withdrawal by the pronouncement of a competent tribunal process (v)) is governed by, and takes place in accordance with, the terms of the pronouncement. Termination by expiry (process (vi)), which takes place automatically, requires no act of the parties; but such an act may be necessary in order to record or establish the precise moment of expiry and to deal with any consequential matters.

3. The processes (methods or modes) of effecting termination or withdrawal, or by which it may come about, are, as described in article 6 above, juridically distinct from the legal grounds validating the process or method, or its use. Termination or withdrawal by a given process or method (especially by notice, or expiry by operation of law) pre-supposes the existence of a valid juridical ground. Termination by the pronouncement of a competent tribunal is a method, not a ground, for the pronouncement

is itself based on a juridical finding that a valid ground exists. Termination by direct terminating agreement is both ground and method, and the same applies to acceptance of an invalid or irregular notice, or of a repudiation, since the act of acceptance is the sole juridical ground of the termination and also the method of it.

Article 25. The exercise of the treaty-terminating power

1. The act and process of terminating or withdrawing from a treaty by any party is an executive one, and, on the international plane, the function of the executive authority of the State. This applies whether the act consists of (i) a notice given under the treaty itself, or under a separate agreement of the parties, or in consequence of a ground of termination or suspension arising by operation of law; (ii) entering into a direct terminating agreement, or a replacing, revising or modifying treaty; or (iii) an acceptance of an invalid or irregular notice of termination, or of a repudiation. Consequently, the provisions of article 9 (The exercise of the treaty-making power) in the introduction to the present Code (A/CN.4/101) apply *mutatis mutandis* to the process of termination and withdrawal in the same way as they do to that of the making and conclusion of treaties.

2. A notice of termination or withdrawal consists, on the international plane, of a formal instrument or notification emanating from the competent executive authority of the State, and communicated through the diplomatic or other accredited channel to the other party or parties to the treaty, or to such "headquarters" government or authority as the treaty may specify, signifying the intention of the party concerned to terminate the treaty, or withdraw from participation in it, on the expiry of the required or appropriate period of notice.

Article 26. The process of termination or withdrawal by notice (modalities)

1. In order to be valid and effective, notice of termination or withdrawal must, whether given under a treaty or other special agreement of the parties, or in consequence of a ground arising by operation of law, comply with the conditions specified in paragraphs 2 to 9 below, it being understood that any reference to a treaty includes any separate agreement of the parties providing for termination in relation to the treaty.

2. Any notice given under a treaty must comply with the conditions specified in the treaty, and must be given in the circumstances and manner therein indicated. Where the notice is not given under the treaty but in the exercise of a faculty conferred by operation of law, it must state the date on which it purports to take effect, and the period of notice specified must be a reasonable one having regard to the character of the treaty and the surrounding circumstances. Except as provided in the remaining paragraphs of the present article, any failure or irregularity in the foregoing respects will render the notice inoperative, unless, either expressly or tacitly (by conduct or non-objection), all the other parties accept it as good.

3. All notices must be formally communicated to the appropriate quarter in accordance with paragraph 2 of article 25 above. It is not sufficient to announce termination or withdrawal or give notice of it publicly, or publish it the press. In the case of bilateral treaties, notice is given to the other party. In the case of plurilateral or multilateral treaties it must be given to each of the other parties individually, unless the treaty enables notice to be given to a "headquarters" government, international organization or other specified authority.

4. Notices take effect on the date of their deposit with the appropriate authority, and any period to which the notice is subject runs from then. In the case of notices given to several governments in respect of the same treaty, a uniform date must be indicated in the notices, and the moment of their communication must, so far as possible, be synchronized.

5. Where the treaty requires a specified period of notice, or only permits of notice to take effect at the end of certain periods, and a notice is given purporting to take effect immediately, or after a shorter period than the one specified, the notice will not be void, but (if it is a notice given under the treaty) will take effect only on the expiry of the correct period as indicated in the treaty. If, however, and whether or not the treaty allows notice to be given under certain conditions, the notice in question does not purport to be given under the treaty, but in the exercise of a faculty conferred by law, the question of the period of notice will be governed by the relevant provisions of paragraph 2 above, and the notice will not take effect before the expiry of a reasonable period.

6. Unless the treaty expressly so permits, notices of termination or withdrawal must be unconditional. Except as so provided, an intimation, public declaration or announcement that a party will terminate or withdraw from a treaty in certain events, or unless certain conditions are fulfilled, does not constitute an actual notice of termination of withdrawal, and will require to be completed by an unconditional notice in due course.

7. Except where the treaty expressly provides for the separate termination or denunciation of, or withdrawal from, some particular part of, or certain individual clauses of the treaty, any notice of termination or withdrawal must relate to the treaty as a whole. In the absence of such express provision, a partial notice is invalid and inoperative.

8. Equally, unless the contrary is both stated in the notice, and permitted by the treaty, a notice of termination or withdrawal applies automatically to all annexes, protocols, notes, letters and declarations attached to the treaty and forming an integral part of it, in the sense that they are without significant meaning or effect apart from, or in the absence of, the treaty.

9. Unless the treaty otherwise provides, any notice of termination or withdrawal may be cancelled or revoked at any time before it takes effect or before the expiry of the period of notice to which it is subject; provided that such cancellation or revocation receives the assent of any other party which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position.

Article 27. Date on which termination or withdrawal takes effect

1. Termination by expiry takes place on the date, or at the end of any period, indicated for that purpose in the treaty or other special agreement of the parties; or, if it occurs upon the happening of certain events, or the cessation of certain conditions (whether by virtue of the treaty, or special agreement, or by operation of law), upon the date or completion of the happening or cessation, as it actually occurs, or as it may be agreed by the parties.

2. Where, in cases coming under paragraph 1 above, expiry takes place automatically in certain circumstances by operation of law, and a notice is sent by one party to another for the purpose of recording or establishing the relevant event or circumstances, the date of termination is nevertheless (unless the parties otherwise agree) that of the event or circumstances producing termination, and not any different date, whether that of the notice or another date indicated therein.

3. Termination by a direct terminating agreement, or by a replacing, revising or modifying treaty, takes place on the date of the entry into force of such agreement or treaty, unless another date is indicated therein.

4. Termination by pronouncement of a competent tribunal takes place on the date of the final award, judgement, or decree, unless another date is specified therein as being the one on which a valid termination is deemed or pronounced to have occurred.

5. Termination or withdrawal by notice takes place on the date (being a date not earlier than the date of the notice itself), or on the expiry of the period, indicated for that purpose in the notice; provided that such indication is correct and regular in accordance with the principles of the present Code. A notice indicating no date or an incorrect date will be deemed to take effect on the date, or at the end of any period of notice, indicated in the treaty itself, or other special agreement of the parties; or, if none is indicated—or if the notice is given in consequence of a faculty arising by operation of law—at the end of such period as is reasonable having regard to the character of the treaty, the ground of termination, and the other circumstances of the case.

6. Termination or withdrawal by acceptance of an invalid or irregular notice, or of an act of repudiation of the treaty, takes place on the date of the acceptance, by which alone a juridical state of termination or withdrawal comes about—unless, in the case of repudiation, the accepting party elects to relate the termination back to the date of the repudiation.

7. In the case of a notice of termination or suspension given in consequence of a fundamental breach of the treaty, or in the application of the principle *rebus sic stantibus*, the date of termination is governed by the provisions of paragraph 5 above, and cannot relate back to the breach or change of circumstances.

SECTION 3. EFFECTS OF TERMINATION AND OF PURPORTED TERMINATION

Article 28. Valid termination (general legal effects)

1. The termination of a treaty (provided such termination is valid and legally effective) puts an end to all executory (continuing) obligations, liabilities or disabilities arising or existing under it, and equally to all corresponding rights, faculties and benefits. The same applies *mutatis mutandis* as regards termination in respect of a particular party, or termination in respect of a particular obligation.

2. In no case, however, can termination, merely as such, affect the validity or continued existence of any right acquired in consequence of, or any status or position, or disability, created by or resulting from, the terms of the treaty, or from the past performance of any obligations or exercise of rights under it. If any reversal or alteration of the situation created by the treaty under its executed clauses comes about, this can only be by reason of some further and separate act or agreement of the parties, on or following upon the termination, and not from the termination itself, as such.

3. Hence, termination cannot cancel, rescind, undo, reopen or jeopardize any executed clause of a treaty or any act performed thereunder, or revive or reinstate a previous condition of affairs, situation or status determined by the treaty, or restore a *status quo ante* to which the treaty put an end. Nor can it affect any rights of property or other acquired rights existing at the date of termination.

4. The foregoing paragraph applies equally to the case where the whole treaty, and not merely some clause in it, is executed. The inherent force and validity of the treaty as an instrument is not thereby affected; and if, for formal reasons, or on grounds of convenience, the parties declare such a treaty terminated, this operates merely as an agreed record of the fact that its obligations have been fully performed, and that the acts performed in satisfaction of them are valid.

5. The foregoing provisions apply whatever the cause of termination.

6. The termination of a treaty, or of any particular obligation under it, or of the participation of a particular party, may give rise to a number of consequential issues. These will, despite the termination, be governed by the treaty itself if it provides for them, and if not, must be the subject of a separate agreement between the parties.

Article 29. Effects of valid termination (special consideration affecting multilateral treaties)

1. In the case of bilateral treaties, termination is necessarily of the treaty itself and for both parties, but where the participation of a party in a multilateral treaty ceases, the effect will vary with the type of treaty:

(i) In the case of multilateral treaties of the type described in article 19, paragraph 1 (iv) above (self-existent type obligations), the treaty itself will not thereby be terminated (nor will the participation of any other party). In consequence of that (i.e. by reason of the treaty's character), although the party concerned will cease to be bound by the obligations of the treaty as such, the remaining parties will continue to be fully bound in all respects to carry it out, even though, in the result, the party whose participation has ceased, its nationals, companies or vessels, continue to receive the benefits of the treaty.

(ii) In the case of multilateral treaties of the type described in article 19, paragraph 1 (ii) (*a*) (reciprocal and concessionary type obligations), the treaty itself will not thereby be terminated (nor will the participation of any other party), but the remaining parties will be entitled to decline to carry out its obligations as respects the party ceasing to participate, and to stop according that party any of the rights or benefits of the treaty.

(iii) In the case of multilateral treaties of the type described in article 19, paragraph 1 (ii) (*b*) (fully interdependent type obligations), where the participation of all the parties is a condition of the obligatory force of the treaty, the remaining parties will, by reason of the character of the treaty, be released from their own obligations, and the treaty will accordingly come to an end.

In each of the foregoing cases, the question of termination, its extent and effect, must in the last analysis depend on the interpretation of the treaty, according to its character and terms.

2. The foregoing provisions are without prejudice to the possibility that the termination of a multilateral treaty may ensue upon a party ceasing to participate, if the effect is to cause the number of remaining parties to fall below that prescribed by the treaty, or by any other agreement between the parties, as being necessary for maintaining the treaty in force, or if it otherwise gives rise to termination on one of the grounds specified in article 9, paragraph 5 (*a*) to (*c*).

Article 29 A. Effects of termination on the rights of third States

[Held over. See paragraph 211 of the commentary.]

Article 30. Purported or invalid termination (character and methods)

1. A party to a treaty may purport to effect a termination of it or to withdraw from it, invalidly:

(i) By declaring termination or withdrawal, (usually by unilateral denunciation) on grounds or for reasons which do not constitute valid grounds or reason under the terms of the treaty, or otherwise under the provisions of the present Code;

(ii) By an act of termination or withdrawal valid in principle, i.e. based on sufficient juridical grounds, but irregular as to method, or involving a defect or irregularity of process;

(iii) By repudiation, as defined in paragraph 2 below. In case (i) above, the party concerned purports to have valid grounds, but does not in fact possess any, either because the grounds put forward are not legally recognized, or because they are insufficient (i.e. the facts alleged are not adequate to support the claim); in case (ii) there is a valid ground but an irregularity of method; in case (iii), repudiation, the obligations of the treaty are rejected without pretence as to grounds.

2. Repudiation is an act of outright rejection, whereby a party to a treaty declares or evidences an intention no longer to be bound by it or some particular obligation under it, and repudiates the treaty or the obligation. Repudiation may be effected expressly or take place by conduct, but, in the latter case, can only legitimately be inferred if the conduct is so much at variance, or so incompatible with the nature of the treaty obligation, as to amount to a rejection of it, or not to be consistent with an intention any longer to be bound. It is of the essence of repudiation that, although it may be effected by means of a unilateral denunciation or notice, the party concerned does not claim the existence of any valid juridical ground on which the treaty or particular obligation is at an end, or on which a right to terminate or withdraw from it has arisen. In general, therefore, if a party simply denounces a treaty in the absence of any right to do so under the treaty itself or other applicable agreement, and without putting forward any ground on which a right of denunciation is claimed, or if the grounds put forward are predominantly non-juridical in character, there is a *prima facie* inference of repudiation.

3. In none of the cases mentioned in paragraphs 1 and 2 above does the act in question terminate the treaty or the obligation, or effect a withdrawal, in the juridical sense; but such results may, without prejudice to the rights of the parties as to damages or other reparation, ensue in the circumstances described in article 31 below.

4. A party to a treaty incurs international responsibility for any invalid or irregular act by way of purported termination or withdrawal which it may carry out, or for a repudiation, and such act of repudiation, if accompanied or followed by non-performance or a cessation of performance, will, in principle, give rise to a liability to pay damages or make other suitable reparation.

Article 31. Effects of purported termination by invalid or irregular act or by repudiation

1. Where a party to a treaty (herein called the denouncing or repudiating party) purports to terminate or withdraw from it, or any part of it, or to repudiate it or any obligations under it, in one of the ways described in the preceding article:

(i) Such action has of itself no effect on the treaty, its duration, validity, the obligations of the denouncing or repudiating party, or the rights of the other party or parties;

(ii) The other party or parties will have an option in such circumstances to accept termination or withdrawal, and to regard the treaty or the denouncing or repudiating party's obligations under it, or the particular obligation concerned, as being at an end; and in that event the treaty or the obligations concerned will terminate as from the date of the acceptance, but without affecting the responsibility of the denouncing or repudiating party, or any right the other party or parties may have to claim compensation or other reparation in respect of any loss or damage or prejudice involved;

(iii) If termination or withdrawal is not accepted as described in sub-paragraph (ii) above, the treaty will continue in full force with all its obligations, including those of the denouncing or repudiating party, but subject to the right of the other parties to treat any non-performance

by that party as a breach of the treaty giving rise to a right to claim damages or other reparation, or to effect a corresponding or counter non-performance.

2. Acceptance, under paragraph 1 above, of an invalid or irregular act of termination or withdrawal, or of a repudiation, may be express or may be inferred from conduct, but, in the latter case, only from conduct clearly evidencing an intention to accept, or inconsistent with any intention not to.

3. Where, however, the act of purported termination or withdrawal is validly based, and merely irregular as to method, or involving some procedural defect or fault, acceptance may always be inferred *sub silentio.*

4. Where a purported termination or withdrawal professes to be based on valid legal grounds, but these are not accepted by the other party or parties, a dispute will ensue. Even if, however, this leads to a non-performance or suspension of the treaty obligations, it will not, pending eventual acceptance, agreement between the parties, or the pronouncement of a competent tribunal, cause termination or withdrawal as such, and in the juridical sense, to take place. If eventually termination or withdrawal does take place, it will be by virtue of such acceptance, agreement or pronouncement of a competent tribunal.

C. Revision and modification

[Held over. See paragraph 227 of the commentary page.]

II. COMMENTARY ON THE ARTICLES

[*Note.* The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.[15]]

General observation. For the purposes of the commentary familiarity with the basic principles of treaty law is assumed, and only those points calling for special remark are commented on. In addition, in order not to overload an already full report, authority has not been cited for principles that are familiar, or where this can be found in any standard textbook; but only on controversial points, or where otherwise specially called for.

First chapter. The validity of treaties

Part III. Temporal validity (duration, termination, revision and modification of treaties)

A. General conditions of temporal validity or duration

Article 1. Definitions

1. *Paragraph 1.* Numerous technical terms are employed in connexion with the subject of the termination of treaties and related matters.[16] At the eighth session of the International Law Commission in 1956, some members expressed doubts, in connexion with article 13 in part I (Formal Validity) (A/CN.4/101), as to the utility of defining such terms. Although the Rapporteur feels that some definitions may be useful, and perhaps even necessary, he suggests that the matter might be left in suspense until the Commission has been able to consider the draft, and to come to some provisional conclusion as to the precise terms to be employed. A number of synonyms or near synonyms exists in connexion with the subject of termination, but the Rapporteur has endeavoured to use as few terms as possible, in the interests of simplification and uniformity.

2. It may, however, be useful at this point to recall that, as provided by articles 1 and 2 and in part I of the Code (A/CN.4/101), the term "treaty", as used in the present Code, includes every kind of written international agreement, whatever its type, form, or designation, and regardless of whether it is expressed in one or more instruments.

3. *Paragraph 2.* The object of this paragraph is largely drafting convenience. Much of the law relating to termination applies equally to the case of the suspension of a treaty, or to suspension of performance; and what is applicable in respect of the treaty as a whole, may be equally applicable in respect of part of it, or of some particular obligation under it. Again, what is applicable to the case of two parties under a bilateral treaty may be equally applicable to that of several parties under a multilateral treaty. Finally, termination itself has two aspects: there is the termination of the treaty as such, but (in the case of multilateral instruments) there is also the possibility of termination not of the treaty as a whole but of the participation of one or more of the parties, by withdrawal or by cessation of its obligation. In such case, there is termination for the party or parties concerned, but nothing more. This paragraph is accordingly intended to make these points clear, and to avoid constant repetition and reiteration in later articles.

4. No particular comment is called for on *sub-paragraphs (i) to (iv),* but the object of the final part of the whole paragraph is to prevent any misunderstanding arising from the fact that, in certain articles, suspension (for example) is expressly mentioned, as well as termination, whereas in others it is not, although intended to be covered unless the contrary is clearly required by the context. The fact is that in certain articles it is necessary or desirable to make express mention of suspension (for example) as well as termination, whereas in others it is sufficient to leave its inclusion to be understood.

Article 2. Legal character of temporal validity or duration

5. This article is largely self-explanatory. *Paragraph 1* links up with articles 10 to 12 of the Code (A/CN.4/101).

6. *Paragraphs 2 to 5* deal with the distinction between the termination of the treaty itself, and its termination for any particular party, where there are more than two. Where there are only two, the withdrawal of one of them necessarily puts an end to the treaty as such (provided, of

[15] For the arrangement of the articles, see footnote 8.

[16] Here are a few: duration, termination, determination, abrogation, cancellation, rescission, dissolution, expiration, supersession, substitution, denunciation, repudiation, renunciation, withdrawal, voidance, desuetude, obsolescence, executed, executory, performed, spent, satisfied, suspension, revision, modification, amendment, etc.

course, that the withdrawal is a valid one); see under articles 30 and 31.

7. *Paragraph 6* states the perhaps obvious consequences of the fact that a treaty is still in force and has not terminated, whether in itself or for any particular party. But it is desirable to state it, in order to deduce the consequence set out in article 3, paragraph 1, which lies at the foundation of the treaty obligation.

8. *Paragraph 7.* As indicated, the case of the termination of a treaty taking place by means of the conclusion of a new revised treaty is dealt with in later articles, and therefore this paragraph may not be essential here, but could be retained for the present.

9. *Paragraph 8.* This paragraph must be regarded as provisional, because certain aspects of revision, modification and amendment are, in fact, or can be, dealt with under the head of termination, and a separate section C on these subjects may eventually prove unnecessary, or should perhaps figure in another part of the work; see paragraph 227 of the commentary.

B. Termination and suspension

10. This section, which contains the kernel of the subject, is divided as follows: 1. General principles; 2. Grounds and methods of termination and suspension; and 3. Effects of termination and of purported termination.

Section 1. General principles

Article 3. General legal character of termination and suspension

11. The purpose of this article is to state at once the fundamental position of principle regarding treaty termination or suspension, and, as an immediate deduction to be drawn from this principle, the general conditions of its validity. *Paragraph 1* stresses the essentially juridical character of termination and suspension. An illegal, invalid, or irregular act in purported termination or suspension of a treaty, or a repudiation of the obligation, whatever the eventual consequences, is, in itself, juridically a nullity and has no effect on the validity of the treaty. This matter is considered further in connexion with articles 30 and 31. It will be seen that while invalid acts may, in certain circumstances, tend to lead to a juridical termination of the treaty, they do not themselves constitute one.

12. *Paragraph 2.* The principle in question, which is here stated, cannot, it is believed, be questioned without involving a destruction of the whole value and essential character of the treaty obligation. It needs no justification, because, without it, treaty obligations, even after being duly assumed, would have no certain foundation, and would only continue for any party so long as that party remained willing to be bound. Since it is always open to the parties to make express provision for termination or suspension by unilateral act if they wish to, or to agree about it separately, it must be assumed, in the absence of such provision or agreement, that they did not intend to allow it. This principle has, of course, certain exceptions, and these are indicated later.

Article 4. General conditions of validity of termination and suspension

13. This article is not intended to state or elaborate in detail the various grounds, methods and modalities of termination and suspension. That is done in section 2. Its object is (*a*) to state the three main sources from which provisions or rules for the termination or suspension of a treaty, or conferring a right to effect either, are derived: the treaty itself, any other agreement between the parties outside the treaty, and the general rules of international law; and (*b*) to state the position according to whether, in the given case, the source (i) makes provision for termination or suspension; (ii) makes no provision, or is silent as to any particular ground or method; (iii) expressly *excludes* termination or suspension, or some particular ground or method of it. Each case is theoretically possible under each head, although some are rather unlikely to occur, while others are usual.

14. *Case A (i).* The fact that the treaty contains certain provisions on the matter does not prevent the parties subsequently making some other special agreement. Nor does it *per se* prevent the possibility that circumstances may supervene in which, under some general rule of international law, termination or suspension may occur, or a right to effect it may arise, by operation of law (as it will hereafter be called).

15. *Case A (ii).* This raises a cardinal issue: are treaties to be deemed terminable by notice if, although not containing any provision for termination, they do not forbid it; or is the correct position that in the absence of provision for termination, this can, *in general*, only take place by mutual consent? There seems to be no doubt that the latter is the correct position, both as a matter of principle and historically.[17] There is, of course, now an increasing tendency to make some express provision about termination in the treaty itself, so that silence is, generally speaking, evidence either of an intention that the treaty (whether or not meant to continue indefinitely) should only be terminable by general consent, or else, at the least, of an absence of any intention to confer on the parties a specific right of unilateral termination or withdrawal. In older treaties, it was more usual to make no provision for termination. But it was precisely because the legal consequences of this were regarded as being those just stated,[18] that the practice of inserting express provisions for termination or suspension (where this was intended) arose.

16. The general rule is therefore clear: silence means, in principle, no termination except by general consent. But to this there may be exceptions: (*a*) some general inference as to duration may be drawn from the treaty as a whole, by considering, for instance, the nature of the obligation; e.g. the parties agree to take certain action " during the following year ", or so long as certain conditions continue, or so long as one of them is in a certain situation, etc.; (*b*) again, it is generally thought that there are certain

[17] See, for the elements both of principle and of history, the text of the Declaration of London of 1871 (which is cited by practically every authority as declaratory of the law on the subject) quoted in paragraph 156 below.

[18] See the Declaration of London quoted in paragraph 156 below.

sorts of treaties which, unless entered into for a fixed and stated period or expressed to be in perpetuity, are by their nature such, that any of the parties to them must have an implied right to bring them to an end or to withdraw from them. Thus, a treaty of alliance may be expressed to be for a fixed term of years, or to continue for specified periods by tacit reconduction, unless and until denounced at the end of any such period. If so, it cannot in principle come to an end, or be denounced, earlier. Even if, however, the treaty contained no such provision, there would probably still be a presumption, arising from the character of the relationship of alliance, that either party may wish to bring it to an end, so that in the absence of any other provision on the matter, this could be done, by giving a reasonable [19] period of notice to that effect. A similar implication may arise from the nature of certain other kinds of agreements, e.g., commercial or trading agreements. For this very reason, such agreements now usually contain express provisions about their intended duration. If they do not, they are depending, of course, in the final analysis, on their terms and correct interpretation governed by an implication of terminability on giving reasonable notice.[20] But this position only exists in relation to treaties. Whose very *nature* imposes such an implication as a necessary characteristic of the type of obligation involved. In all other cases (apart, of course, from that considered under (*a*) of the present paragraph) the principle prevails that silence means termination by consent only.

17. *Case A (iii).* This case is clear where the treaty expressly, or by necessary implication,[21] excludes termination altogether, or for some specified period, or as to a particular ground for, or method of effecting it (e.g. if a treaty is expressed to be for a fixed term of years, this, by implication, excludes denunciation or withdrawal by any party within that period, except by general consent). [22] In all such cases termination (whether in itself, or on the particular ground or by the method concerned) can only take place if permitted under a subsequent agreement of the parties, or by consent given *ad hoc*.

18. There is no reason of principle why, as regards particular grounds of termination, the parties should not (under the treaty, or by subsequent special agreement—see case *B (iii)*), exclude grounds that might otherwise become available to them by operation of law. It is clear that certain grounds of termination must operate independently of the will of the parties. But these are cases in regard to which, by their very nature, the possibility of an exclusion under the treaty or by other agreement will not arise—for instance, the case of the extinction as an international person of one of the parties to a bilateral treaty; or the reduction of the parties to a multilateral treaty to one, in consequence of successive withdrawals; or actual physical impossibility of execution, e.g., by the disappearance or destruction of a material object (such as an island) which forms the subject matter of the treaty. But in other cases in which international law may afford grounds of termination, but which are not cases in which the continuance of the treaty would be an actual impossibility, it seems clear that, if the parties wish to exclude any such case of termination, by the treaty itself or by separate mutual agreement, they are free to do so; and the treaty or separate agreement will in that case govern.

19. *Case B.* The three cases here considered involve elements of the same order as under case A, and are sufficiently covered by the commentary in paragraphs 14 to 18 above.

20. *Case C.* The points involved in *sub-paragraphs (i) and (iii)* will receive comment in connexion with later articles. As regards *sub-paragraph (ii)*, it is an inescapable conclusion that, except on grounds positively provided or permitted by law, termination can only take place as and if provided for in the treaty or other specific agreement of the parties.

Article 5. Grounds of termination or suspension that are excluded by general international law

21. *Paragraph 1* is intended to emphasize that, since any purported termination or suspension effected on grounds that are not positively recognized by general international law, or else specifically provided for in the treaty, or by special agreement of the parties, is invalid and void, it is not strictly necessary to state in terms what are the grounds which general international law excludes—for it really excludes all those it does not expressly admit, or which are not admitted by the parties. However, experience shows that there are certain particular grounds which have frequently been put forward by Governments in purported justification of claims to terminate, or to cease or suspend performance of a treaty. Although, in some of these cases, the other party or parties may have been obliged to accept termination in fact, or may eventually have been willing to agree to it, or to negotiate a new treaty, the grounds themselves have seldom, if ever, been accepted by another party as valid, and there is not believed to be any case on record in which an international tribunal has pronounced termination to be valid on any of these grounds *as such;* [23] while, on the other hand, such tribunals have

[19] What notice is reasonable must depend on the character of the treaty and the general circumstances. It might sometimes be very short, *in principle*, there must be adequate notice, and, of course, all this assumes that no term is provided by the treaty.

[20] It should be stressed that these cases are not, properly speaking, cases of the application of the doctrine of *rebus sic stantibus*. It is true that, if notice of termination is given, it will often be because of a change of circumstances. But this is merely the motive for exercising the right, not the ground of the right itself. The latter is based on the character of the treaty, not on any objective principle of *rebus sic stantibus* applicable (so far as it is applicable at all—see articles 21-23 below) to all treaties except law-making treaties, whatever their character. The right now under discussion, *per contra*, is to be regarded as deriving either from a term implied in the treaty itself in view of its inherent character, or as an implication of law arising from that same character.

[21] This is necessarily a matter of the interpretation of the particular treaty. For instance, a provision, such as occurs not infrequently, that the parties will meet after so many years "in order to introduce into it [the treaty] such modifications as experience may have shown to be necessary", certainly contains such an implication, at least in considerable measure.

[22] Unless, of course, some ground arises by operation of law.

[23] Claims of this kind have sometimes been advanced, though not admitted, on the basis of the doctrine of *rebus sic stantibus* (see below in connexion with articles 21-23).

often endorsed those fundamental principles of international law in the light of which such grounds must be pronounced inadequate and inadmissible.

22. *Paragraph 2* sets out these pleas, together with the fundamental principles of law that render them invalid, taken by themselves. This is in no way to deny that considerations of the kind involved in these cases may play a legitimate part in leading to the termination or revision of a treaty. For instance, they may afford perfectly reasonable grounds on which the party concerned may ask to be *released* (by agreement), or may ask the other party or parties to agree to a revision or modification of the treaty, or to its replacement by a new treaty, or to accept some form of international review. Again, if the treaty itself, or other special agreement of the parties, permits unilateral denunciation after the lapse of a certain period, or at certain stated intervals, or on giving a certain period of notice, the considerations in question may provide an entirely adequate motive for exercising this right. But these are different matters.

23. Finally, as recognized in the phrase "... in the absence of other sufficient grounds ..." (*paragraph 2*), it may well be that if a case arises involving considerations of this sort, it may also involve additional considerations (or may itself, by reason of certain special circumstances, constitute a case) of such a kind, that a right of termination or suspension will arise on other grounds, duly recognized by the present Code. But, if so, it is on those other grounds, not on the occurrence *per se* of the circumstances envisaged by article 5, that the right will be based.

24. The cases envisaged by article 5 (considered, that is, as claims to terminate, or cease or suspend performance of a treaty at will, and as of *right*) all involve a conflict with one or other of three or four great principles of international law, universally accepted, and of wide application over the whole field of international (not merely treaty) law—which might indeed be said to be of a fundamental character for international law, since without them international law could not function—namely, the principle of the continuity of the State as an international entity; the principle of the primacy of international law over national law in the international sphere; the principle *pacta sunt servanda*, which is not merely a principle of the law of contractual obligations, but one of the foundations of the binding force of all law; and the principle *res inter alios acta*, which equally extends beyond the purely contractual field. It is not therefore necessary to justify these principles, which are essential to the stability of international law and obligations, but only to make a few remarks as to their application in the present connexion.

25. "By reason of the principle of the continuity of the State ..." (*sub-paragraph (i)*). Without prejudice to the philosophical questions centring around the personality of the State, it can be affirmed that as *between* the State and such other juridical constructs as governments, régimes, administrations, etc., it is the State (i.e., if preferred, the national community as a whole) which is the subject of international law, and the subject of international rights and obligations (including treaty ones), and it is the State—i.e. the community or aggregation of the citizens of the State, conveniently personified, or at any rate designated, as the State—which is the party to a treaty.[24] This position is not affected by the fact (*a*) that it is heads of State or governments who actually negotiate and conclude treaties, and (*b*) that the treaty is often expressed to be between heads of State, governments, departments of government, ministries, etc.—for it is in the name and on behalf of the State (community, nation, populace, aggregation, society or whatever it may be called) that the head of State, government, etc. acts. It is only in this capacity that the head of State, government, ministry, etc., has any *raison d'être*, i.e. as representing, or as an organ or agent of the State (community, aggregation, etc.). It is only in that capacity that such entities are recognized as being entitled to act and to produce valid juridical effects in the international field.[25] It follows that, in so acting, heads of State, governments, etc., bind the State. If they did not, their acts would have no meaning. From this it follows that while the acts of heads of State, governments etc. can (provided these acts are juridically valid) correspondingly *unbind* the State, they cannot do so merely because the head of State or government is a different one, nor can that be made a ground *per se* for such action. When a government etc. undertakes an obligation, it is the State which becomes bound, not merely the particular government (except as agent of the State responsible for implementing the obligation). Therefore a change of government (agent) has no effect on the international position and responsibilities of the State. At any given moment, a State is subject to a complex of international obligations. A new government simply inherits this position. It can, according to its own views as to what is desirable for the State, take such steps as are legally open to it under the treaty or otherwise, or by agreement with the other parties, to change this position. But it cannot claim a right to change it *at will* merely because it is a new government: for the government can have no right better than, or superior to, that of the State which it represents; and the State itself would have no such right.

26. Put in another way, it may be said that just as a State is continuously bound by its *general* international obligations, irrespective of any change of government, etc., so equally (subject to any *valid* steps open to it by way of termination or suspension) is it continuously bound by its *special* (i.e. treaty) obligations, irrespective of any change of government etc.—for if the new government did not itself personally assume these obligations on behalf of the State, equally it did not personally assume the State's general international law obligations. Yet it is, and remains bound by them. Given the frequency with which changes of government, régime, administration etc. occur, any other view would be fatal to the stability of the treaty obligation, and States would not be willing to enter into the treaty relationship on so precarious a basis. This is not to say

[24] All this is quite without prejudice to any question of the position of individuals in international law. In any event, individuals cannot be parties to treaties—unless indeed as representing the State (e.g. sovereigns, heads of State, etc.).

[25] These remarks are not intended to affect the question of what limited, partial, or temporary recognition, or recognition for special purposes, may, in certain circumstances, be accorded to entities such as insurgents, parties in a civil war, etc.

that the considerations set out in paragraph 22 above are not fully applicable to this case. But it means that a new régime or administration, seeking to free itself from a treaty obligation, can only do so if (and in the manner) provided for by the treaty, and, if neither the treaty itself nor any recognized rule of law avails, must request release at the hands of the other parties. If this is refused, the government concerned must carry out the treaty or accept responsibility for a breach, or for an illegal repudiation of it.

27. "... without prejudice to any question of State succession ..." (*sub-paragraph (i)*). Where the new government, régime, etc. is the consequence not of a mere change of administration within the same State, but of a break in the continuity of the State involving a change in international status or personality, the case is a different one. Common examples are the disappearance of a State by absorption in another; the splitting up of a State into a component state or part of a Federal Union; the emergency of a new State by succession or separation from an existing one (but in that case the international continuity of the latter State is not affected). In such cases, the treaty position will to a greater or lesser extent be affected. But if, in consequence, the new government or régime is entitled to claim that certain treaties are not applicable, it will not be because the government itself is new but, precisely, because there is not merely a new government but a new State, or the disappearance of a former State: the government does not represent the same international entity but a different one, or an entity which is no longer a separate international entity; the State is not the same State that entered into and was bound by the treaty, or the State is no longer there to be bound by it. Except in so far as the total extinction or absorption of a party to a bilateral treaty necessarily brings that treaty, as such, to an end (a case dealt with in article 17), these matters are matters of State succession in regard to treaties, and are probably best dealt with as part of the general topic of State succession. In any event, if dealt with as part of the topic of treaties, they would require to be made the subject of a separate report.

28. The point just discussed is, however, one that fully safeguards the position of colonial or analogous territories that emerge into full independent statehood; for these are new international entities, and the extent, if any, to which, in the absence of any special arrangements relating to their change of status, they will continue to be bound by treaties formerly applicable to their territory as part of a larger international entity, will be a matter of the law of State succession.

29. *Sub-paragraph (i)* (b). The principle of State continuity applies equally to prevent any cessation of the treaty obligation occurring merely because, owing to a diminution in its assets, or a loss of territory, the State may be less well placed to carry it out than previously—just as the curtailment of a private individual's income does not *per se*, or in law, absolve him from payment of his debts.[26]. Such changes may affect the position of the State, but not its personality or continuity. Where, however, the treaty obligation specifically relates to the particular assets or territory affected, the case may be different, and the obligation, if it persists, may devolve on another State. This is partly a matter of the interpretation of the relevant treaty and partly a matter of State succession.

30. *Sub-paragraph (ii)*. The principle that a State cannot plead its internal law or constitution as a ground for non-performance of its international obligations, of which this sub-paragraph is only a particular application, is well established generally, and was affirmed by the Permanent Court of International Justice more than once, and particularly (as regards the present point) in the case of the *Exchange of Greek and Turkish Populations*, when the Court said that it was "... a principle which is self-evident ..." that "... a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[27] It is accepted law that a State entering into a treaty must take the necessary steps to assure or bring about the requisite conformity on the part of its law and constitution, so as to be, or place itself, in a position to implement the treaty. If this is impracticable, the State must refrain from entering into the treaty. If it nevertheless does so, it must, unless it can obtain lawful release, accept responsibility for any resulting breach.[28] Therefore, if it should, for constitutional or other reasons, prove impossible to take the required steps or effect the necessary changes, the State must exercise any right of denunciation afforded by the treaty, or, if none is provided for, must request release at the hands of the other party or parties. If release is not afforded,[29] and it still proves impossible to do what is required, the State must accept responsibility for a breach. It cannot simply declare its own release. Exactly similar considerations apply (see sub-paragraph (ii) (*b*)) to the case of

[26] International law does not recognize anything that is the direct equivalent of the private law principle of bankruptcy But some of the rules given in articles 16 to 23 of the present draft may operate to afford the same kind of relief.

[27] Publications of the Permanent Court of International Justice, *Collection of Advisory Opinions*, series B, No. 10, p. 20.

[28] In some cases, a treaty may expressly provide that the parties shall take the necessary legislative steps to enable themselves to carry it out. Strictly, this is unnecessary. Such an obligation arises *ipso facto* by the very fact of entering into the treaty, which implies and guarantees that the parties can or will be able to carry it out.

Where a treaty provides that it shall be ratified by the parties in accordance with their constitutional requirements, this operates precisely as a warning that domestic considerations may prevent ratification. But that is another matter, for if the treaty is not ratified because of internal difficulties, the country concerned does not become a party to the treaty at all.

The case of a government which ratifies a treaty without having conformed to the State's constitutional requirements is again a different one. This is a matter of the essential validity of the treaty, which comes under part II of this chapter and is to be considered in a separate report.

[29] It is unlikely, in any *bona fide* case, that it would not be afforded. What is inadmissible is that a government should declare its own release because of difficulties arising from a failure of the State as a whole; or alternatively, should refuse to accept responsibility for a failure to carry out the treaty which is equally ascribable to a deficiency of the State as a whole.

supervening changes in the State's internal law of constitution, leading to inconsistency with (or preventing performance of) a treaty obligation. It is the duty of the State, through its government and legislature, to avoid such a result during the currency of the treaty, unless it can lawfully terminate or obtain release from it. Failing this, and if the changes occur and cannot be undone, the State must accept responsibility for any resulting breach.

31. In all these cases, the kind of difficulty or even the "impossibility" involved is not the kind of impossibility in respect of which international law may, in certain circumstances, recognize a termination of the treaty obligation (see article 17 and the commentary thereon below). The latter kind consists of the impossibility arising from circumstances external to the State, over which it has no control, and does not include obstacles arising from defects or failures in the State's own internal arrangements or actions. A State, as an international person, incurs responsibility for the failure or refusal of its legislative or other particular organs to implement its international obligations; or for the action of its government in entering into the treaty in these circumstances; and in the last resort for possessing a constitution that does not permit the State to carry out its treaty obligations [30], for constitutions can be changed. What may be difficult, or constitutionally impossible, for a particular organ of the State, can never be impossible for the State as a whole, unless it is not a fully sovereign State. Sovereignty implies, and indeed denotes, the unfettered ability and capacity of the State internally in such matters.[31]

32. "... the primacy of international over national law in the international sphere ..." (*sub-paragraph (ii)*). The words "in the international sphere" are not intended to raise or prejudge any philosophical question as to the respective positions, and the interrelationships, of national and international law—concerning which various views are, or have been, current. These words are indeed intended to avoid controversy, because, whichever of the different views is taken, the result is in each case (if through different processes of reasoning) the primacy of international law in the international sphere.[32] Without this, international law would have no obligatory force, and would depend on the continuing willingness of States to carry it out voluntarily.[33] On such a basis it could not function, and the common-sense reason for the rule contained in article 5, paragraph 2, sub-paragraph (ii), is that, without it, means would never be wanting for the legal, and quasi-unchallengable, avoidance of treaty obligations.

33. *Sub-paragraph (iii).* The principle *pacta sunt servanda* is not open to question. But it embodies *inter alia* an implied recognition of the need for obligatory force in respect of legal as opposed to "voluntary" obligations. When situations are normal, and relations good, and neither party experiences any difficulty in implementing the treaty, there could be said to be no need for legally binding obligations at all. The matter could be left to the mutual, but voluntary, action of the parties. The introduction of the legal factor involves a recognition precisely of the fact that situations are not always normal, nor relations always good, nor the parties always or equally free from all sense of burden in carrying out the obligation. Indeed, it is not too much to say that, underlying every contractual and treaty relationship, there is an implied anticipation of the possibility that in one form or another, at some time or another, in greater or lesser degree, and for both or one of the parties, such an element may exist or arise. The whole *raison d'être* of the obligatory force of the contract or treaty is to cater for such a situation, and it is therefore virtually a term implied by law that such factors are not *per se* [34] grounds of dissolution.

34. "... or that diplomatic relations have been broken off ..." (*sub-paragraph (iii) (a)*). Cessation or suspension of diplomatic relations between States does not of itself affect treaty relationships between them. If these are affected, it will be *aliunde*, through circumstances with which the breaking of diplomatic relations may be connected, but which are independent of it. Any practical difficulties of implementation can be met by invoking the

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[30] The Rapporteur does not overlook the very real difficulties that may exist for States with non-unitary constitutions, such as federal Unions, where matters which are the actual or potential subject of treaty obligations may be entirely within the purview of the component division of the Union, and not subject to direct control by the federal government. In practice, there are usually a number of domestic devices for overcoming these difficulties, or the matter may be the subject of a special clause in the treaty, or of arrangement with the other party or parties. However, it is believed that the rule enunciated in article 5, paragraph 2, sub-paragraph (ii), and in the text of the commentary above, must be valid unless the whole treaty obligation is to suffer a *reductio ad absurdum*; and that it must, in principle, obtain equally for federal States, unless it is to be admitted that certain kinds of treaty obligations are, for them, purely voluntary in character, not only as regards their initial assumption, but also as regards their actual implementation when assumed—although for the non-federal parties they would be obligatory—a position of discrimination that could not be accepted.

[31] See the luminous analysis of what constitutes fully sovereign independent statehood given by the distinguished Danish jurist Alf Ross in *A Textbook of International Law* (London, Longmans, Green and Co., 1947), chapter I, section 3, pp. 33-46.

[32] This is so whether the position adopted be the dualist view, or the monist view that subordinates international to national law, or the monist view that subordinates national to international law. Even according to the second of these (by which it is each State's national law that applies international law in the State's external sphere, and subjects the State to international law in that sphere) it is (though by the operation of the national law) international law that prevails in the international sphere, in case of any conflict.

[33] States may *enter* into obligations voluntarily, but once entered into they are binding, and their implementation is not a voluntary act. Consent is only a method (if, in the treaty sphere at any rate, an indispensable one) by which obligations arise or come into force; but it is not the foundation of the binding force of the obligation once it has come into force. It is not consent that makes consent binding, for if it depended on that it would be necessary to provide yet another principle in order to give juridical force to the consent that made consent binding. See the present Rapporteur's article on "The Foundations of the Authority of International Law and the Problem of Enforcement" *The Modern Law Review*, vol. 19, No. 1, January 1956, pp. 8-13.

[34] In connexion with other circumstances or factors, they may have an effect indirectly. See paragraph 22 above.

good offices of another State, or by appointing a protecting State.[35]

35. *War*, on the other hand, introduces a radical change in all the relations between the parties, and may constitute an objective ground causing the termination or suspension of treaties between them, other than such as specifically contemplate a state of war [36].

36. *Sub-paragraph (iii)* (b). The considerations set out in paragraph 33 above apply peculiarly to the type of case contemplated by this sub-paragraph. On the other hand, so also do those discussed in paragraphs 22 and 23. But it must be emphasized that if there are elements involved that may give rise to a right of termination or suspension, it will be on the existence of these elements that the right must be based, not on the mere onerousness, difficulty, embarrassment, etc., *per se*.

37. *Sub-paragraph (iv)*. The principle *res inter alios acta*—that a party's rights cannot be affected by transactions entered into by the other party with a third party or parties—is fundamental to treaty law. Without it there would be a complete instability and uncertainty of the treaty obligation, and, frequently, a ready means of avoidance. If, of course, it is not a case of *res inter alios acta* and the other treaty is with the same party or parties, the case is an entirely different one, and this is considered in connexion with article 13. It makes no difference whether the other treaty is previous or subsequent. The party concerned will have entered into two mutually inconsistent sets of obligations. In principle, he will be bound by both, and it is for him to resolve the difficulty. For any breach of either treaty he will incur responsibility.

Section 2. Grounds and methods of termination and suspension

Sub-section 1. Classification

Article 6. Analysis

38. This article is purely analytical in character, but has been included for the present because one of the major difficulties confronting the codifier of the topic of termination is that of classification. Several different systems are possible, and no two authorities deal with the matter in quite the same way. Equally, the various extant codifications adopt different methods.[37] Some authorities make no attempt at classification at all, but simply give an *ad hoc* list of a number of grounds and methods, without reference to the different juridical bases of the methods given.[38] In other cases there is a mixture, one system being employed for part of the subject and another for the rest, because no clear distinction is drawn between *grounds* on the one hand, and *methods* on the other. Again, the authorities differ as to which ground or method they put under which head.[39] Therefore a scientific analysis of the categories involved is, if not essential, very desirable.[40]

39. The main source of confusion lies in the failure to distinguish clearly between the legal grounds causing, justifying, or giving a right of termination, and the methods or processes by which the termination itself results or is carried out. Thus, automatic expiry is a method by which a treaty terminates, but expiry may result from a variety of legal causes (for example, provision in the treaty, operation of law). Again, a notice of termination or withdrawal given by a party is a method of bringing a treaty, or that party's participation in it, to an end; but the categories of legal grounds on which such a notice may be justifiable are several. Another method of termination is by the joint act of the parties in drawing up a specific agreement terminating the treaty, or in replacing it by a new treaty. Here the agreement (or the new treaty) is both ground and method. But an agreement also may be ground without being method, in those cases where the parties supplement or vary the terms of a treaty by making *provision* for termination in a separate agreement, without, however, actually terminating the treaty.

40. There are in fact several ambiguities about the concept of agreement in the present connexion. There is the one just noticed, that an agreement may be an agreement *providing* for termination, or else an agreement actually *terminating*; and an agreement "terminating" may itself be *direct*, or *indirect*, as when it takes the form of assent to or acceptance by one party of what the other wants or does. Secondly, an agreement "providing" may be an agreement by means of, and embodied in, the treaty itself, or else it may be an agreement arrived at outside it; whereas an agreement "terminating" always takes place outside the treaty. Finally, an agreement "terminating", and taking place outside the treaty, may take the form of an agreement expressly for that purpose and having no other effect, or it may take the form of a new treaty replacing or revising the previous one.

41. Further ambiguities are latent in the concept of the *will* of the parties. Termination may take place by the will of both or all parties, of one only, or of neither or none (operation of law). Again, the will of the parties may be manifested either in making provision for termination, or in actually bringing it about, or both. The two are not the same, and frequently do not coincide. Thus, the parties

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[35] *A fortiori* will the treaty position not be affected by a mere withdrawal of heads of mission, leaving the mission functioning *in situ* under a *chargé d'affaires*.

[36] See under commentary on article 17. It is proposed in due course to submit a separate report on the subject of the effect of war on treaties, since, although very closely connected with the subject of termination and suspension, it is not wholly part of it, and is of sufficient importance to warrant a separate report. It is, however, possible that it might be better dealt with as part of the general topic of the legal effects of war, because it must involve certain questions that are not peculiar to the treaty aspect, such as what constitutes "war"; in what does it differ from "hostilities"; are the same rules applicable to the case of hostilities?—and so on.

[37] See, for instance, Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to *The American Journal of International Law*, vol. 29, No. 4 (1935), and the various codes and codifying treaties given in the appendices to that volume.

[38] Paul Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau et Cie, 1926), vol. I, part III, paras. 845-860.

[39] However, that strictly lies outside this article, which is concerned with *systems* of classification rather than classification itself.

[40] This particular analysis is certainly neither flawless nor exhaustive but does constitute an attempt at a classification of the modes of termination on a scientific basis.

may provide that the treaty shall terminate in a certain event, but it may lie outside their control whether that event occurs or when, and it may occur contrary to their wishes. They will the end, but not the occasion of it. Or the treaty may provide for termination by unilateral notice, but only one party gives the notice. Here the parties have both or all willed a *faculty* of termination, but only one party has willed termination itself. Thus, the fact that the parties have agreed on, or made provision for, termination does not mean that they have willed it—or that both or all have.

42. From the foregoing considerations it will be clear that the question of classification is not a straightforward one. For instrance, there is an obvious distinction between the class of case in which a treaty terminates automatically by expiry or lapse, and without specific act of the parties, and the case of termination brought about by the act of the parties themselves, or one of them. Yet automatic termination can itself be (indirectly) the act of the parties—for instance if they embody in the treaty a provision for its automatic expiry on a certain date. Therefore, a different method of classification arises out of the contrast between, on the one hand, the cases where the parties have *provided* for termination (automatic or not) and, on the other, the cases where they have made no such provision; but termination (again, whether automatic or not) can take place by other means, e.g. operation of law. Further distinctions can be drawn according to whether, if the parties have made provision for termination, they have done so in the treaty itself or by means of another separate or subsequent agreement.

43. In consequence, there emerge several possible methods of classification turning on different criteria, such as presence or absence of the will of the parties (or one of them) in the act of termination; presence or absence of agreement of the parties as to termination (contrast with termination by operation of law); termination by expiry or other automatic means, or by the act of the parties; and to these must be added termination provided for or not provided for by the treaty itself. These criteria might be summed up as the criterion of will, the criterion of automaticity, the criterion of agreement, and the criterion of treaty provision. Any concrete case of termination will be made up of a combination of factors, either negative or positive, taken from each category. It has been attempted to render the foregoing points clear in article 6 itself, which requires little further comment, but the following remarks on the separate paragraphs may be made.

44. *Paragraph 1* poses the fundamental distinction between *provision* for termination and termination itself, and between methods or processes of effecting termination and the legal grounds for it.

45. *Paragraphs 2 and 3* deal with *methods* or processes, of which there are only two *classes*, the automatic and the specific, but the latter is divisible according to whether the act is the act of both or all the parties, or of one only. There are, however, two different ways of describing these classes, turning respectively on the criterion of automaticity or not, and on that of the presence or absence of the will of the parties. There are also the complications arising from the different ways in which the agreement of the parties can manifest itself (see also below in connexion with paragraph 4).

46. "... may in some cases be automatic, and yet not take place independently of the will of the parties, but by their will ..." (*paragraph 3*). This occurs if, for example, they agree that it shall take place on the expiry of a specific period or on the happening of an event *certain* to occur. *Per contra,* if the treaty is to expire on the occurrence of an event uncertain of occurrence or under the control of a third State, it is a true case both of automaticity and non-dependence on the will of the parties, because expiry only takes not place automatically on the happening of the event, but because also the parties have not willed the event to occur.

47. *Paragraph 4.* These two cases are described as additional or subsidiary, because the first is really a special case of agreement, though of indirect agreement (see also the commentary to articles 30 and 31 concerning the acceptance of an invalid or irregular act of termination); and the second is rare, because the pronouncement of a tribunal is usually to the effect that the treaty did in fact lapse on a certain date, or that a party validly exercised a faculty of termination. These two cases are not further directly considered in this analysis.

48. *Paragraphs 5 and 6* deal with *categories* or sources of *grounds* (but not with actual grounds, which are considered in later articles according to their source, for example, the treaty, or operation of law). Two criteria are possible, based respectively on whether the parties have or have not themselves provided for termination, and whether the treaty itself does or does not make such provision (the parties may have done so, but not in the treaty).

49. *Paragraphs 7 and 8* make the points explained in paragraphs 40, 41 and 43 above; and *paragraphs 9 and 10* attempt a synthesis based on the three central cases of termination at the will of both or all parties, of one only, or of neither or none. All these paragraphs are self-explanatory and call for no further special comment except as regards two phrases in paragraph 7:

(*a*) "... if an agreement between the parties provides for or permits termination in certain events ..." (*sub-paragraph (i)*). For instance, if the parties sit round a table and draw up and sign a protocol terminating a treaty, the agreement of the parties so embodied is both the legal ground or foundation of the validity of the termination and the terminating act itself; whereas if a party gives a notice of termination in consequence of a faculty provided in the treaty, such act constitutes the termination, but the agreement of the parties embodied in the treaty constitutes the legal ground or foundation of the validity of the act.

(*b*) "... but not necessarily the actual termination itself, which may occur independently of their will." (*sub-paragraph (ii)*). For instance, if they have provided for termination on the happening of an event (*a*) which is not certain to happen, (*b*) over the occurrence of which they have no control.

50. *Paragraph 11.* Because of the complications involved, it seems best to proceed on a largely pragmatic basis. The simplest, and, from the purely legal point of

view, the most fundamental contrast, seems to be that between the case where there is some agreement between the parties about termination (or they consent to it *ad hoc*), and the case where there is not, but termination or suspension can nevertheless, in certain circumstances, take place by operation of law.[41] The first of these, however, itself offers two different cases (though both are cases of agreement), namely, the case where provision is made in the treaty, and the case where the agreement takes place outside the treaty.[42] Thus, the classification adopted for the purposes of the draft Code is the simple and practical one set out in article 7, which is really that of classification according to the *source of the right*. On this basis, if a trifle logically, three main classes may be envisaged: termination deriving from the terms of the treaty; termination deriving from any separate agreement between the parties; and termination by operation of law. In connexion with each, the possible or appropriate method or methods has to be considered as well as the grounds, but this cannot be fully completed until sub-section iii (The process of termination) of the present section is reached—articles 24 to 27.

Article 7. Classification adopted for the purposes of the present Code by reference to the source of the right

51. *Paragraph 1.* See the remarks just made in paragraph 50 above. The classification here suggested has the great advantage of presenting the matter in the same way as it presents itself in practice, namely, according to the source of the right of termination invoked; for the first inquiry that must always be made when any question of termination arises is what does the treaty itself provide, or does it make no provision? If the treaty is silent, the next question will be whether there is any relevant agreement of the parties outside the treaty or, in certain cases, whether they have consented or assented to, or accepted a termination. Finally, there is the possibility that, in addition to either or even both the above, or although there is no treaty provision and no separate agreement, the circumstances may be such as to bring about, or to warrant, termination under some rule of law.

52. "... by one act, or by successive acts ..." (*sub-paragraph (ii)*. This covers the case where the parties designedly agree to terminate, and the case where agreement results from a series of acts, e.g., a request by one party and an assent by the other, or an invalid purported termination by one, which however is accepted by the other (see also the commentary on articles 30 and 31).

53. *Paragraph 2* is self-explanatory and calls for no comment.

Article 8. System of priorities in the exercise of any right of termination

54. *Paragraph 1.* Although this to some extent goes over ground covered in another form by article 4, it seems desirable to state explicitly in what order of priority the basic criteria specified in article 7 for determining the possibility or validity of any termination are applicable, and with what effect in principle.

55. *Paragraph 2.* This is intended to reserve such questions as, for instance, *what* particular circumstances will support a claim of termination or of a right of termination in any given case where operation of law is invoked; or what modalities have to be followed in effecting termination by notice under a treaty clause etc. It is not enough to show the existence of a treaty clause, or an agreement of the parties, or a rule of law: it is also necessary to show that the concrete case is within that clause, agreement or rule, and that any necessary steps have been taken in the manner provided or required.

Sub-section ii. Legal grounds of termination and suspension

Article 9. Termination in accordance with the terms of the treaty (types of such provision)

56. This article is, as a matter of fact, equally applicable to the case where methods of termination are provided for under a separate agreement, and this is made clear by paragraph 3 of article 11. However, as provision in the treaty itself is by far the most frequent case, it is convenient to deal with the substance of the matter under that head.

57. *Paragraph 1.* Everything naturally depends on the correct interpretation of the treaty or special agreement, and this is the primary principle.

58. *Paragraph 2.* There is no limit to what the parties may provide for if they wish. But, subject to that, certain types of provision are very common. They are set out in sub-paragraphs (i) to (iv), which do not call for special comment.

59. *Paragraph 3.* See paragraph 57 above, which applies equally here. It will be rare that notice with immediate effect is permissible, and then usually only under emergency circumstances.

60. *Paragraph 4.* It is not uncommon to find a treaty clause in some such terms as "The present treaty shall remain in force for a period of five years, and thereafter for successive five yearly periods." Such a provision would fail in its proper intention unless its effect was as specified in this paragraph.

61. *Paragraph 5.* See the commentary to article 2 above. In the case of a plurilateral or multilateral treaty, notice by one of the parties will, in general, only affect that party, and will not bring the whole treaty to an end, unless the case is one of the three specified in this paragraph. Clearly, if, by the effect of successive withdrawals, only two parties remain, notice by one of them will bring the treaty to an end. It will do the same if the successive withdrawals have caused the number of parties to fall below a number specified in the treaty as being necessary to keep it in force, or below which it will terminate.[43]

[41] However these two cases are not mutually exclusive, for the fact that there is an agreement between the parties does not of itself preclude termination taking place by operation of law. See paragraphs 14 and 19 above.

[42] Again, the two cases are not mutally exclusive, for provision in the treaty may be supplemented or varied by an agreement outside it.

[43] It will be a matter of the interpretation of the relevant provisions what the position is if new participation by accessions or ratification is still possible at the time.

Such number may, but need not, be the same as that of the number (if any) of ratifications, accessions, etc., specified as necessary to bring the treaty into force. On the other hand, the mere fact that such a number was specified for the purpose of entry into force does not mean that the same, or any, number (other than two) will equally operate for purposes of termination. Finally (although this case is put first in the text), there may be cases where either the treaty provides, or it is a necessary inference from its terms and circumstances, that withdrawal by any party or by a particular party will cause the treaty to terminate.

62. *Paragraphs 6 and 7* are self-explanatory.

Article 10. Termination by agreement outside the treaty.

A. The agreement considered as an enabling instrument

63. The title of this article is based on the distinction between an agreement which simply provides for termination and one which actually effects it. The one is enabling, the other operative.

64. *Paragraph 1.* This provision is based on the principle that the parties can do anything by agreement. Thus, they can provide separately for termination, even though it is not provided for in the treaty, or can vary the provisions of the treaty as to termination.

65. "... (either contemporaneously or collaterally with the treaty, or subsequently) ..." (*paragraph 1*). As a general rule any such agreement will be entered into perhaps a considerable time after the treaty has come into force, with a view to supplementing or varying its provisions in respect of termination, in the light of events that have occurred subsequently. However, there may be cases in which it will suit the parties to embody provisions about termination in a separate or collateral instrument or protocol, drawn up contemporaneously with or immediately after the treaty itself.

66. *Paragraph 2* is self-explanatory.

Article 11. Termination by agreement outside the treaty.

B. The agreement as a terminating act

67. As to the title of the article, see paragraph 63 above.

68. *Paragraph 1.* Four classes of cases are contemplated: (i) the agreement directly terminates the treaty; (ii) it takes the form of a new treaty; (iii) it takes the form of assent to or acquiescence in a simple request for, or in a unilateral act of, purported termination; (iv) it operates in two special cases of renunciation of rights and mutual desuetude.

69. *Paragraph 2* enunciates the general principle that, in order that the agreement of the parties (in whatever form) may operate to terminate a treaty, it must be the agreement of both or all of them, as the case may be. Only if the treaty itself or any separate agreement of the parties otherwise provides (see below in connexion with article 13, paragraphs 4 and 5), will this not be so, and in that case the parties will have agreed in advance that a limited measure of agreement will suffice.

Article 12. Agreement as a terminating act. (i) Case of direct terminative clauses

70. *Paragraph 1.* Although not strictly necessary, it seems desirable to state explicitly that even a treaty expressed to be perpetual or without limit of duration can be terminated by the act of all the parties.

71. *Paragraph 2.* In the type of case contemplated by this article, termination will be the primary, if not the sole object of the agreement, and will take place at once on the coming into force of the agreement (which will itself usually be immediately, unless ratification is provided for). In some cases, however, the parties may terminate the treaty, but provide that this shall only occur after the lapse of a specified period—when it will take place automatically.

72. *Paragraph 3.* It has been maintained (largely, it would seem, with a view to internal constitutional requirements) that in such a case the terminating, replacing, revising or modifying instrument must be of "equal weight" with the one terminated, replaced, revised or modified.[44] On this basis a full treaty could only be terminated or replaced by another full treaty, and so on. However, there appears to be no rule or necessity of law for any such requirement. Nor would the doctrine accord with practice. No doubt where replacement in involved, a treaty will normally be replaced by another treaty. On the other hand, where treaties are terminated by special agreement this will often, indeed usually, take the form of a simple exchange of notes or protocol. The same is true of many revising or modifying instruments. The correct view is that, since the agreement of all the parties is required, they can adopt (or any one of them can insist on) such form as may be appropriate for constitutional or other reasons. In law, however, all that is required is agreement, and the form in which it is embodied is immaterial, provided it is adequate to make clear the character and intention of the transaction.

73. *Paragraph 4.* See the previous paragraph. Where there are a large number of parties which have, at different times, ratified or acceded to the treaty, it may be impracticable to obtain all their signatures to a single terminating instrument, and they may be requested to communicate their assent individually to a central authority. Nor, in the case of treaties concluded under the aegis of an international organization, would there seem to be any reason of principle why termination should not be effected by means of a vote of the assembly of the organization, recorded in the minutes, provided the delegates are duly authorized.

Article 13. Agreement as a terminating act. (ii) Case of termination by means of a new treaty

74. There are two possible cases: all the parties agree, either by participating in the new treaty, or by giving their assent to the termination of the old one on the coming

[44] See a statement by the United States representative at the forty-ninth meeting of the Social Committee of the Economic and Social Council held on 28 July 1948, E/AC.7/SR. 49, p. 8.

into force of the new; or the treaty (or other agreement of the parties) provides for termination on a majority basis, if a specified majority of the parties agree to supersede the treaty by another one, replacing or revising it.[45] Where some only of the parties agree on a different régime for application *inter se* (which may or may not be compatible with the continued application of the existing treaty in their relations with the other parties); or where all the parties to a treaty become parties to a new one without intending to terminate or replace the other treaty, but an incompatibility between the two subsequently reveals itself —difficult questions of interpretation and application may arise. However, since they are fundamentally questions not of termination, but of the operation and effect of treaties, they are dealt with elsewhere in the present Code.

75. *Paragraph 1.* Quite often the new treaty does not explicitly terminate the old one, but either it uses equivalent language (for example, it states that it " replaces " or is in substitution of or supersedes the old), or else it is clear from the tenor of the new treaty that such must be the result. If this is not the case, there is no termination—at least not then and there.

76. *Paragraphs 2 and 3* are self-explanatory.

77. *Paragraphs 4 and 5* deal with the only case where a termination by means of a replacing or revising treaty can take place by majority action (i.e. otherwise than unanimously). See paragraphs 69 and 74 above.

78. "... revision or modification ..." (*paragraph 5*). It is very often the object of this procedure not to terminate or replace the treaty, but to facilitate its revision of the introduction of amendments.

79. *Paragraph 6.* See comments in paragraph 74 above.

Article 14. Agreement as a terminating act. (iii) Case of ad hoc *acquiescence or assent*

80. *Paragraph 1* is self-explanatory and calls for no special comment.

81. *Paragraphs 2 and 3.* There is however an important difference—of a theoretical character at any rate—between assent to another party's request for termination or withdrawal, and acceptance of an illegal or irregular act of purported termination or withdrawal, or of a repudiation of the treaty obligation. The first is a genuine case or agreement; and although it is evidenced by a request or proposal, and a reply thereto (and therefore is analogous, though arising differently, to the case contemplated by article 12, paragraph 4—see paragraph 73 above), there is a genuine common act of the parties, or at any rate a common mind. In the second case, it is only in a somewhat elliptical sense that this can be said to be true. There is no common act and no real common mind. There are two individual and separate acts which, taken together, lead to termination, but the latter (whether termination of the treaty itself or of the participation of the party concerned) springs from, and has its legal foundation solely in the acceptance. For this reason, the incidents of the matter are dealt with under articles 30 and 31.

Article 15. Agreement as a terminating act. (iv) Special cases of renunciation of rights and mutual desuetude

82. The cases covered by this article are both cases which either have been treated by some authorities as cases of termination by operation of law, or which might be so regarded, but which seem to the Rapporteur to fall more properly within the category of termination by agreement, or needing agreement.

83. *Renunciation of rights. Paragraph 1.* This is a controversial case, some authorities (Rousseau and Fauchille, for example) treating it as a case of automatic termination, on the ground that if a party renounces its rights under a treaty the latter *pro tanto* loses its *raison d'être* and therefore must come to an end, either as a whole or as regards that part of it which relates to the obligations corresponding to the rights renounced. Other authorities, on the other hand, consider that a renunciation of rights cannot in itself bring the treaty or relevant part of it to an end, and that the consent of the other party or parties is required, presumably because the latter may have an interest in continuing to perform the relevant obligations, either (where there are reciprocal rights and obligations) to ensure the corresponding performance of the same obligations by the party renouncing its rights (it cannot renounce the obligations), or because such party or parties anticipate some indirect or long-term advantage or interest from performing these obligations, even though obtaining no immediate return, benefit or reciprocity.[46] On the whole, this seems to the Rapporteur to be the better view. Apart from the fact that a renunciation of rights under a treaty and the termination of the treaty are theoretically distinct things, there is also the practical reason that, generally speaking, States do not undertake obligations out of pure altruism; and even where a treaty may, so far as its actual terms go, appear to do no more than confer a benefit on one party and an obligation on the other to furnish that benefit, an indirect or long-term interest may exist for the latter, even if only of a negative kind (e.g. the performance of the obligation has created work in its territory, the cessation or disturbance of which will cause difficulties). Moreover, merely by reason of the fact that it has furnished such benefits it ought to have a say in any question of terminating them—since this may well affect private interests in its territory.[47]

[45] It is, above all, for the purpose of being able to introduce desirable modifications without encountering a "veto" that this majority procedure is employed. Although it would be theoretically possible to do so, it seems that treaties do not normally provide for simple termination by a decision of the majority of the parties, *unless* by way of revision or modification. Provision for termination by unilateral notice is a right which, where given, is given to the parties individually.

[46] See in particular Harvard Law School, *op cit.*, pp. 1161-1162. Alphonse Rivier also admits it only "... lorsque cette renonciation est acceptée par l'Etat obligé ..." (*Principes du droit des gens* (Paris, Arthur Rousseau, 1896), vol. 2, rubric 158.)

[47] For instance, State A is by treaty furnishing State B with certain supplies free of charge. In order to do this, the government of A purchases the materials from manufacturers in its territory and pays them out of revenue. If, owing to a renunciation by B, this suddenly comes to an end, the manufacturers in A will be affected, precisely because the government of A no longer has to furnish the supplies.

84. "... or ... in requiring continued performance of the obligations corresponding to the rights renounced where these are not merely due to the renouncing party." (*paragraph 1*). This contemplates the case of a plurilateral or multilateral treaty of the type where one or more parties own obligations to the others, the latter being beneficiaries. A renunciation or waiver of its rights by one of the beneficiaries cannot of itself (whatever the practical effect) impair the rights of the others as a matter of law, or absolve the party subject to the obligations concerned from continuing to perform them in relation to, or as regards, any non-renouncing party. This may be of importance in the type of case where a number of parties have a common interest in the performance of certain obligations by one or more of them, and a waiver of its rights by one of the beneficiaries may tend to weaken the force of the obligation.[48]

85. *Paragraph 2* makes two alternative proposals for dealing with the case where consent is refused. The second of these is the more favourable to the renouncing State as regards bringing the treaty, or its own participation in it, to an end, but may entail the payment of damages to the other party—by no means an unreal possibility.[49] However, the words "direct and juridically proximate" have been inserted in order to exclude (*a*) damages of a remote character, (*b*) the sort of damage that may be said to arise where the force of an obligation, owed by one or more parties to the other parties in common, may be impaired if one of the latter elects no longer to insist, for its part, on performance of the obligation. Any non-performance in relation to the other parties would however remain contrary to the treaty, and any damage resulting therefrom would have as its juridical cause such (illegal) non-performance. It could not, *juridically*, be attributed to the renouncing party.

86. *Mutual desuetude. Paragraph 3.* Obsolescence is sometimes ranked as a ground terminative of treaties by lapse. But although such cases may involve circumstances rendering it possible to invoke some other principle of law conducing to termination, such as physical impossibility of further performance, the Rapporteur does not believe that there is any objective principle of law terminative of treaties on the mere ground of age, obsolescence, or desuetude as such.[50] Indeed it would be possible to point to a number of treaties centuries old, framed in archaic language, and seldom invoked *in terms* or referred to by the parties, which the latter nevertheless regard as being still in force and effective.[51] On the other hand, where the parties themselves, without denouncing or purporting actually to terminate the treaty, have, over a long period, conducted themselves in relation to it more or less as though it did not exist, by failing to apply or invoke it,[52] or by other conduct evincing lack of interest in or reliance on it, it may be said that there exists what amounts to a tacit agreement of the parties, by conduct, to disregard the treaty and to consider it as being at an end. In such event, however, the basis of the termination would be the presumption of a tacit agreement of the parties—or, alternatively, of an assent to or acceptance by each party of the non-application of the treaty by the other—and not age or desuetude as such, although the latter would be relevant factors in estimating the real attitude and intentions of the parties.

87. "... the conduct of both sides, or of all the parties ..." (*paragraph 3*). It is of course of the essence of this basis of termination that the attitude and conduct of the parties should have been *mutual*. If one of them has taken a different line, there could not be any termination on this particular ground. It is in order that the attitude of the parties may be established beyond doubt that the requirement of long continued disregard exists.

88. "... only if ... its application after the lapse of time would be anachronistic and inappropriate." (*paragraph 3*). While, as stated, mere age and desuetude *per se* do not terminate, it would often be difficult to read into the conduct of the parties to a treaty a positive, if tact, agreement to consider it as terminated, without some assistance from the character of the treaty itself, as being or not being one which the parties would be inherently likely to regard in that light. If, of course, the parties are agreed as to their attitude, no difficulty arises; but if there is a dispute, it will be precisely because one of them differs in the construction it places on the past conduct of the parties. In these circumstances, the inherent character of the treaty becomes an important element in arriving objectively at a correct appreciation of the attitude of the parties towards it.

Article 16. Termination or suspension by operation of law (general considerations)

89. *Paragraph 1.* Although termination is a matter primarily governed by the terms of the treaty, or by any other special agreement of the parties, international law has always recognized the existence of certain factors which will cause a treaty to terminate independently of the will of the parties, or of any provision in the treaty itself or other agreement (unless indeed the parties have expressly excluded the case). There are, similarly, factors which, by law, may confer on a party a right of unilateral termination or withdrawal (again unless the case is excluded by the parties). Practically all writers and publicists list such cases,

[48] See the case propounded in the preceding footnote. The government of A may have placed long-term contracts with its manufacturers in respect of which it will be liable for any cancellation.

[49] For this reason Fauchille (*op. cit.* para. 850), does not admit a right to renounce certain obligations of the treaty only, unless the obligations are divisible and the case is not one where the treaty obligations are interdependent and make an indivisible whole. However, the distinction is a very difficult one to draw in practice.

[50] Thus, even where the doctrine of *rebus sic stantibus* is invoked, it is the alleged change of circumstances that forms the ground of the claim, not age or desuetude *per se*. Of course the two often go together in practice.

[51] See, for instance, the British Seventeenth century treaties with Denmark, Spain and Sweden, the texts of which appear in the *Handbook of Commercial Treaties*, (London, H. M. Stationery Office, 1931).

[52] In a sense therefore, through non-invocation, it is a special case of (tacit and mutual) renunciation of rights, but by both or all, not merely one party.

though they do not all list the same ones, and are not always agreed as to the basis of the right. The general policy of the Rapporteur has been to accord a rather full recognition in principle to these cases, but to subject them to a somewhat stringent process of definition, and of conditions and limitation of application.

90. *Paragraph 2.* In some cases international law does not go so far as to cause or permit termination outright, but only provides for suspension, or a right to effect it. Even where suspension is of indefinite duration, it does not in law amount to a termination of the treaty. What occurs, strictly, is a suspension of the obligation, or of performance, not of the treaty itself as such, which, *qua* instrument, remains intact and alive.[53]

91. *Paragraphs 3 and 4.* The two points here stated are more fully considered later in connexion with the cases of fundamental breach (articles 18 to 20), and essential change of circumstances (articles 21 to 23) with reference to which they chiefly arise. To some cases they are clearly inapplicable, but in principle it is right that a party invoking a faculty of termination or suspension should do so within a reasonable time; and also that the grounds for it which have arisen should not be due to that party's own act or omission. The case of termination or suspension because of *war* is, however, traditionally governed by separate and independant considerations. The words "... (other than in cases of emergency or *force majeure*) ..." have been inserted to meet the type of situation that arose in the *Portendic* case, where the action of the local authorities in blockading one of their own ports, in the course of quelling a revolt, prevented the exercise of trading rights by foreign nationals under treaty.[54]

92. *Paragraph 5.* There is clearly a danger that the force of the treaty obligation may be impaired if too many grounds are recognized on which, by law, a treaty may be terminated or suspended, or if these operate too easily in practice. Most authorities therefore approach the matter with some caution, and admit only certain grounds, and then subject to various limitations and restrictions. On the other hand, there are clearly circumstances in which it would be undesirable, and often even impossible, to hold States to treaty obligations in respect of which a release imposes itself through the facts. It is, however, important to stress that, outside the grounds that international law does recognize (and subject to their proper limitations or restrictions), there are no others, except such as the parties may themselves jointly specify in the treaty or other separate agreement between them. There is, as stated in paragraphs 11, 12, 15 and 16 above, no general or inherent right of unilateral denunciation or termination at the will of a party. The final sentence of this paragraph (paragraph 5), needs no comment, though it embodies an important point.

93. A case not included in the present draft is that of a treaty void *ab initio* either because of some fundamental defect in the method of its conclusion (see part I of this chapter of the Code), or because it is lacking in essential validity (see, eventually, part II). Such cases often have the appearance of being cases of termination or suspension, because the defect or flaw may only be discovered or put forward after the treaty has ostensibly come into force, and been put into operation *in fact*. Nevertheless, the case cannot be one of termination or suspension in the juridical sense, since the treaty will either be valid, or, if it is found not to be, will never have had any legal validity at all, or been binding on the parties. These are not cases of *voidance* or *voidability* by the subsequent operation of a rule of law, but of the treaty being *void* from the start. Such a situation may have its legal incidents and consequences, but they do not lie in the field of termination.

Article 17. Classification and enumeration of cases of termination or suspension by operation of law

94. Cases of termination or suspension by operation of law may be classified according to either of two systems: first, according to whether they operate *automatically* (either to cause termination or to cause suspension), or operate merely to give a *faculty* to a party to terminate or suspend; secondly, according to whether the result is *termination*, or merely *suspension* (whether occurring automatically or by the exercise of a faculty given to a party). There is little practical difference in the results given by these two systems, but the second is adopted here as being the more radical in practice though not perhaps in theory. Even where the case is one of automatic termination or suspension, it will usually be necessary for one of the parties to invoke the ground concerned, and it may be disputed by the other. Therefore the difference between this and the case where operation of law gives a *faculty* of termination or suspension (a faculty very likely to be utilized) is not in practice so radical as that between the case where the treaty terminates entirely and as such, and that where it continues to subsist, though performance of the obligation may be in suspense. The categories here adopted for purposes of classification are thus:

I. *Cases of termination* occurring either:
   - A. Automatically; or
   - B. At the instance of the party invoking the particular ground of termination;

II. *Cases of suspension* occurring either:
   - A. Automatically; or
   - B. At the instance of the party invoking the particular ground of suspension.

For convenience, the individual cases are consecutively numbered throughout.

95. *Case (i)* (class I.A). *Extinction of party* to a *bilateral* treaty. A bilateral treaty must terminate if only one party remains, since the very notion of treaty implies at least two parties. Any difficulties that may arise will be in the field of State succession, and this case is stated to be subject to the rules governing that topic.

96. *Case (ii)* (class I.A). *Reduction of the parties to a single State or to none by means of denunciations.* The

[53] The subsistence of the treaty as an instrument, even though its performance is indefinitely in suspense, may produce a number of effects which, if indirect, can be substantial.

[54] See Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. III, p. 444.

result is the same, but from a different cause. On the subject of successive withdrawals from a multilateral treaty, causing the treaty to terminate because the number of parties falls below a number specified in the treaty, see the commentary on article 4 above. That would be a different case, because the treaty would then terminate by reason of its own provisions, not operation of law. The proviso regarding the legal validity of the denunciations or withdrawals concerned is necessary in order to prevent an invalid act of denunciation or withdrawal having precisely the effect of bringing the treaty to an end. In such a case the denunciation or withdrawal has *per se* legal effect, and the number of parties remains the same. If any juridical termination or withdrawal eventually results, it will be from the act of the other party or parties in accepting what has occurred. This is considered later in connexion with articles 30 and 31. A special case is dealt with in article 29, paragraph 1, sub-paragraph (iii), where, in the case of a certain type of multilateral treaty, withdrawal by one party will lead to or justify a corresponding withdrawal or non-performance by the others. The treaty will end through the effect of multiple withdrawals (see paragraph 209 below).

97. *Case (iii)* (class I.A). *Extinction of the physical object to which the treaty relates* for instance, the disappearance of an island owing to a subsidence in the seabed; the drying up of the bed of a river permanently, the destruction of a railway by an earthquake; the destruction of plant, installations, a canal, a lighthouse, etc. The case is theoretically a clear one, but may give rise to difficulties in practice which the provisos (*a*), (*b*) and (*c*) are designed to meet. Unless the obligation relates wholly to the object concerned, and the destruction of the latter is irremediable and permanent, and the treaty cannot be interpreted as involving an obligation to reconstitute it (where that is possible), there may be no more than a case for suspension for a period more or less prolonged, according to circumstances, until performance can be resumed, or the impossibility of doing so is made clear beyond all doubt. In some cases, the obligation may precisely be to maintain the object concerned in existence (e.g., a light, buoy, or beacon). This is also an obvious case for the application of paragraph 4 of article 16, if what has occurred is due to the act or omission of one of the parties. The result may nevertheless necessarily be termination or suspension, but there will then, in principle, be an obligation to make reparation as if for a breach of the treaty; for, even if the act or omission was in the exercise of what would normally have been a legal right, this cannot, in the absence of an emergency or *force majeure,* justify a course inconsistent with an existing treaty obligation. But admittedly, difficult questions of interpretation may arise as to how far the grant of rights in respect of an object involves a guarantee to maintain the object itself, or to abstain from all action liable to interfere with it. Does a grant of fishery rights in a river imply an obligation not to divert the water or (e.g., by use for industrial purposes) impair the fisheries? Such questions must depend on the interpretation of the treaty.

98. *Case (iv)* (class I.A). *Supervening impossibility of performance.* Certain cases separately listed in this article (such as the previous one, which is a special instance of it) may involve impossibility, but nevertheless have another juridical basis. The present case deals with impossibility in general. The obvious difficulty in the case of alleged impossibility is to decide whether it really exists in the literal and actual sense; but this is a matter that must depend on the particular circumstances. The theory is clear: if there really is impossibility, and it is permanent, the treaty must come to an end. It must be emphasized, however, that impossibility in the present context does not mean mere difficulty, or metaphorical impossibility of the kind denoted by such phrases as " an impossible situation " or " this is an impossible state of affairs ". Such a situation or state of affairs may in fact be all too possible and actual. " Impossibility " is sometimes alleged precisely because there is no literal impossibility in carrying out the treaty, but only what is felt by the party concerned to be a political or moral impossibility. Whether or not in such a case there may be other grounds for claiming termination or suspension, the case is not one of *impossibility.*

99. Some authorities divide cases of impossibility into two: physical impossibility and juridical impossibility. Fauchille, instances as examples of the latter the case of a country having alliances with two other countries which proceed to go to war with each other; and the case of a country having certain military obligations, which then becomes a neutralized State.[55] It seems clear, however, that the case of juridical impossibility, *as such,* cannot be admitted, at least on this ground,[56] for the result would be that a country could always obtain release from its treaty obligation by entering into other incompatible obligations. In such cases there is not impossibility in the sense that the treaty *cannot* be executed, but merely in the sense that it cannot be executed without involving a breach of another treaty. That is not the same thing, and is not impossibility for the purposes of the rule now under discussion. It is moreover governed by the principle *res inter alios acta* discussed above in connexion with article 5. Such a case as that of a country which has entered into conflicting alliances, instanced by Fauchille, can reasonably be regarded as a case of literal impossibility, since the same country cannot fight on opposite sides in a war. Incidentally, even in this case it would not seem that the treaties concerned would be terminated, but merely that they would be rendered impossible of performance on the particular occasion, and to that extent suspended. As for the case of the country that becomes neutralized, though having military obligations, this would raise a preliminary point of principle, applicable in many other types of cases, namely, whether a country in such a position can permit itself to enter into inconsistent obligations, or assume an inherently incompatible status, without first taking steps to obtain release from the existing (incompatible) obligations—either by giving notice of termination where that is permissible, or by requesting the other party or parties to consent to it. In the event of release, any questions of impossibility would automatically disappear. If release is not procurable, it cannot be maintained that performance is thereby rendered impossible, and the assumption of an

[55] Fauchille, *op. cit.,* para. 849.

[56] For a different type of case see in connexion with case (vi), paras. 104 and 105.

inconsistent set of obligations or status cannot, in the juridical sense, afford ground for non-performance (see under article 5).

100. In those cases where the impossibility attaches not to actual and literal performance, but to any further performance of such a kind as to achieve or realize the purposes of the treaty, the case may be one of " frustration ", to which the doctrine of *rebus sic stantibus* applies. This is considered later in connexion with articles 21 to 23. But supervening impossibility, if literal—even though it involves changed circumstances—is an independent ground of termination.

101. *Case (v)* (class I.A). *Supervening literal inapplicability owing to disappearance of the treaty field of action.* Examples that might be given are treaties regulating incidents of the feudal system, after the disappearance of that system; treaties regulating certain matters relating to a system of capitulatory rights, after the disappearance of the system; treaties relating to certain matters arising out of a customs union, after the termination of the union; treaties relative to a *condominium,* the latter having come to an end, etc.[57] Usually these cases are classed sometimes as cases of *rebus sic stantibus* (essential change of circumstances), sometimes as cases of impossibility of performances. As regards the latter, it is not so much that performance has become impossible (probably it has, but it might be that literal performance could in some cases take place): it is rather that performance would, even if possible, be absurd, inappropriate and meaningless, and that it is really no longer a question of performance, because there is no longer any sphere or field of action to which the treaty relates, or in which performance can take place. It seems preferable therefore to treat this as a case that may involve impossibility of performance, but which is juridically distinct from it.

102. As regards the relationship of this case with *rebus sic stantibus.* It is evident that the case is one involving change of circumstances, and essential change at that. Nevertheless, as will be seen later, the principle of *rebus sic stantibus* (within its proper limitations) has a wider scope than would be implied by sheer and literal inapplicability as such, and involves certain considerations of a somewhat different character. As in the case of supervening impossibility therefore (which also involves essential change), it seems better to regard cases of inapplicability arising from a complete disappearance of the treaty's field of action on having an independent juridical basis. Though very close to the case of essential change of circumstances, the present case is not so much one of a *change* in, as of a total *disappearance* of the only circumstances to which the treaty could have any application.

103. *Sub-paragraph* (c) of this case introduces what seems to be a desirable safeguard in order to meet that type of case in which, despite the general situation, it is still possible to give some reasonable effect to the treaty.

104. *Case (vi)* (class I.A). *Supervening illegality arising from incompatibility with a new rule of international law or a new legal situation.* It has already been seen that incompatibility with new treaty obligations is not a ground of termination, unless the parties are the same and have intended to replace the old treaty, or have entered into a new and wholly incompatible treaty on the same subject matter, so that the latter treaty must be regarded as replacing the former one (see above in connexion with article 13). In all other cases, there is simply a conflict between two mutually inconsistent, but equally valid, sets of obligations, which must be resolved in accordance with ordinary legal principles.[58] The case of incompatibility with a new supervening general rule of international law, or a new legal situation, may be different. It is not the same case as incompatibility with an *existing* rule of international law, which might mean that the treaty had an illegal object and lacked essential validity (as to which see, eventually, part II of this chapter). In the case now under discussion, the treaty is valid when made, but, by reason of the emergence of a new general rule of law or legal situation, it cannot later be carried out without involving action in breach of, or incompatible with, the State's obligations under general international law. An example sometimes given is a treaty about privateering in the light of the later abolition of that practice.[59]

105. There must, however, be an actual and definite conflict with the new rule of law or legal situation. For instance, a new rule or legal situation may simply confer on States certain rights they did not previously possess, but without obliging them to exercise those rights. In that case, there would be no conflict with, or ground for overriding, a previous treaty by which the parties had bound themselves not to claim or attempt to exercise such rights, or had regulated certain questions on the footing that neither possessed any exclusive right in the matter. The same must apply *a fortiori* if there is any doubt as to the status of the new rule or legal situation itself. The provisos (*a*), (*b*) and (*c*) to this case are intended to make these points clear. If they are not satisfied, it would seem that, pending any arrangement between the parties, the treaty must be regarded as unaffected.

106. *Case (vii)* (class I.A.). *War.* The existence of a state of war between the parties has various effects in respect of treaties. It may terminate some, suspend others (or suspend performance) and bring yet others into operation.[60] The subject is therefore in a sense more properly part of the general topic of the " Effect of war on treaties ". It must be dealt with in any Code on treaties,

[57] It was, in effect, on this ground that, in 1921, Great Britain notified a number of countries with whom she had treaties for combatting the slave trade, that she regarded these as terminated, there being no longer any slave trade to combat. (If subsequent events have shown the danger of over-optimism in such matters, and the need for safeguards such as those embodied in sub-paragraphs (a)—(c) of case (v), there is no doubt that, in 1921, these treaties appeared to lack any field of application.

[58] This is a question not of the law of termination, but of the *effect* of treaties, and will be the subject of another report. In the case of conflicts with the Charter of the United Nations, the question is resolved in favour of the latter by Article 103 of the Charter. But this does not of course in itself *terminate* the other treaty.

[59] See L. Oppenheim, *International Law: A Treatise,* vol. I, *Peace,* 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 946, para. 546.

[60] For example, The Hague and Geneva Conventions.

even though the effect of war on treaties is itself part of the still more general topic of the "Legal effects of war". But in any case it will require a separate report, and beyond receiving mention here, it is not for the present further considered.

107. *Case (viii)* (class I.B.). *Treaties finite by nature.* With this rubric, the class is entered of those cases in which termination is not automatic, but the party concerned has a faculty of bringing it about. For comment on this particular case see paragraph 16 above. Although considered under article 4, it is strictly a case where a general rule operates to give a right or faculty of termination to any party to the treaty. But it is essential that the treaty should belong to a class generally recognized as having a finite character, and (unless the contrary is provided or implied, or to be inferred from the circumstances) not a treaty intended to set up a permanent or indefinite régime.[61]

108. *Case (ix)* (class I.B.). *Fundamental breach.* As to this, see the commentary to articles 18 to 20 below.

109. *Case (x)* (class II.A). *Performance* by the parties. With this rubric the field of termination or suspension of the obligation, rather than termination of the treaty itself, is entered. Some authorities (Anzilotti and Fauchille, for example) regard the case of full and final performance of the treaty as one of termination, and in a sense it is, for nothing remains to be done. Yet the better view would seem to be that the treaty, though executed, still subsists, at any rate as an instrument, and does not formally and technically determine.[62] The practical result may be much the same, but the latter position ensures that the executed (and therefore acquired or irreversible) character of the acts done in performance of the treaty is not thrown open to doubt or question, on the basis of a contention that the treaty is no longer valid because no longer in force or extant. This matter is further considered in connexion with article 28, under the head of the effects of termination.

110. *Case (xi)* (class II.A). *Performance* aliunde. This will not be a very frequent case, but it is a possible one.[63] For instance, provisions for the placing of beacons or marks in certain waters might, in fact, be satisfied by the action of a third State interested in the navigation of those waters.[64] Again, provisions for the construction of certain works, or a road, railway etc., in, or through, certain territory, might in fact be carried out *aliunde* during a military occupation, etc. The same type of consideration applies in these cases as in the cases coming under case (x), but even more strongly, since there is an obvious element of fortuitousness and possible impermanence about the case, which would in any event preclude the treaty being regarded as terminated.

111. *Case (xii)* (class II.B). This refers to cases previously considered under (iii), (iv) and (v), but where the circumstances only justify suspension, not termination. Clearly, in such cases there is the reverse of any automatic or terminative effect on the treaty, and it is for the party contending that the circumstances justify a suspension to make a claim to that effect.

112. *Case (xiv)* (class II.B). *Essential change of circumstances* (rebus sic stantibus). For comment, see below in connexion with articles 21 to 23.

Article 18. Termination or suspension by operation of law. Case of fundamental breach of the treaty (general legal character and effects)

113. *General remarks.* The principle of fundamental breach as a ground entitling the other party to put an end to a contract is admitted by most authorities on international law; but, presumably because it is basically a common law doctrine, it seems to have been received on the international plane more readily by common law jurists than by those of the civil law. It obviously could not be admitted as a ground *per se* terminating the treaty; for, if it were, then, as Fauchille says:

> "... chaque Etat signataire aurait un moyen trop commode de se dégager à sa guise d'une convention qui le gêne: il lui suffirait, en effet, pour la faire disparaître, de refuser d'exécuter telle ou telle de ses dispositions."[65]

But, even if fundamental breach is not regarded as having any automatic effect, but as merely giving a faculty of termination to the other party, it remains a principle not without danger in the international field, where it is all too easy to allege fundamental breaches of a treaty as a ground for claiming to terminate it. Frequently, moreover, there is no means by which the merits of the allegation

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[61] The classic statement of this doctrine, together with some indication as to its proper field of application, is given by Oppenheim:

> "But there are other treaties which, although they do not expressly provide for the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties. To that class belong all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an everlasting condition of things. Thus, for instance, a commercial treaty, or a treaty of alliance not concluded for a fixed period only, can always be dissolved after notice, though such notice be not expressly provided for." (Oppenheim, *op. cit.*, p. 938, para. 538).

However, the Rapporteur considers that this statement goes somewhat too far, and does not correspond with present practice. Taken literally, it might seem to indicate that any treaty "not expressly concluded for ever" can be denounced at will. This is certainly not the case, either as a matter of principle, or historically (see discussion in paragraphs 15 and 16 above in connexion with article 4). The correct rule is that absence of provision for termination means termination only by agreement or by operation of law (which latter includes the case where the treaty belongs to an inherently finite *class*).

[62] Thus Oppenheim states: "A treaty whose obligation has been performed is as valid as before, although it is then of historical interest only" (Oppenheim, *op. cit.*, p. 937, para. 534.) Supporting this view, Harvard Research states: "A treaty is not terminated by the execution of its stipulations; there may be no further obligations to perform under the treaty, but the treaty continues to exist nevertheless". (Harvard Law School, *op. cit.*, p. 1162.)

[63] Cited in Oppenheim, *op. cit.*, p. 945, paras. 540-544, sub-section (3).

[64] This assumes, of course, that the waters, though near the coast, are not national or territorial.

[65] Fauchille, *op. cit.*, para. 854. Although Fauchille is here speaking of the possibility that fundamental breach might be regarded as an automatic ground of termination, he appears to have little greater liking for it as a ground entitling the other party to declare termination.

can be tested before any tribunal, although, as a rule, it will be this very point which is in issue between the parties. In the domestic field, the principle of fundamental breach operates partly as a sanction, tending to ensure respect for contracts, partly as a relief to the injured party should such a breach occur. But in the international field it may well operate in precisely the reverse sense, under both heads.

114. Not surprisingly, therefore, some international law authorities have only admitted the principle, if at all, with hesitation, and subject to a number of limitations and restrictions. Thus, Rousseau, although giving the matter very full consideration, does not finally appear to admit the principle as a definitely received one.[66] Fauchille seems more or less to reject it,[67] and in the Harvard Research volume it is admitted only as a ground justifying provisional suspension of performance pending the pronouncement of a competent international tribunal or authority.[68]

115. The principle would in any event seem to be confined, mainly if not entirely, to the field of *bilateral* treaties. Indeed it is clear that in the case of a multilateral treaty, a breach by one party, however fundamental, could not *per se* give any right to bring the whole treaty to an end, though it might affect the position of that party, and the obligations of the other parties in their relations with the defaulting party, and might, in the case of treaties of a certain class to be noticed presently, lead to eventual termination of the treaty. On the other hand, there are other classes of multilateral treaties, of the law, system or régime creating, or "social", categories, which have to be applied integrally, where a fundamental breach would not only not give any right of termination, but not even give a right to refuse its application in respect of the defaulting party. This matter is further considered below.

116. Reverting to the field of bilateral treaties, the main difficulty is to define what constitutes a fundamental breach. In the case of ordinary breaches, the other party may have various remedies (such as rights of counter-action); but, in order to justify putting an end to the whole treaty, the breach must itself be of a kind that does practically that. It must be something so inconsistent with the treaty relationship as to amount virtually to a repudiation of the treaty.

117. Despite these difficulties, the Rapporteur considers that the doctrine, in some form, must be given a place in any body of treaty law. In principle, it is difficult to contest that there may be breaches of a treaty so serious as to constitute a denial of it, in the face of which the treaty relationship can hardly continue to exist. Such cases can and do occur, and it is hard to deny that they must confer on the other party some more far-reaching right than a mere faculty of taking counter-action, which may be quite inadequate to meet the situation. But it is necessary to define carefully (*a*) the type of case in which such a right arises, (*b*) the conditions which must limit its exercise, and (*c*) the steps which must be taken before it can be claimed.

118. *Article 18. Paragraph 1.* This poses the fundamental distinction between the operation of the principle of fundamental breach in the case of bilateral treaties, and its operation in the case of multilateral treaties—a distinction rendered necessary by the character of the latter.

119. "... may ... justify the other party in regarding and declaring the treaty as being at an end ..." (*paragraph 1*). All the authorities are unanimous in considering that whatever else it does, a breach of a treaty by one party, however serious and fundamental, cannot operate automatically and of itself to put an end to the treaty. It can only give to the other party a faculty (which it may or may not exercise) of declaring the treaty to be terminated, or of claiming to do so.[69]

120. "... (*a*) ... obligations ... which consist of a mutual and reciprocal interchange of benefits and concessions as between the parties; or (*b*) ... obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance." (*paragraph 1*). It is also necessary, in the case of multilateral treaties (see paragraph 115 above) to distinguish between types of obligations—on the one hand those based on contractual reciprocity consisting of a reciprocal interchange between the parties, each giving certain treatment to, and receiving it from, each of the others; or again, obligations of such a character that their performance by one party is necessarily dependent on performance by all the parties; and on the other hand, those which must be applied integrally or not at all (for instance an obligation to maintain a certain condition of affairs in a certain locality). This matter is further considered below in connexion with article 19, paragraph 1.

121. *Paragraph 2.* The concept of fundamental breach is defined in article 19, paragraph 2, and this is commented on below. It is distinguished from "ordinary" breaches not only by its character, but by its potential consequences, ordinary breaches having no effect on the continued existence of the treaty, and merely justifying counter-action in the way of corresponding or other non-observances of a more or less significant kind, as the case may be. This matter does not enter into the present subject, since it concerns the general question of remedies for breach of treaty and not that of termination.

122. *Paragraph 3.* Because of the dangers inherent in the doctrine of fundamental breach (see paragraphs 113

[66] Rousseau, *op. cit.*, paras. 344-347.

[67] Fauchille, *op. cit.*, paras. 854 and 854[1].

[68] Harvard Law School, *op. cit.*, article 27 and comment, pp. 1077-1096. This is the more striking coming from a common law source.

[69] Jean Spiropoulos in *Traité théorique et pratique de droit international public* (Paris, Librairie Générale de Droit et de Jurisprudence, 1933), p. 257, puts the point well when he states: "... d'après la généralité de la conviction juridique, le simple fait de l'inaccomplissement n'affecte pas la force obligatoire du traité ... la non observation n'entraîne pas par elle-même l'extinction du traité ..." Then, after referring to the right of the injured party to put an end to the treaty in such circumstances, he continues: "Mais la possibilité de la dénonciation n'est point une obligation; c'est une simple faculté accordée par le droit international à celui à l'égard duquel le traité a été violé, en sorte qu'au cas où celui-ci ne fait pas usage de ce droit, le traité subsiste, ainsi que le droit de la partie intéressée à en réclamer l'exécution."

and 114 above), it is necessary to condition both the occasion and the manner of its application and exercise. This is considered below in relation to articles 19 and 20.

Article 19. Termination or suspension by operation of law. Case of fundamental breach of the treaty (conditions and limitations of application)

123. *Paragraph 1, sub-paragraph (i).* For general comment on this matter, see paragraph 115 above.

124. *Sub-paragraph (ii).* The view that a breach, even fundamental, of a *multilateral* treaty cannot give the other parties a right to declare its termination, or individually to withdraw from it, is generally supported by the authorities and is summed up in the following passage from the Harvard Research volume:

> "... the State seeking the declaration is not in any way to be freed of its obligations under the treaty toward all the parties thereto other than the offending State. The treaty is not destroyed; it continues in full force and effect, and must be carried out in accordance with the rule *pacta sunt servanda* ...".[70]

In this passage the Harvard volume clearly has in mind the type of treaty specified in rubric (*a*) of sub-paragraph (ii). In connexion with this type of treaty, it is arguable that it must be open to *all* the other parties acting jointly to declare the treaty to be at an end. This, however, seems doubtful. If the treaty is of the reciprocal benefits and concessions type, such a right might indeed theoretically exist, but it would be quite unnecessary and inappropriate to exercise it, since it would suffice to withhold the benefits and execution of the treaty from the offending party only. If, on the other hand, the treaty is not of this kind, but requires absolute or integral performance, its character would be inconsistent with the existence of any faculty of general termination for such a cause, even if exercised by the joint body of the other parties (see paragraph 125 below). There remains the type of treaty mentioned in rubric (*b*) of sub-paragraph (ii), concerning which see paragraph 126 below.

125. *Paragraph 1. Sub-paragraphs (iii) and (iv).* For general comment, see paragraphs 115 and 120 above. It will be convenient to start with the case given in sub-paragraph (iv), and with some examples of the type of treaty in respect of which a fundamental breach by one party, in addition to giving no right of termination to the other parties, would not even justify a refusal to apply the treaty vis-à-vis the offending party (and where it would perhaps not in any case be practicable to operate such a refusal). Thus, a fundamental breach by one party of a treaty on human rights could neither justify termination of the treaty, nor corresponding breaches of the treaty *even in respect of nationals of the offending party*. The same would apply as regards the obligation of any country to maintain certain standards of working conditions or to prohibit certain practices in consequence of the conventions of the International Labour Organisation; or again under maritime conventions as regards standards of safety at sea. The same principle is now enshrined in express terms in the Geneva Conventions of 12 August 1949 on prisoners of war and other matters.[71] Another type of case is where there exists an international obligation to maintain a certain régime or system in a given area.[72]

126. The key to the cases just mentioned is that the character of the treaty is such that, neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than a reciprocal character—it is, so to speak, an obligation towards all the world rather than towards particular parties. Such obligations may be called self-existent, as opposed to concessionary, reciprocal or interdependent obligations of the types mentioned in rubrics (*a*) and (*b*) of sub-paragraph (ii). The difference between the self-existent type, and the rubric (*b*) type—which is further considered in sub-paragraph (iii) of paragraph 1 of article 19—can easily be seen by comparing the cases mentioned in paragraph 125 above with that of a treaty on disarmament. In the latter case, and unless the contrary is expressly provided by the treaty, the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others. Particular breaches by individual parties would therefore justify corresponding particular non-observances by the others; and a general, or really fundamental breach by one party, amounting to a repudiation, would ensure for all practical purposes an end of the treaty, but this would come to pass from force of circumstances rather than from any juridical act of the parties formally declaring the end of the treaty.[73] Therefore, the case would in some ways be more akin to that of the tacit acceptance by the parties of an illegal repudiation of the treaty on the part of one of them, considered later in connexion with articles 30 and 31.

127. This suggests, as a speculation, the question whether fundamental breach as a ground of termination (particularly as it applies in its proper sphere of bilateral treaties) would not, in general, be better described or considered as a case where one party in effect repudiates the treaty (by conduct), and the other expressly or tacitly accepts this repudiation—subject of course to any resulting right to damages or other reparation. The practical result

[70] Harvard Law School, *op. cit.*, p. 1093.

The "declaration" referred to is that envisaged by the relevant article (article 27) of the Harvard draft convention, according to which an alleged fundamental breach only gives a right of provisional suspension of performance while a declaration is being sought from an international tribunal or authority.

[71] See, in particular, article 2 and other opening articles of each of the four Conventions.

[72] For example the régime of the sounds and belts at the entrance to the Baltic Sea. See the Treaty of Copenhagen of 14 March 1857, and the Convention of Washington of 11 April 1857.

[73] Other cases involving a similar interdependence of the obligations would be treaties not to make use of certain weapons or methods or war, not to commit hostilities in certain areas, to abstain from fishing in certain waters or at certain seasons, etc.

would be the same, but the responsibility for bringing about actual termination would be placed somewhat differently,[74] and perhaps more appropriately. This way of looking at the matter would also have the great advantage of emphasizing the true character of the concept of fundamental breach as a cause or termination, by automatically ruling out as insufficient any breach not of so major a kind as to amount to a denial, or repudiation, of the treaty obligation. However, attractive as is this method of presentation, it must be rejected, for reasons to be stated later.

128. To revert to the sub-paragraphs under discussion, the phrase "... (to the extent to which that might otherwise be relevant or practicable) ..." (*sub-paragraph (iv)* (b)) is inserted in order not to lose sight of the fact that, in the case of the type of obligation here in question (and illustrated in paragraph 125 above), there is, as a rule, no choice, or very little. These obligations do not lend themselves to differential application, but must be applied integrally. In many cases anything else would either be totally impracticable or very difficult, or would entail a general failure to carry out the obligation in question.

129. *Paragraph 2, sub-paragraphs (i) and (ii).* These are self-explanatory, in the light of what has already been said. "... tantamount to a denial or repudiation of the treaty obligation ..." (*sub-paragraph (ii)*). See the remarks in paragraph 119 above.

130. *Sub-paragraph (iii).* It would seem that if the parties foresaw the possibility of a breach in some respect,[75] and provided for the consequences, its occurrence cannot be regarded as destructive of the treaty relationship. Alternatively, the consequences are necessarily governed by the treaty itself, according to its correct interpretation, and not by any general principle of law.

131. *Paragraph 3.* A breach may in fact be fundamental, and such as would normally enable the other party to declare its termination, but there may be factors which must operate to preclude that party from exercising the right.

132. *Sub-paragraph (i).* Although this point is not dealt with by the authorities, it seems to constitute a reasonable safeguard against abuse. One of the reasons why treaties often provide for their own expiry after a relatively short period is the possibility that they will not be satisfactorily executed by the parties; and, similarly, one of the reasons why treaties often give the parties a right of denunciation is to afford the possibility of bringing the treaty to an end to any party dissatisfied with the way in which it is being carried out by the other. In such circumstances, it is unnecessary to envisage a right of immediate termination: either the treaty is due shortly to expire or it can shortly be denounced. Only if the periods involved are such that, in view of the nature of the breach, it would not be reasonable to expect the aggrieved party to wait until termination was brought about by expiry or denunciation, should there be a right to declare immediate termination.

133. *Sub-paragraph (ii).* This has already been mentioned as a factor governing all cases of termination or suspension by operation of law, where this does not occur automatically but by the exercise of a faculty given by law to a party to invoke the ground in question (see paragraph 91 above). It seems reasonable that a party who only invokes the right after an undue lapse of time should forfeit it. The implication will, of course, be that the breach cannot really have been a fundamental one, but even if it is, undue delay in invoking the right must operate as a waiver of it, or as an acceptance of the breach as falling short of being fundamental. This does not mean that the party concerned will forfeit any other right it may possess in respect of the breach—e.g., to damages or reparation, or to take counter-action. On the other hand, a complaint about the breach *made for these latter purposes,* or simply to prevent a recurrence, is not in itself a claim that the breach warrants total termination of the treaty—still less does it operate as an actual declaration of termination on the ground of fundamental breach. Any claim or action of this kind must be made and taken expressly and specifically.

134. *Sub-paragraph (iii).* This is the general principle, of which sub-paragraph (ii)—unreasonable delay—is a special case. If the claim to terminate is not made within a reasonable period, this is evidence of condonation or acceptance of the breach, if not *qua* breach, then as not having any terminative effect. But there may be other ways in which such evidence is afforded—for instance, if, despite the breach, the party concerned takes some action under the treaty which it could not, or would not normally have taken, had it regarded the breach as terminative, or had it intended to claim termination.

135. *Sub-paragraph (iv).* This is simply an application of the ordinary and universal principle of law *nemo ex sua culpa tenet jus.*

Article 20. Termination or suspension by operation of law. Case of fundamental breach of the treaty (modalities of the claim to terminate)

136. *Paragraph 1.* Because of the dangers of abuse, and because it is precisely the character of the breach (or whether there has been a breach at all) that is usually in issue between the parties, it seems desirable to impose a brake on the process of bringing about termination, in such a way that the exercise of the right is neither automatic nor absolute. Therefore, the complaining party should not be able simply to *declare* termination, but should begin by presenting the other party with a reasoned statement of its view, pending consideration of which no further action would be taken.

137. *Paragraph 2.* This imposes a second brake, namely, that if the other party does not reply, or contests the claim of termination, the complaining party cannot proceed to terminate without first offering a reference of the matter to an appropriate tribunal to be agreed between the parties. Without this, termination cannot be declared, and only if the offer is not accepted within a reasonable time can ter-

[74] It would rest somewhat more directly on the party repudiating by breach.

[75] As occurs in some cases, the treaty stating what course is to be followed in that event.

mination be proceeded to. If it is accepted, it will be for the tribunal to decide whether there is a case for an interim suspension of the obligations of the treaty.

138. *Paragraph 3.* This is a logical consequence of the rule stated in the final sentence of paragraph 5 of article 16, and needs no special comment.

139. *Paragraph 4.* This is intended to preserve the general rights of the parties. It is, of course, clear that if the alleged breach has not been a fundamental one, justifying termination, or if the case is one to which one of the limitations specified in article 19 above applies, any purported termination of the treaty will be illegal and invalid; it will leave the treaty juridically in being, giving rise to a claim to damages, or other reparation in respect of any resulting non-performance. Even if the claim of termination is accepted, so that the treaty itself comes to an end, a claim to damages or reparation may remain (see the commentary on articles 30 and 31 below).

140. It was suggested in paragraph 127 above, that the case of termination on the ground of fundamental breach could perhaps more appropriately be regarded as a case of constructive repudiation of the treaty, accepted by the other party subject to its claim to reparation. Despite its attractions, particularly as regards making clear the kind of thing involved in the concept of a fundamental breach, the Rapporteur has not felt able to adopt this theory. It would render impossible the application of the safeguards provided by articles 19 and 20. Basically, the allegation of fundamental breach as a ground of termination is a right claimed by the aggrieved party, and should be claimed and justified as such.

Article 21. Termination or suspension by operation of law. Case of essential change of circumstances, or principle of rebus sic stantibus *(general legal character)*

[*Note.* This part of the report (and the corresponding articles) should be regarded as especially provisional (see paragraph 3 of the general introduction to the report). The Rapporteur has not yet been able to come to final conclusions on all points. In all probability therefore a supplementary or amended report on this part of the subject will be presented later.]

141. *General remarks.* There are few questions of treaty law more controversial, and more controverted, than that of the place to be given to essential (or vital) change of circumstances as a ground of termination, on the basis of the principle of *rebus sic stantibus* (*conventio omnis intellegitur rebus sic stantibus*). Within certain limits, analogous principles find a place in many systems of private law,[76] but in the international field, although much discussed in the literature of treaty law, the doctrine is accorded a mixed reception, compounded of attraction in theory and fear as to the practical consequences of admitting it. As Monsieur Paul-Boncour said in 1929, in presenting the French argument before the Permanent Court of International Justice in the *Free Zones* case:

> " Lorsque j'ai invoqué la clause *sic rebus stantibus,* je ne l'ai pas fait . . . pour transformer cette règle de droit international public en je ne sais quel automatisme qui jouerait par la volonté unilatérale d'une Puissance quelconque et par le fait qu'elle estimerait que les circonstances ne sont plus les mêmes que celles qui avaient présidé à l'élaboration du traité dont elle demande l'abrogation . . . je me permets d'ajouter que les besoins mêmes de mon argumentation, le gain du procès si grave que nous avons engagé devant vous, n'auraient pas pu me faire oublier l'imprudence qu'il y aurait pour l'Europe et pour le monde à donner à la clause *sic rebus stantibus* l'interprétation extensive que mon confrère m'a prêtée."[77]

This attitude has shown itself in a marked reluctance of courts, both national and international, actually to apply the principle, while not rejecting it in theory and even professing to view it with some sympathy.[78] As regards State practice, there were, up to 1939 at any rate, only a very few cases in which States had expressly put forward the doctrine as such, as a ground for claiming that a treaty had *ipso facto* terminated, although there were quite a number in which, without actually invoking the doctrine, States had referred to changed circumstances as a factor justifying non-performance, or calling for the termination or revision of the treaty.[79] Post-war experience on the other hand, would seem to suggest an increasing tendency for States to found themselves on such a principle—in fact, if not in so many words. At the same time, there are virtually no cases in which the other parties to a treaty thus called in question have been willing to admit that the doctrine of *rebus sic stantibus,* as such, was applicable, although they have often been quite ready to agree in practice to revise the treaty in question or to accept its termination.

142. The reasons for this attitude are not far to seek, and are similar to those which have sometimes caused fundamental breach as a ground of termination to be accepted with reserve. The doctrine is attractive in theory, and may, in practice, and within limits, be necessary; but it is dangerous. There are few which could so easily reduce the main principle of treaty law, *pacta sunt servanda,* to a mere form of words; and moreover, its operation on the international plane can frequently, even generally, not be controlled by the action of any tribunal, as it can on the domestic plane. It is all too easy to find grounds for alleging a change of circumstances, since in fact, in international life, circumstances *are* constantly changing. But

[76] It seems to have had its origin in certain provisions of Roman Law. See Chesney Hill, " The Doctrine of *'Rebus sic stantibus'* in International Law ", *The University of Missouri Studies,* vol. IX, No. 3 (July 1, 1934), p. 18. See also the details as to the private law application of the principle given in H. Lauterpacht, *The Function of Law in the International Community* (Oxford, The Clarendon Press, 1933), pp. 272-276 and the footnotes thereto.

[77] Publications of the Permanent Court of International Justice, *Acts and Documents relating to Judgments and Advisory Opinions given by the Court,* series C, No. 17-1 (Case of the Free Zones of Upper Savoy and the District of Gex), vol. I, pp. 283-284.

[78] For a convenient account of these cases with citations see Hill, *op. cit.,* pp. 19-25, 30-31 and 37-41.

[79] See the exhaustive account given in Hill, *op. cit.,* pp. 27-74.

these changes are not, generally speaking, of a kind that can or should affect the continued operation of treaties. As a rule, they do not render the execution of the treaty either impossible or materially very difficult, or its objects impossible of further realization, or destroy its value or *raison d'être*. What they may tend to influence is the willingness of one or other of the parties, on ideological or political grounds—often of an internal character—to continue to carry it out. Such cases, and others which it would take up too much space to go into, no doubt present their difficulties, but these lie in the political field and must be solved by political means. They cannot and ought not to be made a basis for importing into treaty law a juridical doctrine of release that is wholly at variance with its spirit and fundamental purpose.

143. It is therefore tempting—having made provision for a number of specific grounds on which treaties may terminate, or on which a party may acquire a right to terminate or suspend them, by operation of law [80]—to reject *rebus sic stantibus* altogether as a ground for termination, unless it operates in some specific form, independently recognized as a ground of termination, such as a supervening and literal impossibility of performance, due to changed circumstances. Especially is this so having regard to the fact (*a*) that, as will be seen presently, the principle in any case only operates in regard to treaties that are ostensibly of unlimited duration, or do not contain any provision for termination, and that according to modern practice most treaties are drafted so as to include such provision; (*b*) that certain classes of treaties, of frequent occurrence, are in any event recognized as being inherently not intended to be of unlimited duration, and to be subject to an implied right of termination on giving reasonable notice;[81] (*c*) that even in the case of other treaties it is often possible, as a matter of their correct interpretation, to draw from their terms and special character a legitimate inference to the same effect, or alternatively to imply in them a positive intention that the treaty should terminate in certain eventualities.[82]

144. At the least, these various factors should operate severely to limit the scope of any principle of *rebus sic stantibus*—that is to say, to reduce the number of cases in which it will be necessary to have recourse to the principle *as such*, and because the case cannot be covered in any other way. Nevertheless, there will remain a residue of cases that are not covered by any other recognized rule or principle, and with respect to which the question will arise whether termination on a basis of *rebus sic stantibus* is legitimate. The Rapporteur has come to the conclusion (provisionally at all events) that some place must be given to the principle *rebus* in any code of treaty law, though within carefully stated limits, and subject to as clear a definition as possible of what constitutes an essential (or vital) change of circumstances, and what the effect of the change must be in order to bring the principle into play. The main reasons for taking this view are as follows:

(1) Although some authorities reject altogether the doctrine of *rebus sic stantibus* [83] the great majority admit it, in one form or another, although there are great diversities of view as to its legal foundation and the exact extent and manner of its application.

(2) While no international tribunal has not applied the doctrine, there have been several indications that such tribunals would, or might, do so if the circumstances justified it. Referring to the remarks of the Permanent Court of International Justice in the *Free Zones* case, Sir Hersch Lauterpacht has written: "It is clear that the Court was prepared to recognize the principle (although it refused to say to what extent) that a change of conditions may have an effect on the continuation of treaty obligations" [84]

(3) Analogous principles—or principles leading to very similar results—have received a wide degree of recognition in private law.[85] While this is not conclusive (see for instance the different treatment given by private, as compared with international law, to the question of duress as a ground voiding contracts), it suggests that there is a case for some degree of recognition of the principle under international law.

(4) It is impossible to close the mind to certain ways in which the international field differs from the domestic. The absence of any certainty of being able to have recourse to a tribunal; the lack of any legislature able to give relief from unduly burdensome contracts such as exists in the domestic field;[86] the fact that in the domestic field most contracts have a natural term, because individuals die, companies are wound up etc., or the contract soon becomes wholly executed and performed; whereas in general, States do not die, and they often enter into treaties involving continuing obligations without natural term, which may and do last for centuries—all these things and others necessitate a certain measure of acceptance of a principle according to which, if the phrase may be permitted, change calls for change. But, in this, there need be no "negation of international law",[87] if the character and scope of the principle are properly understood and defined—as they must be, for it would be unrealistic not to recognize that the very elements in the international field that call for the doctrine are also those that render it dangerous.

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[80] See articles 16-20 hereof, and paragraphs 89-140 above.

[81] See article 4 A (ii), and paragraphs 15 and 16 of the commentary above.

[82] See article 4 A (ii), (*a*), and paragraph 16 of the commentary above.

[83] For example, Bynkershoek, Wildman, Strupp, Lammasch, and, to a large extent, Grotius, Vattel and Klüber.

[84] H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (London, Longmans, Green and Co., 1934), p. 43.

[85] For a convenient and detailed summary, see Lauterpacht, *The Function of Law in the International Community* (footnote 76 page 56).

[86] Compare, for instance, the French *loi Failliot* of 21 January 1918, passed in order to give relief to cases of undue hardship in the performance of contracts resulting from the 1914-1918 war. As Lauterpacht points out, it is significant that the French Civil Courts refused to apply in the sphere of private contracts the theory of "*imprévision*" applied by the Conseil d'Etat to public contracts. (*The Function of Law in the International Community*, p. 279).

[87] This is the phrase used by Lauterpacht to characterize the principle in its wider and illegitimate senses (*The Function of Law in the International Community*, p. 270). See also the discusion in Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, Green and Co., 1927), pp. 167 ff.

145. *Juridical basis of the principle* " rebus ". The difficulties of discussing this matter are increased by the fact that many writers do not clearly distinguish cases of *rebus sic stantibus,* as such, from certain other cases of termination by operation of law that have features in common with it, although actually possessing an independent juridical basis—such as, for instance, supervening impossibility of performance. True, in such cases, there has been a change of circumstances; but it is the impossibility, not the change as such, that constitutes the juridical ground of termination. The present Rapporteur, for his part, considers it essential that no ground of termination should be regarded as a case of *rebus* that has, or can reasonably be considered to have, an independent juridical basis. It will therefore, in due course, be essential to specify those cases in which termination can occur, if at all, only on a basis of *rebus,* and to define what the proper sphere of application of the principle is for this purpose. Whether the Rapporteur has been successful in this, remains to be seen. As stated, his aim has been to isolate the true cases of *rebus,* by distinguishing from them those cases which involve the common feature of change but seem, in fact, to have an independent juridical basis. The attempt at least cannot fail to prove useful.

146. In any event, whatever the precise scope and application of the principle *rebus,* international jurists have differed widely as to its juridical basis. In the principal monograph on the subject in English, Chesney Hill's study, " The Doctrine of ' Rebus sic stantibus ' in International Law " [88] (to which, together with the relevant parts of Rousseau [89] and the Harvard Research volume,[90] the Rapporteur wishes to acknowledge his deep and particular indebtedness), no fewer than seven different theories are mentioned.[91] It is not necessary for present purposes to state all these, because they can, broadly speaking, be reduced to three, or variants of these. The first bases the principle *rebus* on a supposed implied term of the treaty, arising from the presumed intention of the parties that the treaty should terminate in certain eventualities, or that its duration should be dependent on the continuance of certain circumstances, etc. According to the second theory, the principle is an objective rule of law, a consequence (to use the language of the civil law) following *naturaliter* [92] from certain events, not dependent on any presumed or implied term of the treaty, but imposed *ab extra,* and having the effect that certain changes of circumstances will give a party a right to require the termination of any treaty not already subject by its terms to a limit of duration. A third theory must be noticed which partakes of both the first two. According to this theory, the principle *rebus* is an objective principle of law, but it operates by, so to speak, forcibly importing into the treaty itself (if not already subject by its terms to a limit of duration) a clause (the " *clausula* " *rebus sic stantibus*) to the effect that the treaty will terminate if there is an essential change of circumstances.[93] The first and third theories resemble each other in being based on an implied clause in the treaty; but according to the first, it is there because of the presumed intention of the parties, whereas according to the second it is there because the law decrees it to be there, or places it there. Thus, according to the first theory, the presence of the clause in the treaty is a matter of the interpretation of the treaty itself—(and on the true interpretation of the treaty such a term may or may not be there); whereas according to the third theory it is *always* and necessarily there, unless the parties have expressly excluded it. As regards the relationship between the second and third theories, it may be stated that they resemble each other in operating (basically) *ab extra,* but differ in the mode of their operation, the one operating directly, the other via the treaty.

147. Subject to one important—indeed crucial—point, the difference between the second and third theories seems to be one of form rather than of substance. It matters very little in practice whether the law operates to bring about the termination of a treaty by postulating an objective rule of termination *rebus,* or whether it does so by postulating the automatic and invariable existence of a " *clausula* " *rebus* in all treaties not of limited duration, subject to which they are to be read. In either case, it is the law that operates objectively, either *ab extra* or via the treaty, to terminate it, rather than any inference drawn from the presumed intention of the parties. In one pre-eminent respect however there is a difference. If a *clausula* is presumed to exist in the treaty, then, if the essential change of circumstances occurs, termination takes place by reason of a term contained in the treaty itself, even if it is the law rather than the parties that placed it there. This must, therefore, involve an automatic termination of the treaty *ipso facto,* as soon as the circumstances that call the clause into play arise, for in that event it is a term of the treaty (even if implied by law) that says that the treaty is at an

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[88] Hill, *op. cit.*

[89] Rousseau, *op. cit.,* paras 368-385.

[90] Harvard Law School, *op. cit.,* commentary to article 28, pp. 1096-1126.

[91] See also Rousseau, *op. cit.,* paras 370 and 371, especially the list in para. 371.

[92] For the common-law jurist, who usually prefers the theory of the implied term, Sir John Fischer Williams in an article in *The American Journal of International Law,* vol. 22, 1928, entitled " The Permanence of Treaties ", gives the following explanation: " On the other theory, upon the change in essential conditions, the dissolution of the contract follows *naturaliter,* as a natural consequence. This is not to make the dissolution depend on the intention of the parties, but to invoke a conception of a general or natural order with which the maintenance of the obligation is inconsistent ... we are appealing to a general legal conception independent of the intention of the parties, to whose rule we conceive that they are ready, or bound, to submit their relationships ... arguments of this kind are of permanent value for a development of international law, in that they involve a reference to a standard set, not by the will or intention of the parties themselves, but by an external authority ". The present Rapporteur would qualify this only by saying that what actually occurs *naturaliter* is not the automatic dissolution of the treaty, but the bringing into existence of a faculty for the party affected to take certain steps looking to termination or revision (see below, in connexion with article 23).

[93] For a particularly forthright statement of this theory, see Fauchille, *op. cit.,* para. 853[1].

end, and termination on that basis cannot take place otherwise than automatically.[94]

148. But if there is one point on which there is a very large measure of agreement amongst the authorities, it is that this is *not* the way the principle *rebus* operates—that termination is not automatic, and that what the principle does is simply to give a party a right to invoke it by (in the first place at any rate) addressing a request to the other for termination or revision in view of the changed circumstances. It follows that the third theory, that of the *clausula,* must be rejected, as leading to the wrong results. The second theory does not give rise to this difficulty, for according to it, the principle *rebus* operates *ab extra* not *ab intra.* It does not determine the treaty from within, and of its own force so to speak, but imposes a rule from without, namely that in certain circumstances the parties are invested with a certain faculty which they (or either of them) may exercise if they wish.

149. There remains the choice between the second theory and the first. The first might be said to represent the classical and hitherto dominant view, the second to accord more with modern tendencies. This is so not only on the plane of international law but also in the field of the analogous theories of private law.[95] The view provisionally taken by the Rapporteur is in favour of this second theory, for the following reasons:

(1) The notion of the intention of the parties in a matter of this kind is very much of a fiction. It will generally mean imputing to them ideas they never had, because in most cases the governments concerned will neither have foreseen the actual changes that have occurred, or even, as a rule, envisaged the general idea that changes in essential circumstances might come about—indeed, as will be seen later, if the parties did foresee the possibility of changes, but included no provision regarding them, this is, if anything, a fact that would tend to cause the principle *rebus* not to apply.[96]

(2) If, on the other hand, the parties really did have some intention in the matter, and this intention is expressed in the treaty, or, as a matter of its correct interpretation, is clearly to be inferred from it, then there is no need to have recourse to any abstract *principle* of *rebus sic stantibus* at all. In the contemplated circumstances, the treaty will come to an end as a matter of its own interpretation and effect. It will be a case coming under article 9, paragraph 1, of the present part of the Code, as one in which the parties have themselves made provision for termination in the treaty. There is very little point in saying, as a number of authorities do, that if the parties have themselves expressed or implied a clause *rebus sic stantibus* in the treaty, then the principle *rebus* will operate—for in that case it is not any *principle* of *rebus* that operates, but simply the treaty itself, according to its correct interpretation. The first theory, therefore, as a supposed juridical basis for the doctrine or principle of *rebus,* is really a denial of that principle as having any independent existence. It simply brings the matter back to the interpretation of the treaty, and adds nothing to what would in any event be the case—namely that if the parties have themselves, expressly or by implication, provided for termination if certain circumstances change, then, if that occurs, the treaty will, by its own terms, come to an end. (On the other hand—as will be seen—the fact that the intention of the parties is not the primary reason why the principle *rebus* as such operates, does not mean that such intention can be ignored for the purpose of deciding whether an essential change of circumstances has occurred, or whether the change is in fact an essential one.)

(3) Thirdly, as Rousseau justly points out, there are greater dangers in the *ab intra* basis than in the *ab extra*: "... l'appel à la pseudo-clause tacite est très dangereux pour la force obligatoire des traités, car, sous couvert d'interprétation, il ouvre la voie à d'innombrables et incessantes modifications. Il mène nécessairement, dès lors, à la révision permanente des situations existantes, donc à l'insécurité juridique, en introduisant dans les rapports interétatiques un principe destructeur du droit conventionnel."[97] It is a case of the Trojan horse, the enemy within the gates. On this view of *rebus sic stantibus,* and having regard to the ease with which given interpretations can be put forward and plausibly defended, every treaty would contain the seeds of its own dissolution.

(4) Therefore, and finally, it seems preferable to regard *rebus sic stantibus* as an objective principle of law and (to use the language of an eminent judge in speaking of the analogous English doctrine of "frustration") as being "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."[98]

150. *Operation of the principle* "rebus". *What changes of circumstances bring it into play?* Although the intention of the parties is not, according to the theory here adopted, the juridical basis of the principle *rebus,* as an abstract principle of law (and as opposed to being a principle of interpretation, which will of course always be applicable when in fact a treaty is, on its terms, definitely open to that interpretation), such intention must nevertheless play a major part in determining whether the change which has occurred is one that calls for the application *ab extra* of the rule *rebus.* The rule *rebus,* in short, considered as a rule which, irrespective of anything expressed or implied in the treaty, may give the parties a faculty to take steps directed to the revision or termination of the treaty, operates independently of the will of the parties except at

[94] Naturally, in practice, a party will *invoke* the "clause"; but only in the sense that the conditions that cause it to operate have, in that party's view, come into existence. The party would not be invoking any faculty given him by the clause, but the clause itself, as having operated.

[95] See the French doctrine of "*imprévision*" applied by the Conseil d'Etat to public contracts. The tendency is also noticeable in the trend of recent English decisions. See Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd., Law Reports* [1926] Appeal Cases, at p. 510, and Lord Wright in *Denny, Mott and Dickson Ltd.,* v. *Fraser (James B.) and Co., Ltd., Law Reports* [1944] Appeal Cases, at p. 274-276.

[96] It would in effect be evidence that they did not regard the change as vital, or as affecting the force of the treaty obligation.

[97] *Op. cit.,* p. 584.

[98] Lord Sumner in the *Hirji Mulji* case (see footnote 95 above). Reference may also be made to the quotation from Sir John Fischer Williams' article on "The Permanence of Treaties" given in footnote 92 above.

the point where a party invokes it. But, in determining whether a case has arisen to which the principle properly applies, it is necessary to have regard to the original purposes of the treaty and the circumstances in which it was concluded. As has already been mentioned, the difficulty of discussing the question of the circumstances that give rise to *rebus sic stantibus* is added to by the tendency of many writers not to distinguish it clearly from other cases of termination presenting certain features in common but possessing in fact an independent juridical basis—such as impossibility of performance. Clearly, where a supervening impossibility does arise, a change of circumstances, and an essential one, must have occurred. But although the case of impossibility might therefore be represented as being one of *rebus sic stantibus,* it is clear that the latter principle is not limited to cases of actual impossibility. This can be seen from a consideration of the somewhat similar English doctrine of " frustration ", as it has been applied in, for instance, what is known as the " Coronation " type of case. A room is rented for a certain day, overlooking the route of a procession; before the day arrives the procession is cancelled or postponed.[99] This does not render the contract impossible to execute: the room can still be occupied on the specified day and paid for at the agreed (though of course abnormal) price;[100] but there would be no purpose in it. The contract has lost its *raison d'être*. What has become impossible is not the literal execution of the contract, but its execution in accordance with the intentions of the parties, or rather *of the objects of the transaction.* These have become " frustrated " by a change of circumstances.[101]

151. The question then arises, is the international law doctrine of *rebus sic stantibus* to be regarded as more or less equivalent—and therefore as being confined to—the case of " frustration ", i.e. of a change of circumstances totally preventing the realization of the purposes of the treaty? It would seem that, if the doctrine were to be accepted on the basis on which it has been invoked by various governments at various times,[102] this would not be so. Frequently, the suggestion is not that the change of circumstances has rendered realization by performance impossible, but that it has so altered the *conditions* of performance for the party concerned (either by increasing their onerousness or diminishing the value to be gained by further performance) that such party can no longer carry out, or can no longer be expected to continue performing, the treaty. That this is liable to be the plea is readily seen from the fact that the great majority of treaties involve *continuing* obligations. In this they differ from the " Coronation " type of case, where there is one particular act which has to be performed. Where however there are continuing obligations, it will generally be the case that they have in fact been in the course of performance for some time. The objects of the treaty are therefore, or have been, in principle realizable, and are being realized, so that, short of some event creating an actual and literal impossibility of further performance, or rendering further performance pointless for both or all parties, there is actually nothing to prevent the continued execution of the treaty. The plea put forward in such cases usually is that performance has become vexatious or unduly burdensome for one of the parties, or that events have occurred such that, for one of the parties, the treaty has lost a large part of its value, or is no longer worth while.

152. It would seem that, whatever political merits such a plea may have in a given case, the principle *rebus,* considered as a *juridical* ground for termination, cannot be extended to cover them, without becoming destructive of the whole force of the treaty obligation. On the other hand, the Rapporteur does not think that the principle can be entirely confined to cases of the " frustration " type, i.e. where the changed circumstances have rendered impossible the further realization of the objects of the treaty. There are changes which, without producing quite that result, may destroy the foundation of the obligation, if the latter was essentially based on assumptions or states of fact that have ceased to exist (even although not in such a way as to destroy the whole field of action of the treaty in the manner contemplated by case (v) in article 17).

153. It seems therefore to the Rapporteur that there are two but, in general, only two cases in which, on grounds genuinely of a specifically juridical character, it can be said that a change of circumstances affects the force of the treaty obligation (apart from the cases of impossibility and literal inapplicability separately specified as independent grounds of termination in article 17), and in which therefore the principle *rebus* can apply as such. These are (1) " frustration ", i.e. impossibility of realization, or of further realization, of the objects of the treaty; (2) destruction or alteration of a situation of fact, or state of affairs, fundamental to the treaty obligation, and on the basis of the existence of which *both* the parties contracted.

154. The second of these is further considered below in connexion with paragraph 1 of article 22. The first calls for certain further general remarks here, as regards the words " the objects of the treaty ". It is essential in this respect to distinguish clearly between what was the *object* of the treaty itself, and what may have been the *motives* of one or other of the parties in entering into it. The distinction is fully recognized in private law. For instance, a distinguished recent authority on English contract law states:

" The doctrine [of frustration] is certainly applicable

[99] This actually happened in the case of the Coronation procession of King Edward VII in 1902. Owing to the King's sudden illness, the Coronation was postponed for several months. Hence the appellation given to this type of case.

[100] See Arnold Duncan McNair, *Legal Effects of War,* 3rd ed. (Cambridge University Press, 1948), p. 151.

[101] The original " Coronation " case was *Krell* v. *Henry* [1903] 2 K.B. 740. But the process involved had been applied some time earlier in decisions such as that of *Taylor* v. *Caldwell* (1863), 3 B. and S.826. In that case, a hall hired for a concert was destroyed by fire six days before the date of the concert. This of course was a case of impossibility resulting from destruction of the physical object of the contract. Still, it was in this case that the English Courts began to resile from their former doctrine, deriving from the 17th century case of *Paradine* v. *Jane* (1647), Aleyn, 26, according to which an unconditional undertaking must be regarded as absolute, since the party concerned could have insisted on the inclusion of a clause safeguarding him from occurrences rendering performance impossible. However, as McNair shows (*op. cit.,* pp. 139-142), the process of softening the rigour of this rule had, in maritime cases, started well before *Taylor* v. *Caldwell.*

[102] See Hill, *op. cit.,* pp. 27-74.

if the object which is the foundation of the contract becomes unobtainable, but the judges are equally insistent that the motive of the parties is not a proper subject of enquiry." [103]

A man may contribute to a charity for the blind because of his affection for a blind daughter. But his object is to benefit the charity, and his affection for the daughter is simply his motive in wanting to do so. If, as he well may, he enters into some sort of covenant with the charity to subscribe to its funds,[104] he will not be absolved from carrying it out because, after a time, his daughter recovers her sight. Motives, and objects or purposes may sometimes be difficult to disentangle, but they are always juridically distinct. Possible examples may be imagined in the treaty field. For instance, a number of countries may, in relation to some specific area, enter into a treaty having as its object the regulation and equitable division amongst them of certain resources and activities, e.g., sealing, whaling, guano-collecting, oyster-taking, or whatever it may be. For this purpose they agree, *inter alia,* to divide up the area, each assuming exclusive rights in respect of a prescribed part of it. After a certain period, however, owing to a change in the habits of the animals, fish, birds, etc., these abandon certain parts of the area, and are only to be found in others. In such a case it may well be contended that the object of the treaty was, *inter alia,* an equitable division of the available resources of the region as a whole; that this was effected on the footing of a certain distribution of those resources over the region as a whole, and that, if this materially alters, the object (or this particular object) of the treaty is frustrated or can no longer be realized. Suppose, however, a different case. Two countries grant each other trading rights, and various facilities and exemptions in each other's ports or territory. The object of the agreement is that the ships and nationals of each country shall enjoy these rights and facilities, etc., in the ports and territory of the other. After a lapse of time however, one of the parties finds that, owing to a change in the pattern of its trade, it is no longer interested in the exercise of these rights, and it thereupon finds the obligation to grant them to the other party burdensome and vexatious. But all that has really happened here is that the party concerned has lost the motive it originally had for entering into the treaty. The object of the treaty itself is not in the least affected, and remains fully realizable—namely that the ships and nationals of each country should have certain rights and facilities etc., in the ports and territory of the other. The fact that one of the parties no longer wants to exercise its rights under the treaty, and perhaps would not have entered into the treaty at all if the pattern of its trade had not then lain in that direction, is quite irrelevant, and affords no ground for any denial of the treaty rights to the other party on the basis of a supposed application of the principle *rebus sic stantibus.*

155. *Method of invoking the principle* "rebus". In addition to the limitations arising out of its inherent character, there are a number of further limitations that operate as regards the exercise of the rule, of the same order as in the case of fundamental breach, i.e. in respect of the type of treaty involved, and of certain particular circumstances that may debar a party from invoking it in a particular case. These are discussed below in connexion with article 22. The remaining, much controverted question, is as to the exact extent of the right given by the rule "*rebus*" in those cases where it is applicable, and in what manner it must be invoked. The great majority of the authorities are agreed that it neither operates automatically of itself to terminate the treaty, nor even to give a party a right immediately to declare termination. The main weight of opinion undoubtedly is that a party which considers that, by reason of an essential change of circumstances, a treaty should be revised or terminated, should begin by addressing a request (or at least a reasoned statement) to that effect to the other party or parties, and that there is no automatic or immediate right of unilateral denunciation. Moreover, State practice is in accordance with this view, as is shown by the numerous cases cited by Chesney Hill.[105] But there is disagreement as to what happens next, if the request is refused or ignored. Some authorities consider that in such case the State concerned can thereupon denounce the treaty; others think or imply that it cannot do so. A third school considers that the matter must then be referred to a tribunal. A fourth suggests no solution, and merely discusses the problem.

156. None of these courses is satisfactory, and perhaps there is no practicable course that could be wholly so. The third involves the difficulty that, in existing circumstances, the parties themselves would have to consent to the reference, unless they happened both to be parties to the compulsory jurisdiction of the International Court of Justice, and the case was also not covered by any reservation.[106] The second course would be tantamount to denying any effective sphere of operation at all to the principle *rebus,* except in those cases where the other party or parties happened to be willing to agree to termination or revision; while the first course, on the other hand, given the ease with which essential change can plausibly be alleged, would, in effect, amount to giving an absolute, if delayed, right of unilateral denunciation, and would be quite inconsistent with the often cited Declaration of London of 17 January 1871,[107] which still forms part of the corpus of written international public law, according to which:

"[Les Puissances] reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale." [108]

[103] G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract,* 4th ed. (London, Butterworth and Co. (Publishers) Ltd., 1956), p. 467.

[104] Legally binding covenants of this kind are frequently entered into in England because of certain (perfectly lawful) tax advantages to be gained thereby.

[105] *Op. cit.,* pp. 27-74.

[106] Nevertheless, as will be seen, it would be possible to make the exercise of the right dependent on an *offer* of adjudication being made by the party claiming it, followed by *non-acceptance* on the part of the other.

[107] Annex to Protocol 1 of the London Conference, *British and Foreign State Papers, 1870-1871,* vol. LXI, pp. 1198-9.

[108] To this would now have to be added the recognized cases where, by operation of law, a party is given a right of unilateral termination.

157. Where the other party or parties agree to revision or termination, *cadit quaestio*. The case is then one of agreement (either express, or else tacit—by mutual desuetude—see above in connexion with article 15, paragraph 3). If therefore the principle *rebus* is to have any separate field of application, it must be in those cases where the parties do *not* agree. Yet the dangers of this are manifest. The solution offered by the Rapporteur is that contained in article 23. Actual termination would only result (apart from agreement) from the pronouncement of a competent tribunal. The party invoking the change of circumstances would, basically, only have a right of *suspension*, though (if necessary) of suspension for an indefinite period. Even this could only be effected if the party concerned was willing to offer recourse to some form of international adjudication, and if this offer was not accepted. The practical result of indefinite suspension may not differ greatly from termination, although the indirect and secondary differences are considerable. In any case, the other party could always avoid an unjustified suspension by accepting the offer of adjudication.

158. *Comments on the particular paragraphs of article 21. Paragraph 1.* This states the principle, for general comment on which see paragraphs 141 *et seq.*, above.

159. " In the case of treaties not subject to any provision, express or implied, as to duration . . . " (*paragraph 1*). There is a general consensus of opinion [109] that the principle *rebus* is only relevant to the case of what are sometimes called " perpetual " treaties—indeed it can be said that the principle has no *raison d'être* in the case of other treaties, for it is precisely to remedy the hardship that might result from perpetuation, if an essential change of the order contemplated by the *rebus* principle occurs, that the principle exists. If the treaty is not of this kind, either the question does not arise, for the treaty can be terminated by other means (if a change has in fact occurred, it may *motivate* such termination but will not be the juridical ground of it), or else the treaty will expire in due course under its own terms; and this event can reasonably be awaited, for, short of supervening literal impossibility of performance (which would terminate the treaty in any case), a change of circumstances can hardly be of such a character that termination cannot await the natural advent of the treaty term. Indeed, it is a legitimate inference, as a matter of interpretation, that, if the parties provided a term, they meant to *exclude* earlier termination on any basis other than further special agreement, fundamental breach,[110] or literal impossibility of performance.

160. ". . . a fundamental . . .change in essential circumstances . . ." (*paragraph 1*). The requirement of essentiality attaches both to the original circumstances—which must have been basic to the contract—and to the change itself—which must affect it in an essential way (see article 22, paragraph 1, and the comments thereto).

161. ". . . and unforeseen change . . ." (*paragraph 1*). If the change was foreseen by the parties, whether actually or as a possibility, and even if they did not provide for it in terms in the treaty, they must be taken to have contracted with reference to it or the possibility of it. Either they must be taken impliedly to have excluded it as a ground of termination, or the change itself must be held not to be an essential one giving rise to such a ground.[111]

162. *Paragraph 2.* The remaining phrases of paragraph 1 have either been sufficiently explained in the general commentary on this article above, or will be further considered in connexion with articles 22 and 23, to which paragraph 2 refers. The definitions and limitations thereby introduced form of course an integral part of the concept of *rebus*.

163. *Paragraph 3.* The reasons for this have been fully explained in paragraphs 145 and 150 above. *Rebus* is, within its limitations, essentially a residual right. It is not to be invoked, and is not applicable, in any case where an independent right or ground of termination or suspension exists.

Article 22. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(conditions and limitations of application)*

164. The conditions and limitations on the application of the principle *rebus* are, *mutatis mutandis*, of the same order as those relevant to the case of fundamental breach, and some of the commentary to article 19 is accordingly applicable.

165. *Paragraph 1. Limitations in respect of the type of treaty involved. Sub-paragraph (i).* This statement is *broadly* true, and is not intended to be more. *Rebus* has seldom been invoked, and is unlikely to be, in the case of general multilateral conventions; but it has not infrequently (in one form or another) been put forward in connexion with plurilateral treaties having special and restricted objects, and a limited number of parties.[112] This sort of case may well come under sub-paragraph (iv) of the paragraph now under discussion.

166. *Sub-paragraph (ii).* For comment and illustration of this type of treaty, see paragraphs 125 and 126 above. It is believed that the principle *rebus* cannot, or should not, ever be invoked with regard to this type of treaty. If a case should arise, it must be a matter for agreement with the other parties.

167. *Sub-paragraph (iii).* For comment on this type of treaty, see paragraphs 124 and 126 above. The case of essential changes of circumstances affecting all, or the great

[109] See the standard authorities *passim*. Even the most ardent advocates of the doctrine of *rebus* base themselves precisely on the presumed impossibility for a State to bind itself for ever. If therefore it had *not* bound itself for ever, there is no need for *rebus*.

[110] Even here, there may be doubt. See paragraph 132 above.

[111] If they both foresaw *and* provided for it in the treaty, then of course no question arises, but, for reasons already considered (para. 149 above), it is not a case of *rebus*.

[112] A typical case that might be cited is the well known one that resulted in the Declaration of London referred to in paragraph 156 above, namely the Russian request for a revision of the Black Sea clauses of the Treaty of Paris of 1856.

majority of, the parties need hardly be dealt with, since there would inevitably ensue an agreed revision or termination. If only one or some parties are involved, this may lead to their withdrawal, or to a suspension of their obligation, but it cannot affect the remaining parties or the treaty itself (unless of course it led to termination *aliter*, as for instance if the number of parties became reduced to below a prescribed number).[113]

168. On the other hand—*sub-paragraph (iv)*—in the case of the type of treaty involved in this sub-paragraph, the interdependence of the obligations might lead to termination by general withdrawals or suspensions, if one or more parties, on a basis *rebus* (or indeed on any other basis or ground), themselves withdraw or suspend.

169. *Paragraph 2. Limitations as to the character of the change necessary before the principle* rebus *can be invoked.* It is not every change, nor even every important change, that can constitute an "essential" change for purposes of the application of the *rebus* rule. For general comment see paragraphs 151 to 154 above.

170. *Sub-paragraph (i).* Many pleas of essential change are motivated by a change in the attitude of the party concerned towards the treaty. This, however, is the very case that the rule *pacta sunt servanda* is intended to apply to. The change must therefore be an objective one, taking place in the external circumstances. Of course, if that duly exists, the fact that there has also been a subjective change of attitude by one of the parties will not matter. This is the reason for the phrase "and not merely".

171. *Sub-paragraph (ii).* The situation of fact or state of affairs in which the change has taken place must have been in existence at the time when the treaty was entered into. This is of the essence of the whole doctrine. A change in a subsequent situation or state of affairs would be juridically quite irrelevant. But further, it must be a change in a situation or state of affairs that was itself fundamental to the contract, as a factor moving the parties to enter into it. A change in circumstances which, though they existed at the time of the treaty, were not of that nature would be irrelevant, and not a ground of *rebus*. For the formula employed in this sub-paragraph, the Rapporteur is indebted to Hill, and the Harvard Research volume whose respective formulae [114] (which considerably resemble each other) he has merged and adapted. He has not however made use of the words in Hill's formula "... and whose continuance ... formed a condition of the obligatory force of the treaty according to the intention of the parties". The reasons for this are given in paragraphs 146 to 149 above. According to the view taken by the Rapporteur, the principle *rebus* (*as such*) does not operate as a *condition of the contract,* to bring about termination. If the latter occurs, this will not (if the basis *rebus* is in question) be attributable to any original intention of the parties, but to an independent and objective principle of law that essential changes having certain specific effects should (unless the parties agree otherwise) be grounds for termination.[115] The intention of the parties remains relevant —as implied in the actual wording of sub-paragraph (ii)— in order to determine *what* facts or circumstances existing at the time of the conclusion of the treaty were fundamental as constituting a determining factor jointly moving them to contract. Such intention is not however material (according to the theory provisionally adopted in the present report) when it comes to considering whether or not the parties may invoke the *principle* of essential change, as a principle that, if the facts warrant it, may give grounds for termination (subject always to the reservation that, if the parties have indeed expressed or clearly implied a *term* in the treaty providing for termination in certain eventualities, it will operate accordingly—but, in that case, by reason of the treaty, not of the principle *rebus* as such). In short, the question of intention (actual or presumed) is not material for the purpose of determining the legitimacy of the principle itself, but only for the purpose of determining whether it can legitimately be invoked in the particular case. To put the matter from another point of view, what is necessary for the purposes of sub-paragraph (ii) is not so much to show that the parties intended the treaty to terminate if there was a change in certain then existing circumstances, but that *in the absence of those circumstances they would not (that is, neither of them would) have entered into the treaty at all, or that they would have drafted it differently.* It is only on that basis that the circumstances can be regarded as being such that a fundamental change in them should give a faculty of termination or suspension of the treaty obligation.

172. "... with reference to which *both* the parties contracted, and ... envisaged by both of them as a determining factor moving them jointly ..." (*sub-paragraph (ii)*). The governing terms are "both" and "jointly". Here the heart of the problem of *rebus sic stantibus* is reached. This is the question of the distinction between objects or purposes on the one hand, and motives or inducements on the other, discussed in paragraph 154 above. Neither of these terms figures in the Hill or in the Harvard drafts, though they are probably implied by both. It is the failure to deal clearly with this point that has tended to render so many attempts to deal with the topic of *rebus sic stantibus* unsatisfactory. Does it suffice to bring the principle *rebus* as *such* into play, that there has been a change (even an essential change) in circumstances that moved *one* of the parties only, and not both to enter into the treaty? If so, what are the juridical grounds, if any, on which it can be asserted that (the change having occurred) the interests of the party affected must *ipso facto* prevail, not only over those of the other or others, but over the treaty obligation itself? If it is once settled that the change must be in something that was a determining factor moving *both* parties jointly to enter the treaty, a decided step forward will have been taken in the direction of placing the doctrine of *rebus* on a firm foundation and removing it from the realm of the arbitrary and the unilateral.

173. In a matter of this kind, it is of great assistance

[113] See paragraph 96 above concerning this case.

[114] Hill, *op. cit.*, p. 83, and Harvard Law School, *op. cit.*, article 28, pp. 662-663 and 1096.

[115] If the parties had intentions about termination if certain changes occurred, and these intentions are clearly expressed in, or to be inferred from the treaty, then it is a case of termination by virtue of the treaty itself.

to look away from the *ignis fatuus* of the intentions of the parties and to consider the treaty itself. According to the most up-to-date theories of treaty interpretation,[116] and even if the extreme teleological position is avoided,[117] the treaty itself has to be regarded as possessing objects and purposes that may to some extent be, or have developed in a manner, independent of the original intentions of the parties. What these objects and purposes are, may be a matter of the interpretation of the treaty, on which the parties may differ, and if the text is not clear, recourse may be had to non-textual means of interpretation[118] but, by whatever means they are arrived at, the treaty does have such objects and purposes. The parties, on the other hand, may have had various, and widely different *motives* for entering into the treaty. They may have had a common objective, but different reasons for pursuing it. If, later on, something occurs radically to affect this objective as such, that will be one thing; but if it merely affects the interest or motives of one party, so that a situation arises in which that party wishes to end the treaty, but the other party wishes to preserve it, there may, purely *in the abstract*, be no reason why the views of either should prevail over the other's, if it is simply a question of the views or wishes of one party against the other's. *Juridically* however, what occurs at this point is that the rule *pacta sunt servanda* enters in, not in favour of either party as such, but in support of the *treaty*.[119]

174. For the rule *rebus* to operate *as such* therefore, it is necessary to have an essential change of circumstances which either vitiates the objects and purposes of the treaty itself, or relates to fundamental considerations that were basic to the treaty for *both* parties and moved them jointly to conclude the treaty. This is not to deny that there may be cases (though they would normally be rare) where the particular or special interests of a particular party in entering into a treaty are so obvious and paramount that their continuance could be said to be an actual condition of the treaty. But, if so, it would be by reason of such an implied condition in the treaty itself that any termination on that ground would take place, and not in the application of any independent principle of *rebus* in the proper sense. Much of the confusion that surrounds the subject has sprung from the failure to distinguish clearly between the case when a party claims termination by virtue of a definite (even if implied) condition of the treaty, and the case where termination is claimed on the basis of some general and independent principle of change as a ground of termination. The former is a matter of interpretation of the treaty; the latter of deciding whether the objective requirements of any such principle are met in the given case. The articles and paragraphs now under discussion are intended to state what those objective requirements are, and to do so in such a way as to rule out the subjective and individual attitudes of the parties, by relating the matter exclusively to a change of the kind described in the first sentence of the present paragraph, and more closely defined in paragraph 2 of article 22.

175. *Sub-paragraphs (iii) and (iv).* In view of what has just been said, these need no further elucidation.

176. *Sub-paragraph (v).* This has already been adequately discussed in paragraph 171 above.

177. *Paragraph 3. Limitations arising from particular circumstances operating to preclude a party from invoking the principle* rebus. *Sub-paragraph (i).* This has already been fully discussed in paragraph 159 above.

178. *Sub-paragraph (ii).* Reference may be made to the comment on the same point in connexion with fundamental breach, which, *mutatis mutandis*, is applicable here (see paragraph 133 above).

179. *Sub-paragraph (iii).* It may be argued that this principle, correct when it is a case of *culpa* on the part of a party complaining of a fundamental breach which it has caused or contributed to, should have no place here, where no direct *culpa* is necessarily involved. It is believed however that the limitation should none the less apply. The point links up to some extent with that of a party's personal attitude and motives. Where the party concerned has itself caused the change invoked, the chances that this change will not be of the character required by paragraph 2 of article 22 will be considerable. Even where this is not so, it would seem that a State taking (or contributing to) action bringing about a fundamental change in essential circumstances affecting a treaty to which it is a party must be presumed to be aware of the possible effects on the treaty. It therefore has a choice. It can elect to take the action, but cannot then plead it as a ground for claiming to terminate the treaty. By action inherently detrimental to the treaty, the party concerned incurs—if not direct *culpa*—at any rate responsibility. It may be that the *other party* can invoke the principle *rebus*, but not the party responsible. If A gives rights to B in territory belonging to A, in return for receiving rights in certain territory belonging to B, and A afterwards acquires this very territory by annexation from B, it admittedly no longer receives any *quid pro quo* under the treaty, since it will not need the rights in question—the territory concerned now belonging

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[116] See G .G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", *The British Year Book of International Law*, 1951, pp. 1-28, especially pp. 1-6; and the proceedings of the Bath, Siena and Granada sessions of the Institute of International Law in *Annuaire de l'Institut de droit international* for 1950, 1952 and 1956 (vols 43, 44 and 46) *passim*.

[117] See Fitzmaurice, *loc. cit.*, p. 4.

[118] At its 1956 session (Granada) the Institute of International Law adopted a resolution which in these circumstances looked principally to sources of non-textual interpretation, such as the subsequent practice of the parties in relation to the treaty, but without any direct reference at all to their presumed intentions at the time of its conclusions. See *Annuaire de l'Institut de droit international* (1956), vol. 46, pp. 364 and 365.

[119] Suppose, to take an example, that a number of countries enter into an arrangement by treaty to pool their information on a certain subject. They may have a number of different motives, and the interest of some may be much greater than that of others. But the *object* of the *treaty* is that each should have any information possessed by or becoming available to any of the others. A discovery by one party that, owing to a change of circumstances affecting it, it was no longer interested in receiving the information would not justify it, on a basis *rebus*, in refusing it to the others.

to it.[120] But this, it is conceived, could not, in the circumstances, be made a ground for invoking the principle of *rebus sic stantibus* to refuse B the agreed rights in the territory of A.

Article 23. Termination or suspension by operation of law. Case of essential change of circumstances or principle of rebus sic stantibus *(modalities of the claim)*

180. The reasons for the procedure (and, resulting from that, the limitations) proposed in this article have already been explained in paragraphs 155 to 157 above. Reference may also be made to the comments on the somewhat similar article proposed in respect of fundamental breach (article 20). In the present case it will be noticed that, as in the case of fundamental breach, the claiming party is not obliged, initially, to offer reference to a tribunal. But unless it eventually does so if necessary, it cannot either permanently suspend the obligation (if the offer is not accepted) or proceed to termination (if the offer is accepted, and the tribunal finds in a manner justifying that step). If it does not make this offer of adjudication, the party invoking the change must continue performance of the treaty in full, pending any eventual termination or revision by agreement with the other party.

Sub-section iii. The process of termination

Article 24. General provisions

181. *Paragraph 1.* Reference may be made to paragraphs 38 to 43 of the present commentary for an explanation of the important distinction between grounds and methods (or processes) of termination, which is essential to a proper understanding of the subject. It will be realized that in this section of the work (the process of termination) it is questions of mechanics rather than of substance that are under discussion.

182. *Paragraph 2.* A purely logical order of arrangement would have required that all the articles on methods as opposed to grounds should be placed together in a separate self-contained section. On that basis, the articles would have figured in the present section. As regards articles 10 to 14 however, the difficulty is that termination by special agreement, or by a replacing treaty, is both method and ground, and is more conveniently dealt with under the section on grounds; while, as regards articles 30 and 31, it is more appropriate to deal with the case of termination eventually brought about by the acceptance of an invalid or irregular termination, or repudiation as part of the topic of " Effects ".

183. "... in order to record or establish the precise moment of expiry and to deal with any consequential matters " *(paragraph 2).* For instance, literal impossibility of performance is a ground *ipso facto* of termination. The event, not either of the parties, terminates the treaty. But it may not be certain or clear, or may be a matter of dispute, at exactly what moment the impossibility supervened and the treaty could no longer be carried out. Something may turn on when that moment was, and it may be that a Code on the law of treaties should contain more detailed and specific provisions on the matter. For the present the Rapporteur contents himself with the phrase quoted above.

184. *Paragraph 3.* See comments in paragraphs 181 and 182 above. The pronouncement of a tribunal is never the ground of termination, because what a tribunal is called upon to do is to determine whether legal grounds already exist according to which a treaty must be regarded as terminated, or as having come to an end at a certain time, or on the happening of a certain event, or on the basis of which one of the parties possesses a right of denunciation, or has properly exercised such a right. Such a pronouncement may however be a *method* of actual termination in those cases where the tribunal declares the treaty to be at an end on some (pre-existent) legal ground, but with effect from the date of the pronouncement.

Article 25. The exercise of the treaty-terminating power

185. This article and the succeeding one are applicable to *all* notices of termination or withdrawal, whether given by virtue of the treaty itself (as will usually be the case), or of a special agreement about termination, or in the exercise of a faculty given by law. It must therefore logically figure in the present section, as a method or process, not a ground of termination, although, purely as a matter of convenience, it might have been grouped with articles 9 *et seq.*

186. *Paragraph 1.* See generally the commentary to article 9 (The exercise of the treaty-making power) in the introduction to the Code (A/CN.4/101), which is equally applicable here. Treaty-termination carried out by any party on the inter-governmental plane is procedurally the obverse of treaty-conclusion.

187. *Paragraph 2.* The considerations here involved are of the same order as in the case of the deposit of other instruments in connexion with a treaty (such as ratifications or accession), and it will be sufficient to refer to the relevant parts of the 1956 report, for instance, paragraph 2 of article 31 and the commentary thereto (A/CN.4/101).

Article 26. The process of termination or withdrawal by notice (modalities)

188. *Paragraph 1.* The remarks made in paragraph 185 above are equally applicable to the present article.

189. *Paragraph 2* lays down the basic requirement of strict conformity with any conditions specified in the treaty itself, or in any separate agreement of the parties. Defects can of course be cured if the other party or parties all accept the notice as good, but, failing that, a notice given irregularly is void and inoperative. Where the notice is not given under the treaty or a separate agreement, but in

[120] Something of this kind, although the facts are not quite parallel, occurred in the case of what was known as the " French shore ". By the Treaty of Utrecht, 1713, Great Britain granted France certain fishing rights in Newfoundland (ceded under that Treaty to Great Britain), France being then also in possession of settlements in Canada. Later, in consequence of the Seven Years War, French Canada also was ceded to Great Britain; but French fishermen continued to enjoy rights in Newfoundland for nearly two hundred years after the original grant, until they were determined by agreement under the Anglo-French Convention of 1904.

the exercise of a faculty conferred by operation of law, there will of course be no specified period of notice. But a reasonable period must be given. What this will be will depend on the factors mentioned in the article. In all other respects, the requirements of the article will be applicable to the case of such notices.

190. *Paragraph 3.* It not infrequently happens that the first intimation of the denunciation of a treaty received by the other party or parties is an announcement in the press of the country effecting, or purporting to effect, termination or withdrawal. This is not only discourteous, but also inoperative as an actual notice, even in those cases where the treaty permits of withdrawal by notice. Equally, where there are several parties and no "headquarters" government, organ or authority is provided, any notice must be given to *all* the other parties separately. Notice given to one does not count as notice to another, and is not in itself sufficient.

191. *Paragraph 4.* The date of the notice will normally be inserted by the diplomatic representative or other competent authority of the notifying country, and will be that of the day on which the notice is actually deposited by such representative or authority, either at the ministry of foreign affairs of the other country or of the "headquarters" government, or at the seat of an international organization where appropriate, or at the diplomatic mission of that country or government, or the local office of the organization in the capital of the notifying country. Where notice has to be given to several parties, the notifying government must insert a uniform date in the notices, and must so far as possible synchronize the moment of their communication to the various recipients.

192. *Paragraph 5.* This is self-explanatory, except as regards the latter part. This relates to the case of the exercise of a faculty of giving notice of termination arising by operation of law. Although the treaty might provide such a faculty, it might do so, for example, only in the form that the treaty remain in force for successive periods of five years, subject to a right to denounce it by a notice to take effect at the end of any five-yearly period. In the meantime, however, it is possible that circumstances may arise in which a party might, by virtue of one of the rules set out in articles 16 and 17 above, acquire a right of termination or suspension by operation of law, exercisable immediately or by giving "reasonable" notice, and in any case earlier than the end of the current quinquennial period. Or there may be no provision at all in the treaty, but such a right may arise by operation of law. In all such cases, if the notice states no date or period, or states an inadequate period, it will not be void but will not take effect until the expiry of a period that is reasonable, having regard to all the circumstances.

193. *Paragraph 6.* This is self-explanatory, though see the remarks made in paragraph 190 above, in connexion with paragraph 3 of this article.

194. *Paragraph 7.* This provision is the necessary counterpart, so to speak, of those in part I of the first chapter (A/CN.4/101). These do not permit of ratification, accession etc., to *part* of a treaty only, unless the treaty itself so permits.[121] The object of that rule is to avoid a position in which intending parties can exclude portions of the treaty they do not wish to carry out, while obtaining the benefit of participation in the rest. This object would however be defeated if a State, having become a party to the treaty as a whole, could then proceed to terminate or withdraw from performance of part of it, while continuing to be a party in respect of the remainder. Such a process would, in fact, amount to effecting a disguised unilateral reservation, and would be particularly objectionable, since the process would permit of reservations not merely made once and for all on signature, ratification etc.,[122] but made at any time during the currency of the treaty, the operation of which would accordingly always be uncertain and precarious.

195. *Paragraph 8.* This is required partly as a corollary to paragraph 7, and partly to avoid situations likely to create doubt and uncertainty.

196. *Paragraph 9.* Whereas ratifications, accessions etc., once made, cannot be withdrawn,[123] there seems to be no reason why a notice of termination should not be withdrawn, provided it has not yet taken effect. Ratifications and accessions or acceptances are acts that take effect immediately. The State concerned is thereupon bound, either immediately by the treaty, or so soon as the latter comes into force, and is in any case immediately operative in order to bring or assist in bringing the treaty into force.[124] In a sense, therefore, any withdrawal of the ratification or accession would be tantamount to a termination of or withdrawal from the treaty, and could only be effected on such grounds and in such circumstances as are recognized by the provisions of the present part of the Code.[125] But a notice of termination or withdrawal, the period of which is still unexpired, has not yet taken effect and has not the same finality. From the point of view of the other parties and of the treaty itself there can, in principle, only be advantage in permitting its cancellation or revocation if the party concerned changes its mind. It would seem, however, that a right of objection must be reserved to the other party or parties if, in the meantime, they have been led by the original notice to enter similar notices, or otherwise to change their position.

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[121] See, for instance, article 31, paragraph 4; article 34, paragraph 8; and article 36, paragraph 1 (A/CN.4/101).

[122] These remarks are not intended to imply that there is an unlimited freedom of reservation, provided only that it is effected initially. On this subject, see generally articles 37-40 on reservations, and the commentary thereon, in document A/CN.4/101.

[123] See article 31, paragraph 5; article 34, paragraph 8; and article 36, paragraph 1; and the commentary thereon (A/CN.4/101).

[124] This is always true of accessions and acceptances, and also of ratifications of a bilateral treaty. In the case of multilateral treaties there may be an interval between the deposit of the ratification of any particular party and the actual entry into force of the treaty, if the latter is not already in force and requires a stated number of ratifications to bring it into force. Nevertheless, the ratification is final as respects the party effecting it, will count towards making up the required number of ratifications, and in other ways has an immediate operative effect. See article 33, paragraph 1, and the commentary thereon (A/CN.4/101).

[125] See the commentary to article 31, paragraph 5, in part I (A/CN.4/101).

Article 27. Date on which termination or withdrawal takes effect

197. *Paragraph 1.* This is self-explanatory. "... or as it may be agreed by the parties"—see paragraph 183 above.

198. *Paragraph 2.* See equally paragraph 183 above.

199. *Paragraphs 3 and 4* are self-explanatory.

200. *Paragraph 5.* "... (being a date not earlier than the date of notice itself) ...". Notices of termination cannot be antedated or "relate back". The parties can of course agree on some special date, and where *repudiation* is *accepted* by a party, thus terminating the treaty, or the repudiating party's participation in it, there is an option to relate the termination or withdrawal back (see paragraph 201 below)—but these are different matters. Where "reasonable" notice is required, it may in fact be quite short, almost immediate if the circumstances justify this; but not otherwise.

201. *Paragraph 6.* "... unless, in the case of repudiation, the accepting party elects to relate the termination back to the date of the repudiation". In general, termination must date from the moment at which it legally occurs: previous to that there is no termination. Thus, in the ordinary way, where a purported termination is invalid or irregular, it can only be validated (in the sense of producing legal termination, not of validating the act) by an acceptance of termination by the other part, so that termination takes place and dates from then. However, *repudiation* (which is defined in article 30, paragraph 2) seems to involve somewhat different considerations. In the other cases, the party claiming to terminate at least professes valid grounds for doing so, or has merely committed some procedural irregularity. In the case of repudiation, there is an open and deliberate rejection of the obligation. In these circumstances, it seems right that the other party, if it is prepared to accept the repudiation as a basis of termination, should have a faculty of election as to the date on which termination will be deemed to have taken place. In most cases such party will probably have no interest in "relating back", but in some cases it may. It is of course well understood that any acceptances of the kind here referred to cannot affect the *consequences* of any repudiation or other illegal act of purported termination, as regards the right of the aggrieved party to damages or other appropriate reparation.

202. *Paragraph 7.* This paragraph is included largely for the avoidance of doubts. However fundamental a breach may be, it has no automatic terminative effect. The treaty goes on. The other party has a right (subject to the provisions of articles 18 to 20) to declare termination. It may or may not exercise this faculty. If it does, termination only takes place and dates from then.

SECTION 3. EFFECTS OF TERMINATION AND OF PURPORTED TERMINATION

Article 28. Valid termination (general legal effects)

203. *Paragraphs 1 to 3.* The term "valid" termination is strictly inapt, since an "invalid" termination is not a termination at all, and therefore termination, if it is such, is necessarily valid. But the term is none the less convenient in order to mark a difference, the full significance of which appears in connexion with articles 30 and 31.

204. The principle embodied in these paragraphs, based on the accepted and inherent distinction between "executory" and "executed" clauses, is common form in private law. It is no less so in international law. Yet the point surprisingly often gives rise to misunderstanding. In particular, the idea that the termination of a treaty may somehow revive an antecedent state of affairs is quite often entertained, although, as the Harvard Research volume points out, it is really inherent in the very fact of termination that this cannot be so:

> "In other words, after a treaty has been terminated, *and because of that fact,* [italics added] there can be no undoing of what was already done in carrying out the provisions of the treaty while it was in force, and no disturbing of rights vested as a result of such performance." [126]

Familiar examples would be transfers of territory effected under a treaty, boundary agreements or delimitations, and territorial settlements of all kinds; payments of any kind effected under a treaty; renunciations of sovereignty or of any other rights (these would not revive); recognitions of any kind (no position of non-recognition or contestation would revive). As stated in paragraph 1, a continuing disability will cease, but not a permanent disability created by the treaty. Thus an obligation to refrain from doing certain things will not persist when the treaty terminates;[127] but a renunciation of certain claims or pretensions will, and so also will an acceptance of any legal situation or state of fact.

205. Any notions to the contrary spring from a confusion of ideas as to what termination really involves. The treaty may be terminated, but not the legal force of the situation it has created. Executed clauses of the type described above are spent only in the sense of being fully performed; but, by this very fact, the rights, status or situations resulting therefrom are complete, in the sense of being acquired, established or stabilized. Their juridical validity and force is not affected by the termination of the treaty in which they are contained, or from which they resulted. They persist, although the treaty which gave them life may not. As stated in paragraph 2, any reversal or alteration of the situation created by the treaty under its executed clauses could only be brought about by a distinct and separate act or agreement of the parties, on or after termination. Thus, territory ceded under the treaty could be retroceded, rights renounced could be reconferred, etc.[128] But none of this could result from the termination itself, as such.

206. *Paragraph 4.* For the sake of "tidyness", or for the removal of doubts, States sometimes prefer to "ter-

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[126] Harvard Law School, *op. cit.*, p. 1172.

[127] For instance, in the case of an obligation not to levy certain dues and charges, the party concerned may resume doing so when the treaty terminates, but could not purport to collect dues etc. retroactively for the period of the treaty.

[128] However, "de-recognition" would not, in general, appear to be possible at all, by any method.

minate " a fully executed treaty, performance of which is complete and under which nothing remains to be done. As has been seen in connexion with article 17, cases (x) and (xi) (see paragraphs 109 and 110 above), even where the whole of a treaty is executed and carried out, it does not strictly determine as an instrument—it remains, so to speak, on the statute book. If, for reasons of convenience, the parties agree to " terminate " it, this is really no more than a record (*constatation*) of the fact that its obligations have indeed been fully performed, and that nothing remains to be done under it.

207. *Paragraph 5.* The cause of termination is of course immaterial. It is the fact that counts. " Cause " naturally means juridical cause. A treaty illegally " terminated " is not terminated. The provisions of this article, therefore, apply no less in cases of termination by operation of law than in cases of termination provided for by the treaty itself, or by other special agreement of the parties. Hence, it follows that such grounds as changed circumstances, breach by the other party, etc., even where valid, can only affect executory treaties or clauses, and cannot affect executed treaties or clauses, or reopen past situations or facts.

208. *Paragraph 6.* This is self-explanatory.

Article 29. Effects of valid termination (special considerations affecting multilateral treaties)

209. *Paragraph 1.* When a multilateral treaty does wholly terminate, the results are, in general, the same as in the case of a bilateral treaty. But whereas termination by one of the parties to a bilateral treaty necessarily terminates the treaty itself, this is not usually the case with multilateral treaties. The treaty itself is not affected, unless it is of the type in which the participation of each of the parties is a *sine qua non* of the obligation, and hence of the continued participation of all the others. Except in that type of case, the withdrawal from, or termination of, the treaty in respect of one particular party will do no more than allow the other parties to cease performance of their obligations in respect of that party—and may not in certain cases have even that effect. For more detailed comment it will be sufficient to refer to paragraphs 124 to 126 above.

210. *Paragraph 2.* This is self-explanatory, but see the comment to article 17, case (ii), in paragraph 96 above.

Article 29 A. Effects of termination on the rights of third States

211. This is held over for the time being. It may more properly belong to the general topic of the effect of treaties upon third States, which will be dealt with elsewhere in the Code. Provisionally, and without prejudice to the question whether, and if so when and to what extent, third States may have rights under any treaty, the Rapporteur suggests that where such rights do exist, or have arisen out of the situation created by the treaty, or where third States are in fact benefiting, this can nevertheless not prevent the actual parties to the treaty from exercising any rights of termination *inter se* that they may possess under the treaty or otherwise; but that it will not necessarily follow from their doing so that the position or rights of third States will thereby *ipso facto* be affected. However, this is a matter requiring separate treatment.

Article 30. Purported or invalid termination (character and methods)

212. *General remarks on articles 30 and 31.* The subject of " invalid " termination is not free from the possibility of confusion. The term is one of convenience, and characterizes an act or process rather than the result. The invalidity lies in the act or pretension, and therefore no termination in the juridical sense ensues. Hence the adjective " purported " is preferable.

213. It is necessary to insist that an invalid act cannot *of itself* bring a treaty to an end, juridically, because so often all the appearance of termination is, in practice, produced, and there is actually termination in fact, in the sense that no further performance takes place. But this does not terminate the treaty in law. If it did, then for all practical purposes treaties would be terminable at will, subject only to paying damages or making other suitable reparation for the prejudice caused. No doubt in actual fact this is what may sometimes occur. But it cannot be the legal position, or a treaty would, juridically, be reduced to the level of that type of quasi-obligation, found in private law, according to which the person concerned is not actually obliged to do a certain thing (in the sense that he commits an illegality if he does not), but suffers a penalty or forfeiture if (or to the extent to which) he elects to withhold performance. (See also articles 3 and 5 and the commentary thereto.)

214. It follows that a purported, invalid or irregular " termination ", in one of the ways described in this article, can, in itself, have no effect on the legal existence of the treaty, or on the legal force of the obligation. It may of course be accepted by the other party, who may elect to regard the treaty as at an end (subject to any claim of reparation); but if so, it is by this acceptance, and from the date of it, that the treaty terminates. There are in fact only three ways in which an illegal termination can be validated and —subject to any claim of reparation—become actual termination, namely, unilateral acceptance by the other party or parties, subsequent agreement of both or all parties, and the pronouncement of a competent tribunal that the act of termination was in fact valid. Only in the latter case will the act itself rank as the source of termination, or termination date from it—and this will be precisely because it has been found to be valid.

215. The Rapporteur considered whether, as a matter of convenience, it might not be desirable to have a separate section entitled " invalid or irregular termination " in which the two articles now under discussion and also an earlier article (article 5) and much of what appears in article 3 could be grouped. To do so, however, would tend to lend support to the fallacy that such things as repudiations or unilateral denunciations, without basis of right, and although illegal, and although giving rise to claims for damages or other reparation, nevertheless do, in fact, terminate the treaty as a legal instrument. But this is not the case. There-

fore, the present arrangement was adopted whereby, on the one hand, the section on " general principles " contains articles stating the general principles of termination as a *legal* act, and excluding *au préalable* certain grounds of purported termination as being at variance with accepted principles of international law; and, on the other hand, irregular and invalid " termination " are relegated to the section on " effects " of termination, for there is no doubt that these acts, although they have in themselves no effect on the legal existence of the treaty, do have consequences, some of which may be of a juridical order.

216. There was the further, if somewhat technical difficulty, that *repudiation* (see article 30, paragraph 2) is not really even an act that purports to *terminate* the treaty. It is a rejection of it. The attitude of the *terminator*, whether justified or not, is to claim to have grounds on which there is a right to terminate the treaty. But the *repudiator* says in effect that the treaty has no existence for him, and he refuses to be bound by it any longer. The terminator recognizes the obligation, though purporting to be entitled to put an end to it. The repudiator rejects it altogether.

217. *Article 30. Paragraph 1.* See the foregoing. "... (usually by unilateral denunciation) ..." (*sub-paragraph (i)*). Strictly, a declaration of termination which is not officially communicated to the other party has no effect even as a purported termination (still less as an actual one—see article 26, paragraph 3, and paragraph 190 above). If relations are bad, governments sometimes decline to communicate with each other even through a third party, and simply make a public announcement. This partakes more of the nature of repudiation than of purported termination.

218. *Sub-paragraph (ii).* The usual case would be a failure to give a notice when the treaty requires one, or a notice purporting to take effect immediately when the treaty prescribes a *period* of notice, or a notice given at the wrong time, for example, if the treaty provides for tacit reconduction, terminable by notice only at the end of specified successive periods. In all these cases there is *in principle* a right of unilateral denunciation provided by the treaty, but it is irregularly exercised.

219. *Paragraph 2.* See the remarks in paragraph 216 above. "... may be effected expressly or take place by conduct ... ". The words immediately following this passage are intended to make it clear that repudiation is not lightly or easily to be inferred. It is too grave a step to be imputed to a government except on the clearest evidence. Moreover, the dangers attendant upon a faculty to declare that the other party to the treaty has by its conduct repudiated its obligations, are not unlike those noticed in paragraphs 113 and 114 above, in the case of alleged fundamental breach. It would in some cases not be difficult for a government seeking a pretext to put an end to an unwanted treaty, to allege that the other party had by its conduct repudiated the treaty, and that the first party was prepared to accept this act and regard the treaty as being at an end. Nevertheless, although for these reasons a repudiation should normally be evidenced by an express declaration, there undoubtedly are cases where it takes place by conduct—a crude and obvious case would be if a country having a treaty of alliance with another were to invade the latter. The inference of repudiation would not only be irresistible, but the act would actually constitute a repudiation *per se.*

220. " It is of the essence of repudiation that, although it may be effected by means of a unilateral denunciation or notice, the party concerned does not claim the existence of any valid juridical ground on which the treaty ... is at an end, or on which a right to terminate or withdraw from it has arisen " (*paragraph 2*). This and the concluding sentence of the paragraph lead to the consideration that it may not always be easy to say whether a denunciation by notice is in the nature of repudiation or not. If no right of termination by giving notice is provided for in the treaty, and the latter is also not of a type in respect of which the existence of such a right can be inferred, and if the notice is silent as to the ground on which it purports to be based, or gives reasons which are clearly of a purely political, ideological, economic, or otherwise of an extra-legal character, the inference is one of repudiation. A denunciation which is only thinly veiled by a pretension of legal right may give rise to the same inference. But, if any serious legal grounds are put forward, the case must be regarded as one of purported termination, even if the grounds given appear *prima facie* to be bad or insufficient.

221. The distinction between repudiation and invalid termination is undoubtedly important, but its importance lies mainly in the political and psychological field. Legally the consequences, or lack of consequences, of repudiation and invalid termination are the same, except (*a*) as regards the question of possible date of termination if this ensues by virtue of an acceptance by the other party—see above in connexion with article 27, paragraph 6; (*b*) in so far as a competent tribunal may eventually pronounce an apparently invalid termination to have been lawful, whereas a repudiation *as such* can never be lawful; (*c*) because the grave character of a repudiation may affect the question of reparation and the *quantum* of damages.[129]

222. *Paragraph 3.* No further comment is required.

Article 31. Effect of purported termination by invalid or irregular act or by repudiation

223. *Paragraph 1.* No further explanation seems required, except as regards sub-paragraph (iii). Some difficult questions may arise when the other party refuses to accept the repudiation or " termination ", and elects to regard the treaty as remaining in full force. Such party must then *in principle* be prepared to continue performance of its own obligations. But in these circumstances the non-performance of its obligations by the repudiating or " terminating " party will simply constitute a breach of the treaty which will, *inter alia,* give a right of corresponding non-performance to the other party. The latter cannot, of course, be deprived of this right merely because it has refused to accept termination, and regards the treaty as continuing in force. This may lead therefore to a total

[129] This is probably the case, despite the limited extent to which international law recognizes the principle of moral or exemplary damages. Even within the scope of ordinary damages, a tribunal can take a restrictive view, or the reverse.

cessation of performance *de facto* on both sides, though without affecting *per se* the existence or validity of the treaty.

224. There are however cases of a different kind. There is, for instance, a fairly common class of treaties where the essence of the obligation on the one side is not the performance of any specific acts, but the allowing or licensing (perhaps in return for a payment) of certain acts by the other party, which that other party would not otherwise be free to carry out. Examples might be if one country were, by treaty, to allow another to maintain and operate a meteorological station in its territory, or to afford it certain special traffic or transit rights. If the party affording the rights denounces the treaty, it may nevertheless content itself for the time being simply with doing so, and with maintaining that, thenceforth, the exercise of the rights in question is illegal and a violation of its sovereignty. Since, under the treaty, only passive not active conduct is required of such a party, no question of any specific non-performance arises. Can the aggrieved party then maintain that, in such circumstances, the denunciation must itself be regarded as a breach and specific non-performance, entitling it—while continuing to exercise its rights, for example, to maintain the meteorological station—to refuse performance of any accompanying obligations, for example, the payment of rent?[130] Or must the aggrieved party under these conditions, if it continues to exercise its rights, also continue to perform the related obligations? On ordinary private law principles, the latter would appear to be the correct view; and this is also what would result from this provision of article 31 as drafted, if it were applied to a case of this kind. However, given the international law principle of retaliatory rights—a principle which, generally speaking, does not obtain in private law—it may well be that, although no case for non-performance would exist on a basis of *counter* non-performance (there being no original non-performance to counter), such a right might exist on a general retaliatory basis.

225. *Paragraphs 2 and 3.* This point may be of importance. Where a party is said to have accepted, for example, a repudiation in such a way that, apart from consequential questions of damages etc., the treaty is at an end as an instrument, and as a source of legal obligation, it is necessary that this should be established beyond doubt. Normally, this can only be done if the party makes an express acceptance. It can only be *inferred* from conduct that permits of no other interpretation. Generally speaking, silence is not enough, or at any rate would not produce any effect until after the lapse of a considerable period of time. Where, however, only irregularity of method, rather than a repudiation or illegal termination is in question—particularly in the case of a defective notice—acceptance *sub silentio*, i.e. failure to reject the notice, or to query its regularity, would normally operate as an acceptance of termination.

226. *Paragraph 4.* This has already been sufficiently commented on in paragraph 214 above.

C. Revision and modification

227. This is held over for the time being. The essentials of the matter as they affect the specific question of termination are covered by article 13 and the commentary thereon in paragraphs 74 to 79 above. It may be that the rest would be better placed in a general section on "Conflicting treaties".

[130] A nice point arises if the local government accepts the rent. Can it thereby be held to have admitted the invalidity of the denunciation and to have re-instated the treaty, so to speak? Or can it maintain that it now allows the station to be operated on a basis of sufferance only, and not by right, and accepts rent on that footing alone?

CONSULAR INTERCOURSE AND IMMUNITIES

[Agenda item 4]

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Report by Jaroslav Zourek, Special Rapporteur

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PART I

CHAPTER I

Historical development [1]

I. INTRODUCTION

1. Consulates are a much more ancient institution than permanent diplomatic missions, and one born of international trade requirements and having its economic basis in trade relations.

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2. Even in the ancient days of slavery, trade relations between different peoples gave rise to institutions which may be considered as the forerunners of modern consulates. The merchants of those days went after trade in foreign countries which often were very far away and had very different laws and customs; hence their desire to have their disputes settled by judges of their own choice administering their own national laws. Foreigners living in ancient Greece chose protectors known as *prostates*, who acted as their intermediaries in legal and political relations with their State of residence. Six centuries before our era, according to Herodotus, the Egyptians allowed Greek settlers at Naucratis to select a magistrate, also called a *prostates*, who administered Greek law to them. During the same period, there were special judges for foreigners among some of the peoples of India.

3. The need of the Greek city states to protect their trade and their citizens in other cities gave rise to *proxeny*, which is very similar to the modern system of honorary consuls. *Proxeni* were chosen from citizens of the city whose protection was sought, their main duty being to protect citizens of the city they represented, act for them in assemblies, witness their wills, arrange the sussession of foreigners who died without heirs, and see to the sale of cargoes. They introduced foreign ambassadors to assemblies and temples and prepared treaties between their own country and the city they represented.[2] Some of them are known to have been sent later by their country as ambassadors to the country they had represented (Callias, *proxenos* of Sparta at Athens) was sent by Athens to Sparta as an ambassador).

4. The Roman institution of the patronate bears some resemblance to the Greek system of *proxeny*. But the main measure to meet the need to administer justice to foreign merchants in accordance with legal principles less formalistic than those of Roman civil law, hence better suited than the ancient Roman law to trade requirements, was the creation in 242 B. C. of the office of the *praetor peregrinus*, a magistrate who judged disputes between foreigners (*peregrini*) or between foreigners and Roman citizens. That is to say, foreigners' cases were tried under the rules of *jus gentium*, including both those arising out of international trade relations and those borrowed from laws of foreign countries.

2. Origin of consulates

5. After the fall of the Western Roman Empire in A.D. 476, the economy of western Europe was agricultural for several centuries, whereas Byzantium, backed by Asia Minor, remained the centre of a vast international trading system. It traded intensively with the East, Italy and the Frankish Kingdoms, and also with the Slav world; for the Kingdom of Great Moravia and Bulgaria (ninth century), and the Kiev State of the Ruriks (ninth and tenth centuries), maintained very close economic and political relations with Byzantium.

6. Many foreigners, attracted by the international trade, took up residence in Constantinople and other towns of the Byzantine Empire. Merchants from the same town or the same country would live in the same district, setting up independent communities (brotherhoods, colonies), and building their warehouses, administrative offices and churches, while remaining subject to their own national laws. Flourishing colonies were established at Constantinople by several Italian towns, Venice and Amalfi to begin with, and later Genoa and Pisa. The Bulgarians also kept warehouses there from the ninth century on, and Russian merchants took over a special district there in the tenth century. On the basis of the principle of the personality of laws, which was widely recognized in the feudal times, these communities soon acquired a degree of autonomy, and in particular the right to have special magistrates, who began to be called "consuls" in the twelfth century.

7. For instance, in 1060 Venice acquired the right to send magistrates to Constantinople to try their compatriots in civil and criminal cases, while in the following century the Emperor Alexius III's Golden Bull of 1199 granted the Venetians the privilege of having even disputes between them and citizens of the Byzantine Empire judged by their own magistrates. In 1204, the Republic of Genoa obtained permission to occupy, and appoint Genoese magistrates to administer, a district in Constantinople, from which its merchants were to trade as far afield as the south shores of the Black Sea. In 1243, the merchants of the town of Montpellier had a consul and their own street in Constantinople, and in 1340 the town of Narbonne obtained permission for its merchants to settle there also.

8. After the Arab conquest of much of the Roman Empire in the seventh century, the Moslem States granted merchants from cities of western Europe a system of protection, on which the capitulations were later based. Pisa appears to have been the first town to enjoy this privilege in Morocco in 1133; Montpellier and Narbonne achieved it at Alexandria, in 1267 and 1377, respectively.

9. The same kind of international trading requirements as had given rise to the institution of independent communities with their own magistrates in the Byzantine Empire and the Muslim States led to the establishment of warehouses or trading posts in the various Christian principalities during the Crusades. The town of Amalfi set up trading posts at Acre (1110) and Tyre (1123), in the Kingdom of Jerusalem (1157), at Antioch and Tripoli (1170), and Pisa at Tyre (1187). These independent trading posts greatly increased in number as a result of the Crusades. Marseilles obtained permission to have consuls at Tyre and Beirut (1223), Montpellier at Antioch and Tripoli

[2] Stuart, *loc. cit*, p. 484.

(1243), in Cyprus (1254) and Rhodes (1356), and the town of Narbonne in Rhodes (1351).

10. The institution of special judges survived after the fall of the Western Roman Empire even in western Europe, where the militarily organized tribes of barbarian invaders founded, on the ruins of the Roman Empire, feudal States characterized by the sovereignty of the feudal domains, the decay of the towns and a return to an agricultural economy, economic and administrative particularism, and the personality of laws. Where trade managed to survive, the institution of special judges survived likewise. For instance, in the fifth and sixth centuries the Visigoths had special magistrates called *telonarii* for settling disputes between foreign merchants in accordance with their own laws. But the great invasions of the Huns (fifth century), the Avars (sixth century) and the Lombards (sixth century) almost completely destroyed foreign trade in western and southern Europe.

11. Trade in that part of Europe was not revived until much later, as a result of the division between crafts and agriculture, the manufacture of products for sale, the resurgence of the old Roman towns which had been depopulated during the invasions, and the foundation of new towns in the feudal societies of central and eastern Europe. International trade grew up, at first with the Italian, Slav and Frankish cities, then with the Moslem States, and, later, with the Atlantic, North Sea and Baltic ports.

12. A similar process went on in the western part of the Mediterranean basin. In most of the trading and industrial towns, special magistrates called "consul judges" or "merchant consuls" were appointed to settle disputes between foreigners and local merchants.

13. Soon, the need to protect their interests abroad induced the mercantile towns to send similar magistrates, known as "overseas consuls" or "foreign consuls" to foreign towns and ports, for the main purpose—in the generally unsettled conditions of the period—of providing their own traders with *security* and a *judicature* for the protection of the interests of merchants and ships' masters and the settlement of their disputes in accordance with their own laws.

14. Consulates therefore had their origin in the institution of the special magistrates whose function it was to settle disputes between merchants. The history of the very earliest centuries of our era shows that these judges appeared wherever international trade arose. They apparently existed in China (eighth century), India and the Arab countries (ninth century); but consulates first appeared in Europe to deal with relations between Europe and Byzantium. As early as 945, under a treaty concluded between the Russian principality of Kiev and the Byzantine Empire, Russian merchants were protected by a Russian official whose task it was to settle disputes between them. The part played at that time by the Byzantine Empire in international trade explains the great expansion in the system of consulates.

3. Development of consulates

1st period: The consul mainly as judge

15. Spurred on by international trade, the consular institution developed rapidly in the thirteenth and fourteenth centuries, not only in the Mediterranean basin but also on the Atlantic, North Sea and Baltic coasts. The Italian republics, for example, exchanged consuls with one another and set up consulates in Spain. In 1251, the city of Genoa obtained permission from King Ferdinand III of Castille to have consuls at Seville empowered to settle disputes, not only between Genoese, but between Genoese and local citizens. In the thirteenth century, Venice had consuls in more than thirty cities. In 1347, King Peter IV of Aragon granted the city of Barcelona the right to set up a consular court.

16. By the thirteenth and fourteenth centuries, the important part played by the Italian republics and the cities of Marseilles, Valencia and Barcelona in international trade obliged them to send consuls to cities and ports on the Atlantic, North Sea and Baltic coasts. In 1402, consuls of the Italian republics were sent to London and the Netherlands. In 1485, the England of Richard III sent its first consul to Italy and, before the end of the fifteenth century, there were English consuls in the Netherlands, Sweden, Norway and Denmark.

17. During the same period, the Hanseatic and Flemish towns set up trading posts, under officials called aldermen, conservators, praetors or consuls, on the Atlantic and Mediterranean coasts.

18. The laws, customs and usages administered by the consuls of the time have been handed down to us in the form of collections or compilations of maritime law. The first of the codes on the duties of consuls, known as the *Amalfi Tables* (*Tabula Amalfitana*), probably dates from the eleventh century. Its main object was to protect the interests of the shipowners of the time. Another collection of texts, of French origin and dating from the feudal era, is the document entitled *Jugemens d'Oléron*, also known as the *Rôles* (or *Charte*) *d'Oléron*. This is a private collection of judgements rendered by the Court of Justice on the Ile d'Oléron, also dealing with relations between ships' masters and crews. These judgements probably date from the end of the eleventh and beginning of the twelfth century. They were in force over a long period in the countries of western Europe.

19. The best-known compilation of maritime customs is unquestionably the *Consolato del Mare* (Consulate of the Sea), which, it is generally agreed, was drawn up at Barcelona in the fourteenth century. It is a complete codification of the contemporary maritime law under which disputes between sailors and merchants were settled by two magistrates called consuls.

20. The Consulate of the Sea appears to have been accepted in nearly all Mediterranean seaports and enjoyed considerable authority. In the towns of the Hanseatic League it was the *Codes of Lübeck* and the *Maritime Law of Visby*, a town on the island of Gotland, which became the basis of international practice at almost the same time.

21. The existence of merchant colonies in the Levant was unaffected by the disappearance of the Christian Kingdoms there or the Turkish capture of Constantinople in 1453. To enable them to trade and to have their disputes settled by their own consuls in accordance with their

own national laws, the Italian cities and the kings of France obtained special concessions called *capitulations* from the Turkish Porte and the chiefs of the Moslem States. The powers of consuls in countries governed by the capitulations were subsequently extended to cover penal and administrative (police) matters, foreigners being completely exempt from the jurisdiction of the territorial State and having ex-territorial rights.

22. Among the Italian cities, Genoa concluded capitulations with the Turkish Empire in 1453 and Venice in 1454. France was the first great power to obtain the same privilege in 1535.

2nd period: The consul as State representative

23. In the sixteenth century, the consolidation of the power of the monarchy in the feudal States, the expansion of productivity within the feudal system, the growth of towns and the new stimulus given to international trade by the great geographical discoveries fostered the development of the consular institution.

24. The great importance of this institution at the time can only be understood in the light of the difficulties under which international trade then laboured. In the first place, every nation was hostile to every other nation's trade as detrimental to its citizens. Again, trade was greatly hampered by the dangers of sea and land communications, and by the very frequent wars of the feudal age. International treaties were a dubious safeguard, as diplomatic missions were rather infrequent and, as a rule, of short duration. Therefore, only consuls could give any sort of effective protection to international trade; but, to do so, they had to be vested with sufficient authority, hence the need for the consul judge to become a real public minister. So the State took over the right to send consuls, who ceased to represent the traders and became official State representatives performing certain diplomatic functions and enjoying the corresponding privileges and immunities.

25. This situation is at the bottom of the arguments, so common in the 17th century, as to whether or not consuls are public ministers. These arguments were still going on in the nineteenth century, as witness the view upheld by Mr. Ed. Engelhardt in his report of 1894 to the Institute of International Law that the consul represents "within the varying limits of his competence, the interests both of the sending State and of its subjects, and thus in some degree partakes of the main attribute of the diplomatic function ".[3]

26. The last traces of this old dispute are to be found in those provisions of some of the older conventions where the contracting parties deemed it necessary to eliminate any doubt by answering the above question in the negative. (See, for example, the Convention between Cuba and the Netherlands of 31 December 1913, article 6, para. 1).

3rd period: Safeguarding trading and shipping interests

27. The vast increase in productivity in the countries of western Europe brought about immense changes in the domestic circumstances and the foreign relations of States in the first half of the seventeenth century. The pressing need for large domestic markets resulted in the unification of States. Those which had overcome their feudal particularism began to affirm their national sovereignty and independence. The exercise of civil and penal jurisdiction by consuls became incompatible with the sovereignty of the territorial State. Everywhere in Europe this consular right was transferred to the State.

28. The first of the consuls' traditional powers to be lost were those affecting citizens of the State of residence. It was not until much later that the State began to exert its legal authority over foreigners also. For instance, the Convention of Pardo, concluded between France and Spain in 1769 ("Convention between the Courts of Spain and France for the better regulation of the functions of the Consuls and Vice-Consuls of the Spanish and French Crowns in their respective ports and territories"), still prescribed that "disputes between subjects of either contracting party in the territory of the other, including all matters concerning seafarers, shall be settled by the respective consuls without the intervention of any local official". Under this Convention appeals from these decisions could only be lodged with the courts of the country of origin of the consuls.

29. Consular powers were further reduced in another direction. The appearance and spread of permanent diplomatic missions in Europe during the sixteenth and seventeenth centuries resulted in consuls losing their diplomatic powers.

30. Owing to this development, the consul's functions underwent a radical change. His diplomatic and judicial duties, on which most of his powers had previously been based, were replaced by the task of looking after the interests of the State and its citizens, *particularly in trade, industry and shipping.*

31. As this change took place only in European countries, it did not affect the status of consuls in countries where the capitulations obtained. There consular representatives still enjoyed diplomatic privileges and immunities. This exceptional system was subsequently imposed on other countries: in Asia, Africa and Europe.

32. The interest of States in the consular service is borne out by the regulations governing it. The first set of consular regulations was published in France by Colbert in his *Ordonnance de la marine* (1681), which several other States took as a model in organizing their consular services. At the same time, the ramification of economic relations between States helped to generalize the institution.

33. In the seventeenth century, British, Swedish and Danish consuls went to Russia; but Russian consuls were not sent abroad until the beginning of the eighteenth century, when they went to Amsterdam (1707), Venice (1711), Hamburg (1715), Paris (1715), Wroclav (Breslau) (1717), Antwerp (1717), Vienna and Liège (1718), Nuremberg (1722), and Bordeaux and Cadiz (1723). Austria, which already had consulates in the countries of the Levant, set up others in Europe in 1752. The United States of America set up its first consulate in France in 1780.

34. The abolition of the feudal system and the in-

[3] *Annuaire de l'Institut de droit international, Edition nouvelle abrégée* (1928) (Paris, A. Pedone, 1928) vol. III, p. 415.

dustrial revolution at the beginning of the nineteenth century brought about an unprecedented expansion of communications, international trade and foreign travel, which led to an extraordinary increase in the number of consulates and to the adoption by States of regulations for the consular service. In France, the edict of 1778 and the ordinances of 1781 made substantial changes in the *Ordonnance de la marine*, the new regulations being amplified by a series of ordinances in 1833. The first United States laws concerning consuls were drafted in 1792. Prussia published its first consular regulations in 1796, Sardinia in 1815, Russia in 1820 (amended in 1858), Great Britain in 1825 and the Netherlands in 1838. The German Confederation promulgated a law on the organization of consulates in 1867, and this was supplemented by instructions in 1871 and 1873. Other States also issued regulations for their consular services during the nineteenth century, for example, Colombia (Organic Law of 1866), Paraguay (Regulations of 1871), the Principality of Monaco (Ordinance of 1878), Romania (Consular Regulations of 1880), Bolivia (Consular Regulations of 1887), the Dominican Republic (Organic Law of 1887), Guatemala (Regulations of 1892), the Republic of San Marino (Law of 1892), Peru (Consular Regulations of 1898) and Japan (Regulations of 1899).

35. In the twentieth century, almost every State took steps to regulate its consular service, and many formulated rules defining the legal status of foreign consuls in their territory.

36. The development of consular relations was also reflected in the ever-increasing number of bilateral treaties with provisions concerning consuls. Phillimore gives a list of 140 treaties concluded before 1876 on the duties, powers and privileges of consuls, 10 of which were concluded in the seventeenth century, 33 in the eighteenth century and 94 in the nineteenth century.[4]

37. The importance of the consular institution for economic relations between States and the need to define the legal status of consuls were the reasons for the conclusion on 13 March 1769 of the Convention of Pardo between France and Spain. This Convention, which prescribed detailed rules governing the status of the consuls of the two States concerned, was the first of the consular conventions.[5]

Abolition of the capitulatory system

38. After the emergence of independent national States, the maintenance of consular jurisdiction in countries where the capitulatory system obtained, was, as Professor Fauchille has said, diametrically opposed "to national unity and homogeneity and to the sovereignty of States".[6] The abolition of consuls' civil and penal jurisdiction in Europe made its survival in non-European countries look like a form of discrimination incompatible with the principles of national sovereignty and equality between States. Hence it was naturally not very long before steps were taken to remove the anomaly.

39. Some States got rid of the capitulatory system on attaining their national independence, for example, Serbia, Bulgaria, Romania and, later, Syria and Lebanon. Others saw it wane after coming under the colonial domination of foreign Powers. Among the remainder, only Japan succeeded—under the Anglo-Japanese Treaty of 16 July 1894—in getting rid of the capitulatory system, before the end of the First World War, by means of a series of treaties concluded with the States enjoying capitulatory rights.

40. Turkey's repeated efforts before the First World War to achieve the same result were fruitless, and its repudiation of the capitulatory system in its note of 9 September 1914 met with the unanimous opposition of all the States enjoying capitulatory rights. The Treaty concerning the Protection of Minorities in Greece, signed at Sèvres on 10 August 1920 but not ratified, prescribed, in article 261, the restoration of the capitulations. When, after the October Revolution, the Soviet Union abrogated all the unequal treaties concluded by the former Czarist Government in a declaration dated 7 December 1917, Turkey was one of the first countries to benefit. The Soviet Union later confirmed its abandonment of capitulatory privileges in its treaty with Turkey of 16 March 1921 (article VII). It was not until after that date that Turkey managed to achieve the complete abolition of the capitulations, under the Treaty of Peace signed at Lausanne on 24 July 1923 (article 28).

41. Having, like Turkey, benefited from the Soviet Government's abrogation of unequal treaties, Iran won confirmation of the abandonment of the capitulations in the Russo-Iranian Treaty of 26 January 1921 (article XVI). Other European powers did not give up their capitulatory privileges in Iran until 1928.

42. The capitulatory system ended for Egypt with the Convention regarding the Abolition of the Capitulations in Egypt, signed at Montreux on 8 May 1937.

43. In the case of China, the Soviet Union was for a long time the only State to have abolished its consuls' jurisdiction and exterritorial rights, which were privileges based on the earlier capitulations, the abolition being confirmed by the Treaty of 31 May 1924 (article 12). Despite repeated efforts, China only achieved the abrogation of exterritorial rights during the Second World War, under its treaties of 11 January 1943 with the United States and the United Kingdom, and its Agreement of 28 February 1946 with the French Government.

44. The abolition of consular jurisdiction in Thailand was achieved, subject to certain conditions, under a series of agreements concluded from 1925 on with the States enjoying capitulatory rights.

45. A glance at the measures taken to abolish the capitulatory system is enough to show that the privileges enjoyed under it by the consuls of some European countries, and in particular their judicial powers in civil, commercial and penal matters, belong to the past, and, conflicting as they do with the fundamental principle of the sovereign equality of States, have no place in current international law.

[4] Robert Phillimore, *Commentaries upon International Law*, 3rd ed. (London, Butterworths, 1882), vol. II, pp. 280 ff.

[5] Fauchille, *op. cit.*, p. 115.

[6] *Ibid.*, p. 144.

4th period: Recent developments in the consular institution

46. The economic interests of States and the importance foreign trade has acquired for most of them have compelled Governments to entrust the protection of their citizens' trade and the safeguarding of their economic interests to their diplomatic representatives, assisted by officials specially versed in trade matters, known as *commercial attachés*. Whereas in earlier times the consul's main function was the protection of trade and shipping, nowadays he is more concerned with administrative matters.

47. This trend in the development of the consular institution has been hastened by economic factors in both the capitalist and the socialist worlds. The concentration of industry in the capitalist countries has enabled large firms and trusts to send abroad more and more frequently representatives with technical knowledge not readily available to a consul,[7] while the introduction in some socialist countries, and above all in the Soviet Union, of a foreign trade monopoly has led to the creation of a special organ to deal with trade matters, namely, the *trade mission*, which forms part of the diplomatic mission.

48. The consul's powers in economic matters, as recognized in customary international law, remain unchanged; but he is, in fact, no longer the main representative of his country's commercial interests, his more limited task being to act as intermediary between the diplomatic mission or the trade mission and the authorities or traders of his consular district.

49. In this connexion, however, two points are to be noted: first, that in countries where the State of origin has no diplomatic mission the consular representatives' commercial activities normally retain their former scope, and, secondly, that consular functions have been widened in modern times by technical improvements in international air communications and the development of cultural relations between countries.

50. Some consular conventions, for example, that between Czechoslovakia and the Soviet Union of 16 November 1935 (article 18), define consular duties as regards assistance to aircraft. The consular regulations of some countries likewise specify consular powers regarding air traffic and prescribe, *inter alia*, that they must help aircrews, lend assistance where aircraft are damaged, supervise the observance of international conventions on aviation, and check log-books. Recent consular conventions recognize the right of consular representatives (which was already theirs by custom) to foster scientific, artistic, professional and educational relations, or cultural relations in general (article 20 of the Consular Convention of 14 March 1952 between the United Kingdom and Sweden; article 20 of the Consular Convention of 22 February 1951 between the United Kingdom and Norway; article 28 of the Consular Convention of 31 December 1951 between the United Kingdom and France; article 20 of the Consular Convention of 17 April 1953 between the United Kingdom and Greece; article 21 of the Consular Convention of 20 March 1954 between the United Kingdom and Mexico).

51. A brief analysis of the historical development of the consular function shows it to reflect the main features of international economic relations at each stage, the nature, scope and content of consular duties being mainly determined by international trade requirements in the widest sense. What also emerges from such an analysis is that, despite the changes it has undergone during its history, the institution of consular missions is still fully adapted to the real requirements of international life.

CHAPTER II

Codification of consular law

52. The first attempts to codify the rules of international law on consuls were the result of the growth of consular relations and the extraordinary increase in the number of consulates during the nineteenth century. They were all due to private effort.

53. The first draft codification was the work of the Swiss Johann Gaspart Bluntschli: "*Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*" which appeared in 1868.[8] This was followed in 1872 by the draft of the American jurist David Dudley Field, published in his work entitled *Draft Outlines of an International Code*. Chapter XIII of the second edition of this work, which appeared in 1876, deals with consuls (articles 159-185).[9] The Italian Pasquale Fiore dealt with consuls in his work entitled "*Il Diritto internazionale codificato e la sua sanzione giuridica*".[10] The 5th edition, which appeared in 1915,[11] deals with this subject in title XV of book I.

54. The main feature common to these three codifications is that they contain an indiscriminate mixture of rules of international law and personal suggestions by the authors which should, in their opinion, be accepted as rules of international law.

55. The Institute of International Law first looked into the legal status of consuls during its sessions held at Lausanne (1888), Hamburg (1891), Geneva (1892) and Venice (1896). Draft regulations containing twenty-one articles on the immunities of consuls were adopted at the Venice session.[12]

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[7] See Luke T. Lee, "Some New Features in the Consular Institution", *The Georgetown Law Journal*, vol. 44, No. 3, March 1956, pp. 406-424.

[8] Translated into French by M. C. Lardy: *Le droit international codifié*, 5th ed. (Paris, Guillaumin et Cie., 1895). In this edition articles 244-275 of the "*Code de droit international*" deal with consuls.

[9] *Draft Outlines of an International Code*, 2nd ed. (New York, Baker, Voorhis and Company, 1876), pp. 58 ff.

[10] 1st edition, 1889-1890; 2nd edition, 1898; 3rd edition, 1900; 4th edition, 1909. French translation of the 4th edition by Ch. Antoine: *Le droit international codifié et sa sanction juridique* (Paris, A. Pedone, 1911).

[11] English translation by Edwin M. Borchard, *International Law Codified and its Legal Sanction* (New York, Baker, Voorhis and Company, 1918).

[12] *Annuaire de l'Institut de droit international*, Edition nouvelle abrégée (1928), (Paris, A. Pedone, 1928), vol. III, pp. 1075-1081.

56. In 1925, the American Institute of International Law adopted a draft convention containing eleven articles on consuls.[13] This draft was sent to the Governments of the American Republics through the Pan-American Union.

57. A draft convention on immunity in international law, submitted by Dr. Karl Strupp to the thirty-fourth conference of the International Law Association, held at Vienna in 1926, contained only two articles on consuls. Article XXVIII provided that consuls should enjoy only such immunities as were granted to them under special agreements, and article XXIX that, in the absence of special provisions, consuls in capitulatory countries should enjoy the same immunity as the heads of diplomatic missions.[14]

58. In 1927, Mr. David Jayne Hill presented to the Institute of International Law a report on "Diplomatic and consular immunities and immunities to be granted persons vested with international functions", the second part of which deals with consular immunities, the author's conclusion being that there is no need for a radical revision of the regulations drafted at Venice (1896), that the principles governing consular immunities are sound and generally accepted, and that he has no proposals to make on the subject.[15]

59. A draft multilateral consular convention containing twenty-four articles [16] is included in Mr. Witold Wehr's report on the codification of consular law to the thirty-fifth conference of the International Law Association, held at Warsaw in 1928.

60. Lastly, the detailed draft codification (in thirty-four articles) concerning the legal position and functions of consuls, prepared by the Harvard Law School on Professor Quincy Wright's report, has the merit of containing abundantly documented commentaries on the articles.[17]

61. On the other hand, there were no signs of any official efforts to codify the rules of international law on consuls in the form of multilateral conventions until the beginning of the twentieth century. The first such conventions were of a regional nature, the earliest being that signed at Caracas on 18 July 1911 by Bolivia, Colombia, Ecuador, Peru and Venezuela, concerning consular functions in each of the signatory Republics.[18]

62. In 1927, the Inter-American Commission of Jurists prepared a draft set of twenty-six articles on consuls.[19] On the basis of this draft, the Sixth International Conference of American States drew up the Convention regarding Consular Agents, signed at Havana on 20 February 1928,[20] which contained twenty-five articles regulating the appointment and functions of consuls, their rights, and the suspension and termination of consular functions.

63. The question of the legal status and functions of consuls was taken up again as part of the activities of the League of Nations. In 1926, the Committee of Experts for the Progressive Codification of International Law, established pursuant to the Assembly resolution of 22 September 1924, compiled a list of seven subjects, the regulation of which seemed to be most desirable and realizable.[21] The Committee of Experts subsequently studied other subjects that might be added to its list, among them the question of the legal status of consuls. A Sub-Committee, with Mr. Guerrero as Rapporteur, was set up to prepare a report on whether it was possible to establish by way of a general convention provisions as to the legal status and functions of consuls, and, if so, to what extent. In the words of the conclusions to that Sub-Committee's report,[22] amended as a result of discussion in the Committee, the latter found that "the regulation of the legal status of consuls by international agreement is desirable from every point of view, and is even indispensable in order to avoid disputes which the absence of definite rules on the matter must certainly cause". The question of consular functions was reserved for later examination.[23]

64. A questionnaire (questionnaire No. 9), dated 2 April 1927, was sent out to Governments to ascertain whether they considered that the questions referred to in the aforementioned report of the Sub-Committee, or some of them, could advantageously be examined with a view to the conclusion of a general convention which, if necessary, could be completed by particular agreements between groups or pairs of States.[24] Of the twenty-six Governments which replied to the questionnaire, sixteen favoured regulation by multilateral agreement, and, since one Government did not indicate its official view but sent personal comments from a professor of international law supporting codification, it may be taken that there were seventeen replies in favour. Two Governments, while not opposed to codification, more or less adopted a waiting attitude, while seven Governments were against.[25]

65. Following this consultation, the Committee of Experts added two new questions, including one entitled "Legal position and functions of consuls", to the original list of seven subjects. The League of Nations Assembly took note of this decision in 1928 and reserved the two additional questions with a view to subsequent conferences.[26] And that was as far as the question got.

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[13] Harvard Law School, *Research in International Law, II. The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), pp. 392 and 393.

[14] The International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, Ltd., 1927), p. 433.

[15] *Annuaire de l'Institut de droit international, 1927* (Paris, A. Pedone), vol. I, p. 420.

[16] The International Law Association, *Report of the Thirty-Fifth Conference* (London, Sweet and Maxwell, Ltd., 1929), pp. 356-375.

[17] Harvard Law School, *op. cit.*, pp. 217-375.

[18] *British and Foreign State Papers, 1914 (Part 1)* (London, H.M. Stationery Office, 1917), vol. CVII, pp. 601-603.

[19] Harvard Law School, *op. cit.*, pp. 389-392.

[20] League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

[21] League of Nations publication, *V. Legal, 1926. V.11* (document C.96.M.47.1926.V).

[22] Idem, *V.Legal, 1928.V.4* (document A.15.1928.V), pp. 41-44.

[23] *Ibid.*, p. 44.

[24] *Ibid.*, p. 41.

[25] *Ibid.*, pp. 57 ff.

[26] League of Nations, *Official Journal, Special Supplement No. 63* (October 1928), p. 10.

CHAPTER III

General nature of the consular mission

66. Before approaching the subject of the codification of consular intercourse and immunities, it is necessary to consider the general nature of the consular mission and to devote a few words to the, in the past much-debated, question whether or not the consul is a " public minister ", since on the answer to that question largely depends the definition of his rights and prerogatives. From an analysis of the international treaties, and of the national laws and jurisprudence concerning consuls, the answer is distinctly in the negative, and most authorities confirm this view. The opinions of some nineteenth century authors who defended the opposite thesis are doubtless explained by the fact that they were misled by the status of the consul in a country where the sending State has no diplomatic mission and by that of the consul-general—*chargé d'affaires,* i.e. by two exceptional cases. Consular representatives, though official representatives of the State appointing them, are not at the present time public ministers—in other words, are not diplomatic agents. And though, as a glance at the historical background of the consular mission shows, consuls at one point in their history did fill that role, they have since lost it (see chapter I above).

67. Diplomatic agents, within the limits fixed by international law, represent the State whose credentials they bear in all aspects of its international intercourse. They are representatives of the Head of State and of the Government which appointed them. It is the State itself that speaks through them. That is their essential attribute. Their main role is to act as a liaison organ and agent in all their Government's transactions, in the negotiations it conducts, and in all intercourse between the Head and the Government of the sending State and the Head and the Government of the State to which they (the agents) are accredited —unless, of course, the sending State prefers to send a special mission for the purpose. Consuls, on the other hand, while State representatives, are appointed for limited purposes to a specific district outside which they can engage in no official activity without the permission of the Government of the State of residence. They are State agents whose competence is limited *ratione materiae,* and very often *ratione loci* as well.

68. The difference between these two categories of State representative comes out in the manner of their appointment, the form of their credentials, their assumption of office and their attributes.

69. Diplomatic representatives, with the exception of *chargé d'affaires* accredited by the minister of foreign affairs of one State to the minister of foreign affairs of another, are appointed by a Head of State and accredited to another Head of State. The appointment of consuls is governed not by international but by municipal law. Although in many countries consuls-general and consuls are appointed by the Head of State, in others the power of appointment is vested in the minister of foreign affairs. As to vice-consuls and consular agents, there are several States whose laws accord even consuls-general or consuls the right to appoint them, subject in some cases to confirmation by the ministry of foreign affairs.

70. Diplomatic representatives are provided with credentials addressed by the Head of the accrediting State to the Head of the receiving State, whereas consuls carry commissions, which are often signed by the Head of State but are mostly drafted in the form of a power of attorney addressed to the civil authorities.

71. Diplomatic representatives are entitled to the immunities recognized under international law from the moment they arrive in the State of residence, provided they produce reliable documentary proof of their status,[27] and enjoy in full all the prerogatives deriving from their function as soon as they have presented their credentials. Consuls are recognized in their official capacity, not from the time they present their commission, but only from the time they are granted the exequatur, or at least provisional recognition.

72. In the absence of international treaties, the attributes of diplomatic representatives are regulated by customary international law, whereas the scope of a consul's functions is, in such case, determined only in part by customary international law, being mainly defined by municipal law, in conformity, of course, with the fundamental principles of international law. Furthermore, the attributes of diplomatic representatives are much wider than those of consuls and include consular functions.

73. Lastly, there is also a difference as regards their right to communicate with the authorities of the State of residence. A diplomatic representative may approach the minister of foreign affairs and, through him, even the Head of State. As a general rule, a consular representative can approach only the local authorities of his consular district, direct access to the central authorities of the State of residence being allowed him only in exceptional circumstances, (for example, in the absence of a diplomatic mission from his country).

CHAPTER IV

Honorary consuls and consuls otherwise gainfully employed

74. Apart from career consuls (*consuls d'Etat, consules missi*), who are officials of the State, paid by it and fully occupied in the performance of their official duties, hence engaged in no other lucrative occupation on their own account, consular intercourse is maintained in some countries by honorary consuls (*consules electi*), mostly chosen from among merchants or businessmen of the State in whose territory they are to exercise their functions. In most cases they do not have the nationality of the State appointing them. Honorary consuls enjoy much less favourable treatment than career consular representatives. Consular conventions and national regulations do not grant the same privileges and immunities to consular representatives who, though officials of the State they represent, are authorized by their national laws to engage in some gainful activity

[27] P. Pradier-Fodéré, *Cours de droit diplomatique à l'usage des agents politiques du ministère des affaires étrangères des Etats européens et américains,* 2nd. ed. (Paris, A. Pedone, 1899), vol. I, p. 446.

or occupation outside their consular functions in their country of residence.

75. The existence of these two categories of consular representative complicates the work of codifying consular law. One question which arises is whether the draft convention on consular intercourse and immunities should include provisions concerning honorary consuls. The above-mentioned report of the sub-committee appointed by the Committee of Experts for the Progressive Codification of International Law expresses the following view on the subject:

> " In the present stage of development of the institution of consuls and in the interest of the prestige of the career, the latter class of consuls should no longer exist. In point of fact, most honorary consuls of foreign nationality are far busier with their personal affairs than with those of the country which has conferred the title upon them, and as they generally engage in commerce in their consular area they occasion appreciable loss to other merchants. The commercial invoices submitted to them enable them to obtain valuable information which is of great use to them in their private affairs. They are thus able to compete on an unfair basis with the traders in their area. Moreover, nationals of the country which appoints these foreign consuls do not obtain from them the protection to which they are entitled and which they would always obtain from a consul of their own nationality." [28]

76. To the arguments put forward in the report of the Sub-committee should be added the point that the State which has appointed an honorary consul of foreign nationality can exercise no effective control over his activities. Should he perform his duties badly, the only practical remedy is to dismiss him.

77. It must be added that the authorities on the subject are far from unanimous on the need to retain this type of consul. For a very long time there have been writers advocating the abolition of *consules electi* who are citizens of the State of residence. For instance, as early as the eighteenth century, Vattel very firmly maintained that a consul's functions demanded that he should not be a subject of the State in which he resided, as otherwise he would be obliged to take orders from that State on all matters, and would not be free to perform his duties.[29] Phillimore is also opposed to them.[30]

78. Despite the above-mentioned objections, a fair number of Governments still employ this type of consul nowadays. Some of them, in their replies to the 1927 questionnaire of the Committee of Experts (see above, para. 64), opposed the abolition of honorary consuls. Among these were Finland, the Netherlands and Switzerland, the opposition of at least Finland and Switzerland being based on practical and financial considerations. On the other hand, due account must be taken of the already quite large number of States which refuse to accept honorary consuls, and of the even larger number which do not appoint them. A convention containing provisions relating to honorary consuls would certainly not be acceptable to such States.

79. In these circumstances, the only means of reaching international agreement would be to devote a special chapter to honorary consuls in a draft set of articles on consular intercourse and immunities, and to stipulate in the final clauses that the chapter need not apply to States which do not appoint or accept honorary consuls.

Chapter V

Questions of method

80. In framing draft articles on consular intercourse and immunities, a careful distinction must be drawn between those aspects of the status of consular representatives which are regulated by municipal law and those which are, or could be, regulated by international law. In the latter case, the regulations must be divided into two categories: (*a*) *customary* international law provisions, and (*b*) international *conventions*, or more specifically consular conventions. The former establish the general system applicable to all consular representatives, whereas the latter define the system applicable, on a strictly reciprocal basis, to consuls appointed by the contracting parties. Such particular provisions can of course be given general application under the most-favoured-nation clause.

81. Going through the international treaties, it is possible to pick out rules that might be acceptable, on a reciprocal basis, to at least the vast majority of, if not all, States.

82. Wherever the need arises to fill in gaps left by this process or to clarify certain disputed or obscure points, account will have to be taken of the practice of States, and of the regulations enacted under the world's main legal systems, in so far as the national laws concerned are consistent with the fundamental principles of international law.

83. That is the only method of successfully preparing a draft that will have any chance of being accepted by Governments, and of becoming an effective instrument for furthering co-operation in that aspect of international relations which involves daily contact between States with different political and economic systems.

84. A draft set of articles prepared by that method will therefore entail the codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations.

85. The question arises what the relationship will be between the draft articles to be prepared by the International Law Commission and the many agreements to which States are parties. It would seem reasonable to specify that the projected draft should not affect existing bilateral

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[28] League of Nations publication, *V.Legal, 1928.V.4* (document A.15.1928.V), p. 43.

[29] E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, vol. I, reproduction of books I and II of 1758 edition (Washington, D.C., Carnegie Institution of Washington, 1916). book II, chap. II, sect. 34, p. 282.

[30] Phillimore, *op. cit.*, p. 279.

agreements, assuming it is finally accepted by States in the form of a multilateral convention. An explicit provision to that effect should be included in the draft. For obvious practical reasons, there would be every advantage in leaving such arrangements intact, the new convention applying only to questions not regulated by *ad hoc* agreements. States acceding to the new multilateral convention would be entirely free thereafter to depart from the *ad hoc* system whenever it was different from, or less favourable than, that introduced by the multilateral convention.

86. Discussion and codification of this question would be greatly facilitated if the collection of legislative texts concerning diplomatic and consular representatives now being prepared for publication by the Secretariat of the United Nations could be published as soon as possible, since the comprehensive collection of such texts, edited in two volumes by A. H. Feller and Manley O. Hudson (*A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*), was published in 1933.

87. Through the good offices of the Secretariat of the United Nations (Codification Division of the Office of Legal Affairs), the Special Rapporteur has had an opportunity of studying the available material on the laws of thirty-seven States concerning the legal status of consular representatives; having succeeded in obtaining privately similar information in eight other States, he has been able to take account in his report of the national regulations of forty-five States in all.

Chapter VI

Questions of terminology

88. Complete lack of uniformity is to be noted in the generic appellations of consular representatives abroad.

89. The term most frequently used is "consul". It is to be found, for instance, in the report on the legal position and functions of consuls by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law,[31] in the draft prepared by the Inter-American Commission of Jurists in 1927,[32] in the Caracas Convention of 18 July 1911,[33] and in many national regulations (for example, Argentina, Regulations of 1926, article 2; Bolivia, Regulations of 1886, article 1; Colombia, Act of 1905, article 1; Chile, Act of 1930; Switzerland, Consular Regulations of 1924, article 1; and the Democratic Republic of Viet-Nam, Provisional Regulations governing Relations with Foreign Consuls). The term is used in the same sense in the draft codifications of Bluntschli,[34] Field [35] and Fiore,[36] in the draft convention on immunity in international law, submitted by Karl Strupp in 1926 to the thirty-fourth conference of the International Law Association, held at Vienna (article XXVIII and XXIX),[37] and in the Harvard draft published in 1932.[38] It is also used in the same sense in quite a considerable number of bilateral treaties.

90. In some conventions care is taken to specify that the term "consul" covers consuls-general, consuls, vice-consuls and consular agents (for example, the Consular Convention between Bulgaria and Poland of 22 December 1934, article 1, para. 3; the Consular Convention between the Soviet Union and Czechoslovakia of 16 November 1935, article 1, para. 3; and the Consular Convention between Poland and Romania of 17 December 1929, article 1, para 3).

91. Other terms than the word "consul" are used in official texts to designate all categories of consular representative.

92. In some conventions the term used is "*consular official*". In others, this term covers not only consular representatives who are heads of consular offices, but also all official staff employed in the consul's office.

93. In other texts the expression "*consular agents*" is used to describe all classes of consular representative, (for example, the Belgian Regulations of 1920, article 53, and the Convention regarding Consular Agents signed at Havana on 20 February 1928). In the draft of the American Institute of International Law the terms "consular officer" (article 1) and "consular agent" (article 2, *et seq.*) are used alternatively.

94. The term "consular officer" is to be found in the regulations and conventions of the United Kingdom and of the Netherlands; it is also sanctioned by the municipal law of the United States of America (Regulations of 1931, sections 11 and 19, and Consular Regulations of 1932, section 19—although the latter regulations explicitly permit the use of the term "consul" (section 20)). The same term (or its French equivalent, "*fonctionnaire consulaire*") is also to be found in conventions concluded by other States: for example, in the French text of the 1923 Treaty between the United Kingdom and Finland, article 1, and in the French text of the Consular Convention of 22 April 1926 between Cuba and the United States of America. It is also used in the treaties between the United Kingdom and Thailand, of 23 November 1927 (articles 17 and 18), between Chile and Sweden, of 30 October 1936 (article 6, used alternatively with the terms "consular agents" and "consular representatives"), between Denmark and Thailand, of 5 November 1937 (article 17 to 21, used alternatively with the expression "consular agents"), between Germany and Thailand, of 30 December 1937 (article 16 to 18), in the conventions between the Netherlands and Cuba, of 31 December 1913, and between the Netherlands and Austria, of 6 November 1922, and in the Consular Convention between Mexico and Panama, of 9 June 1928 (articles I to VII).

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[31] League of Nations publication, *V.Legal, 1928.V.4* (document A.15.1928.V), pp. 41-44.

[32] Harvard Law School, *op. cit.*, pp. 389-392.

[33] *British and Foreign State Papers, 1914 (Part I)* (London, His Majesty's Stationery Office, 1917), vol. CVII, pp. 601-603.

[34] Harvard Law School, *op. cit.*, pp. 403-406.

[35] *Ibid.*, pp. 399-403.

[36] *Ibid.*, pp. 396-399.

[37] The International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, Ltd., 1927), p. 433.

[38] Harvard Law School, *op. cit.*, pp. 193-200.

95. Less common is the term "consular authority", which occurs in the Franco-British Treaty of 1922 (article 4), and in the Hispano-Greek Treaty of 1919 (article 1).

96. Lastly, the term "consular representative" is to be found in certain national regulations (Soviet Union, Norway, Honduras, Luxembourg, People's Democratic Republic of Korea, Federal Republic of Germany) and in some international conventions: Germany-Austria of 1920 (article 14); Denmark-Finland of 1920 (article 21); Germany-Finland of 1922 (article 16); Provisional Agreement between Afghanistan and the United States of America, of 26 March 1936 (article II); Treaty between Japan and Thailand, of 8 December 1937 (articles 25 and 26); Treaty between Chile and Sweden, of 30 October 1936 (article 6); and the Provisional Agreement between Saudi Arabia and the United States of America, of 7 November 1933 (article 1).

97. There can be no doubt that standardization of the above-mentioned terminology is highly desirable.

98. The term "consul", being used to designate a particular class of consular representative, is accordingly ambiguous and not to be recommended where a general term is required to cover all categories of consular representative.

99. The same remark applies to the term "consular agent". Since, however, the term "consular" in the broad sense is sanctioned by long usage, it may be accepted in all cases where its use can lead to no misunderstanding, and particularly in all cases where its meaning is defined in the legal text itself. The same cannot be said of the term "consular agent", since it is reserved in certain laws and regulations (for example, those of France) for non-official staff. According to the regulations on consular immunities adopted by the Institute of International Law at its session held at Venice, in 1896, "consular agents" are: (*a*) national consuls who exercise some other function or profession; and (*b*) consuls who by their nationality are subject to the jurisdiction of a State which is not the appointing State, whether or no they exercise other functions or professions.[39]

100. Furthermore, this expression is apt to be confused with the term "agents of the consular service", which is used in some conventions to designate all staff of consular offices other than heads of offices (acting and assistant consuls, vice-consuls, chancellery attachés and secretaries, chief clerks, chancellery assistants, consular attachés and secretaries, interpreters, and chancellery clerks (cf. article 4 of the Consular Convention of 3 June 1927 between France and Czechoslovakia).

101. For the reasons given, the term "consular representatives", which is also sanctioned by international practice, appears to be the most suitable in the circumstances, having the advantages of clarity and precision and being easy to translate into all languages.

[39] *Annuaire de l'Institut de droit international. Edition nouvelle abrégée* (1928) (Paris, A. Pedone, 1928), vol. III, p. 1076.

PART II

INTRODUCTION

1. After making a general review of international law at its first session in 1949 on the basis of a survey prepared by the United Nations Secretariat (A/CN.4/Rev.1), the International Law Commission added the following question to the list of topics selected for codification: "Consular intercourse and immunities".[40]

2. The General Assembly of the United Nations, by approving at its fourth session [resolution 373 (iv)] part I of the report of the Commission, signified its acceptance of the list of topics selected.

3. At its seventh session, the Commission decided to begin the study of "Consular intercourse and immunities" and appointed Mr. Jaroslav Zourek Special Rapporteur on the question.[41]

4. As the rules of international law concerning consular intercourse and immunities can only be codified by the conclusion of a multilateral convention, the Special Rapporteur, following a well-established practice of the Commission, has prepared a series of draft provisional articles on the subject. As was explained in part I, chapter V, of this report, some of the texts proposed represent an attempt to formulate rules based on common practice as evidence of international custom, while others reproduce provisions which have been selected from international conventions and national laws and on which agreement is sufficiently wide to justify the hope of their acceptance by governments. It will be indicated in the comments on the various articles whether the text suggested merely codifies existing practice or is, from the point of view of general international law, a proposal *de lege ferenda* more fitly coming under the progressive development of international law.

5. In accordance with the Commission's well-established practice, the Special Rapporteur has added comments to the provisional articles, drawing attention to the relevant provisions of international conventions and national laws, and, where it appeared expedient, to the views of the authorities on the subject.

6. The Special Rapporteur would like to point out that, in view of the vast range of material available, he was not always able to check whether a particular convention or a particular set of regulations published in the standard collections of treaties or legal texts was still in force or not. Any attempt to do so would have entailed extensive research, which would have delayed completion of this report. He took the view that such necessarily laborious research was not absolutely essential at the present stage of the work, as such a check will be made more or less automatically when the draft provisional articles formulated by the Commission are communicated to Governments for their observations.

7. Chapter I of the draft contains the articles relating to consular intercourse, chapter II those relating to the

[40] *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 16.

[41] *Ibid., Tenth Session, Supplement No. 9*, paras 31 and 34.

privileges and immunities of career consular representatives, chapter III is designed to regulate the legal status of honorary consuls, and chapter IV contains general provisions.

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES

CHAPTER I

Consular intercourse

Article 1

Establishment of consular relations

1. Every State has the right to establish consular relations with foreign States.

2. The establishment of diplomatic relations includes the establishment of consular relations.

3. In cases other than those covered by the preceding paragraph, the establishment of consular relations shall be effected by an agreement between the States concerned regarding the exchange or admission of consular representatives.

Comment

1. The right to establish consular relations — like the right of legation, whether active or passive — derives from the sovereignty of States. For a fairly long period the two rights were exercised separately, with the result that in most States the diplomatic and consular services were kept separate. This attitude was still in evidence in the Caracas Convention of 1911, article III of which prohibits the joint exercise of consular and diplomatic functions.

2. With the extension of diplomatic duties (see part I, chapter I, section 3, above), consular functions came to be, in principle, incorporated in diplomatic functions in the broad sense of the term. A logical consequence of this development is that the establishment of diplomatic relations is assumed to include the establishment of consular relations. Another is the abolition of the strict separation between the diplomatic service and the consular service in many States. Since the end of the First World War, most States have merged their diplomatic and consular services, and are in the habit of assigning to their officials diplomatic functions *stricto sensu* or consular functions.

3. The tendency to merge the two services (diplomatic and consular) is of long standing, having been in evidence as early as the eighteenth century. Some States, while preserving the distinction between the two services, were content to ensure their interconnexion by a kind of personal union, appointing their diplomatic officers simultaneously as consular representatives. For instance, Mr. Gérard, the first minister plenipotentiary sent by France to the United States in 1778, was the bearer of a commission appointing him consul-general " at Boston and other ports belonging to the United States of America ".[42]

4. This practice was still current after the First World War. Under the Norwegian law of 7 July 1922, ministers and *chargés d'affaires* were also to be appointed as consuls-general, and counsellors of legation and secretaries of legation as consuls, unless otherwise decided by the King (section 2, para. 4). The same idea would appear to have inspired article 13 of the Havana Convention of 1928,[43] under which one and the same person duly accredited for the purpose may combine diplomatic representation and the consular function provided the State to which he is accredited consents to it. The Venezuelan delegation entered a reservation concerning this provision, which it regarded as opposed to its national tradition.

5. But legislation in other States has followed the abovementioned trend in confirming the competence of diplomatic agents to perform both diplomatic and consular functions. An example is the Swedish Law of 1 April 1927, which stipulates that every official act or other measure which is within the competence of consular agents, according to the provisions in laws or regulations, may also be validly undertaken by a diplomatic agent. Under the Ordinance of 3 February 1928, when there is no consul at the seat of a legation, the chief of legation must undertake the official acts and take all the other measures whose execution devolves upon consuls (article 22).

6. At the present time, the vast majority of diplomatic missions also performs consular duties. As a general rule, they set up a consular department for the purpose in which consular activities are centralized, on account of their special nature. Recent trends may therefore be said to have resulted, not so much in a merging of the diplomatic and consular services as in a novel kind of symbiosis. Analysis of national laws shows that States still regard consular departments as organs of the consular service (see the 1932 Consular Law of the Mongolian People's Republic, article 3, and the Ecuadorian Presidential Decree No. 820 of 16 May 1953, article 1).

7. This new mode of exercising consular functions is furthermore confirmed by several conventions. For example, the Consular Convention of 18 July 1924 between Poland and the Soviet Union stipulates that its provisions relating to consular officials shall also apply to officials belonging to diplomatic missions insofar as they perform consular functions in their country of residence (article 25). A similar provision is to be found in the Consular Convention of 16 November 1935 between the Soviet Union and Czechoslovakia (article 19). Article 31 of the Treaty concluded between Greece and Lebanon on 6 October 1948 also contains a clause to the effect that the provisions of the treaty concerning the duties and prerogatives of consuls shall also apply to diplomatic agents of either party invested with consular functions whose appointment has been notified to the other party through the diplomatic channel.

8. Furthermore, almost all States entrust their diplomatic representatives with the general supervision of their consular missions' activities in the countries to which they

[42] A. H. Feller and Manley O. Hudson (ed.), *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington, D. C., Carnegie Endowment for International Peace, 1933), vol. II, p. 1222.

[43] Convention regarding Consular Agents, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

are accredited, and there are many countries under whose laws diplomatic representatives are authorized to issue instructions to their consular representatives in their countries of residence.

9. While, as has been stated, consular relations are in most cases established concurrently with diplomatic relations, this is not always so. Consular relations may sometimes be established separately, often as a kind of prelude to diplomatic relations.

10. No State is bound to establish consular relations, unless it has covenanted to do so under an earlier international agreement. Subject to the same reservation, no State is obliged under international law to admit foreign consuls into its territory. This has always been the accepted view of the authorities, [44] and it is confirmed by the international treaties on the subject. Under the Havana Convention of 1928, for instance, the consent (express or tacit) of States is required for the appointment of foreign consuls (article 1).

11. A State may refuse to receive consuls and give preference to the immediate establishment of diplomatic relations. It may also require consular relations to be arranged in accordance with certain rules governing, for example, the number of consulates and the area of the districts they serve.

12. However, systematic refusal by a State to accept the establishment of consular relations with one or more other States at peace with it is to be considered as contrary to the fundamental principles of international law, and, in particular, when Members of the United Nations are concerned, to Article 1, paragraph 3 of the Charter of the United Nations, which lays on such States the duty of achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character. The establishment of diplomatic and consular relations is undoubtedly the first condition to be fulfilled, and diplomatic and consular missions are the main means to that end.

13. The problem of what the connexion between consular and diplomatic services should be is a matter solely for the State concerned, all States being at liberty to safeguard their interests in consular affairs through their diplomatic missions, or, with the consent of the State of residence, through consular missions. Where consular duties are performed by a diplomatic mission, there can be no objection to the joint discharge of diplomatic and consular functions by the officers of that mission, or to such officers enjoying all the privileges and immunities accorded to diplomatic agents under international law. For, in that case, who shall discharge the consular functions is the particular diplomatic mission's own domestic concern, the diplomatic representative being alone responsible for the conduct of consular affairs.

14. The term " sending State " denotes the State which appointed the consular representative; the term " State of residence ", the State in whose territory the representative is to perform his functions.

Article 2

Agreement concerning the consular district

1. The agreement concerning the exchange and admission of consular representatives shall specify, inter alia, the seat and the district of the consular mission.

2. Subsequent changes in the consular district may be made only by agreement between the sending State and the State of residence.

3. No consulate may be established on the territory of the State of residence without that State's permission.

4. Save as otherwise expressly provided in these articles, consular representatives may exercise their functions outside their district only with the express permission of the State of residence.

Comment

1. The permission of the State of residence, whether at the time of establishing consular relations or subsequently, is essential for the creation of a consulate. This principle, which derives from the sovereign authority exercised by the State over its own territory, also applies when a State maintaining consular relations with another State through its diplomatic mission decides to create an independent consular office having as its district either the whole or part of the territory of the State of residence.

2. The consent of the State of residence is also required if the sending State, or its consular representative, wishes to create a consular office within the existing consular district, as often happens in the case of consular agencies.

3. The State of residence may object to the opening of a consular office in a particular town. It may also exclude a particular town or zone from the consular district of a foreign consul. This principle has been sanctioned by practice and stated in many international treaties: the Agreement of 25 April 1947 between the United States

[44] See, for example:

Vattel, *op. cit.*, book II, chap. II, sect. 34;

P. Fiore, *Il Diritto internazionale codificato e la sua sanzione giuridica*, 5th ed. trans. by Edwin M. Borchard: *International Law Codified and its Legal Sanction* (New York, Baker, Voorhis and Company, 1918), p. 250;

J. G. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, trans. by M. C. Lardy: *Le droit international codifié*, 5th ed. (Paris, Guillaumin et Cie., 1895), " Code de droit international ", art. 247;

Ph. Zorn, *Deutsches Gesandschafts- und Konsularrecht auf der Grundlage des Allgemeinen Völkerrechts*, in Fritz Stier-Somlo (ed.), *Handbuch des Völkerrechts*, vol. II, 3rd part, (Berlin-Stuttgart-Leipzig. Verlag von W. Kohlhammer, 1920), pp. 64 ff.

F. P. Contuzzi, *Trattato teorico-pratico di diritto consolare e diplomatico* (Turin, Unione tipografico-editrice torinese, 1910), vol. I, pp. 178 ff.;

L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), vol. I, p. 834;

A. S. Hershey, *The Essentials of International Public Law and Organization* (New York, The Macmillan Company, 1927), p. 418;

Kozhevnikov, *op. cit.*, p. 42;

Harvard Law School, *op. cit.*, pp. 505-507.

and Nepal (para. 2); the Agreement of 4 May 1946 between the United States and Yemen (article II); the Consular Convention between France and Czechoslovakia of 3 June 1927 (article 1); the Consular Convention between the United States and Costa Rica of 12 January 1948 (article I, para. 1); the Treaty between Greece and Lebanon of 6 October 1948 (article 14, para. 2); the Provisional Agreement between the United States and Saudi Arabia of 7 November 1933 (article 1); the Caracas Convention of 18 July 1911 (article I). Certain national regulations sanction the same principle: Honduras, Law No. 109 of 14 March 1906 (article 7).

4. The consent of the State of residence is also required when it is wished to include the territory of a third State in a consular district.

5. Lastly, the permission of the State of residence is necessary for subsequent changes in the consular district.

6. Some conventions contain provisions granting the sending State the right to own or lease buildings for the use of its consular missions (the Treaty between the United States and Finland of 13 February 1934, article XXI; the Consular Convention between the Philippines and the United States of 14 March 1947, article III; the Consular Convention between the United States and Costa Rica of 12 January 1948, article V; Consular Convention between the United States and France of 31 December 1951, article 9). The right to lease premises needed for the exercise of consular functions derives *ipso jure* from the establishment or the existence of consular relations, while the right to own the necessary buildings depends on the domestic legislation of the State of residence. In view of these facts, there seemed to be no need to include a provision on this point in the articles.

Article 3

Classes of consular representatives

1. Consular representatives shall be divided into four classes:

(1) Consuls-general;

(2) Consuls;

(3) Vice-consuls;

(4) Consular agents.

2. Consular representatives shall rank in these four classes according to the date of the granting of the exequatur. Where the exequatur was granted simultaneously to two or more representatives, rank shall be determined according to the dates on which their commissions were presented. Heads of consular offices shall take precedence of consular officials not holding such rank.

Comment

1. The classes of consul, unlike the classes of diplomatic agent, which were laid down in the Regulations adopted at the Congresses of Vienna (1815) and Aix-la-Chapelle (1818), have not yet been codified. In the past, the most varied titles were used. Even today the law differs from country to country on this point. For instance, in several countries the consular corps comprises only consuls-general, consuls and vice-consuls (Bolivia, Consular Regulations of 4 July 1887, article 2; Norway, Law of 7 July 1922, section 2; Sweden, Ordinance of 3 February 1928; article 3; People's Democratic Republic of Korea, Decree of 29 June 1951, article 2). In Switzerland, the consular hierarchy comprises: (*a*) consuls-general, (*b*) consuls, (*c*) vice-consuls of the first class, and (*d*) vice-consuls of the second class, (Consular Regulations of 1923, as amended in 1937, article 10). The consular missions of Ecuador are divided into the following categories: (*a*) consulates-general of the first class, (*b*) consulates-general, (*c*) consulates of the first class, (*d*) consulates, (*e*) vice-consulates, and (*f*) consular departments of diplomatic missions (Presidential Decree No. 820 of 16 May 1953, article 1).

2. Nevertheless, the present practice of States, as it emerges from national laws and international conventions, reveals sufficiently wide agreement to warrant the classification proposed in article 3.

3. The four classes of consular representatives listed in the article are to be found in the legislation of many countries: Colombia, Law of 1866 (article 26); Nicaragua, Consular Regulations of 16 October 1880 (article 4); Peru, Consular Regulations of 1 January 1898 (article 3); Honduras, Law No. 109 of 14 March 1906 (article 5); Liberia, Regulations of 1908 (article 1); Haiti, Law of 27 April 1912 (article 1); Costa Rica, Organic Law of the Consular Service of 1 July 1925 (article 1); Panama, Law No. 41 of 1925 (article 51); Venezuela, Organic Law of the Consular Service of 30 July 1925 (article 3); Soviet Union, Consular Law of 8 January 1926 (article 5); Netherlands, Rules and Regulations of 1926 (article 1); Guatemala, Decree No. 1780 of 1939 (article 111, 112, 114); Mongolian People's Republic, Consular Law of 1932 (article 3); Yugoslavia, Law of 25 March 1930 (section 37); United States, Consular Regulations of 1932 (section 20); Luxembourg, Statutory Order of 5 July 1935 (section 47, para. 1, point 4).

4. The fact that heads of consular departments in diplomatic missions are listed among consular representatives in the laws of certain States (Soviet Union, Mongolian People's Republic, People's Democratic Republic of Korea, Ecuador, etc.) does not affect the proposed classification, since in this case a function rather than a new consular class is involved.

5. The above-mentioned four classes also figure in the peace treaties concluded after the First World War Versailles, article 279; Saint-Germain-en-Laye, article 231; Trianon, article 214; Neuilly, article 159).

6. Lastly — and this is a decisive point in favour of codification — these four classes of consular representatives are to be found in many international agreements: the Caracas Convention of 1911 (article I); the Consular Convention between the United States and Romania, of 17 June 1881 (article I, II, IX); the Convention between the Netherlands and Cuba, of 31 December 1913 (articles 1 to 4, and 6 to 13); the Convention between Spain and Greece, of 6 March 1919 (article I); the Convention

between the Netherlands and Austria, of 6 November 1922 (article 1 to 4, 6 and 8 to 13); the Treaty between the United Kingdom and Finland, of 14 December 1923 (article 18); the Consular Convention between Italy and Czechoslovakia, of 1 March 1924 (article I); the Consular Convention between France and Poland, of 30 December 1925 (article 1, 3, 5, 8, 9 and 11); the Convention between Albania and Yugoslavia, of 22 June 1926 (article 5); the Consular Convention between France and Czechoslovakia, of 3 June 1927 (articles 1, 2 to 4, 17, 18 and 20); the Consular Convention between Yugoslavia and Czechoslovakia, of 7 November 1928 (article I); the Consular Convention between Spain and Greece, of 23 September 1926 (article 8); the Consular Convention between the Soviet Union and Czechoslovakia, of 16 November 1935 (article I); the Protocol to the Treaty between the United States and Finland, of 13 February 1934; the Treaty between Germany and Siam, of 30 December 1937 (article 17); the Treaty between the Philippines and Spain, of 27 September 1947 (article V); the Treaty between Greece and Lebanon, of 6 October 1948 (article 14); the Consular Convention between the United Kingdom and France, of 31 December 1951 (article 3); the Consular Convention between the United Kingdom and Norway, of 22 February 1951 (article 3); the Consular Convention between the United States and the United Kingdom, of 6 June 1951 (article 3); the Consular Convention between the United Kingdom and Sweden, of 21 August 1952 (article 3).

7. It should be pointed out that the term "consular agent" is used in article 3 in its technical sense, which differs radically from the general meaning attached to it in some international instruments. (See part I, chapter V, of this report). To avoid confusion on the subject, the use of this term in its broad sense, i.e. to mean a consular representative of any of the above-mentioned four classes, should be abandoned. In the laws of certain States, vice-consuls and consular agents may be gainfully employed in the State of residence — a practice which is sanctioned by international conventions, (for example, the Consular Convention between the United Kingdom and France, of 31 December 1951, article 2, para. 7, in the case of consular agents). Some States reserve the title of vice-consul or consular agent solely for *honorary* i.e. non—salaried officials (Peru, Consular Regulations of 1 January 1898, article 5).

8. The term "commercial agent" is still used sometimes to designate a consular agent (see, for example, article 4 of the Havana Convention of 1928).

9. Article 3 refers solely to (titular) heads of offices, and in no way affects the right of States to determine the titles of officials and clerks on the staff of the head of a consular office. Usage varies greatly in this respect.

Article 4

Acquisition of consular status

A "consular representative" within the meaning of these articles is an official appointed by a State to a post in one of the four classes listed in article 3, and recognized in that capacity by the State on whose territory he is to discharge his functions.

Comment

1. Two conditions must be fulfilled for a person to acquire the legal status of consular representative:

(*a*) He must be appointed consul-general, vice-consul or consular agent by the authority designated in the Constitution or laws of the State; and

(*b*) He must be recognized in that capacity by the Government of the State on whose territory he is to exercise his functions.

2. It is a universally accepted principle that a consular representative cannot be recognized as a consul without the consent of the State in which he exercises his functions. This principle is laid down in almost all consular regulations as well as international conventions, for example: the Consular Convention between the Soviet Union and Poland, of 18 July 1924 (article 2); the Consular Convention between Yugoslavia and Czechoslovakia, of 7 November 1928 (article I); the Consular Convention between the United States and Costa Rica, of 12 January 1948 (article I, para 3); the Consular Treaty between Greece and Lebanon, of 6 October 1948 (article 14).

3. A consular representative completely loses his official status and becomes a mere private individual if his consular district is incorporated in a new State. The same applies if the Government controlling the territory on which he exercises his functions withdraws its recognition from him.

4. The article enunciates a fundamental principle, which is elaborated in articles 6 to 9 below.

Article 5

Powers of the State relating to the appointment of consular representatives

The power to appoint consular representatives, the manner of their appointment, and their allocation to a particular class and category are governed by the domestic legislation of the sending State.

Comment

1. Since there are no rules of international law specifying which State organ is empowered to appoint consular representatives, the competent organ is that indicated in the legislation of the State concerned. Each State is also at liberty to decide the manner and qualifications for appointment of consular representatives, and their category (career or honorary) and class. There is no ground for the view expressed by some authorities that the right to appoint consular representatives is the sole prerogative of the head of State. This view is confirmed neither by the practice of States nor by national laws. For instance, in Soviet Union law, consular representatives are appointed by the minister of foreign affairs. In the United States, consular representatives other than vice-consuls and consular agents are appointed by the President on the advice and with the consent of the Senate, while vice-consuls and

consular agents are appointed by the Secretary of State, the latter after being nominated by the consular representative for the district in which they are to exercise their functions (Foreign Service Regulations of January 1941, I-3 (*b*), (*c*), (*d*).[45] In Poland, consular representatives are appointed by the minister of foreign affairs. In Bulgaria, consuls-general and consuls are appointed by the President of the National Assembly, vice-consuls and consular agents by the minister of foreign affairs. In Switzerland, consuls are appointed by the Federal Council on the proposal of the Political Department, vice-consuls of the second class by the Political Department (Consular Regulations of 1923, article 11). In Sweden, the Royal Ordinance of 3 February 1928 reserved to the Head of State the right to appoint consuls-general and non-salaried consuls, and empowered the minister of foreign affairs to appoint vice-consuls and non-salaried chancellors (article 10). Even in States where the appointment of consular representatives lies with the Head of State, an exception is sometimes made with regard to honorary consuls (Norwegian Law of 7 July 1922, section 3).

2. The sending State is at liberty to choose whatever class of consular representative it deems appropriate. Domestic regulations sometimes stipulate that a consular representative whose district embraces the whole territory of the State of residence must have the rank of consul-general, but these are exceptional (see, for example, article 66 of the Law of 14 March 1906, Honduras).

3. The principle on which article 5 is based is codified in article 2 of the Havana Convention of 1928, which runs as follows: "The form and requirements for appointment, the classes and the rank of the consuls, shall be regulated by the domestic laws of the respective State."[46]

Article 6

The consular commission

1. Consular representatives who are heads of consular offices shall be furnished by the State appointing them with full powers in the form of a commission made out for each appointment and showing the surname and first name of the consular representative, the consular category and class, the consular district and the representative's future place of residence.

2. The State appointing a consular representative shall communicate the commission through diplomatic channels to the Government of the State on whose territory the consular representative is to exercise his functions, with a view to obtaining the necessary consent for the exercise of the said functions.

3. When the two States concerned have no diplomatic relations with each other, the commission shall be transmitted through the consular mission or, where none exists, through a diplomatic mission accredited to a third State.

Comment

1. The form of the special letters patent issued to a consular representative is governed entirely by the domestic legislation of the State sending the officer concerned. The letters patents have the same importance for the latter as his letters of credence for a diplomatic agent. But from the point of view of form there is a fundamental difference between the diplomat's credentials and the consular commission: namely, that the latter is not addressed to the Head of the State in which the consular representative is to exercise his functions, but either bears no address at all (this appears to be the practice in Austria, Bolivia, Brazil, the Chinese People's Republic, Costa Rica, Czechoslovakia, Denmark, Finland, Greece, Guatemala, Iran, the Mongolian People's Republic, the Netherlands, Paraguay, Poland, Portugal, Sweden, Switzerland, Turkey) or is addressed "to all who shall see these presents" (Belgium, Colombia, France, Nicaragua, Panama, United States of America) or "to all whom it may concern" (Iraq) or "to those to whom these presents shall come" (Japan, Thailand, Venezuela), or "to all and singular to whom these presents shall come" (United Kingdom). But even if it bears no address, the consular commission often contains a general request to the Government of the State of residence — or, much more commonly, to the authorities of the State of residence in general — that the consular representative be recognized in that capacity, that the free discharge of his functions and enjoyment of all privileges appertaining thereto be ensured, and, lastly, that he be afforded all aid, assistance and protection of which he may anywhere or in any circumstances stand in need.

2. In the practice of some States, the consular commission contains a provision authorizing the consular representative to appoint vice-consuls at ports and localities in his district (United Kingdom) or to appoint vice-consuls and consular agents (France). This power can of course only be exercised with the consent of the State of residence.

3. What is normally called the "consular commission" in English-speaking countries is variously termed in French: *lettre patente* or *lettre de provision*, or *commission consulaire*, depending on the legislation concerned.

4. The instrument handed to vice-consuls and consular agents when they are appointed by consuls and consuls-general is often called a *brevet*. Article 6 is designed to unify practice on this point in all cases where the consular representative is appointed head of an office, since it is undesirable for consular representatives in the same town with the same title and equivalent functions to be furnished with full powers of different types according to whether they are appointed by a central authority of the sending State or by a consular representative of the latter.

5. The consular commission and the *brevet* are regular letters of appointment. However, it is the practice among States to accept, and some recent conventions allow — in addition to these regular documents — irregular documents, such as a notification concerning the consular representative's posting (cf. article 4 of the Consular Convention between the United Kingdom and France, of 31 December 1951; article 4 of the Consular Convention between the United States and the United Kingdom, of 6 June 1951; article 4 of the Consular Convention between the United Kingdom and Norway, of 22 February 1951;

[45] Charles Cheney Hyde, *International Law Chiefly as Interpreted and applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Company, 1947), vol. II, p. 1314.

[46] League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582, p. 306.

article 4 of the Consular Convention between the United Kingdom and Sweden, of 14 March 1952). It would nevertheless not be in the interest of relations between States to encourage the tendency to replace regular by irregular letters of appointment, which should continue to be reserved for exceptional cases only.

6. In some cases, the form of the consular commission has been the subject of regulation between States (see, in particular, the following conventions: Philippines—United States, of 14 March 1947, article I; United States—Finland, of 13 February 1934, article XIX, para. 3; Spain—Philippines, of 20 May 1948, article IV, para. I, stipulating that regular letters of appointment shall be duly signed and sealed by the Chief of State).

7. Certain conventions even contain provisions concerning the terms of the consular commission (cf. the Convention between Cuba and the Netherlands, of 31 December 1913, article 3).

8. It was on the terms of the commission that Lord Chancellor Talbot based his judgement in the Barbuit case (1735) that Mr. Barbuit, who was designated in the commission as commercial agent of the King of Persia, was a consul but was not, as he claimed, a public minister. [47]

9. Procedure for the presentation of the consular commission is quite often regulated by national laws: Argentina, Regulation No. 4712 of 31 March 1926 (article 18); Belgium, Decree of 15 July 1920 (article 53); Brazil, Decree No. 14058 of 11 February 1920 (article 13); Costa Rica, Decree No. 46 of 7 July 1925 (article 7); Ecuador, Presidential Decree of 27 October 1916 (article 4); Luxembourg, Grand-Ducal Decree, of 29 June 1923 (article 8); Switzerland, Consular Regulations of 1923 (article 13).

10. It is also stipulated in certain international conventions that the consular commission shall be communicated through the diplomatic channel (see, for example, article 4 of the Convention regarding Consular Agents (Havana, 1928).

Article 7

The exequatur

Without prejudice to the provisions of articles 9 and 11, consular representatives appointed heads of consular offices may not take up their duties until they have obtained the assent of the Government of the State in which they are to exercise them. Such assent is given in the form of an exequatur.

Comment

1. The granting of an exequatur is the act whereby the State of residence confers on a representative of a foreign State admitted into its territory the right to exercise his consular functions in that territory. This act, added to the appointment of the consular representative by the sending State, vests the representative with the authority he must enjoy in dealings with the officials of the State of residence. The exequatur is therefore a formal recognition of a person as a consular representative. It is the usual mode of conveying such recognition.

2. In most States the exequatur is granted by the Head of the State, if the commission is signed by the Head of the sending State, and by the minister of foreign affairs in other cases. The power to grant the exequatur may be reserved to the Government (cf. Honduras: Law No. 109 of 14 March 1906, article 13). In a number of countries the exequatur is granted by the minister of foreign affairs (Soviet Union, Chinese People's Republic, Poland, etc.).

3. The form of the exequatur is governed by the domestic law of the State in which the consular representative is to exercise his functions. But certain forms most commonly used in practice are to be noted. The exequatur may be granted by decree of the Head of the State, signed by him and countersigned by the minister of foreign affairs, the original being handed to the representative concerned, or by decree of the Head of the State, a copy of which, certified by the minister of foreign affairs, is handed to the consular representative. In other countries, again, the exequatur is granted in the form of a special instrument signed by the minister of foreign affairs.

4. Another mode of granting the exequatur is to copy the text by which it is conveyed onto the document bearing the commission. This method had several variants, for example, an entry on the commission certifying that the exequatur is granted by the Head of the State and signed by the minister of foreign affairs (Czechoslovakia).

5. The simplest form consists of notifying the sending State through the diplomatic channel that the exequatur has been granted.

6. The United Kingdom practice distinguishes between the exequatur granted by the Head of State on presentation of the commission, signed by the supreme sovereign authority of the appointing State, and the formal recognition granted in other cases. [48]

7. The issue of the exequatur is in some cases covered by agreements, which usually specify that it shall be granted without delay and free of charge.

8. The granting of the exequatur is not the only means whereby a foreign consul may be recognized. He may, as prescribed in article 9, be accorded provisional recognition before receiving his exequatur. Under article 11, a substitute may *temporarily* assume consular functions in the case of disability, death, or absence of the head of a consular office. That is why article 7 had to be qualified by an explicit reference to the two articles aforementioned.

9. Certain international conventions provide for other modes of authorizing the consular representative to discharge his functions than the granting of the exequatur (Consular Convention between the United States and Costa Rica, of 12 January 1948, article I, para. 3), or do not use the term "exequatur" (Treaty between Germany and Siam, of 30 December 1937, article 17, para. 2). But if the term "exequatur" is taken in the technical

[47] Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. III, pp. 245-247.

[48] Oppenheim, *op. cit.* p. 835.

sense in which it is defined above, it must cover such other forms of authorization (for example, notification of admission) as well. The Special Rapporteur accordingly saw no point in mentioning them in the text of article 7.

10. The authorization conferred by an exequatur granted to a consular representative appointed head of a consular office covers *ipso jure* the consular activities of his assistants and of all consular staff working under his orders and on his responsibility. Accordingly, it is unnecessary for consular representatives who are deputies of the head of office or members of the consular staff to present their own commissions for the purpose of obtaining an exequatur. Notification by the head of the consular office to the competent authorities of the State of residence should suffice to ensure their enjoyment of the rights and privileges recognized under international law or conferred by these articles.

Article 8

Refusal of the exequatur

Unless it has given its *agrément* in advance, any State shall be entitled to refuse to admit a person to the exercise of consular functions on its territory, without giving reasons for its refusal.

Comment

1. The right to refuse a foreign consul the exequatur is implicit in the sovereignty of a State. There are various examples of the exercise of this right in international practice. For instance, in 1720 Denmark refused to accept Mr. Niel Sandersse Wienwich, a Danish citizen, as consul of the United Provinces at Bergen, Norway. In 1830, Austria refused to grant the exequatur to Stendhal, who had been oppointed consul at Trieste by the French Government, giving as its ground that he had been in trouble with the Austrian police. In 1855 Mr. Priest, who had been appointed United States consul at San Juan del Sur, was refused an exequatur by the Nicaraguan Government on the ground that he had written a private letter which it regarded as reprehensible. [49] The United Kingdom Government refused the exequatur to Major Haggerty, a naturalized Irishman whom General Grant had appointed United States consul at Glasgow in 1869, giving as its reason that Major Haggerty had taken part in the Fenian revolutionary movement. [50]

2. The principle that a State may refuse to admit a foreign consul into its territory seems to be universally accepted. It is all the more justified by the fact than an *agréation* procedure for consular representatives, though much to be desired, does not generally exist. The giving of *agrément* in advance by a State, whether under convention or otherwise, is an exception to the rule contained in this article. The fact that the peace treaties concluded after the First World War imposed on the defeated States a one-sided obligation to receive the consuls of the allied and associated Powers merely confirms the rightness of this point of view.

3. The only doctrinal point of controversy has been whether the government concerned must be told the reasons for the refusal of an exequatur. Some of the older authorities thought that it must. [51] This view is incorrect. In order to take that attitude, one would have to be able to point to a general practice requiring the communication of the grounds for such a refusal. But we are bound to note that conventions specifying that reasons must be communicated are the exception; examples are the Convention between Guatemala and Honduras of 10 March 1895 (article 21), the 1894 Convention between Honduras and Nicaragua (article 20) and the Convention between Honduras and El Salvador of 19 January 1895 (article 21). There are also very few States whose domestic legislation requires communication of reasons (see, for example, the Bolivian Consular Regulations of 4 July 1887, article 93). There are, on the other hand, many national laws and international conventions which establish the right to refuse the exequatur, but make no mention whatsoever of the need to give reasons for such refusal, for example: Costa Rica, Organic Law of the Consular Service of 7 July 1925 (article 8); Honduras, Law No. 109 of 14 March 1906 (article 54); Treaty of 23 September 1926 between Spain and Greece (article 8, para. 2); Treaty of 1903 between Denmark and Paraguay (article 8); the Havana Convention of 1928 (article 5). It is even explicitly acknowledged in some conventions that there is no need to communicate the reasons for refusal to the other party (see the Consular Convention between the Soviet Union and Poland of 18 July 1924, article 2, para. 3). This was also the view expressed in 1927 by the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law in the conclusions of its report. [52] That being so, the rule stated in this article may be regarded as reflecting the existing state of law.

Article 9

Provisional recognition

Pending the delivery in due form of his exequatur, a consular representative may be granted provisional recognition by the State of residence at the request of the State which appointed him.

Comment

1. While it is true that a consular representative cannot take up his official duties until he has received his exequatur, there may be cases in which it is desirable to allow a consular representative to exercise his functions before the exequatur is granted, for example, where a

[49] John Bassett Moore, *A Digest of International Law* (Washington, D.C., Government Printing Office, 1906), vol. V, p. 28.

[50] William Edward Hall, *A Treatise on International Law*, 8th ed., A. Pearce Higgins (ed.) (Oxford, The Clarendon Press, 1924), p. 373.

[51] See, for example, A. von Bulmerincq, *Consularrecht* (Hamburg, Verlag von J. F. Richter, 1887), p. 20; and E. von Ullmann, *Völkerrecht* (Tübingen, Verlag von J. C. B. Mohr (Paul Siebeck), 1908), p. 215.

[52] League of Nations publication, *V.Legal, 1928.V.4* (document A.15.1928.V), p. 43.

consular office already exists and its new head is awaiting the exequatur. Provisional recognition meets this need, and is an expedient often resorted to in practice. Such provisional authorization is, moreover, provided for in various international treaties, for example, the Consular Convention between Mexico and Panama of 9 June 1928 (articles II and III), the Consular Convention between Bulgaria and Poland of 22 December 1934 (article 2, para. 4), the Consular Convention between the United States and Costa Rica of 12 January 1948 (article 1, para. 3, last sentence) and, in particular, the Havana Convention regarding Consular Agents of 1928 (article 6, para. 2). The laws and regulations of certain States also make the same provision (Cuba, Regulations for Consular Offices of 30 October 1925, article 2; and the United States Regulations of 1932, section 49). All things considered, it appeared advisable to include a provision such as article 9 in the draft, although it was impossible to ascertain whether this practice was quite general.

2. It should be noted that the right to grant or refuse provisional recognition is within the discretionary power of the State of residence.

Article 10

Obligation to notify the authorities of the consular district

The Government of the State of residence shall immediately notify the competent authorities of the consular district that the consular representative has taken office, and the said authorities, on receipt of such notification, shall without delay take all the necessary steps to enable the consular representative to carry out the duties appertaining to his office and to enjoy the privileges and immunities recognized by existing conventions and by these articles.

Comment

1. This article lays down two obligations:

(*a*) The Government of the State of residence must notify the competent authorities of the consular district that the exequatur or provisional recognition has been granted;

(*b*) The said authorities must ensure that the consular representative is able to perform his duties and to enjoy the privileges and immunities recognized by existing conventions and by these articles.

2. The custom in many States is to publish the granting of the exequatur in an official gazette.

3. The obligations laid down in article 10 are a corollary to recognition of the consular representative. They are stipulated in some consular conventions (see, for example, that between Yugoslavia and Czechoslovakia of 7 November 1928, article I, para. 3).

Article 11

Ad interim *functions*

1. In case of death or absence of the head of a consular office (consulate-general, consulate, vice-consulate or consular agency) or other impediment to the performance of his duties, a substitute, whose name must be communicated in good time to the competent service of the State of residence, shall be permitted *ipso jure* to perform the duties of the head of the office *ad interim*, pending the latter's return to duty or the appointment of a new head.

2. The competent authorities shall afford assistance and protection to such substitutes, and accord them, while in charge of the consular office, such privileges and immunities as are conferred on the head of the consular office concerned by existing conventions and by these articles.

Comment

1. This article regulates the function of acting head of a consular office, which corresponds to that of *chargé d'affaires ad interim* in diplomatic law. The acting head may be designated beforehand under the national regulations of the State that established the consular office, or may be appointed by the competent authority of that State when the vacancy occurs. This function of acting head of a consular office has been common practice for a long time, as witness many national regulations: Bolivia, Regulations of 4 July 1887 (articles 16 and 17); Cuba, Regulations of 30 October 1925 (article 47, para. 26, and article 48, para. 13); Egypt, Legislative Decree of 5 August 1925 (article 6); United States, Regulations of 1932 (section 20, para. 5 and section 29); France, order of 20 August 1833 (article 8); United Kingdom, General Instructions of 1922 (chapter XIII, article 11); Luxembourg, Order of 29 June 1923 (articles 2 and 3); Soviet Union, Consular Law of 8 January 1958 (articles 13 to 15).

2. International conventions often contain provisions concerning acting headships of consular offices. Take only the following consular conventions: United States - Romania, of 5 to 17 June 1881 (article VII); Italy - Czechoslovakia, of 1 March 1924 (article 3); Soviet Union - Poland, of 18 July 1924 (article 8); Albania - Yugoslavia, of 22 June 1926 (article 6); Poland - Yugoslavia, of 6 March 1927 (article IV), France - Czechoslovakia, of 3 June 1927 (article 3); Albania - France, of 5 February 1928 (article 7); Belgium - Poland of 12 June 1928 (article 4); Poland - Romania, of 17 December 1929 (article 4); Bulgaria - Poland, of 22 December 1934 (article 4); Uniter States - Finland (treaty), of 13 February 1934 (article XXII, para. 3); United States - Liberia of 7 October 1938 (article IV, para. 3); United States - Costa Rica, of 12 January 1948 (article I, para. 6); Philippines - Spain (treaty), of 20 May 1948 (article IV, paras. 3 and 6); Greece - Lebanon (treaty), of 5 October 1948 (article 14, last paragraph); United Kingdom - France, of 31 December 1951 (article 7); United States - United Kingdom, of 6 June 1951 (article 6); United Kingdom - Norway, of 22 February 1951 (article 7); United Kingdom - Sweden, of 14 March 1952 (article 7).

3. The Convention regarding Consular Agents (Havana, 1928) also contains a provision concerning temporary assumption of consular functions (article 9).

4. The text proposed therefore merely codified existing practice, leaving States quite free to decide the method of appointing the acting head.

5. For such an acting head to enjoy the prerogatives attaching to his office under this article, notice of his appointment must be given to the competent authority of the State of residence, usually the ministry of foreign affairs.

Article 12

Consular relations with unrecognized States and Governments

The granting of an exequatur to a consular representative of an unrecognized State or Government, or a request for the issue of an exequatur to a Government or State not recognized by the State which appointed the consular representative, shall imply recognition of the State or Government concerned.

Comment

1. The view that the granting of an exequatur implies recognition seems to be generally accepted. It is confirmed by authorities like Hall, [53] and Oppenheim, [54] and by the practice of States. [55]

2. As to the request for the issue of an exequatur made to the Government of a State which is not recognized by the State that appointed the consul, or to the unrecognized Government of a State which is itself recognized, practice does not seem to be uniform. [56] If it is borne in mind that the exequatur is, in fact, the means by which a Power exercising sovereignty over a certain territory conveys its permission to the representative of a foreign State to exercise consular functions in that territory or a part of it, it is hard to see how one can request the issue of an exequatur without recognizing the sovereignty of the Government so requested over the territory in question, unless the special circumstances of the case or an explicit declaration by the sending State make it clear that there is no intention of according such recognition.

3. When a new government is formed in the State of residence as a result of a revolution or of a change in the social and economic system of the State, and the Government of the sending State refuses to recognize that Government, the State of residence is not bound to recognize the consular status of the representatives accepted by the previous Government. Where recognition is withheld, such persons cease to enjoy consular privileges and immunities.

4. Questions relating to the juridical status of neutral consular representatives in occupied territory during an armed conflict are reserved for later study.

Article 13

Consular functions

FIRST VARIANT

The functions and powers of consular representatives shall be determined, in accordance with international law, by the States which appoint them.

SECOND VARIANT

The task of consular representatives is to defend and further the economic and legal interests of their countries, to safeguard cultural relations between the sending State and the State of residence, and to protect the nationals of the State which appointed them.

For the above purposes they shall be entitled, *inter alia:*

1. To see that the treaties between the sending State and the State of residence are properly observed, and to make representations concerning any breach of such treaties of which their State or its nationals may have to complain;

2. To protect and promote trade between the respective countries, and to foster the development of economic relations between the two States;

3. To ensure the general protection of shipping, and to render assistance of every kind to merchant vessels flying the flag of the sending State when in any port within their consular district, and in particular:

(a) To examine and stamp ships' papers;

(b) To take statements with regard to a ship's voyage and destination, and to incidents during the voyage (master's reports);

(c) To draw up manifests;

(d) To question masters, crews and nationals on board;

(e) To settle, in so far as authorized to do so by the laws of the sending State, disputes of any kind between masters, officers and seamen, especially those relating to pay and the execution of contracts between them;

(f) To facilitate the departure of vessels;

(g) To assist members of the ship's company by acting as interpreters and agents in any business they may have to transact, or any applications they may have to make, for example, to local courts and authorities;

(h) To be present at all searches (other than those for customs, passport and aliens control purposes and for the purpose of admission to *pratique*) **conducted on board merchant vessels and pleasure craft;**

(i) To be given notice of any action by the courts or the administrative authorities on board merchant vessels and pleasure craft flying the flag of the sending State, and to be present when such action is taken;

(j) To direct salvage operations when a vessel flying the flag of the sending State is wrecked or runs aground on the coast of a State of residence;

(k) To settle, in accordance with the laws of the sending State, disputes concerning general average between nationals of a State of residence;

4. To render assistance to vessels owned by the sending State, and particularly to its warships;

5. To render, in so far as authorized to do so by the laws of their country of residence, all necessary assistance to aircraft registered in the sending State, including:

(a) Checking log-books;

(b) Rendering assistance to air crews;

(c) Giving help in the event of accident or damage to aircraft;

(d) Supervising compliance with international conventions on air transport to which the sending State is a party.

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[53] Hall, *op. cit.*, p. 109.

[54] Oppenheim, *op. cit.*, p. 148.

[55] See the letter, dated 28 January 1819, addressed to the President of the United States of America by Mr. Adams, Secretary of State, in J. B. Moore, *op. cit.*, vol. V, p. 13.

[56] See H. Lauterpacht, *Recognition in International Law* (Cambridge, The University Press, 1947), pp. 384-387.

6. To further cultural relations, particularly in the realms of science, the arts and professions, education and sport;

7. To protect juridical entities and persons of the nationality of the sending State and, to that end:

(a) To see that nationals of the sending State enjoy all the rights accorded them under the laws of the country of residence, in accordance with existing treaties and conventions between the two States concerned and with international custom;

(b) To take all the necessary steps to obtain redress when the rights of juridical entities or persons of the nationality of the sending State are infringed;

(c) To defend the labour rights of employed persons who are nationals of the sending State, in accordance with the international conventions on the subject;

(d) To make welfare payments to nationals of the sending State who are in difficulties through illness, accident or other similar cause;

8. To perform certain administrative functions, and in particular to:

(a) Keep a register of nationals of the sending State residing in their consular district;

(b) Issue passports and other personal documents to nationals of the sending State;

(c) Visa passports and other documents of persons travelling to the sending State;

(d) Expedite matters relating to the nationality of the sending State;

(e) Supply to interested persons in the country of residence information on trade and industry, and on all aspects of national life in the sending State;

(f) Stamp certificates indicating the origin or source of goods, invoices and the like;

(g) Pass on to the entitled persons any benefits, pensions or compensation due to them in accordance with their national laws or with international conventions, in particular, under social welfare legislation;

(h) To receive payment of pensions or allowances due to nationals of the sending State absent from the State of residence;

(i) To perform all duties relating to service in the armed forces of the sending State, the keeping of muster-rolls for those services and the medical inspection of conscripts who are nationals of the sending State;

9. To perform acts of civil registration or record those acts, in so far as they are authorized to do so under the laws of the sending State, and in particular:

(a) To receive declarations concerning births and deaths of nationals of the sending State, without prejudice to the obligation on the declarant to make such declarations in accordance with the laws of the State of residence;

(b) To record marriages celebrated under the laws of the territory, provided that at least one of the parties is a national of the sending State;

10. To perform certain notarial functions, and in particular:

(a) To receive in their offices or on board vessels flying the flag of the sending State or aircraft of the nationality of the sending State, any statements which nationals of that State may have to make;

(b) To draw up, attest and receive for safe custody, wills and all deedspoll executed by nationals of the sending State;

(c) To draw up, attest and receive for safe custody indentures to which the parties are nationals of the sending State or nationals of the sending State and nationals of the State of residence, provided that they do not relate to immovable property situated in the country of residence or to rights *in rem* in connexion with such property;

(d) To attest signatures of nationals of the State of residence, acts and documents emanating from the authorities or officials of the sending State or of the State of residence, and copies of such acts and documents;

(e) To translate acts and documents of any kind emanating from officials of their own country or of their country of residence;

(f) To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to them by nationals of the sending State;

11. To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by existing conventions or otherwise not inconsistent with the laws of the State of residence;

12. To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other incapable persons who are nationals of the sending State and who are in the consular district;

13. To represent in all cases connected with succession, without producing power of attorney, the interests of absent heirs-at-law who have not appointed special agents for the purpose, to approach the competent authorities of the State of residence in order to arrange for the compilation of an inventory of assets and for the winding up of estates, and to settle disputes and claims concerning the estates of deceased nationals of the sending State;

14. To act as arbitrators or mediators in any disputes submitted to them by nationals of the sending State, where this is not contrary to the laws of the country of residence;

15. To celebrate marriages between nationals of the sending State in accordance with the laws of that State, if this is permitted by the laws of the country of residence.

Comment

1. The functions of consular representatives are determined by international custom and usage, international treaties and national laws and regulations—which explains why they differ so much in particular cases. Whereas, for example, consular activities in protecting and promoting trade, supervising shipping, assisting warships and protecting nationals of the sending State have always been recognized in international law, other activities are based on individual conventions, the scope of which has in many cases been widened by application of the most-favoured-nation clause. This is especially true of civil registration, notarial functions, the serving of judicial documents and the taking of evidence on behalf of courts, the supervision of guardianship and trusteeship over nationals of the sending State, the development of cultural relations, and assistance to aircraft, etc.

2. Moreover, conventions differ quite considerably in their provisions on the same subject, a typical example being those defining the powers of consuls in regard to successions.

3. The question arises whether draft provisional articles on consular intercourse and immunities should also comprise a definition of consular functions.

4. Earlier codifications or attempts at codification of this subject reveal two trends, based on different approaches.

5. The first is to leave the definition of consular functions generally speaking to municipal law. This is the approach adopted, for instance, in the Havana Convention of 1928, article 10 of which provides that: "Consuls shall exercise the functions that the law of their State confers upon them, without prejudice to the legislation of the country where they are serving." [57]

The League of Nations Committee of Experts for the Progressive Codification of International Law adopted the same approach in reserving the question of consular functions for later examination. [58] Reference may also be made, in this connexion, to the resolution adopted in 1896 by the Institute of International Law, which deals solely with the regulation of consular immunities, making no attempt to define consular functions.

6. The second trend is towards the more or less exhaustive definition of consular functions in conventions and draft codifications. This is the approach that prevailed in, for example, the Caracas Convention of 1911 previously referred to, and in the Harvard draft (article 11). [59] This trend is apparent in almost all consular conventions, though no exhaustive definition of consular functions has so far been produced.

7. The Special Rapporteur thinks that the International Law Commission should adopt the first of these two approaches, at any rate for the time being, since consular functions necessarily reflect, on certain points, the differences in the social structure of States and the economic life of nations, which also come out in municipal law and international treaties. Moreover, certain functions are conferred on consular representatives under some collective agreements, for example, the Sanitary Conventions of 1903 and 1905, the International Convention relating to the Simplification of Customs Formalities of 3 November 1923, and the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 12 September 1923 — which are binding on by no means all States. It should be added that a general definition of consular functions covering only typical activities of consular representatives could not take into account those special circumstances which sometimes enable States to give consuls wider powers in their mutual relations. Again, a general definition of consular functions could have an adverse effect in cases where local laws and custom allow the performance of consular functions not covered by the definition.

8. In view of all this, it was felt inopportune to propose unification of consular functions.

9. Nevertheless, as some members of the Commission held at the eighth session that it would be preferable to include a definition of consular functions in the projected draft, the Special Rapporteur has prepared, purely for guidance and as a second choice, the rough draft of an article setting out the functions of consular representatives, to enable the Commission to make its choice between the two approaches mentioned above in full knowledge of the facts.

Article 14

Extension of consular functions in the absence of a diplomatic mission of the sending State

The consular representative in a State where there is no diplomatic mission of the sending State may undertake such diplomatic actions as the Government of the State of residence may permit in such cases.

Comment

1. A consular representative in a country in which the sending State has no diplomatic mission, and in which he is therefore the sole representative of his State, is in a very special position, being compelled by the force of circumstances to act as spokesman for the sending State, even in questions outside his consular functions proper, and possibly even to undertake diplomatic action. Such an extension of consular functions — which may be purely temporary pending the establishment of a diplomatic mission in the country — can, of course, be made only with the (express or tacit) consent of the State in which the consular representative is serving. The taking of diplomatic action naturally does not confer diplomatic character on the consular representative or affect his legal status. [60]

2. In its reply of 11 January 1928 to the questionnaire of the Committee of Experts for the Progressive Codification of International Law, the Government of the Commonwealth of Australia pointed out that, there being no diplomatic missions in Australia at the time, consuls-general and consuls often transacted business with the Government which in countries where diplomatic missions exist is normally dealt with by the latter. This was the reason which that Government then gave for its negative view on the possibility of regulating the legal position of consuls by way of a general convention. [61]

3. The merging of the diplomatic and consular services into a single foreign service in a goodly number of States has resulted in diplomatic functions being conferred on consular representatives (see comment on article 1). The laws of certain States provide for such duality of functions in the case referred to in article 14. (Cf. Haiti, Decree of 7 August 1917, article 6; Monaco, Ordinance of 7 March 1878, article 2; Republic of San Marino, Law

[57] League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

[58] League of Nations publication, *V.Legal, 1928.V.4* (document A.15.1928.V), p. 44.

[59] Harvard Law School, *op. cit.*, pp. 251 ff.

[60] Paul Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Berlin, Verlag von Julius Springer, 1896), pp. 176 ff.

[61] League of Nations publication, *V.Legal, 1928.V.4* (document A.15.1928.V), p. 59.

of 12 January 1892, article 9). In other countries, the consular representative must have special authorization before accepting a diplomatic or political function. (Cf. Switzerland, Consular Regulations of 1923, article 32; Italy, Decree of 28 January 1866, (article 20). A provision similar to article 14 also appears in the Havana Convention of 1928 (article 12).

4. Article 14 may be taken to reflect the existing state of law. It caters for a need that arises in real life.

Article 15

Consuls-general - chargés d'affaires

A consular representative serving in a country where the sending State has no diplomatic mission may, with the consent of the State of residence, be entrusted with diplomatic functions, in which case he shall bear the title of consul-general - *chargé d'affaires* and shall enjoy diplomatic privileges and immunities.

Comment

1. Consuls-general - *chargés d'affaires* used to form an intermediate category of State representatives between diplomatic agents and consular representatives, and bore a variety of titles: consul-general - *chargé d'affaires, chargé d'affaires* - consul-general, diplomatic agent and consul-general, commissioner and consul-general. Consuls-general - *chargés d'affaires* had a diplomatic character, signed international conventions, and corresponded on political questions with the ministry of foreign affairs. A consul-general - *chargé d'affaires* must be provided with both a consular commission and a letter of credence. It is acknowledged that he should enjoy diplomatic privilcges and immunitics. [62]

2. It is essential to distinguish between consular representatives of this type and those referred to in article 14, who, though not formally vested with diplomatic functions, are allowed by the State of residence, in the absence of a diplomatic mission from the sending State, to undertake certain diplomatic action or discharge certain similar functions. Consuls-general - *chargés d'affaires* must be specifically entrusted with diplomatic functions and provided with a letter of credence; they enjoy diplomatic privileges and immunities and discharge diplomatic functions in the widest sense, and not only within the limits agreed by the State of residence.

3. The Special Rapporteur has not been able so far to check whether, and if so to what extent, such representatives are still used; but they appear to be few in number nowadays. The laws of several countries, however, contain provisions which would have no point unless such representatives existed. (Cf. Argentina, Law No. 4712 of 25 September 1905, article 11; Cuba, Organic Law of 14 February 1903, Transitory Provisions; Soviet Union, Consular Law of 8 January 1925, article 18).

This being so, the Special Rapporteur thought it better to include in his draft a special article on consuls-general - *chargés d'affaires.*

Article 16

Discharge of consular functions on behalf of a third State

No consular representative may discharge consular functions on behalf of a third State without the express permission of the State of residence.

Comment

1. Consular intercourse between two States may, in exceptional cases, be effected through a consular representative of a third State. This situation chiefly arises when consular relations are broken off, or when a State not maintaining a consular mission in the country concerned wishes to arrange consular protection for its nationals. [63]

2. Under the Caracas Convention of 1911, the consuls of each contracting Republic, residing in one of the others, could make use of their powers in favour of individuals of the other contracting Republics which did not have a consul on the spot (article VI). The laws of many countries used to provide, or now provide, for such plurality of functions — subject, however, to the authorization of the Head of State, or of the Government, or of the minister of foreign affairs. (Cf. Argentina, Regulation No. 4712, of 31 March 1926, article 7; Belgium, Law of 1 January 1856, article 59; Ecuador, Law of 28 July 1870, article 19; France, Ordinance of 20 August 1933, article 45; United Kingdom, Act of 27 August 1917, article 16; Luxembourg, Decree of 29 June 1923, article 7; Netherlands, Regulations of 1926 on the consular service, chap. 1, article 12; Norway, Law of 7 July 1922, article 10; San Marino, Law of 12 January 1892, article 58; Siam, Consular Regulations of 12 January 1929, article 6; Sweden, Ordinance of 3 February 1928, article 18; Switzerland, Consular Regulations of 1923, article 33; Soviet Union, Consular Law of 6 January 1926, article 19).

3. In some States such plurality of functions is prohibited or permitted only as a temporary expedient. (Cf. Chile, Law of 31 January 1930, article 21; Venezuela, Law of 30 July 1925, article 10; United States of America, Regulations of 1931, sections 174 and 453).

4. It is self-evident that neither the performance of isolated acts of consular protection nor the discharge of consular functions on behalf of a third State is permitted without the express consent of the State of residence.

Article 17

Withdrawal of the exequatur

1. A consular representative's exequatur may be withdrawn

[62] See Hall, *op. cit.*, p. 378; L. van Praag, *Juridiction et droit international public* (The Hague, Librairie Belinfante Frères, 1915), p. 245, note 647, and the literature quoted, including the decisions of the Paris Court dated 1 December 1840 and La Goulette Court dated 27 June 1889.

[63] The practice prior to 1931 is outlined in the Harvard draft (Harvard Law School, *op. cit.*, p. 204) according to information given in the *Annuaire du corps diplomatique et consulaire* (Geneva, 1931). The Special Rapporteur had no information on current practice at his disposal.

by the Government of the State of residence in the event of his being guilty of an infringement of that State's laws; but, except in urgent cases, the State of residence shall not resort to this measure without previously attempting to obtain the consular representative's recall by his sending State.

2. The reasons for withdrawal of the exequatur or for a request for recall shall be communicated to the sending State through the diplomatic channel.

Comment

1. The revoking of the consent given by the State of residence to the exercise of consular functions in its territory is usually called "withdrawal of the exequatur", although the destruction of the document recording the granting of the exequatur is not required. The withdrawal, like the granting, of the exequatur is a sovereign right of the State.

2. There have been various cases of withdrawal of the exequatur in the history of consular intercourse. For instance, the French vice-consul at Boston, Mr. Duplaine, had his exequatur withdrawn in 1793 for using force in resisting the enforcement of local laws.[64] In 1856, the United States Government withdrew its exequatur from three British consuls (at New York, Philadelphia and Cincinnati), alleging that they had tried to recruit men to serve in the British army during the Crimean War.[65] In 1861, the United States withdrew its exequatur from the British consul, Mr. Bunch, on the ground that he had infringed the Logan Act forbidding unauthorized persons to correspond with foreign Powers. Although it disputed the charge levied against its consul, the British Government did not question the right to withdraw the exequatur. In 1897, the President of the Republic of Guatemala withdrew the exequatur from Mr. Florentin Souza, United States consular representative at Champerico.[66] There have been several cases of withdrawal of the exequatur since the Second World War.

3. The right to withdraw the exequatur is sanctioned in many international treaties, for example, the Consular Convention of 14 March 1947 between the Philippines and the United States (article XV); the Treaty of 20 May 1948 between the Philippines and Spain (article XXI); Consular Convention of 4 November 1913 between Chile and the Netherlands (article 3); the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal (article 4); the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (article 1, para. 7); the Convention of 1913 between Cuba and the Netherlands (article 3); and the Havana Convention of 1928 (article 8).

4. There has been no consistent regulation in international instruments of the question whether a State resorting to the measure in question is obliged to communicate its reasons to the Government of the sending State; the provisions of a convention on the point run counter to those of the text.[67] Some conventions stipulate that the reasons for the measure must be communicated to the sending State, for example, the Consular Convention of 1924 between Italy and Czechoslovakia (article 1, para. 7); the Treaty of 22 June 1926 between Albania and Yugoslavia (article 5, para. 7); the Consular Convention of 28 May 1929 between Germany and Turkey (article 3, para. 6); the above-mentioned conventions between the Netherlands and Cuba, and Chile, in 1913 (article 3, para. 3). But others either state the opposite or make no mention of the obligation to give reasons.

5. In view of the seriousness of the measure, the State taking it should in this case — as distinct from cases where it merely refuses the exequatur (article 8) — be bound to give its reasons. As, however, there is no rule on the subject in existing international law, this is no more than a proposal *de lege ferenda*. The remainder of the article is to be regarded as reflecting the existing state of law.

Article 18

Termination of consular functions

A consular representative's functions are terminated by, *inter alia*:

1. His recall by the Government of the sending State;
2. His resignation;
3. His death;
4. Withdrawal of his exequatur;
5. Breaking-off of consular relations. *

* See Article 19.

Comment

1. Termination of consular functions is to be distinguished from the breaking-off of consular relations referred to in article 19. While the breaking-off of consular relations always entails the cessation of the consular functions between the States concerned, the opposite is not the case.

2. The termination of consular functions is due either to a decision taken by the State which appointed the consul or to steps taken by the State of residence; it may also arise out of some personal activity of the consular representative.

3. The list contained in article 18 is not restrictive; it covers only the commonest causes of the cessation of consular functions. There may be others — for instance, the extinction of the sending State or the incorporation of the consular district in another State.

4. The situations resulting in the termination of consular functions are sometimes listed in international conventions (cf. the Consular Conventions between Mexico and Panama, of 9 June 1928 (article XVII), between the Philippines and Spain, of 20 May 1948 (article XXI),

[64] Moore, *op. cit.*, vol. V, p. 19.

[65] Stuart, *American Diplomatic and Consular Practice*, 2nd ed. (New York, Appleton-Century Crofts Inc., 1952), pp. 299-301.

[66] *Ibid.*

[67] A. V. Sabanin, *Posolskoe i konsulskoe pravo* (Diplomatic and Consular Law), (Moscow, G9Z, 1930), p. 65.

between the Philippines and the United States, of 14 March 1947 (article XV), and the Havana Convention of 1928 (article XXIII)).

5. This article is to be regarded as reflecting the existing state of law.

Article 19

Breaking-off of consular relations

1. Consular relations may be broken off by an official declaration to that effect by the Government of one of the States concerned.

2. Proclamation of a state of war between the sending State and the State of residence entails *ipso facto* the breaking off of consular relations between them.

3. Except in the case referred to in paragraph 2 of this article, the breaking off of diplomatic relations shall not automatically entail the breaking off of consular relations.

Comment

1. This article, which complements article 1, gives two causes for breaking off consular relations, leaving aside those causes, such as the extinction of the sending State or of the State of residence, which put a complete end to consular relations.

2. Armed conflict between the sending State and the State of residence does not necessarily lead to the cessation of consular relations. That situation would only arise where a state of war has been declared by at least one of the parties.

3. Existing as they do for particular purposes and being specific in nature and self-contained, consular relations need not be broken off because diplomatic relations are broken off. This principle has practical implications, particularly where consular intercourse is through the medium of consular offices distinct from diplomatic missions.

CHAPTER II

Privileges and immunities of career consular representatives

Article 20

The protection and immunities of consular representatives and their staff

1. The State of residence is bound:

(a) In accordance with the conditions set forth in this chapter and subject to reciprocity, to grant consular representatives and consular staff the privileges and immunities conferred by existing conventions and by these articles;

(b) Ensure protection of consular representatives and consular staff, and safeguard consular offices from attack.

2. For the purposes of these articles, "consular staff" includes any person who, although not belonging to one of the classes of consular representatives referred to in article 3, performs consular duties under the orders of the head of a consular office, provided that the person is not a national of the State of residence and that he engages in no professional or gainful activity other than his consular functions in that State.

Comment

1. It is generally acknowledged in international law that the State of residence is obliged to grant consular representatives such privileges and immunities as are essential to the discharge of their functions; for, were it otherwise, the admission of these representatives would serve no practical purpose. Article 10 of this draft provides one possible means of ensuring the conditions required for the exercise of consular functions.

2. Provisions stressing the respect and consideration due to consuls are to be found in certain national laws, for example, Argentina, Regulation of Law No. 4712 of 1926 (article 63); Honduras, Law No. 109 of 14 March 1906 (article 40); and Venezuela, Decree of 25 January 1883 (article 5).

3. So far as could be ascertained, the laws of all countries make immunity from jurisdiction, exemption from taxation and from customs duties, and other material or honorific privileges accorded to consular representatives conditional on reciprocity. This stipulation is designed to guarantee consular representatives of the same category (status) and of the same class (rank) equality of treatment in the State of residence with that accorded the latter's consular representatives in the sending State, and vice versa.

4. Under certain national regulations, the condition of reciprocity applies to all privileges and immunities; but under others it applies only to some of them. Depending on circumstances, its effect may be positive (where it serves as a basis for claiming certain privileges and immunities) or negative (where it constitutes the juridical basis for a State's refusal to grant a particular prerogative to the consuls of another State because it is not granted to its own consuls in the latter State). Reciprocity is also stipulated in international agreements, for example, in the following: the Exchange of Notes between Finland and Norway of 23 August and 30 September 1927, the Exchange of Notes between the Iranian and Swedish Governments of 30 July and 9 August 1928, the Treaty between Japan and Siam of 8 December 1937 (article 25, para. 3), the Treaty between Great Britain and Siam of 23 November 1937 (article 18, para. 2).

5. The principle of reciprocity can be said to be inherent in consular relations and to constitute one of the elements in customary international law relating to consular privileges and immunities.

6. The admission of consular representatives involves the obligation on the State of residence to protect them and their consular staff in the discharge of their official functions. That obligation includes the duty to ensure their personal safety and to protect consular offices from attack. In some countries, consular officials, as representatives of foreign States, are protected by special provisions in criminal law (Cf. article 95 of the Norwegian Penal Code of 1902). The obligation to protect or support is often covered by international treaties: the Consular Con-

vention of 1925 between Italy and Czechoslovakia (article 1, para. 9); the Treaty of 20 May 1948 between the Philippines and Spain (article 4, para. 5); the Consular Conventions of 1951 between the United States and the United Kingdom (article 5, para. 2) and of 1952 between the United Kingdom and Norway (article 5, para. 2). The obligation to protect the consul in the discharge of his functions is also prescribed in article 7 of the Havana Convention of 1928.

7. Failure to protect has often given rise to diplomatic representations by States whose consulates have been attacked, or whose representatives have been maltreated. [68]

8. Article 20 is partly based on article 15 of the Harvard draft.

Article 21

The coat-of-arms of the sending State

1. The coat-of-arms of the sending State, with an appropriate inscription, may be displayed on the building occupied by the consular offices or by the entrance door thereto.

2. These external signs, which mainly serve to indicate the consular office to interested parties, may not be interpreted as conveying the right of asylum.

Comment

1. The right to place the coat-of-arms of the sending State on, or at the entrance to, the building occupied by consular offices serves an eminently practical purpose, namely, to identify the offices for anyone needing their services. This right is sanctioned under many international consular conventions of which the following at least should be mentioned: United States-Romania, 1881 (article 5): Cuba-Netherlands, 31 December 1913 (article 4); United States-Germany, 1923 (article 20); Italy-Czechoslovakia, 1924 (article 2); Soviet Union-Poland, 1924 (article 9); France-Poland, 1925 (article 5); United States-Cuba, 1926 (article 7); United States-El Salvador, 1926 (article 18); United States-Honduras, 1927 (article 19); Albania-France, 1928 (article 5); Poland-Yugoslavia, 1927 (article 5); Albania-Yugoslavia, 1926 (article 7); Germany-Turkey, 1929 (article 5); Poland-Romania, 1929 (article 5); Bulgaria-Poland, 1934 (article 5); United States-Finland, 13 February 1934 (article XXII, para. 1); Soviet Union-Czechoslovakia, 1935 (article 8); Philippines-United States, 14 March 1947 (article VI); Philippines-Spain, 1948 (article IX); Greece-Lebanon, 1948.

The Havana Convention contains no provision on the subject.

2. Some consular conventions specify that the appropriate inscription must be in the national language of the sending State, and that the coat-of-arms and inscription may also be placed on or by the entrance door to the consulate (France-United Kingdom, 1951, (article 10); United States-United Kingdom, 1951, (article 8, para. 1); United Kingdom-Norway, 1951, (article 10, para. 1); United Kingdom-Sweden, 1952, (article 10, para. 1)). The right to place the coat-of-arms of the State on the consulate building or its entrance is generally acknowledged in modern times, and may certainly be considered as accepted in international law. [69]

3. The provisions of consular conventions regarding the right to display the coat-of-arms of the State are often qualified by a clause designed to prevent misinterpretation of the privilege. While this is doubtless a provision framed *ex abundanti cautela,* the Special Rapporteur retained it in paragraph 2 of the article because it appears in many consular conventions.

Article 22

The national flag

The State of residence is bound to permit:

(a) The national flag of the sending State to be flown by the consular office on solemn public occasions and on other customary occasions;

(b) Consular representatives who are heads of consular offices to fly the national flag of the sending State on all means of transport used by them in the discharge of their functions.

Comment

1. While the right to fly the national flag on the building occupied by the consular office has not gained as wide acceptance as the right to put up the coat-of-arms of the State, since it frequently depends on local usage and custom, recent conventions regularly confer this privilege along with that concerning the coat-of-arms of the State.

2. As this right is extended to vessels, motor vehicles, aircraft and other means of transport in a fairly large number of international conventions, it seems wisest to take account of this trend in article 22 and prescribe the right to fly the national flag also on means of transport used in the discharge of official functions. The sending State is granted this privilege, however, only in respect of the heads of consular offices (i.e. the titular consul).

3. When States use a special consular flag, the above provisions refer to that flag.

4. It should be noted that the obligation on the State of residence to permit the flying of the national flag implies the obligation to ensure its protection.

Article 23

Communication with the authorities of the sending State

The sending State has the right that its consular representatives established in the State of residence should be at liberty to correspond freely, in time of peace, with its governmental authorities, including its diplomatic and consular missions established on the territory of the State of residence. Consular re-

[68] See Moore, *op. cit.,* vol. V, pp. 42-44; and Fauchille, *op. cti.,* p. 127.

[69] In support of this assertion, see Hall, *op. cit.,* p. 375; Hershey, *op. cit.,* p. 422; Sabanin, *op. cit.,* p. 84; Institute of Law of the Academy of Sciences of the USSR, *Mezhdunarodnoe pravo* (International Law) (Moscow, 1947) p. 328.

presentatives have, in particular, the right to communicate with the said authorities by messages in cipher.

Comment

1. The right to communicate freely with the authorities of the State which appointed the consul is an essential condition for the discharge of consular functions, and may be regarded as part of customary international law; it is frequently enunciated in national regulations (Argentina, Organic Regulation of Law No. 4712 of 1926, article 355; United States, Regulations of 1932, sections 94, 97, 101, 114, 115, 117, 118; Soviet Union, Consular Law of 1926, article 21; Bolivia, Consular Regulations of 1887, article 14; Belgium, Decree of 1920, article 69; Luxembourg, Grand-Ducal Order of 1923, article 17; Haiti, Law of 1912, article 14; Netherlands, Regulations of 1926, articles 4 and 5; Sweden, Ordinance of 1928, article 64; General Instructions of 1928, article 64).

2. It should be pointed out that the regulation of such communication is within the sole competence of the State which appointed the consul; it mainly depends on the rules governing relations between consular representatives of the various grades and their home authorities. The laws of most countries authorize consular representatives abroad to communicate with their Government only through the ministry of foreign affairs, and sometimes carefully stipulate that correspondence shall be conducted through the official senior in consular rank.

3. The use of cipher or code is provided for in the regulations of certain countries and is authorized in some consular conventions: Italy-Czechoslovakia, 1924 (article 9, para. 5); Treaty between Afghanistan and Great Britain, 1921, (schedule II, para. *f*), etc.

4. Freedom of communication may be restricted in case of armed conflict.

Article 24

Communication with authorities of the State of residence

The procedure for communication between the consular representative and the authorities of the State of residence shall be determined by local custom or by the laws of that State.

Comment

1. It lies with the State of residence to regulate the manner in which consular representatives may communicate with the local authorities, and in particular those of their consular districts. National regulations vary widely on this point. Under some regulations consuls may address the "local authorities" direct. (See, for example, Bolivia, Regulations of 1887 (article 31); Brazil, Regulations of 1928 on formalities for the admission of foreign consuls (article 24); United States of America, Regulations of 1932 (sections 149 and 437); Soviet Union, Consular Law of 1926 (article 23); Sweden, Ordinance of 1923 (articles 20 to 22)). Under some of the last-named regulations, consuls, though they may address the local authorities, must conform to international usage and to local custom (Sweden, Instructions of 1928, article 64, para. 5).

2. The question whether consular representatives may approach the Government and the central authorities of the State of residence is settled in a variety of ways by national laws. In some States consular representatives are authorized to communicate with the ministry of foreign affairs. Consuls of States which do not authorize direct correspondence have to resort to the good offices of a friendly legation (Haiti, Order of 1925 on foreign consuls, article 17). Other States permit communication with the central authorities, or the authorities outside the consular district, only through the diplomatic channel (Honduras, Law of 1906 on foreign consular missions, article 16). Under the laws of various countries, consuls may communicate with the central authorities if the local authorities do not act in response to their representations, or if there is no diplomatic representative of their sending State in the country (Bolivia, Regulations of 1887, articles 22 and 23; United States of America, Regulations of 1932, section 437; Denmark, Instructions of 1932, article 35; Ecuador, Law of 1870 on the consular service, article 28, and Decree of 27 October 1916, article 7; United Kingdom, Instructions of 1923, chapter 5, article 13; Honduras, Decree of 1906, article 31; Sweden, Instructions of 1928, article 24, para. 2, article 35 and article 64, para. 5). The same right is recognized under the Havana Convention of 1928 (article 11). The Brazilian Regulations of 1928 authorize consuls of countries having no diplomatic mission in Brazil to address only certain officials of the ministry of foreign affairs itself (article 31). The Consular Regulations of Switzerland (1923) authorize Swiss consuls to have recourse to diplomatic representatives of other States (article 28).

3. Under some international conventions the right in question can only be exercised through the diplomatic channels: Cuba-Netherlands, 1913 (article 6); Soviet Union-Poland, 1924 (article 11); Italy-Czechoslovakia, 1924 (article 11, para. 4). The Consular Convention of 1923 between the United States and Germany (article 21) grants this right only to a consul-general or consular official established in the capital.

Article 25

The inviolability of consular correspondence, archives and premises

1. The correspondence and archives of consular offices and the premises used as consular offices shall be inviolable.

2. The State of residence must ensure that the privilege of inviolability referred to in paragraph 1 above is respected. If the authorities of that State wish to inspect the consular premises, they must first obtain the permission of the head of the office. However, on no pretext whatever, may the said authorities examine, seize or place under seal the files, papers or other articles which are in the consular offices.

Comment

1. The inviolability of consular correspondence and archives is universally recognized in international law. It is also absolutely essential to the discharge of consular functions. Its logical corollary is the inviolability of the premises where such correspondence and archives are found.

2. The principle stated in this article is to be regarded as reflecting the existing state of law. It is confirmed by many conventions: Greece-Lebanon, 5 October 1948, (article 16, para. 1); Cuba-Netherlands, 31 December 1913 (article 5); Philippines-United States, 14 March 1947 (article VI, para. 2); United States-Romania, 5-17 June 1881 (article VI); United States-Costa Rica, 12 January 1948 (article VI); Spain-Philippines, 20 May 1948 (article IX, para. 2); United States-Finland, 13 February 1934 (article XXII, para. 2); Greece-Spain, 23 September 1926 (article 9, para. 1); Soviet Union-Czechoslovakia, 16 November 1935 (article 7); France-Czechoslovakia, 3 June 1927 (article 7); Italy-Czechoslovakia, 1 March 1924 (article 9); Yugoslavia-Czechoslovakia, 7 November 1928 (article 10); Poland-Romania, 17 December 1929 (article 8); Soviet Union-Poland, 18 July 1924 (article 10); Belgium-Poland, 12 June 1928 (article 8); Albania-Yugoslavia, 22 June 1926 (article 12); Poland-Yugoslavia, 6 March 1927 (article VIII); Albania-France, 5 February 1928 (article 6); Soviet Union-Germany, 12 October 1925 (article 5); Germany-Turkey, 28 May 1929 (article 6); Havana Convention of 1928 (article 18).

3. Doctrine is unanimous in recognizing the inviolability of consular archives. [70] In article 9 of its Regulations on Consular Immunities, adopted in 1896, the Institute of International Law recognized the inviolability of consular archives and premises in the following terms:

> "The official residence of consuls and the premises occupied by their office and its archives are inviolable.
>
> "No administrative or judicial officer may invade them under any pretext whatsoever." [71]

4. Some countries grant consuls even inviolability of their residence: Honduras, Law No. 109 of 1906, article 36.

5. It has been accepted in practice that the consular representative is entitled to enjoy inviolability of his correspondence, archives and offices — as a mark of the respect due the State which appointed him — even before he obtains the exequatur. [72]

6. This immunity persists even after the breaking-off of consular relations.

[70] See Kozhevnikov, *op. cit.*, p. 43; Sabanin, *op. cit.*, pp. 79-80; Institute of Law of the Academy of Sciences of the USSR, *Mezhdunarodnoe pravo* (International Law); W. E. Beckett, "Consular Immunities", *British Year Book of International Law, 1944, pp. 37-38* (Mr. Beckett quotes the following authorities as affirming the inviolability of consular archives: Bluntschli, Fiore, Martens, Phillimore, Fauchille, Hall, Pradier-Fodéré, Anson, Strupp, Bustamante, Guerrero, Stewart, Hyde, Verdross); Hershey, *op. cit.*, pp. 421 and 422; Oppenheim, *op. cit.*, p. 842.

[71] Albéric Rolin, *Tableau général de l'organisation des travaux et du personnel de l'Institut de droit international pendant la période décennale 1904 à 1914* (Paris, A. Pedone, 1919), p. 87; *Annuaire de l'Institut de droit international*, édition nouvelle abrégée (1928), vol. III, p. 1078.

[72] See Green Haywood Hackworth, *Digest of International Law* (Washington, D.C., Government Printing Office, 1942), vol. IV, p. 694.

Article 26

Consular fees

For official acts performed by its consular representatives, the sending State is entitled to charge on the territory of the State of residence the fees payable under its national laws.

Comment

This article states a rule of customary international law. It has always been accepted in practice that the State to which the consular representative is responsible has the right to charge the fees laid down in its legislation for official acts performed by its consular representative in the performance of his duties.

Article 27

Immunity from jurisdiction

Consular representatives and members of consular staff shall not be amenable to the jurisdiction of the judicial or administrative authorities of their State of residence in respect of acts performed in the discharge of their functions.

Comment

1. The immunity from jurisdiction enjoyed by consular officers (consular representatives and members of their staff) with regard to acts performed by them in the discharge of their functions is based on the respect due the sovereignty of the foreign State whose organs they are. It is therefore not a personal immunity but an immunity attaching to every act of a sovereign State.

2. This immunity from jurisdiction is confirmed by many consular conventions, of which only the following need be mentioned: Belgium-Poland, 12 June 1928, article 6, last paragraph; Albania-France, 5 February 1928, article 4, para. 1; Albania-Yugoslavia, 22 June 1926, article 9; Poland-Yugoslavia, 6 March 1927, article 6, last paragraph; Bulgaria-Poland, 22 December 1934, article 11; Italy-Czechoslovakia, 1 March 1924, article 4; Soviet Union-Poland, 18 July 1924, article 5; Soviet Union-Czechoslovakia, 16 November 1935, article 4; Germany-Turkey, 28 May 1929, article 10; France-Poland, 30 December 1925, article 4, para. 1; Yugoslavia-Czechoslovakia, 7 November 1928, article 4; Mexico-Panama, 29 February 1924, article IV; Italy-Turkey, 9 September 1929, article 11; Havana Convention of 1928, article 16.

3. The relevant laws of several countries are based on the same principle (cf. Ecuador, Law of 1870, article 17; Dominican Republic, Law of 1887, article 18; Uruguay, Regulations of 1917, article 57; Soviet Union, Law of 14 January 1927, article 11 (*c*).

4. The rule stated in article 27 is to be regarded as part of existing international law. [73]

[73] W. E. Beckett gives copious references to immunity from jurisdiction in respect of acts done in the performance of consular duties, and quotes the following writers in support of the opinion expressed above: C. de Martens, Fiore, Pradier-Fodéré, Halleck, Rivier (only in penal proceedings), Calvo, von Ullmann, Stowell, de Louter, Hall, Fenwick, Fauchille, Stewart, Lapradelle and Niboyet, Hezking, Puente, de Paepe, François, Fedozzi, Verdross (only in penal proceedings) (*loc. cit.*, p. 47).

5. As regards their private activities, consular officers are subject to the jurisdiction of the State of residence, unless otherwise provided in international conventions.

Article 28

Exemption from taxation

1. The State of residence is bound to exempt consular representatives and members of consular staff from payment of all direct taxes and dues levied by the competent authorities, including those of territorial subdivisions (cantons, provinces, departments, districts, communes) but not form dues representing payment for services actually rendered.

2. The exemptions provided for in the preceding paragraph shall not, however, apply to taxes and dues on any immovable property which the officers refered to in that paragraph may possess or farm in the State of residence, or to any capital or income from investments they may have there.

Comment

1. As there are considerable differences in taxation systems, the exemptions from taxation which States grant consular officials vary widely in scope.

2. Subject to reciprocity, States generally grant consular representatives and members of their official staff exemption from direct taxes and charges of a personal nature. Such exemption primarily concerns salaries and other emoluments received by consular officers in respect of their official functions.

3. Exemption is not, however, usually granted to:

(*a*) Consular officers who are nationals of the State of residence; or

(*b*) Consular officers engaging in any professional business occupation or in any occupation for gain, apart from their consular functions, in the State of residence.

4. Many national regulations confer exemption from taxation on a strictly reciprocal basis. (Cf. Argentina, Law No. 13,238 of 10 September 1948, article 1; Brazil, Decree No. 18,956 of 22 October 1929; Honduras, Law of 14 March 1906, article 41; Greece, Income Tax Code of 1929, article 25; Cuba, Decree No. 347 of 17 July 1934, articles 40 to 44; Decree No. 2677 of 13 September 1939, articles 8 to 11; Ecuador, Income Tax Law, article 8; Finland, Law of 12 July 1940, No. 378, articles 4 and 18; and Law No. 886 of 19 November 1943, article 9; Norway, Law of 18 August 1911, article 7 (*f*) and Decree of 7 December 1939; Peru, Decree No. 69, of 18 February 1954, articles 60 to 62; Soviet Union, Law of 14 January 1927, article 11 (*a*); Poland, Decree of 26 October 1950, article 2.)

5. Exemption from taxation is also granted under many conventions, which are alike in recognizing the exemption prescribed in paragraph 1 of this article, though in a fair number of cases they exclude the two categories of officer mentioned in paragraph 3 above. Many of the texts carefully state that exemption from taxation does not apply to charges that are in the nature of payment for a service actually rendered.

6. Under certain conventions, income derived from the possession or ownership of real estate in the State of residence is not eligible for exemption from taxation (cf. Havana Convention of 1928, article 20). Under others, all income from sources situated on the territory of the State of residence is excluded.

7. On all the foregoing grounds, it seemed essential to restrict exemption from taxation, in accordance with the principles on which consular conventions are based, to income from sources outside the State of residence.

Article 29

Exemption from customs duties

1. The following items shall be admitted free of all customs duty and other taxes:

(a) Coats-of-arms, flags signs, seals and stamps, books and all official printed matter for the current use of the consulate;

(b) Furniture, office equipment and other articles required to fit out the consular offices;

(c) Personal possessions and effects which consular representatives, members of the consular staff, and members of their families proceeding to the State of residence bring with them or have brought in from the sending State within six months of their arrival in the State of residence.

2. For the purposes of these articles the term "members of his family" shall mean the wife, children under age, and parents of any of the persons referred to in paragraph 1 (c) above, when they are economically dependent on that person and live with him under the same roof.

Comment

1. National laws and consular conventions usually prescribe duty-free admission for the three categories of items listed in this article, but with certain differences of detail. For example, under certain regulations and some of the conventions the items referred to in paragraph 1 (*b*) are admitted free of customs duty only on first installation of the office. In regard to the personal possessions and effects of persons referred to in paragraph 1 (*c*), the period of time from the consular officer's arrival in the State of residence within which they are admitted free of duty varies. Lastly, there are differences in the definition of the expression "members of his family".

2. The term "office equipment" should be taken to cover all articles required to fit out offices (filing cabinets, calculating machines, typewriters, writing materials, etc.).

3. Although, as regards general international law, this article constitutes a proposal *de lege ferenda*, it contains elements from enough different national laws and international conventions to warrant the hope that it will be found acceptable.

Article 30

Exemption from military and personal services

1. The State of residence shall:

(a) Not subject the buildings and premises used by a consul-

ate, or the equipment, means of transport and furniture pertaining thereto, to military requisitions or billeting;

(b) Exempt consular representatives, members of consular staff, or such other staff as are in the sole employ of the consulate or of the families of consular officers and are not nationals of the State of residence, from material military obligations (requisitions, taxation or billeting);

(c) Exempt the persons referred to in sub-paragraph (b) above from all personal services, and in particular personal military obligations, and from all public service of whatever kind.

2. The premises used by consulates or by the persons referred to in paragraph 1 (b) above shall not, however, be exempt from temporary occupation, expropriation and like measures for purposes of national defence or public utility in accordance with the laws of the State of residence. In such cases, every consideration shall be shown to avoid interference with the performance of consular functions.

Comment

1. The exemption of consular representatives from military service and all personal military obligations is to be regarded as part of customary international law. Many conventions prescribe such exemption, often including exemption from material military obligations, i.e. taxation, billeting and the requisitioning of premises used by consular offices or officials, of vehicles, furniture and other household goods.

2. Under some conventions and some national laws, consuls are granted exemption from all personal services and any service of a public nature, which may be taken to cover such things as service in the territorial army, conscription by communes for work on the roads or in connexion with a public disaster, and service as a juryman, or as a lay magistrate.

3. All the exemptions prescribed by this article are essential to the discharge of consular functions. Being granted only to career consular officers, they do not apply to the officers referred to in article 35, or to staff in the sole employ of the consular office, or of consular officers, where such staff have the nationality of the State of residence.

4. The provision contained in paragraph 2 of this article is designed to reconcile the sending State's interest in the free exercise of consular functions with the sovereign rights of the State of residence.

Article 31

Social security legislation

The State of residence shall grant exemption from all obligations under its social security legislation to consular representatives of the sending State, to members of consular staff and to other persons in the sole employ of a consular office or of consular officers, if they are nationals of the sending State and are not permanently established in the State of residence.

Comment

This article is based on practical considerations. In view of their frequent postings to different foreign countries, it would create serious difficulties for them, if consular representatives, or other members of the consular staff or persons in the sole employ of a consular office or of consular officers were to cease to be subject to their country's social security laws (insurance against sickness, old age, disability, etc.) and come under different legislation every time they were moved. It is therefore in the interest of all States to grant the exemption prescribed in this article, so that consular officers and other persons in the sole employ of consular offices or of consular officers may remain subject to the social security legislation of their own country throughout. The only exception to this rule is in the case of persons who, though nationals of the sending State, are permanently established in the State of residence.

Article 32

Attendance as witnesses in courts of law and before the administrative authorities

1. Consular representatives are liable to attend as witnesses in the courts of their country of residence if the local judicial authorities deem it necessary. In such cases, the judicial authorities must request them to attend by an official letter addressed to the consular mission, without any threat of penalties in case of non-appearance.

2. Should the consular representative be prevented from appearing before the judicial authorities for reasons connected with his duties or with his health, he must send them a written deposition bearing his signature, and, where appropriate, his official seal, when such a method of giving evidence is sanctioned by the laws of the country. Otherwise, the judicial authorities shall be entitled to take his oral evidence at his office or residence in the form prescribed by the laws of the country of residence.

3. Consular representatives may decline to give evidence on circumstances connected with the performance of their official duties and to produce official correspondence and documents relating thereto.

4. Any case of non-appearance in court or of refusal to give evidence or to produce a document shall be settled solely through the diplomatic channel. No coercive measures may be taken by the court.

5. The provisions contained in the preceding paragraphs shall apply *mutatis mutandis* to members of the consular staff.

6. The provisions of this article shall also apply to proceedings before the administrative authorities.

Comment

The wording of this article is based on the provisions to be met with in many consular conventions, for example, Poland-Romania, 17 December 1929 (article 7); France-Czechoslovakia, 3 June 1927 (article 4, paras. 2 and 3); Soviet Union-Czechoslovakia, 16 November 1935 (article 6); France-Albania, 5 February 1928 (article 4, paras. 5 and 6); United States-Costa Rica, 12 January 1948 (article 2, para. 3); Havana Convention of 1928 (article 15).

Article 33

Jurisdiction of the State of residence

Subject to the privileges and immunitise recognized by existing conventions or conferred by these articles, consular representatives and all members of consular staff shall be amenable to the jurisdiction of the State in which they discharge their functions.

Comment

1. The principle stated in this articles is part of customary international law. It is in many cases confirmed by international conventions. (Cf. Consular Convention between France and Albania, of 5 February 1928, article 4, last paragraph; Havana Convention of 1928, article 17; Convention between Italy and Turkey, of 9 September 1929, article 11, etc.).

2. Except in cases where they enjoy exemption under international law or existing conventions, consular representatives are subject to the jurisdiction of the courts of their country of residence in both civil and criminal proceedings.

Article 34

Obligations of the State of residence in certain special cases

To facilitate the work of consular representatives, the State of residence shall:

(a) In the case of the death on its territory of a national of the sending State, see that a copy of the death certificate is sent to the consular representative in whose district the death occurred;

(b) Have the nearest consular office immediately notified of any cases where the appointment of a guardian or trustee appears to be in the interests of a minor or otherwise incapable person who is a national of the consular representative's sending State;

(c) Have the competent consular representative, or, failing him, the representative nearest to the scene of the accident, immediately informed when a vessel flying the flag of the sending State is wrecked or runs aground on the coast or in the territorial waters of the State of residence.

Comment

This article is designed to ensure co-operation between the authorities of the State of residence and consular representatives in three types of cases affecting the work of consular offices. The obligation to bring the facts referred to in this article to the notice of consular representatives in three types of cases affecting the work tions. It would greatly facilitate the task of consular representatives if this obligation were made more general by means of a multilateral convention.

CHAPTER III

Privileges and immunities of honorary consuls and similar officers

Article 35

Honorary consuls

1. For the purpose of these articles the term "honorary consuls" shall mean consular representatives *, whether nationals of the sending State or not, who are not officers appointed or paid by the State.

2. Consular representatives who, although officers of the sending State, are authorized by the national laws to be in business, or engage in some other occupation for gain, in the State of residence shall be on the same footing as honorary consuls.

* See article 3, page 85.

Comment

1. The term "honorary consul" is not used in the same sense in the laws of all countries. The decisive criterion in some is the fact that the official concerned is not paid for his consular work (Switzerland, Consular Regulations of 1923, article 10, para. 1). In others, while it is expressly acknowledged that career consuls may be either paid or unpaid, the essential difference between the two types of agents is that the career consul is sent out while the honorary consul is selected on the spot (cf. Finland, Law of 6 July 1925, para. 4). In still other national regulations the term "honorary consul" means an agent who is not a national of the sending State, and who is entitled to engage in a gainful occupation apart from his official functions in the State of residence, whether he does in fact do so or not (cf. Peru, Decree No. 69 of 18 February 1954, article 62). For the purpose of granting consular immunities, other States again regard as honorary consuls any representatives, of whatever nationality, who engage in a gainful occupation or profession apart from their official functions in the country of residence (cf. Cuba, Decree of 17 July 1934, article 29).

2. In the face of such divergent views, it would seem essential to find a uniform criterion. The consul's position with regard to the administrative machinery of the State may afford a satisfactory solution. If the consul is a civil servant, paid by the State and subject to its disciplinary powers, he should be regarded as a career consul, and in other cases as an honorary consul.

3. As to consular representatives who, although civil servants, are entitled under the laws of their country to engage in business or some other gainful occupation in the State of residence, they should be put on the same footing as honorary consuls, because States treat them in the same way as honorary consuls, even though, as has just been shown, they do not directly regard them as such.

Article 36

Powers of honorary consuls and similar officers

1. The powers of the consular representatives referred to in article 35 shall be determined by the sending State in accordance with international law.

2. The sending State shall inform the Government of the State of residence through the diplomatic channel of the extent of the powers of its honorary consuls.

Comment

The powers of honorary consuls are often much narrower than those of career consular representatives. In some countries honorary consuls are not authorized to perform notarial acts or to exercise jurisdictional powers (cf. Peru, Presidential Decree No. 820 of 16 May 1953, articles 50 to 52). It would therefore seem advisable to follow the regular practice of leaving it to the sending State to determine the powers of its honorary consuls. But, as the State of residence is entitled to know the extent of these powers, an obligation is placed on the sending State, under paragraph 2 of the article, to inform the State of residence on that point.

Article 37

Legal status of honorary consuls and similar officers

1. The provisions of articles 21, 22 (a), 24, 26, 29 (para. 1 (a)) and 32 shall apply to the consular representatives referred to in article 35.

2. The official correspondence, official documents and papers, and consular archives of the consular representatives referred to in article 35 shall be inviolable and may not be the subject of search or seizure, provided that they are kept separate from private correspondence and from books and documents relating to any business, industry or profession in which such representatives may be engaged.

3. The consular representatives referred to in article 35 may decline to give evidence before a judicial or administrative authority, or to produce documents in their possession, should their evidence or the production of documents relate to their consular functions. No coercive measures may be taken in such cases.

Comment

It emerges clearly from a study of national laws and international conventions that States are not prepared to accord honorary consuls and officers authorized to engage in a gainful occupation or profession in the country of residence the same treatment as career consular representatives in the matter of consular privileges and immunities. This differentiation is quite understandable, in view of the fact that the honorary consuls and officers in question are engaged in another gainful occupation or profession apart from their consular functions in the country of residence, that they are not civil servants of the sending State, and, as often as not, are not even nationals of that State. An attempt is made in this article to define the legal position by referring to some of the articles concerning career consular representatives, and by specifying, in its paragraphs 2 and 3, the exemptions to be granted in respect of official acts of the foreign State.

CHAPTER IV

General provisions

Article 38

The relationship between these articles and previous conventions

1. The provisions contained in these articles shall in no way affect conventions previously concluded between the Contracting States, these articles shall apply solely to questions not covered by previous conventions.

2. Acceptance of these articles shall be no impediment to the conclusion in the future of individual conventions concerning consular intercourse and immunities.

Comment

The reasons for including this article in the draft were explained in chapter V of part I of this report. It should be pointed out that the same procedure was adopted in the Havana Convention of 1928 (article 24).

Article 39

Complete or partial acceptance

1. Ratifications of and accessions to these articles may refer:

(a) Either to all the articles (chapter I, II, III, IV and V),

(b) Or to those provisions only which relate to career consular representatives (chapters I, II, IV and V).

2. The Contracting Parties may benefit by the ratifications or accessions by other Parties only in so far as they have themselves assumed the same obligations.

Comment

The reasons why provision had to be made for complete or partial acceptance of the articles on consular intercourse and immunities were adequately explained in chapter IV of part I of this report. This article merely adopts the procedure provided in, and follows the wording of, article 38 of the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949 [74].

CHAPTER V

Final Clauses

[The final clauses will be formulated at a later stage of the work.]

[74] Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949. See United Nations, *Treaty Series*, vol. 71, 1950, No. 912.

STATE RESPONSIBILITY

[Agenda item 5]

DOCUMENT A/CN.4/106

International responsibility. Second report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS. PART I: ACTS AND OMISSIONS

[*Original text: Spanish*]
[*15 February 1957*]

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Introduction

1. In his first report (A/CN.4/96), the Special Rapporteur indicated that the subject of State responsibility was so vast and complex that the immediate codification of the law covering the entire field was not practicable. As in the case of other topics, the International Law Commission had to adopt a gradual approach, dealing first with the branch which was most ripe for codification and in which the solution envisaged in General Assembly resolution 799 (VIII) was most urgently required. The branch covered by the title "(international) responsibility of the State for injuries caused in its territory to the person or property of aliens" seemed to satisfy these two require-

ments. In this second report, therefore, the Special Rapporteur has embarked on a study of this vast branch of the subject, and submits draft articles to serve as the basis of discussion at the Commission's ninth session.

2. The Special Rapporteur has taken into account the opinions expressed by the members of the Commission during its eighth session.[1] For example, in deference to the general opinion expressed in the Commission, the draft contains no mention of *criminal* liability for the failure to comply with certain international obligations, even in those cases where the criminal aspect may have some effect on the strictly *civil* responsibility. Hence, the draft is concerned solely with the " duty to make reparation ", *stricto sensu*, that is incumbent upon the State which violates or fails to comply with its international obligations.

3. For reasons which will be stated later, this report and the draft deal only with principles and rules of a *substantive* nature, i.e. only with *acts and omissions* which give rise to the international responsibility of the State for injuries caused to aliens. Principles and rules of a procedural or adjective character are not touched upon. These include the rules governing the exhaustion of local remedies, the waiver of diplomatic protection by the foreign individual concerned or his national State, modes and procedures of settlement (including the principle of the nationality of the claim and the rules concerning the capacity to bring an international claim), prescription and other exonerating, extenuating or aggravating circumstances and the form and measure of reparation.

4. The principal reason for this pruning of the subject-matter is the shortness of the Commission's session. As its programme of work already includes, among other topics, the law of treaties, diplomatic intercourse and immunities, and consular intercourse and immunities, the Commission will be unable to spend more than three weeks in discussing the topic of responsibility. In this brief period, in view of the increase in its membership, the Commission would not be able to discuss the entire subject in detail. Another consideration which the Special Rapporteur took into account is the fact that, despite their undeniable interdependence, the substantive and procedural aspects can be discussed separately. In fact, as the work of codification is in its initial stage, there may even be certain advantages in this method. Any decisions on the principles and rules contained in the draft, as also the opinions expressed by members, will certainly facilitate the work of codification on the remaining questions. At its next session, therefore, the Commission should be in a position to prepare a draft covering the entire subject and to invite comments from Governments.

5. This report consists of five chapters, each dealing with the field covered by the corresponding chapter of the draft. In order to avoid unnecessary repetition in cases where particular questions were fully considered in the first report, the Special Rapporteur has expressly refrained from citing in the commentaries on the various articles many precedents and other background material; in those cases, he has confined himself to references. In other respects, the Special Rapporteur has followed the same method of work, examining each principle or problem in the light of existing conventions, international judicial practice, previous efforts at codification and the opinions of learned authorities.

[1] *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3 vol.I), 370th to 373rd meetings.

CHAPTER I

Nature and scope of responsibility

ARTICLE 1

1. For the purposes of this draft, the " international responsibility of the State for injuries caused in its territory to the person or property of aliens " involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression " international obligations of the State " shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The State may not plead any provision of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

Commentary

1. THE " DUTY TO MAKE REPARATION "

1. Under paragraph 1 of this article, the responsibility with which the draft is concerned " involves the duty to make reparation " for injuries caused to the person or property of aliens. In his first report, the Special Rapporteur examined in detail the juridical nature of international responsibility, and reached the conclusion that, in its present state of development, international law does not justify the assimilation of the notion of responsibility to the " duty to make reparation ", pure and simple, because there exist certain obligations the non-observance of which involves, besides civil responsibility in the strict sense of the term, some criminal responsibility and the consequent punishment of the author of the injury (A/CN.4/96, chap. III).

2. As was stated in the introduction, in deference to the general opinion expressed in the International Law Commission, the Special Rapporteur has excluded from the draft the penal consequences of the non-fulfilment of certain international obligations, even where such consequences might affect the strictly *civil* responsibility. At least as far as the Special Rapporteur is concerned, this aspect of the question is therefore left pending. There is hardly any need, moreover, to elaborate on what was said in the first report regarding the meaning of " the duty to make reparation ". The only question which matters now for the purposes of the draft is the exact nature and measure of reparation, a question which will be considered when the Commission discusses the relevant article.

2. Imputability of acts or omissions

3. Article 1, paragraph 1, next refers to "some act or omission" which is capable of engaging the international responsibility of the State. Most learned authorities agree that the responsibility of the State does not extend beyond the acts or omissions imputable to the State itself. This problem of imputability was considered fully, though rather more generally, in the first report (chapter IV). When viewed in relation to the narrower concept of responsibility with which the draft is concerned the question becomes much less complex. The reason is not merely that the draft concentrates exclusively on the responsibility of *the State*, but also that, the draft being no longer concerned with the *criminal* responsibility which may exist in certain cases, it is now sufficient to determine what conditions and circumstances must be present before a given act or omission is properly imputable to the State. The article simply states the general principle that responsibility is involved only if the injuries are the consequence of some act or omission which is imputable to the organs or officials of the State. Other provisions of the draft specify these necessary conditions and circumstances.

3. Scope of responsibility

4. Lastly, article 1, paragraph 1, refers to some act or omission "which contravenes the international obligations of the State". In the first report, it was shown that the prevailing, not to say unanimous, trend in doctrine and practice is to regard responsibility as "a consequence of the breach or non-performance of an international obligation" (A/CN.4/96, para. 35). In its draft of 1927, the Institute of International Law stated that "The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations..." (article 1).[2] The texts adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930) were based on the same line of thinking. One of these texts (article 3) even affirms that "The international responsibility of a State imports the duty to make reparation for the damage sustained in so far as it results from failure to comply with its international obligation".[3] This conception of responsibility was also repeatedly reflected in the decisions of the former Permanent Court of International Justice to which reference was made in the writer's first report (A/CN.4/96, para. 37).

5. At the eighth session of the International Law Commission, some members, discussing this view of responsibility, referred to the traditional theories of "causality", "fault", "risk" and so forth. After careful reflexion the Special Rapporteur has reached the conclusion that, because they are so academic, an inquiry into these theories would not produce any practical results or solutions conducive to the codification of the subject. In fact, they are relevant only to certain instances of "omission" and even among these they have a bearing only on the conduct of the organs and officials of the State with respect to acts of private persons and internal disturbances which result in injury to the person or property of aliens. The proper context for the discussion of these matters, however, is chapter V below which deals with the draft articles concerning acts of individuals and internal disturbances.

6. In the course of the debate in the Commission one specific question was brought up, however, which is directly related to article 1 (even though it was brought up in connexion with the theories just mentioned). The question was: Can there be responsibility even in the absence of any breach or non-observance of a specific international obligation? The case cited, for the purposes of illustration, was that of the damages paid by the United States Government to Japanese fishermen after the atomic explosion on the Bikini atoll.[4] A similar situation was considered in the *Trail Smelter Arbitration* (1938-1941) between the United States and Canada, where the Tribunal expressly held that responsibility existed. The Tribunal concluded that "... under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[5]

7. In situations such as those mentioned above, it seems impossible to deny the responsibility of the State or its duty to make reparation for the injury caused. There is admittedly no breach or non-performance of a concrete or specific obligation, but there is a breach or non-performance of a general duty which is implicit in the functions of the State from the point of view of both municipal and international law, namely, the duty to ensure that in its territory conditions prevail which guarantee the safety of persons and property. The rule of "due diligence" (for which see chapter V below) is in reality nothing more than an expression of the same idea, and is recognized as an integral part of the international law relating to responsibility. But would it not be most dangerous to depart from the traditional formula and to include in such draft as the Commission may prepare a clause providing for responsibility in the absence of any violation or non-observance of specific international obligations? Such a clause would without doubt open the door to wholly unjustified claims, and so produce chaos in the current theory of State responsibility. The most important point, however, is that, as long as the draft does not in any way exclude such responsibility whenever the circumstances genuinely justify a claim against the State for negligence in the discharge of its essential functions, any clause of this nature would be completely redundant.

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[2] Harvard Law School, *Research in International Law, II, Responsibility of States* (Cambridge, Mass., Harvard Law School, 1929), p. 228.

[3] League of Nations publication, *V.Legal,1930.V.17* (document C.351(*c*)M.145(*c*)1930.V), p. 236.

[4] *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3, vol.I), 372nd meeting, para. 27.

[5] United Nations, *Reports of International Arbitral Awards*, vol.III (United Nations publication, Sales No.: 1949.V.2), p. 1965.

4. THE " INTERNATIONAL OBLIGATIONS OF THE STATE "

8. Article 1, paragraph 2, seeks to define the meaning and scope of the expression " international obligations of the State ". The only codification in which a formula of this nature was ever attempted is the text adopted by the Third Committee of The Hague Conference, whose article 2 reads as follows:

> " The expression ' international obligations ' in the present Convention means (obligations resulting from treaty, custom or the general principles of law) which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.
>
> " [The Drafting Committee proposed to replace the words in parentheses by the following words: '. . . obligations which result from treaties as well as those which are based upon custom or the general principles of law . . .']." [6]

9. The Hague formula, it will be noted, specified the sources of international obligations, but, in indicating the nature of the latter, confined itself to stating that they were " designed to assure to foreigners in respect of their persons and property a treatment *in conformity with the rules accepted* by the community of nations ". The purpose of the present codification, however, as indeed of all its predecessors, is precisely to determine what acts or omissions give rise to the international responsibility of the State, i.e., to enunciate the *rules* which govern the State's conduct with respect to aliens. Clearly, a mere general reference to the sources of international obligations and to the " rules accepted by the community of nations " cannot accomplish the purpose of this codification which is, precisely, to enumerate those very obligations and rules and to define their content.

10. For this reason, the article expressly uses the phrase " as specified in the relevant provisions of this draft ". The provisions in question describe the acts and omissions which engage the international responsibility of the State for injuries caused in its territory to the person or property of aliens, and they also specify the conditions and circumstances the presence or absence of which determines whether such acts or omissions may be qualified as wrongful for the purposes of an international claim. The enumeration of the acts and omissions and of the decisive conditions and circumstances should be as exhaustive as possible, for otherwise the work of codification will necessarily prove deficient and incomplete. In other words, the draft prepared by the Commission should be self-sufficient, and should not constitute a merely subsidiary instrument which leaves the final solution of the problems to the very principles and rules of international law which it is supposed to assemble and formulate in an ordered and systematic form.

11. Every work of codification is, of course, always apt to contain " gaps " and, at least in the present stage of the development of international law, such shortcomings are virtually inevitable. In articles 5 and 6, which deal with the responsibility for violation of fundamental human rights, the Special Rapporteur has expressly followed a system which takes this factor into account. In the other possible areas of responsibility, the " gaps " can also be filled without undue difficulty: the article defines " international obligations " as those resulting from " any of the sources of international law "; consequently, while the draft endeavours to provide for every contingency, any situation not expressly foreseen in the text only necessitates reference to such sources and a search for an applicable principle or rule which is not incompatible with the provisions of the instrument. Hence, the expression " obligations resulting from any of the sources of international law " allows for the application, as a subsidiary expedient, of principles or rules not expressly set forth in the draft prepared by the Commission.

5. THE SUPREMACY OF INTERNATIONAL OBLIGATIONS

12. The Special Rapporteur's first report contains a full discussion (A/CN.4/96, section 14) of the principle stated in article 1, paragraph 3, so that further commentary on this point is unnecessary. This principle, generally recognized by the learned authorities, has been affirmed in previous draft codes and in the recorded decisions of the former Permanent Court of International Justice. It is now therefore accepted that the State cannot appeal to any provision of its municipal law in order to escape a responsibility arising out of the non-observance of its international obligations.

CHAPTER II

Acts and omissions of organs and officials of the State

ARTICLE 2

Acts and omissions of the legislature

1. The State is responsible for the injuries caused to an alien by the enactment of any legislative (or, as the case may be, constitutional) provisions which are incompatible with its international obligations, or by the failure to enact the legislative provisions which are necessary for the performance of the said obligations.

2. Nothwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if, without amending its legislation (or its constitution), it can in some other way avoid the injury or make reparation therefor.

ARTICLE 3

Acts and omissions of officials

1. The State is responsible for the injuries caused to an alien by some act or omission on the part of its officials which contravenes the international obligations of the State, if the officials concerned acted within the limits of their competence.

2. The international responsibility of the State is likewise involved if the official concerned exceeded his competence but purported to be acting by virtue of his official capacity.

[6] League of Nations publication, *V.Legal,1930.V.17* (document C.351(*c*)M.145(*c*)1930.V), p. 236.

3. Nothwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury.

ARTICLE 4

Denial of justice

1. The State is responsible for the injuries caused to an alien by some act or omission which constitutes a denial of justice.

2. For the purposes of the provisions of the foregoing paragraph, a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (*f*), (*g*) and (*h*) of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

4. Cases of judicial error, whatever may be the nature of the decision or order in question, do not give rise to responsibility within the meaning of this article.

Commentary

1. It is not strictly the purpose of the foregoing three articles to define, from the point of view of their *nature,* the acts and omissions of the organs and officials of the State which give rise to international responsibility on its part by reason of the injuries caused by such acts or omissions to the person or property of aliens. That is the purpose of the articles contained in the other chapters of the draft. For reasons of method, it was considered desirable that the draft should open (as do a number of earlier codifications) with a statement indicating the circumstances and conditions which have to be present if the act or omission is to give rise to responsibility. In principle, the conduct of any organ or official is *prima facie* an act or omission imputable to the State. Yet, before the act or omission can in fact involve the international responsibility of the State, specific circumstances and conditions must be present which support the description of the act or omission as an international wrong. Some of these circumstances and conditions are common to all organs of the State, but others are not, owing to the diversity of the nature and function of these organs. It is these latter circumstances and conditions which will be discussed more particularly below.

2. First, however, it should be explained why this chapter of the draft does not deal with cases of international responsibility arising out of acts or omissions of organs and officials of the political subdivisions of the State or of its colonies and other dependencies. As stated in the first report (A/CN.4/96, para. 72), in essence there are two decisive considerations: the degree of control or authority exercised by the State over the internal affairs of its political subdivision, colony, or dependency; and the extent to which the State is responsible for the international relations and representation of the entity concerned. Consequently, each case must be considered and decided in the light of its own characteristics. Of course, some cases, such as those involving the political subdivisions of a federal State, will present no difficulty. This is not, however, true in other cases, such as those involving certain semi-sovereign entities, some of which have acquired an international personality of a fairly advanced type. An article to supplement the three now contained in this chapter can best be drafted when the Commission comes to deal with the international responsibility of other subjects of modern international law.

6. ACTS AND OMISSIONS OF THE LEGISLATURE

3. One of the drafts approved at the first reading by the Third Committee of The Hague Conference dealt specifically with cases of responsibility for injuries caused to aliens by acts or omissions on the part of legislative bodies. The provision in question (article 6) reads as follows:

> "International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations." [7]

Basis of discussion No. 2 of the Preparatory Committee of the Conference was to the same effect. All the replies received at the time from Governments agree that it is possible for a State to incur responsibility by reason of either of the two circumstances described in the provision cited.[8]

4. It is indeed possible for the State to incur international responsibility by reason either of an act or of an omission on the part of the legislature (or, as the case may be, of the constitution-making body), for the injury sustained by the alien may result from the enactment of a law which conflicts with some particular international obligation of the State or from the non-enactment of legislation which is necessary for the performance of that or some other obligation. Each of these two possibilities might be illustrated with a wealth of practical examples. For instance, expropriation laws which do not provide for adequate compensation or indemnity in respect of the assets expropriated would be in breach of an international obligation; while, on the other hand, typical cases of wrongful inaction are all those in which the legislature fails to take the proper measures for giving effect to the State's contractual obligations. Naturally, this does not mean that the legislature's action or failure to act is in itself, or in itself alone, a circumstance which invariably gives rise to international responsibility. In practice, a State may not necessarily have to refrain from passing a legislative act, or have to enact some particular measure, if it can prevent or make good the injury in some other way.

5. These cases of responsibility are based on the familiar principle that a State cannot rely on its municipal law

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[7] *Ibid.*

[8] League of Nations publication, *V.Legal,1929.V.3* (document C.75.M.69.1929.V), pp. 25-30.

as an excuse for failing to perform its international obligations. In conformity with this principle, if its municipal law is incompatible with these obligations, in that it conflicts with them or fails to provide for their performance, the State will be internationally responsible for injuries caused to the person or property of aliens. With respect to this point, the former Permanent Court of International Justice stated, in the *Case concerning certain German interests in Polish Upper Silesia* (1926): " From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures ".[9]

7. Acts and omissions of officials

6. Where the act or omission giving rise to the international responsibility of the State emanates from the executive authority or from some specific official, the problem does not present itself in the same terms as in the case of other State organs. The distinctive features of this type of responsibility, as considered in this chapter, are the competence of the authority in question and the capacity in which it is acting. They are " distinctive " because in some way they are peculiar to the cases of responsibility which have their origin in acts or omissions of the executive. The explanation is that, by reason of the intrinsic nature of the different organs of the State, one cannot inquire, or one can inquire only exceptionally, into the competence or capacity of the legislature and the judiciary. This observation can be easily confirmed by a reference to international case-law and codifications. Moreover, a study of these sources shows that it is important to distinguish between an official who acted within the limits of his competence, one who exceeded his competence, and one who acted in a private capacity.

7. The abundant case-law of arbitration tribunals and claims commissions on this point will be cited below, in connexion with the different questions posed by these cases of responsibility. For this purpose, let us first consider earlier attempts to codify the principles and rules governing the subject.

8. The report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law of the League of Nations (Guerrero report) contains the following paragraphs:

> " 3. A State is responsible for damage incurred by a foreigner attributable to an act contrary to international law or to the omission of an act which the State was bound under international law to perform and inflicted by an official within the limits of his competence, subject always to the following conditions:
>
> " (*a*) If the right which has been infringed and which is recognized as belonging to the State of which the injured foreigner is a national is a positive right established by a treaty between the two States or by the customary law;
>
> " (*b*) If the injury suffered does not arise from an act performed by the official for the defence of the rights of the State, except in the case of the existence of contrary treaty stipulations;
>
> " The State on whose behalf the official has acted cannot escape responsibility by pleading the inadequacy of its law.
>
> " 4. The State is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:
>
> " (*a*) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;
>
> " (*b*) If, when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalties on the said official as the laws of the country provide;
>
> " (*c*) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws." [10]

In effect, therefore, the Guerrero report admitted the international responsibility of the State both where the official acted within the limits of his competence and also where he exceeded his competence, but in both cases it stipulated that his conduct had to be characterized by specific conditions or circumstances. In general, the conditions or circumstances mentioned in the passages quoted above are based on a rather restrictive view of responsibility. A contrasting view, in certain respects, is that underlying the two bases of discussion of the Preparatory Committee of The Hague Conference, quoted below:

> " *Basis of discussion No. 12*
>
> " A State is responsible for damage suffered by a foreigner as the result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State." [11]
>
> " *Basis of discussion No. 13*
>
> " A State is responsible for damage suffered by a foreigner as the result of acts of its officials, even if they were not authorized to perform them, if the officials purported to act within the scope of their authority and their acts contravened the international obligations of the State." [12]

One of the texts approved by the Third Committee of the Conference reflected the fundamental ideas of these bases of discussion in article 8:

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[9] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7, p. 19.

[10] League of Nations publication, *V.Legal,1927.V.1* (document C.196.M.70.1927.V), p. 104.

[11] *Idem*, *V.Legal,1929.V.3* (document C.75.M.69.1929.V), p. 74.

[12] *Ibid.*, p. 78.

" 1. International responsibility is incurred by a State if damage is sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State.

" 2. International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.

" International responsibility is, however, not incurred by a State if the official's lack of authority was so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage." [13]

9. These three texts, especially the last two, contain the basic principle which has been confirmed by international practice: the responsibility of the State is involved if the official acted within the limits of his competence. Likewise, there seems to be general agreement that the State also incurs responsibility if the official acted " under cover of his official character ", although possibly in excess of his functions. The essential point in this second type of responsibility is the fact that the act or omission which causes the injury may occur precisely by reason of the official function and authority of the agent.[14] The saving clause in the last paragraph of article 8 as approved by the Third Committee of the Conference is self-explanatory: if the lack of authority or the excess of competence is so plain and obvious that the alien can be aware of it and avoid the injury, the situation is analogous, if not identical, to that which arises when the official acts in his private capacity.

10. In the light of a number of precedents from practice, an attempt has been made to distinguish between acts of " higher authorities " and those of " subordinate officers or employees ". Article 7 of the Harvard Law School draft, quoted below, makes this distinction:

" (*a*) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

" (*b*) A State is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the State has failed to discipline the officer or employee." [15]

In the comment on this article, the reason for the distinction is explained as follows: It is only rarely that acts or omissions of " higher authorities " of the State are reviewable, whereas in the case of subordinate officers or employees, " the State may be responsible if it fails to discipline the subordinate officer or employee or if it denies justice to the injured alien." [16] This distinction, which was introduced by Borchard in the Harvard draft, has been much criticized. Eagleton, for example, says that the cases in which this distinction appears were decided according to different criteria, and that, where responsibility was not admitted, the principal ground of the ruling was the non-exhaustion of local remedies.[17] The comment of the Harvard Research authorities actually reaches the same conclusion, which raises the question how far it is necessary and justifiable to maintain the distinction in the codification of the general principles of responsibility.

11. If the official acted in a capacity wholly unrelated to his office or function and commits a purely private act, such as homicide, theft or other crime, then the opinion of learned writers and practice agree unanimously that the State does not incur any responsibility for the said act. This is readily understandable, for neither the status of the official nor the official function has anything to do with the action injuring the alien in his person or property. In so far as there is any responsibility, which there may be in certain cases, it will originate in the State's conduct with respect to the injurious act; in other words, in some new act or omission on the part of some other organ or official of the State. In brief, these cases of responsibility fall within the category of those originating in " acts of private persons ", which will be considered in a later chapter.

8. The " denial of justice "

12. The last question to be discussed in this chapter is this: " Under what conditions and in what circumstances can the conduct of the judiciary involve the international responsibility of the State? " In cases of responsibility of this type, the problem is the definition of the term " denial of justice ", which is constantly employed in learned writings, in diplomatic practice, in international case-law and in codifications. In the first place, " denial of justice " has sometimes been interpreted in a broad sense as including all the acts or omissions capable of giving rise to international responsibility on the part of the State for injuries caused to the person or property of aliens, independently of the organ which may have been the proximate cause of such injury. We find this very broad conception of the term even in arbitral opinions.[18] As a general rule, of course, " denial of justice " is construed in a narrower sense as including only acts and omissions of the judicial authorities, acts or omissions of some organ or official of the State concerned with the administration of justice, and at times merely some of these acts and omissions. Yet, even within the limits of this interpretation there is no unanimity concerning the acts and omissions

[13] League of Nations publication, *V.Legal,1930.V.17* (document C.351(*c*).M.145(*c*).1930.V), p. 237.

[14] See, for example, Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cía, 1936), vol. III, p. 495.

[15] Harvard Law School, *op. cit.*, p. 157.

[16] *Ibid.*, p. 158.

[17] Clyde Eagleton, *The Responsibility of States in International Law* (New York, The New York University Press, 1928), pp. 47-49.

[18] See references to these opinions in Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd ed. (New York, Appleton-Century-Crofts, Inc., 1952), pp. 677 and 678.

which truly give rise to responsibility. In other words, the authorities do not agree under what conditions and in what circumstances the conduct of the judiciary with respect to aliens involves the international responsibility of the State.

13. Unfortunately, the international case-law on this point is somewhat confusing. Not only are there conflicting decisions by arbitration tribunals and claims commissions, but also the precedents, considered as a whole, do not yield any general and objective criteria applicable to situations which occur in reality. Practically all types of situations are dealt with and described in the decisions, but one will look in vain for specific criteria by reference to which the act or omission was held capable of giving rise, or of not giving rise, to responsibility on the part of the State.[19] And these are precisely the criteria one would like to discover, at least for the purposes of codification.

14. In this respect, the draft codifications cited above offer much surer guidance. It will be noticed that although these drafts do not always agree on the definition of the acts and omissions which give rise to responsibility, they do in general agree remarkably on fundamental points. The following extract is taken from the conclusions of the Guerrero report.

> " 6. The duty of the State as regards legal protection must be held to have been fulfilled if it has allowed foreigners access to the national courts and freedom to institute the necessary proceedings whenever they need to defend their rights.
>
> " It therefore follows:
>
> " (*a*) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;
>
> " (*b*) That a judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State.
>
> " 7. On the other hand, however, a State is responsible for damage caused to foreigners when it is guilty of a *denial of justice.*
>
> " *Denial of justice* consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a *denial of justice.*" [20]

The conclusions lay down some specific rules, including a general principle, namely, there is no responsibility if the alien had unrestricted access to the courts and was permitted to institute the proceedings provided for by the municipal law. If these conditions are not fulfilled, the case will be one of " denial of justice " which, consequently, engages the international responsibility of the State. Apart from this particular instance, the conduct of the judicial authorities does not give rise to responsibility. Accordingly, the term " denial of justice " (in the sense of acts or omissions on the part of the judiciary which involve international responsibility) expressly excludes rulings declaring a suit inadmissible, judicial error and unjust decisions.

15. Other codifications contain stricter definitions of the acts or omissions which may give rise to responsibility. For example, the draft of the Institute of International Law provides as follows:

> V
>
> " The State is responsible on the score of denial of justice:
>
> " 1. When the tribunals necessary to assure protection to foreigners do not exist or do not function.
>
> " 2. When the tribunals are not accessible to foreigners.
>
> " 3. When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice.
>
> VI
>
> " The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State." [21]

According to this draft, it is not only the denial of access to the courts which constitutes " denial of justice " but also the mere fact that the courts " necessary to assure protection to foreigners do not exist or do not function " or that the courts do not offer the guaranties " indispensable to the proper administration of justice ". In addition, the draft includes " manifestly unjust " judgements among the acts involving responsibility. The purport of article 9 of the Harvard Research draft is essentially the same.[22]

16. Other codifications follow similar lines, though their language is considerably less strict; examples are basis of discussion No. 5 drafted by the Preparatory Committee of the Hague Conference and the text approved by the Third Committee of the Conference. The former reads as follows:

> " A State is responsible for damage suffered by a foreigner as the result of the fact that:
>
> " 1. He is refused access to the courts to defend his rights.
>
> " 2. A judicial decision which is final and without

[19] Concerning these judicial precedents, see Harvard Law School, *op. cit.*, pp. 181-187.

[20] League of Nations publication, *V.Legal,1927.V.1* (document C.196.M.70.1927.V), p. 104.

[21] Harvard Law School, *op. cit.*, p. 229.

[22] Article 9 reads as follows: " A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice ". See Harvard Law School, *op. cit.*, p. 173.

appeal is incompatible with the treaty obligations or other international obligations of the State.

"3. There has been unconscionable delay on the part of the courts.

"4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State." [23]

The text approved by the Third Committee appears to have been influenced by the basis of discussion but was less explicit.[24] The cases described in paragraphs 1, 3 and 4 have their parallels, in identical or similar terms, in some of the drafts cited earlier. The contingency referred to in paragraph 2, however, is not dealt with in other drafts; the passage in question is somewhat vague and the Preparatory Committee did not elaborate on its meaning in its observations to the Conference. Still, in the light of the replies of Governments on which the Committee relied, and of some arbitral decisions which have dealt with this question, this paragraph 2 might be interpreted to mean that a judicial decision, although in conformity with municipal law, involves responsibility if it is incompatible with some international obligation of the State. If this interpretation of the basis of discussion is correct, there is no doubt that it contains a rule which may have considerable significance in certain cases. But this is a point which will be discussed further below.

17. The inter-American codifications reveal a different line of thought. The Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902), stipulates that claims shall not be made, through diplomatic channels, "except in the cases where there shall have been, on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law".[25] The resolution on "International Responsibility of the State", adopted by the Seventh International Conference of American States (Montevideo, 1933), reduces the possible cases of responsibility to two: cases where there is a manifest denial of justice or unreasonable delay of justice. And it adds that these cases "shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen".[26] Project No. 16 on "Diplomatic Protection" prepared by the American Institute of International Law in 1925, makes provision for the three contingencies mentioned in the Convention of 1902, but in article IV adds the following definition of "denial of justice":

"Denial of justice exists:

"(*a*) When the authorities of the country where the complaint is made interpose obstacles not authorized by law in the exercise by the foreigner of the rights which he claims;

"(*b*) When the authorities of the country to which the foreigner has had recourse have disregarded his rights without legal reason, or for reasons contrary to the principles of international law;

"(*c*) When the fundamental rules of the procedure in force in the country have been violated and there is no further appeal possible." (A/CN.4/96, annex 7).

Whatever view one takes of the enumeration of the acts and omissions referred to in these codifications, their outstanding characteristic lies in the general and fundamental conception behind them. In the codifications cited, the terms in which the acts of the judiciary are described conform, expressly or by implication, with the "international standard of justice", in the sense that, even if there has been no violation of municipal law, the State incurs responsibility if the act or omission constitutes disregard of some generally accepted "standard" in the matter of judicial organization or procedure. In the inter-American codifications, on the other hand, at least in so far as they relate to "denial of justice" and "unusual delay", the definition of the act or omission for the purpose of determining international responsibility depends exclusively on municipal law. In fact, all of them contain other articles (discussed in detail in the writer's first report (A/CN.4/96, chap. VI, sect. 21), which specifically apply the principle of the equality of nationals and aliens in these cases of responsibility.

18. It will be seen that in the matter of responsibility for the conduct of judicial bodies this is the fundamental problem: is the act or omission which caused the injury to be judged in conformity with an international standard or with the country's own municipal law? The next chapter will seek to demonstrate that the problem cannot and should not be presented in terms of irreconcilable opposites, as was the practice in the past. The acts or omissions meant here are, of course, those which violate *fundamental* human rights; for those which violate other rights are dealt with either in article 4 or in other provisions of the Special Rapporteur's draft.

CHAPTER III

Violation of fundamental human rights

ARTICLE 5

1. The State is under a duty to ensure to aliens the

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[23] League of National publication, *V.Legal,1929.V.3* (document C.75.M.69.1929.V), p. 48.

[24] Article 9 reads as follows: "International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact: (1) That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the State; (2) That, in a manner incompatible with the said obligations, the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice. The claim against the State must be lodged not later than two years after the judicial decision has been given, unless it is proved that special reasons exist which justify extension of this period." League of National publication, *V.Legal,1930.V.17* (document C.351.(c).M.1145(c).1930.V), p. 237.

[25] *The International Conferences of American States, 1889-1928* (New York, Oxford University Press, 1931), p. 91.

[26] See *The International Conferences of American States, First Supplement, 1933-1940* (Washington, D.C., Carnegie Endowment for International Peace, 1940), p. 92.

enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the " fundamental human rights " recognized and defined in contemporary international instruments.

2. In consequence, in case of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized " fundamental human rights " are affected.

ARTICLE 6

1. For the purposes of the foregoing article, the expression " fundamental human rights " includes, among other, the rights enumerated below:

(*a*) The right to life, liberty and security of person;

(*b*) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;

(*c*) The right to freedom of thought, conscience and religion;

(*d*) The right to own property;

(*e*) The right of the person to recognition everywhere as a person before the law;

(*f*) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

(*g*) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;

(*h*) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

2. The enjoyment and exercise of the rights and freedoms specified in paragraph 1 (*a*), (*b*), (*c*), and (*d*) may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality or to secure respect for the rights and freedoms of others.

Commentary

9. THE INTERNATIONAL RECOGNITION OF HUMAN RIGHTS

1. In the Special Rapporteur's first report (A/CN.4/96) the question of human rights was treated in connexion with the " doctrine of diplomatic protection " and formed the subject of basis of discussion No. IV (chapter X). In chapter VI (paras 134 and 135) the report stated:

" In traditional international law the ' responsibility of States for damage done in their territory to the person or property of foreigners' frequently appears closely bound up with two great doctrines or principles: the so-called ' international standard of justice ', and the principle of the equality of nationals and aliens. The first of these principles has been invoked in the past as the basis for the exercise of the right of States to protect their nationals abroad, while the second has been relied on for the purpose of rebutting responsibility on the part of the State of residence when the aliens concerned received the same treatment and were granted the same legal or judicial protection as its own nationals. Although, therefore, both principles had the same basic purpose, namely, the protection of the person and of his property, they appeared, both in traditional theory and in past practice, as mutually conflicting and irreconcilable."

" Yet, if the question is examined in the light of international law in its present stage of development, one obtains a very different impression. What was formerly the object of these two principles—the protection of the person and of his property—is now intended to be accomplished by the international recognition of the essential rights of man. Under this new legal doctrine, the distinction between nationals and aliens no longer has any *raison d'être*, so that both in theory and in practice these two traditional principles are henceforth inapplicable. In effect, both of these principles appear to have been outgrown by contemporary international law."

2. In what manner, and to what extent, then, have these two traditional principles been outgrown by the development of international law? Here again, the first report offers an answer. The " international standard of justice " was evolved and obtained recognition at a time when ideas differed from those which prevail at present: international law recognized and protected the essential rights of man in his capacity as an alien, or, in other words, by virtue of his status as a national of a certain State. The principle of equality between nationals and aliens, in its turn, was formulated in order to counteract the consequences of the difference in the status which the law attached to nationals and aliens. Both principles had therefore the same basis; the distinction between two categories of rights and two types of protection. That distinction disappeared from contemporary international law when that law gave recognition to human rights and fundamental freedoms without drawing any distinction between nationals and aliens. The object of the " internationalization " (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person; human beings, as such, are under the direct protection of international law.

3. In this connexion, it should again be pointed out that the fact that these two traditional principles are no longer applicable does not necessarily imply that the new conception of the law ignores their essential elements and basic purposes. On the contrary, the " international recognition of human rights and fundamental freedoms " constitutes precisely a synthesis of the two principles. From

a study of the United Nations Charter and of the regional instruments which provide for such international recognition, and from the two great declarations and other instruments which enumerate and define these rights and freedoms, it becomes evident that all of them accord a measure of protection which goes well beyond the *minimum* protection which the rule of the " international standard of justice " was meant to ensure to aliens. Moreover, in all these documents there is no reference to any case or circumstance in which aliens enjoy a legal status more favourable than that of nationals. In reality, as will also be seen in the next section, the idea of equality of rights and freedoms is the very essence of all these instruments.

4. The foregoing needs to be amplified only by one remark, concerning what seems the only possible method of making provision in this codification for the protection of internationally recognized human rights. Not all these rights are equally relevant to this codification; indeed, many of them are wholly irrelevant. In this respect, the international responsibility of the State extends solely to acts and omissions which infringe particular rights of the alien, and not to all the rights which he possesses or would like to claim. Only in its extreme expressions did the doctrine of the international standard aspire to protect all the rights of the alien. Nor did the principle of equality cover all these rights. In both cases the idea of protection related solely to certain rights, namely, those which modern constitutional provisions recognize as *fundamental* or *essential*.

10. Fundamental rights as embodied in post-war instruments

5. The principal sources of these rights are: the United Nations Charter, the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man (Bogotá, 1948), the Universal Declaration of Human Rights (Paris, 1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), and the draft covenant on civil and political rights prepared by the United Nations Commission on Human Rights (1954).

6. The first two neither enumerate nor define these rights, but confine themselves to proclaiming them and to stipulating certain obligations concerning their observance and effectiveness. For example, Article 1 of the United Nations Charter states that one of the purposes of the United Nations is " to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ". The Charter admittedly does not contain any provision that binds Member States in law to respect these fundamental rights and freedoms or to guarantee their effective exercise. However, this is a defect of form only, inasmuch as the binding nature of the obligation imposed on Member States is implied in other provisions. Under Article 55, for example, " the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . .". And under Article 56, " all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." The Charter of the Organization of American States, which was signed three years later, also provides for the recognition and protection of human rights and fundamental freedoms. Article 5 reaffirms the principles on which the Organization is based and proclaims " the fundamental rights of the individual without distinction as to race, nationality, creed, or sex ". And the chapter relating to " Fundamental Rights and Duties of States " categorically stipulates that, in the free development of its cultural, political and economic life, " the State shall respect the rights of the individual ".

7. These human rights and fundamental freedoms are enumerated and defined in the supplementary instruments mentioned above. Broadly speaking, the catalogue of the rights and freedoms is identical in all these instruments, and the treatment is also largely analogous. For the purposes of the present draft, they may be conveniently discussed under the following heads.

(a) Equality of rights and equality before the law

8. Both in the United Nations Charter and in the Charter of the Organization of American States the fundamental rights are recognized " without distinction " based on racial, religious or other reasons. The other instruments are more explicit in stipulating this " equality of rights ". The Universal Declaration of Human Rights, for instance, states:

> " Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status " (article 2, paragraph 1).

The corresponding provision of the draft covenant (article 2, paragraph 1) is to the same effect. From the point of view of the international responsibility of the State, it is particularly noteworthy that nationality is not included among the reasons or factors which are expressly mentioned in connexion with the recognition of the equality of rights.

9. " Equality before the law " is a corollary of the foregoing principle, and is in some ways complementary thereto. In article 7 of the Universal Declaration it is expressed as follows:

> " All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination ".

The terms of article II of the American Declaration are analogous. The fundamental idea is that of " protection against any discrimination " that is incompatible with the equality of rights laid down in these instruments. The two which have been cited are the only ones in which this idea is enunciated in general terms. In the Charters, as well as in the two declarations, the concept of equality of protection is applied to various concrete situations, in order that the equality of protection should be effective with respect to all the rights and guarantees proclaimed. This, however, may be better appreciated from a closer inspection of those rights and guarantees.

(b) Substantive rights

10. Naturally, not all the rights enunciated in the above instruments are *fundamental* human rights, or at least not all can be regarded as fundamental for the purposes of the present codification. In some of the cases it is easy to see that a particular right or freedom is not truly *fundamental* in the strict sense of the term, but in others the use of the term will depend on the view one takes of the content of the right or freedom in question. For the purposes of this codification, however, the important point is to indicate those rights and freedoms whose *essential* or *fundamental* character appears to be beyond all doubt.

11. This category includes, in the first place, the " right to life, liberty and the security of person ", as proclaimed in the Universal Declaration (article 3), and in the corresponding provisions of the other instruments mentioned. The rights which are enunciated in these provisions and which are formulated in general terms have different forms of expression and application. Sometimes the case contemplated is that in which exceptions are made to the recognition or exercise of the rights; at other times the reference is to the specific form which the guarantee takes. An illustration of one of these types of provision is offered by article 6 of the draft covenant, which states that " No one shall be arbitrarily deprived of his life "; whilst an example of the other is article 5 of the European Convention: " No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ". Actually, however, these various forms of expressing and applying the right to life, liberty and security constitute the judicial and other guarantees provided by the instruments themselves; as such, they will be discussed below.

12. A second group of substantive rights consists of the rights to the inviolability of the privacy, home and correspondence of the person, and to respect for honour and reputation. In this connexion the draft covenant, which is based on the earlier declarations, stipulates in article 17:

> " 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> " 2. Everyone has the right to the protection of the law against such interference or attacks."

Furthermore, the European Convention interprets the scope of the " protection " which the law is to extend to these interests in providing in article 8, paragraph 2:

> " There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This provision epitomizes the limitations or conditions to which the recognition and protection of these rights are subordinated. Since public and social interests may prevail over the rights, the State's obligation to respect the rights is not absolute.

13. The treatment is similar in the case of other rights, such as freedom of thought, conscience and religion, for which all the instruments make provision. For example, the individual's freedom to profess his own religion or beliefs is expressly governed under the draft covenant by the " limitations . . . prescribed by law and . . . necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others " (article 18, paragraph 3); and as regards freedom of expression, the draft covenant states that this is a right which " carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and necessary, (1) for respect of the rights or reputation of others, (2) for the protection of national security or of public order, or of public health or morals " (article 19, paragraph 3).

14. The right to own property is another of the rights recognized in the instruments mentioned. The Universal Declaration states in article 17: " Everyone has the right to own property alone as well as in association with others." A second paragraph of the same article adds: " No one shall be arbitrarily deprived of his property ". The object of the word " arbitrarily " seems to allow for exceptions in contingencies in which the State may legitimately deprive persons of their property or goods. This is also the interpretation of the provision relating to private property rights in the Protocol to the European Convention, signed at Paris on 20 March 1952, to ensure the collective implementation of certain rights and freedoms not provided for in the Convention. Article 1 of the Protocol states: ". . . No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law ". This right, in so far as it may be affected by acts of expropriation, will be discussed further in the next chapter.

15. The last substantive right to be mentioned here may be of special interest for the purposes of this codification. According to article XVII of the American Declaration, " Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." The Universal Declaration and the draft covenant also state quite simply that everyone has the right to recognition everywhere as a person before the law (articles 6 and 16, respectively). When this article was discussed during the preparation of the draft covenant, the general idea was " to ensure recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations ".[27] Clearly, the recognition of the juridical personality and capacity of every individual is intended to remedy the more or less unfavourable treatment extended to aliens by the legislation of practically all countries in the world, in the form of restrictions and special obligations affecting their right to acquire property, their contractual capacity, appearance in court, etc. The dominant idea of these instruments is to abolish such limitations affecting the personality of the

[27] *Official Records of the General Assembly, Tenth Session, Annexes,* agenda item 28 (part II), document A/2929, p. 46.

individual in civil law, so that he may be recognized as possessing and enjoying all rights of this nature which are by law conferred upon nationals.

(c) Judicial and other guarantees

16. The American Declaration contains the following article: " Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights " (article XVIII). A similar general provision occurs in the other instruments. The Universal Declaration speaks of " the right to an effective remedy by the competent national tribunals . . ." (article 8); and the draft covenant says it is the duty of the State " to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity " (article 2, paragraph 3 (*a*)). The language of article 13 of the European Convention is similar. The object of these provisions is apparently to lay down the general principle that every person should have at his disposal judicial or other remedies which offer an adequate and effective means of asserting his rights.

17. Most of the guarantees stipulated in the various instruments relate to criminal proceedings. In some cases, however, they also relate to civil proceedings. For example, article 14 of the draft covenant (as distinct from the two declarations) provides: " In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

18. So far as criminal proceedings are concerned, all the instruments mentioned provide, in identical or similar terms, that the accused shall have the following rights and guarantees: the right to be presumed innocent until proved guilty; the right to be informed of the charge against him, in a language which he understands; the right to have adequate time and facilities for the preparation of his defence; the right to speak in his defence or to be defended by a counsel of his choice, and so forth. It is also stipulated that no one shall be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed.

19. Some of these guarantees represent forms of expressing and applying certain of the substantive rights referred to above. For example, in connexion with the right to freedom and security of the person, the instruments in question lay down the following guarantees, among others: the right of every detained or imprisoned person to be informed immediately of the charge against him, and to be tried without delay or to be released.

11. Method adopted in the draft

20. For the purposes of the codification of the topic dealt with in this chapter three methods are possible. One method would be to lay down a general rule, under which the specific acts or omissions on the part of organs or officials of the State would be judged in the light of existing instruments that enumerate and define the fundamental human rights. The draft would then say, simply, that the State incurs international responsibility for injuries sustained by aliens in their person or property if internationally recognized fundamental human rights have been violated. If this method were employed, however, the text would be open to the serious criticism of uncertainty, for at the present stage of development of the international law relating to this topic the question whether particular rights can or cannot be treated as " internationally recognized fundamental human rights " would frequently be the subject of controversy. Accordingly, what is needed is a method which will yield a more precise rule.

21. An enumeration—a provision itemizing the various rights and guarantees, the violation of which would give rise to responsibility—would naturally be the most effective method. But since no single instrument is now in force with respect to all or to a great majority of States, an attempt to enumerate all these rights and guarantees would undoubtedly encounter serious difficulties. Moreover, the enumeration would be bound to be restrictive—with the consequence that it might omit certain rights and guarantees which are now regarded as " fundamental human rights ". Alternatively, the enumeration might be too broad and include some rights which are not genuine " fundamental human rights ".

22. There is a third method, which has all the advantages of the first two and yet none of their defects. This would be a " mixed " method—a text containing both a general definition and an enumeration. This is the method adopted in the Special Rapporteur's draft laid before the Commission. In any specific situation it is possible to apply articles 5 and 6, either directly (i.e. where the right or freedom in question is expressly mentioned in the non-exhaustive enumeration of article 6, paragraph 1), or else by analogy with the rights and freedoms described in that clause as " fundamental " for the purposes of article 5.

Chapter IV

Non-performance of contractual obligations and acts of expropriation

Article 7

Contractual obligations in general

1. The State is responsible for the injuries caused to an alien by the non-performance of obligations stipulated in a contract entered into with that alien or in a concession granted to him, if the said non-performance constitutes an act or omission which contravenes the international obligations of the State.

2. For the purposes of the provisions of the foregoing paragraph, the repudiation or breach of the terms of a contract or concession shall be deemed to constitute an " act or omission which contravenes the international obligations of the State " in the following cases, that is to say, if the repudiation or breach:

(*a*) Is not justified on grounds of public interest or of the economic necessity of the State;

(*b*) Involves discrimination between nationals and aliens to the detriment of the latter; or

(*c*) Involves a " denial of justice " within the meaning of article 4 of this draft.

3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article . . .*

* The article referred to in this paragraph will be drafted when the subjects remaining pending are studied.

ARTICLE 8

Public debts

The State is responsible for the injuries caused to an alien by the repudiation, or the cancellation, of its public debts, save in so far as the measure in question is justified on grounds of public interest and does not discriminate between nationals and aliens to the detriment of the latter.

ARTICLE 9

Acts of expropriation

The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.

Commentary

12. CONTRACTUAL OBLIGATIONS IN GENERAL

1. The above three articles deal with cases of responsibility which are closely interrelated, both by reason of the nature of the injuries caused and by reason of the type of act or omission that causes them. The injury in question here is invariably pecuniary, originating in the non-performance on the part of the State of residence of an obligation towards a particular alien. Apart from a few cases of expropriation in which there is no concession or other form of contract between the State and the individual, the hallmark of these cases of responsibility is accordingly the non-performance or non-observance of a contractual obligation. However, does a State which fails to perform an obligation of this kind really incur international responsibility? On this point, one well-known claims commission, after reviewing the jurisprudence, declared that it was impossible to hold either that there was a rule of international law establishing responsibility for violation of contract, or that there was no such rule.[28]

[28] United States-Mexican General Claims Commission (Illinois Central Railroad Company Case). See *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico—February 4, 1926, to July 23, 1927* (Washington, D.C., United States Government Printing Office, 1927), pp. 15 ff.

Dunn observes that " this subject presents a diversity of views among legal authorities and a confusion of precedents quite as great if not greater than any subject previously considered ". (Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore, The Johns Hopkins Press, 1932), p. 163.)

2. What is the crux of the question? If both parties are States, the failure to perform contractual obligations undoubtedly involves some kind of international responsibility, but responsibility of this type falls outside the scope of the present report. If the obligations in question arise out of contracts between private persons of different nationality, the rules which apply are those of private international law. The failure to perform obligations of this type could only give rise to international responsibility indirectly, i.e. if an injury has been suffered by reason of some action or inaction of a local authority; but then the case would be one of denial of justice or of some other illegal act or omission on the part of a State organ or official. Nevertheless, there is a certain analogy between the obligations with which this chapter is concerned and the obligations under contracts to which private persons of different nationalities are parties. Learned opinion and practice are agreed that contracts made between the Government of a State and an alien are governed, so far as their conclusion and performance are concerned, by the municipal law of that State and not by public international law, for a private person who enters into a contract with a foreign Government *ipso facto* agrees to be bound by the local law with respect to all the legal consequences which may flow from that contract. If this is the correct view in law of the contractual relationship between a State and an alien, can it really be said that the obligations contracted by the State are " international ", as they have to be before their non-performance can give rise to international responsibility?

3. This is certainly the consideration which decisively influenced the prevailing opinion on the subject, which is that the non-performance of contractual obligations of this type does not *per se* constitute an international wrong. Or, to put it differently, the failure to perform these obligations does not in itself engage the international responsibility of the State. Eagleton, who recognized the right of the private person's national State to intervene on his behalf and even resort to armed force to recover his claim, concedes that it is not only necessary to exhaust the local remedies but also that the claim should be based on the absence of such remedies or on the fact that they are dilatory.[29] Other authors have been more explicit on this point. In the opinion of one of them, it is often impossible in these cases to prove that an unlawful act exists, or that one of the parties possesses the specific right asserted in support of the contract, until the competent courts have determined the facts and ruled on the matter. For this reason, in order to substantiate an international claim of this kind, it is necessary to prove that the respondent Government has committed a wrong through its duly authorized agents, or that the claimant has suffered a denial of justice in attempting to secure redress.[30] Borchard himself, relying on cases which had arisen and had been decided in actual practice, was one of the first who helped to establish this opinion. Discussing the propriety of " diplomatic interposition " in these cases of respon-

[29] Eagleton, *op. cit.*, pp. 160, 167 and 168.

[30] Marjorie M. Whiteman, *Damages in International Law* (Washington, United States Government Printing Office, 1943), vol. III, p. 1558.

sibility, he contends that it would not lie "for the natural or anticipated consequences of the contractual relation, but only for arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law".[31]

4. This conception of the international responsibility which the State may incur owing to the non-performance of contractual obligations towards aliens is not reflected in all private and official codifications. The first codification to deal with this type of responsibility was the Harvard Law School draft. Its article 8 reads as follows:

"(*a*) A State is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

"(*b*) A State is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice."[32]

5. The commentary explains that it is the duty of the State to perform these contractual obligations and that "subject to the exhaustion of local remedies, it will be responsible to the alien's State for non-performance. The article implies, of course, an unlawful or wrongful non-performance." The commentary adds that the purpose of paragraph (*b*) is to make an exception to the rule laid down in article 3 which admits the responsibility of the State for an injury attributable to one of its political subdivisions.[33] As can be seen, in both cases responsibility is admitted if the non-performance of the contractual obligation is accompanied by an act or omission that constitutes an international wrong.

6. The bases of discussion prepared by the Preparatory Committee of The Hague Codification Conference diverged considerably from the prevailing doctrine. The relevant texts are reproduced below:

"*Basis of discussion No. 3*

"A State is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or a contract made by the State.

"It depends upon the circumstances whether a State incurs responsibility where it has enacted legislation general in character which is incompatible with the operation of a concession which it has granted or the performance of a contract made by it.

"*Basis of discussion No. 8*

"A State is responsible for damage suffered by a foreigner as the result of an act or omission on the part of the executive power which infringes rights derived by the foreigner from a concession granted or a contract made by the State.

"It depends upon the circumstances whether a State incurs responsibility when the executive power has taken measures of a general character which are incompatible with the operation of a concession granted by the State or with the performance of a contract made by it.

"*Basis of discussion No. 4*

"A State incurs responsibility if, by a legislative act, it repudiates or purports to cancel debts for which it is liable.

"A State incurs responsibility if, without repudiating a debt, it suspends or modifies the service, in whole or in part, by a legislative act, unless it is driven to this course by financial necessity.

"*Basis of discussion No. 9*

"A State incurs responsibility if the executive power repudiates or purports to cancel debts for which the State is liable.

"A State incurs responsibility if the executive power, without repudiating a State debt, fails to comply with the obligations resulting therefrom, unless it is driven to this course by financial necessity."[34]

7. What were the Preparatory Committee's reasons in formulating the rules contained in bases of discussion Nos. 3 and 8? (Bases of discussion Nos. 4 and 9 will be discussed in the next section of this report, which deals with public debts). According to the Committee's observations, the replies received from Governments differed greatly with respect to the question whether responsibility existed in these cases. In its opinion, "certain difficulties will be met if a distinction is made between legislation [or executive measures, as the case may be] which directly infringes rights conferred by the State upon a foreigner in a concession or a contract and legislation of a general character which is incompatible with such concession or contract; as regards the latter, the responsibility of the State would seem to depend to some extent on the circumstances of the case."[35] As can be seen without difficulty, the distinction drawn by the Committee was not only unsupported by any evidence taken from practice but is also plainly artificial and unjustified. The lawfulness of a legislative or executive measure of the nature referred to in the basis of discussion does not, surely, depend on the generality or particularity of the measure, for if there are grounds justifying the adoption of the measure the State has an equal right to take action with respect to either particular (private) or general interests, regardless whether the particular interests are national or foreign. It would be more logical, and also far more consistent with the principles of international law governing responsibility, if the

[31] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, The Banks Law Publishing Co., 1915), p. 284.

[32] Harvard Law School, *op. cit.*, pp. 167 and 168.

[33] *Ibid.*, p. 168.

[34] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 33 ff. (There is no provision on this subject in the draft approved in first reading by the Third Committee of the Conference).

[35] *Ibid.*, pp. 33 and 58.

distinction were drawn by reference to the discriminatory character (if any) of the measure in question; it would be held internationally unlawful if, while affecting both national and foreign interests, it discriminated against the latter.

8. Questions concerning pecuniary claims have been given special attention by the inter-American conferences and their codification committees.[36] At the request of the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), the Committee of Experts on the Codification of International Law prepared a report on the subject which was based both on precedents and on the discussions held at that Conference. After thorough study of the problem, the Committee approved the following draft articles:

> " 1. The High Contracting Parties pledge themselves, without any reservation, not to employ armed force for the collection of public debts or contractual debts.
>
> " 2. The High Contracting Parties agree not to intervene diplomatically in support of claims arising out of contracts, unless there has been a denial of justice or infraction of a generally recognized international duty.
>
> " 3. In the event of unjustified repudiation or breach of the terms of a contract and the failure to settle the claims by resort to local remedies and diplomatic negotiations, either creditor or debtor may demand and obtain the arbitration of the issue of unjustified repudiation or violation, denial of justice or infraction of a generally recognized international duty." [37]

In the light of the above text, what are the constituent elements of international responsibility in the case of failure to perform or to observe contractual obligations? In the first place, the repudiation or breach of the terms of a contract will not constitute a basis for a claim in every case, but only in cases where the contracting State has committed some *unjustified* act. In the second place, before there can be arbitration, the local remedies and direct diplomatic negotiations must first be resorted to. Lastly, the international claim can only relate to the issues of " unjustified repudiation or violation, denial of justice or infraction of a generally recognized international duty ". In this respect, the draft of the Committee of Experts agrees in substance with the prevailing doctrine on this subject.

13. Public debts

9. Borchard was perhaps the first to distinguish claims based on contracts between a private person and a foreign Government from those arising out of bonds issued by a foreign Government. He says: " This distinction ... is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign Government than there is in the case of breaches of concession and similar contracts. " [38] In a memorandum submitted to the Committee of Experts, Accioly made the same distinction and explicitly indicated the reasons justifying it. According to this jurist, it is desirable to make a distinction between the non-payment of public debts and the breach of ordinary contractual obligations. In the first case, the reason for the non-performance of the obligation may be genuine and honest financial incapacity, for which the creditors ought to show some consideration, not only because the foreign Government did not enter into direct relations with them when it negotiated its loan, but more particularly because the creditors, when they acquired the bonds in question, should have been aware of the risks involved in such a transaction. Clearly, this will not be an admissible defence if the debtor Government acted fraudulently or in bad faith. In the case of ordinary contractual obligations the situation is different, inasmuch as the Government, acting like an individual, entered into direct relations with specific, known persons and the latter relied upon its word.[39]

10. As will have been observed, bases of discussion Nos. 4 and 9 of the Preparatory Committee of The Hague Conference, quoted above, were drawn up without proper regard for this distinction and for the reasons supporting it. To some extent, the same may be said about the Committee's interpretation of the replies sent in by Governments on that subject. It is true that those replies admitted, in principle, the responsibility of the State for repudiation of public debts. But it is equally true that the comments and reservations made by Governments did not refer solely to the distinction, made in the bases of discussion, between the repudiation or purported cancellation of public debts and the suspension or modification of debt service in whole or in part. The majority of the replies contained a number of important exceptions to the general rule concerning responsibility. For example, some suggested that if the repudiation of a debt was justifiable, no claim would lie so long as the foreign creditors had been treated on a footing of equality with national creditors. Other replies distinguished between arbitrary acts on the part of a State and acts which it carried out for juridical reasons. Yet others pointed out that the public interest prevailed over private interests, whether the creditors were nationals or aliens.[40]

11. These arguments are undoubtedly far more in keeping with the views of leading writers than are the distinctions and solutions contained in the Preparatory Committee's bases of discussion. Actually, when a State repudiates or purports to cancel its public debts, there can be no question of international responsibility, unless the measure cannot be justified by reasons of public interest, or unless it discriminates between nationals and aliens to the detriment of the latter.

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[36] See the writer's first report (A/CN.4/96), section 4.

[37] See *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), p. 4. The report is signed by the following members: Afranio de Mello Franco, Chairman; Alberto Cruchaga Ossa; Luis Anderson and Edwin M. Borchard.

[38] Borchard, *op. cit.*, p. 282.

[39] See *Informes y Proyectos Sometidos por la Comisión de Expertos* (Washington, D.C., Pan American Union), pp. 84 and 85. In the same sense, see Luis A. Podestá Costa, "La responsabilidad Internacional del Estado", *Cursos Monográficos* (Havana, Academia Interamericana de Derecho Comparado e Internacional, 1952), vol. II, p. 216.

[40] League of Nations publication, *V.Legal,1929.V.3* (document C.75.M.69.1929.V), pp. 37-40.

14. Acts of expropriation

12. The codifications considered in this report and in its predecessor do not contain any provision specifically referring to acts of expropriation. This omission may be due to the fact that in most actual cases such acts involve the non-performance of an obligation derived from a concession or from some other type of contractual relationship. Nevertheless, there are some occasions when no contractual obligations of any kind are involved, inasmuch as the objects expropriated are assets or rights which have been acquired in some other way. For this reason, it is necessary to determine when and in what circumstances the State will incur international responsibility. In addition, however, even where there is a contract or concession, it will be equally necessary to determine the specific circumstances in which an act of expropriation can give rise to responsibility.

13. Most of the quite large number of precedents found in diplomatic practice offer an accurate guide to the rules of international law which govern this subject. One of the earliest and best known cases is that of the expropriation of the Delagoa Bay Railway (1900), which was arbitrated between Great Britain and the United States on one side and Portugal on the other. The *compromis* entered into by the parties to define the arbitration tribunal's terms of reference was concerned exclusively with the *quantum* of the indemnity payable by the Portuguese Government for having cancelled the railway concession. At no time was any question raised as to the validity of the act of expropriation itself; the only issue was the form and measure of the compensation to be paid to the aliens affected. The issue was put in similar terms in a case in 1911 brought by a number of countries whose nationals were going to be affected by draft legislation to establish an Italian State insurance monopoly. The same principles were also applied in the arbitration of the case of the expropriation of the Portuguese religious properties.[41] Diplomatic practice furnishes more recent examples, but in these too (though in various guises) the really controversial issue has always been the duty of the State to compensate for the expropriated property.[42]

14. The foregoing paragraphs explain the general tenor and dominant ideas in the replies of Governments to point III, No. 3, of the questionnaire drawn up by the Preparatory Committee of The Hague Conference. In keeping with the opinions expressed on the similar question mentioned above, these replies recognized expropriation as one of the acts which the State could lawfully execute. Some replies added that in such cases the private interest should yield to the public interest, irrespective of the nationality of the persons affected. Others drew a distinction between cases in which there was an obligation arising out of a treaty, and those in which the rights affected had been acquired under municipal law; they recognized responsibility in the former cases only. Lastly, several argued from the principle of equality between nationals and aliens that the State would incur responsibility if in adopting measures of expropriation it discriminated against aliens.[43]

15. In the jurisprudence of the former Permanent Court of International Justice, the question is more closely related to the doctrine of "vested rights". In conformity with the "generally accepted principles of international law generally" applicable to aliens, to which the Court certainly referred, it is the obligation of the State to respect vested rights. In particular, the Court developed this doctrine in the *Case concerning certain German interests in Polish Upper Silesia* (1926). In its judgement in this case, the Court said that acts of expropriation in the public interest and other similar measures were exceptions to the general principle of respect for vested rights.[44] The Court's attitude in this case is consistent with its statement in a later judgement: "In principle, the property rights and the contractual rights of individuals depend in every State on municipal law."[45] For the purpose of determining the form and measure of compensation in each case, the Court distinguished between acts of expropriation pure and simple and those not involving the non-performance of contractual obligations.[46]

16. The authors who have made a careful study of the question have arrived at the same fundamental conclusions. According to Fachiri, no international responsibility will be incurred if the expropriation does not involve discrimination against aliens and if compensation is paid, always provided that the compensation is not so inadequate as to amount, in effect, to confiscation.[47] Sir John Fischer Williams goes further; he states that where no treaty or other contractual or quasi-contractual obligation exists by which a State is bound in its relations to foreign owners of property, no general principle of international law compels it not to expropriate except on terms of paying full or "adequate" compensation. In his opinion, this does not imply that a State is free to discriminate against foreigners

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[41] For a fuller discussion of these precedents, see Alexander P. Fachiri, "Expropriation and International Law", *The British Year Book of International Law, 1925*, pp. 165-169.

[42] For these more recent cases, see B. A. Wortley, "Expropriation in International Law", *The Grotius Society: Transactions for the Year 1947* (London, Longmans, Green and Co., 1948), vol. 33, pp. 25-48; Charguéraud-Hartmann, "Les intérêts étrangers et la nationalisation", *Etudes internationales*, vol. I (1948) (Brussels, Librairie Encyclopédique), pp. 331-354; Arthur K. Kuhn, "Nationalization of Foreign-Owned Property in its Impact on International Law", *The American Journal of International Law*, vol. 45 (1951), pp. 709-712; S. Friedman, *Expropriation in International Law* (London, Stevens and Sons Limited, 1953), *passim*.

[43] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 33-36. The Preparatory Committee did not draft a basis of discussion on this point because the replies disclosed substantial differences of opinion and doubts as to the exact meaning of the expression "vested rights" (*ibid.*, p. 37).

[44] Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 7, pp. 21 and 22.

[45] *Idem, Judgments, Orders and Advisory Opinons*, series A/B, No. 76 (The Panevezys-Saldutiskis Railway Case, 1939), p. 18.

[46] *Idem, Collection of Judgments*, series A, No. 17 (Case concerning the Factory at Chorzów), p. 48.

[47] Fachiri, *loc. cit.*, p. 171.

and attack their property alone.[48] Lastly, Kaeckenbeeck (who is familiar with the subject through experience), discussing rights acquired under concession or contract, takes the view that the freedom of the State to modify the existing rights by some general enactment does not in itself imply either the duty or the absence of a duty on the part of the State to compensate the owners of the rights for any injuries caused to them. And he adds that the question of the circumstances in which compensation is payable, or the fairness of compensation, is an independent question which in reality is likewise within the competence of the legislature. Moreover, as stated earlier, the machinery of diplomatic protection cannot legitimately be invoked, except in the case of discrimination against foreigners, unless the State of the legislator fails to conform to the minimum standard of civilized societies.[49]

17. Article 9 is based on all the precedents and considerations cited above, and follows the general trend of the other two articles in this chapter. The only point requiring an explanation is why this article does not contain the clause on discrimination which appears in articles 7 and 8. The reason is obvious: acts of expropriation generally affect specific assets, the property of an individual or of a body corporate, and the owner may be either a national or an alien. That being so, the problem of discrimination obviously does not arise. Should the situation be otherwise (in that the measure affects the property both of nationals and of aliens), then the general principle would be applicable, namely, international responsibility is incurred if the indemnity is not identical for all owners, and if the discrimination is based on the status of the owners as nationals or aliens.

Chapter V

Acts of individuals and internal disturbances

Article 10

Acts of ordinary private individuals

The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts.

Article 11

Internal disturbances in general

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question.

Article 12

Acts of the constituted authority and of successful insurgents

1. The State is responsible for injuries caused to an alien by measures taken by its armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance, if the measures taken affected private persons directly and individually.

2. In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequence of measures which were taken by the revolutionaries and which were analogous to the measures referred to in the foregoing paragraph.

Commentary

1. In the circumstances envisaged in this chapter of the draft, the author of the act which directly causes the injury to the alien is not an organ, or official, of the State but a person, or group of persons, acting in a private capacity. As it is one of the fundamental principles of international law on the subject of responsibility that the State cannot be held responsible except for " its own acts or omissions ", its responsibility and the duty to make reparation can only arise in these cases if there is a second act or omission imputable to an organ of the State, or to one of its officials. As was stated in the writer's first report (A/CN.4/96, para. 73), the State's responsibility is not involved directly by the injurious act, but is rather the consequence of the conduct of its authorities with respect to the act. Viewed in these terms, the imputation of international responsibility will necessarily depend on the existence of factors and conditions extraneous to the actual event which caused the injury. This explains why, in doctrine and in practice, there has been so much argument, and such divergence of opinions, concerning the conditions which have to be present before the State can be truly said to be responsible.

2. In these cases, the problem whether the international responsibility of the State is purely *objective,* or whether it originates in a specific attitude deliberately adopted by some organ or official, does not even arise. For not only must there be a harmful act committed by an individual, but, in addition, it must be possible to attribute to the State some conduct with respect to the act that implies a specific attitude wilfully adopted by the organ or official (fault, *culpa*). Where imputability is determined by this indirect process, it is not difficult to see that what is in essence imputed to the State is not really the act or deed which causes the injury, but rather the non-performance of an international duty, a duty the content and scope of which are as a rule very hard to define, and in certain specific cases utterly undefinable. This " duty " is discussed in the next section, where, for the purpose of these cases of responsibility, it is formulated in terms of the concept or rule of " due diligence ".

[48] John Fischer Williams, " International Law and the Property of Aliens ", *The British Year Book of International Law, 1928,* p. 28.

[49] Georges Kaeckenbeeck, " La protection internationale des droits acquis ", *Recueil des cours de l'Académie de droit international,* 1937, I, p. 412.

15. THE RULE OF "DUE DILIGENCE"

3. Some of the drafts prepared for The Hague Conference contain a provision which speaks in general terms of the standard or rule of "due diligence". One of these is the Harvard Law School draft, article 10 of which provides:

> "A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case." [50]

4. The relevant comment explains the meaning and scope of this article as follows. "Due diligence" assumes that the State has jurisdiction to act, i.e. to take measures of prevention, and also that it has the opportunity to act. Due diligence is a standard and not a definition. What is "due diligence" in a given case is therefore often difficult to determine. The term "due diligence", as contrasted with the terms "means at its disposal" employed in article 8 of the Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (The Hague, 1907), emphasizes the efficiency and care used by governmental instrumentalities, rather than the instrumentalities themselves. The responsibility of a State for failure to use diligence to prevent injuries to aliens must be distinguished from its responsibility for failure to use diligence to bring offenders to justice. The latter is a responsibility for denial of justice. It grows out of a State's exercise of the remedial function, while the former grows out of a State's duty to exercise the preventive function.[51]

5. Basis of discussion No. 10 drawn up by the Preparatory Committee of The Hague Conference expressed the same fundamental idea in another manner:

> "A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the person concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance." [52]

6. In its observations, the Preparatory Committee stated that the following points emerged from the replies received from Governments: the degree of vigilance must be such as may be expected from a civilized State; the diligence required varies with the circumstances; the standard cannot be the same in a territory which has barely been settled and in the home country; and the standard varies according to the persons concerned, in the sense that the State has a special duty of vigilance, and has therefore a greater responsibility, in respect of persons invested with a recognized public status. The reply of the Government of Poland stressed that the State was under a fundamental duty to lend the alien assistance and to protect his life and property, but that international responsibility only arose in cases where there had been a serious breach of that duty.[53]

7. The learned authorities are in almost unanimous agreement that the rule of "due diligence" cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was "diligent" in discharging its duty of vigilance and protection. On the contrary, the conduct of the authorities must, in each particular case, be judged in the light of the circumstances. In effect, therefore, the rule of "due diligence" is the expression *par excellence* of the so-called theory of fault (*culpa*), for if there is any category of cases in which it cannot be said that responsibility arises through the simple existence of a wrong it is surely the category dealt with in this chapter. Accordingly, though the rule is vague and, consequently, of only relative value in practice, there is no choice—so long as some better formula is not devised in its stead—but to continue to apply the rule of "due diligence" in these cases of responsibility.

8. For the purposes of its interpretation and application to the particular case in question, the rule of "due diligence" has been linked, for easily discernible reasons, to the "international standard of justice". Eagleton, for example, says that the State's performance must be measured by the international standard, because "it is not enough to say that the diligence required for the protection of citizens is sufficient for the alien".[54] At the same time, and for the same purposes, the rule has been linked to the principle of equality between citizens and aliens. For example, the Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902), provides in article 2:

> "The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.
>
> "Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties." [55]

9. As will be shown below, the basic principle apparent in previous codifications, in the decisions of international tribunals, and in the works of the learned authorities is that there is a presumption against responsibility. In other words, the State is not responsible unless it displayed, in the conduct of its organs or officials, patent or manifest negligence in taking the measures which are normally taken in the particular circumstances to prevent or punish the injurious acts. This is the principle which is endorsed in the chapter of the Special Rapporteur's draft under comment here; the latter does not follow the casuistic

[50] Harvard Law School, *op. cit.*, p. 187.

[51] *Ibid.*, pp. 187 and 188.

[52] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 67.

[53] *Ibid.*, p. 65.

[54] *Eagleton, op. cit.*, pp. 130-131.

[55] *The International Conferences of American States, 1889-1928*, p. 91.

method employed by earlier authors and codifications that generally drafted elaborate provisions relating to the multiplicity of diverse circumstances which can occur in practice. In fact, the same method of codification might be employed, to a greater or lesser extent, with respect to all the other cases of responsibility. Yet, this method or technique would invariably lead to the same result, namely, an enumeration and detailed regulation which could never claim to be exhaustive, with the consequence that the codification would lose the technical and practical advantages offered by a general statement of the rules and principles.

16. Acts of private individuals

10. Although in most of the cases actually occurring in practice the responsibility with which this chapter is concerned arises out of harmful acts committed in connexion with civil strife or other internal disturbances, and although the fundamental principle always remains the same, nevertheless the acts of ordinary private individuals should be distinguished and considered separately. In the course of the discussion which follows it will be found that the distinction is useful, if only as a means of facilitating the study of the problem. At this stage, it is sufficient to point out that, despite the weight of opinion to the contrary, there has always been firm resistance to the idea of attributing to the State any responsibility whatsoever for injuries resulting from the acts of ordinary private individuals. One familiar expression of this school of thought can be found in conclusion 5 of the Guerrero report, which states that "losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the State". As will be shown later, however, the report admits that a State may, in certain circumstances, be responsible in cases of riot, revolution or civil war.[56]

11. Most authorities on this subject still adhere essentially to the view enunciated by Grotius, who rejected the notion of "community liability" which was widely accepted in his day. In his opinion, the State could only be held responsible if its conduct with respect to the injurious act was inconsistent with its duties. The two most important and frequent forms of such conduct, according to Grotius, were *patientia* and *receptus*. The first of these two terms denotes the situation in which the State is aware of an individual's intention to perpetrate a wrongful act against a foreign State or sovereign, but fails to take the proper steps to thwart his designs; the second term denotes the situation in which the State receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offence. By such conduct, which constitutes tacit approval of the offence, the State tends to identify itself with the offender. And it is this tacit approval—and not the relationship between the individual and the community—which gives rise to the responsibility of the State.[57] In other words, the responsibility of the State can only arise in such circumstances if its organs or officials have been guilty of an act or omission which in itself constitutes an international delinquency.

12. The difficulty lies in determining whether a specific act or omission comes within this category. As was pointed out above, the nature and scope of the State's duties in such cases are very difficult to define and are sometimes quite undefinable. There is, however, a large volume of relevant precedent from which one can derive at least the basic principle applicable in such cases of responsibility. Examples are given below of the manner in which this principle has been formulated in decisions of international tribunals and in previous codifications. As will be seen, both in the former and in the latter, the general rule in these cases is the international irresponsibility of the State, while responsibility is the exception to the rule.

13. In the famous arbitration of the *Alabama Claims* (1872), the Tribunal held that the British Government had "failed to use due diligence in the performance of its neutral obligations", and especially that it had "omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290' [subsequently known as the *Alabama*], to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable".[58] In other cases, the (unlawful) act or omission giving rise to the responsibility of the State was not the State's failure to take prompt action to prevent the individual from committing the wrong, but its negligence or impotence in taking the necessary measures which any State ought to take to punish the act by prosecuting and imposing penalties on the wrongdoer. An example of this second category of acts or omissions imputable to the State is offered by the *Janes Claim* (1926). In that case, the Claims Commission awarded damages amounting to $12,000, not because that figure corresponded to the injury caused by the original wrong but because the respondent Government had been guilty of an "international delinquency" in failing to measure up to "its duty of diligently prosecuting and properly punishing the offender."[59] International jurisprudence contains many other decisions illustrating the circumstances in which arbitral tribunals or commissions have held a State responsible, and the precise manner in which they have applied the rule of "due diligence".

14. As far as the various codifications are concerned, they differ *inter se* more in the matter of form than in the matter of substance. Among those which deal separately with the question of responsibility for acts of private individuals, the earliest statement is that contained in the 1927 draft prepared by the Institute of International Law. Article III of that draft reads as follows:

"The State is not responsible for injurious acts committed

[56] League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 104.

[57] Dionisio Anzilotti, *Corso di Diritto Internazionale*, 3rd ed. (Rome, 1928).

[58] Charles G. Fenwick, *Cases on International Law*, 2nd ed. (Chicago, Callaghan and Company, 1951), p. 708.

[59] United States-Mexican General Claims Commission, *op. cit.*, p. 115.

by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions." [60] Some of the bases of discussion drawn up by the Preparatory Committee of The Hague Conference contained the same fundamental idea as that underlying the Institute's draft: the injury caused by the act of the individual must be attributable to the non-performance of a duty incumbent upon the State in the particular circumstances of the case. In some of the other bases, however, the Preparatory Committee dealt with specific situations and formulated new rules applicable to them. The following five bases of discussion are of special interest:

"*Basis of discussion No. 10*

"A State is responsible for damage suffered by a foreigner as the result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and to the status of the persons concerned, could be expected from a civilized State. The fact that a foreigner is invested with a recognized public status imposes upon the State a special duty of vigilance.

"*Basis of discussion No. 17*

"A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.

"*Basis of discussion No. 18*

"A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected from a civilized State.

"*Basis of discussion No. 19*

"The extent of the State's responsibility depends upon all the circumstances and, in particular, upon whether the act of the private individual was directed against a foreigner as such and upon whether the injured person had adopted a provocative attitude.

"*Basis of discussion No. 20*

"If, by an act of indemnity, an amnesty or other similar measure, a State puts an end to the right to reparation enjoyed by a foreigner against a private person who has caused damage to the foreigner, the State thereby renders itself responsible for the damage to the extent to which the author of the damage was responsible." [61]

15. The new features which can be perceived in the above texts are the following: the link between the rule of "due diligence" and the concept of a "civilized State"; the public status with which the foreigner may be invested and the "special duty of vigilance" which that fact imposes on the State; the question whether the act of the private individual was directed against the foreigner as such and whether the injured person provoked the injury by his conduct; and the provision for the situation where a State puts an end to the right to reparation enjoyed by the foreigner against the private individual who caused the injury. One of the texts adopted in first reading at The Hague Conference contains a general provision applicable to these cases of responsibility, but the rule formulated does not introduce any new idea not already covered by the Institute's draft or by the bases of discussion.[62]

16. The Harvard Law School draft is somewhat different. It contains one general provision relating to "due diligence", and another which specifies the conditions to be fulfilled before there can be any responsibility on the part of the State in the case of injury resulting "from an act of an individual or from mob violence". These two provisions read as follows:

"*Article 10*

"A State is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

"*Article 11*

"A State is responsible if an injury to an alien results from an act of an individual or from mob violence, if the State has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice." [63]

17. In section 15 above, the Special Rapporteur cited the views expressed in the Harvard Research comments on the rule of "due diligence". With reference to the other two conditions stipulated in article 10—that local remedies must have been exhausted and that no adequate redress has been obtained—the comment contains the following statement: "Where a State has failed to exercise due diligence to prevent an injury, its responsibility is

[60] Harvard Law School, *op. cit.*, p. 229.

[61] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 67 ff.

[62] Article 10 of those texts reads:

"As regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment for the acts causing the damage." See League of Nations publication, *V. Legal, 1930.V. 17* (document C.351(*c*).M.145(*c*).1930.V), p. 237.

[63] Harvard Law School, *op cit.*, pp. 187 and 188.

conditioned upon the exhaustion of the remedies afforded by its laws for the injury which is the result of its failure . . . However, if no local remedy is available, or if the available local remedy is exhausted without adequate redress for the injury suffered, the State is responsible. There may be no technical denial of justice, yet in the latter case the State may nevertheless be responsible, because of the State's delinquency." [64]

18. The inference to be drawn from this comment is that, in practically every imaginable case, the conduct of the State is so closely connected with the injury caused by the private individual that the responsibility of the State will always be involved. The accuracy of this interpretation of the text seems to be confirmed by the fact that " adequate redress " for the injury is an absolute prerequisite of exemption from responsibility. Indeed, does not the duty to make reparation for an injury always presuppose some act or omission imputable to the State? The comment on article 11 emphasizes the same idea, but the conduct of the State in such cases is more explicitly described as an " actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender ".[65]

17. Internal disturbances in general

19. The contribution of the Americas to the development of the principles and rules of international law which govern this subject is so considerable that a brief summary of the relevant statements by American jurists should facilitate a better understanding of the prevailing doctrine and practice. Podestá Costa, who has written with profound knowledge of the subject in numerous learned works, says that it was a Colombian publicist, J. M. Torres Caicedo, who first advanced the theory of the irresponsibility of the State for injuries caused to aliens during civil strife.[66] Later, Calvo developed this theory further, especially in the doctrine which bears his name concerning the equality of nationals and aliens.[67] The theory of irresponsibility, combined with the principle of equality and formulated in the manner shown below, was one of the earliest expressions of the conventional law of the Americas. It can be found in the Convention relative to the Rights of Aliens, signed at the Second International Conference of American States (Mexico City, 1902). The relevant provisions of that Convention read as follows:

" *Article 2*

" The States do not owe to, nor recognize in favor of, foreigners, any obligations or responsibilities other than those established by their Constitutions and laws in favor of their citizens.

" Therefore, the States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of any kind, considering as such the acts of war, whether civil or national; except in the case of failure on the part of the constituted authorities to comply with their duties.

" *Article 3*

" Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law. " [68]

20. As can be seen, neither of these articles states a theory of irresponsibility in absolute terms. In fact, article 2 expressly provides for the situation where the authorities of the State have failed " to comply with their duties ", while article 3 goes much further in admitting the possibility of a valid diplomatic claim in cases where there has been " a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law ".

21. At first, the idea of making the responsibility of the State in such cases conditional on the presence of certain conditions and circumstances was not favourably received. One of the critics was Emilio Brusa, who, in a report presented to the Institute of International Law at its session of 1898, contended that even where the injurious act was defensible on grounds of *force majeure*, the State remained under a duty, as in the case of an expropriation, to indemnify the injured party by paying him compensation.[69] This opinion was shared by Fauchille, although he based it on the theory of risk (*risque étatif*): " A State ", he wrote, in proposing an amendment to the draft which was being discussed by the Institute, " which derives profit from the presence of aliens in its territory, is under an obligation to make reparation for injury caused to those aliens during any riot or civil war that may break out in that territory, unless it can prove that the injury was caused by the fault, imprudence or negligence of the aliens who sustained it." [70]

22. The view of these writers that the responsibility of the State arises in all cases, regardless of the State's con-

[64] *Ibid.*, p. 188.

[65] *Ibid.*, p. 189.

[66] See Luis A. Podestá Costa, " La responsabilidad del Estado por daños irrogados a la persona o a los bienes de extranjeros en luchas civiles ", *Revista de Derecho Internacional* (Havana, 1938), Year XVII, vol. XXXIV, No. 67, p. 7 and No. 68, p. 195.

[67] See Charles Calvo, " De la non-responsabilité des Etats à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles ", *Revue de droit international et de législation comparée*, vol. I, 1869, pp. 417-427.

[68] *The International Conferences of American States, 1889-1928*, p. 91.

[69] *Annuaire de l'Institut de droit international, Edition nouvelle abrégée (1928)* (Paris, A. Pedone, 1928), vol. V, pp. 340 ff.

[70] *Ibid.*, p. 613.

duct with respect to the injurious act, rested on a misconception of the legal and political relationship between the State and the alien who resides or sojourns in its territory. As has been stated by virtually all the authors who have studied the problem, the State cannot be considered an insurer of the person or property of the alien; the latter, on the other hand, must have foreseen and weighed both the advantages and the risks involved in his leaving his country or in making investments outside his country. Nor would there seem to be much substance in the notion that the State of residence "derives profit from aliens", for —although it cannot be said that only the very opposite is true—the presence of an alien in the territory of a State presupposes a certain reciprocity of advantages and benefits. In any case, the Institute reached no decision in the matter at that particular session. And later, when it came to adopt a formula, it accepted—as will be shown below—a principle wholly different from that advocated by Brusa and Fauchille. The influence of their opinions can, however, be noted in the Harvard Research draft. Besides article 11, which deals both with acts of individuals and with "mob violence", the draft contains another similar provision applicable to injury resulting from an "act of insurgents".[71] The general position adopted by this draft with respect to this question has been discussed earlier in the present report.

23. The essence of the prevailing doctrine on this subject is reflected in the other codifications. The draft finally prepared by the Institute of International Law (1927) itself does not require from the State more than "proper diligence" in taking measures to prevent and punish the injurious acts. Article VII of the Institute's draft provides:

> "The State is not responsible for injuries caused in case of mob [*sc. violence*], riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to its nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes of other persons..." [72]

24. The Guerrero report, which admits no responsibility whatsoever for acts of ordinary private individuals, recognizes that the State may be responsible in case of riot, revolution or civil war, if certain specified circumstances are present; these circumstances are indicated in conclusions 8 and 9:

> "8. Damage suffered by foreigners in case of riot, revolution or civil war does not involve international responsibility for the State. In case of riot, however, the State would be responsible if the riot was directed against foreigners, as such, and the State failed to perform its duties of surveillance and repression.
>
> "9. The category of damage referred to in the preceding paragraph does not include property belonging to strangers which has been seized or confiscated in time of war or revolution, either by the lawful Government or by the revolutionaries. In the first case the State is responsible, and in the second the State must place at the disposal of foreigners all necessary legal means to enable them to obtain effective compensation for the loss suffered and to enable them to take action against the offenders.
>
> "The State would become directly responsible for such damage if, by a general or individual amnesty, it deprived foreigners of the possibility of obtaining compensation." [73]

25. The Guerrero report thus places a restrictive interpretation on the prevailing doctrine, as generally formulated, but also introduces some noteworthy new factors. These include, in particular, the express reference to riots directed against foreigners as such, and the preferential treatment of aliens for the purposes of the reparation of the injuries in the event of an amnesty. Lastly, the subject was dealt with in the following terms in the bases of discussion drawn up by the Preparatory Committee of The Hague Conference:

> "*Basis of discussion No. 22*
>
> "A State is, in principle, not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence.
>
> "*Basis of discussion No. 22* (a)
>
> "Nevertheless, a State is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.
>
> "*Basis of discussion No. 22* (b)
>
> "A State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.
>
> "*Basis of discussion No. 22* (d)
>
> "A State is responsible for damage caused to the person or property of a foreigner by persons taking part in a riot or by mob violence if the movement was directed against foreigners as such, or against persons of a particular nationality, unless the Government proves that there was no negligence on its part or on the part of its officials." [74]

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[71] Article 12 of the draft reads as follows:

"A State is responsible if an injury to an alien results from an act of insurgents, if the State has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure." Harvard Law School, *op. cit.*, p. 193.

[72] Harvard Law School, *op. cit.*, p. 229.

[73] League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), pp. 104 and 105.

[74] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), pp. 111 ff.

26. The above texts clearly show that the Committee followed the broad lines of the rules formulated in the Institute draft and in the conclusions of the Guerrero report.

27. The numerous precedents found in relevant decisions of international tribunals also confirm the prevailing doctrine set forth above, namely, that, as a general rule, the State is not internationally responsible for injuries sustained by aliens in connexion with internal disturbances. Some cases can be cited by way of illustration. In the *W. A. Noyes Claim* (1933), the Commission declared that "the mere fact that an alien has suffered at the hands of private persons an aggression which could have been averted by the presence of a sufficient police force on the spot, does not make a Government liable for damages under international law. There must be shown special circumstances from which the responsibility of the authorities arises: either their behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals".[75] In the case of the *Home Missionary Society* (1920), the Special Tribunal established by the United States of America and Great Britain held that "it is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection".[76] In the *Rosa Gelbtrunk Claim* (1902), which arose from a dispute between El Salvador and the United States, the arbitrator (Sir Henry Strong) declared that the State to which the alien owes national allegiance "has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection, or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens. This I conceive to be now the well-established doctrine of international law."[77] In the *Sambiaggio Claim* (1903), between Italy and Venezuela, the umpire (Ralston) ruled as follows: "The ordinary rule is that a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it... A further consideration may be added. Governments are responsible, as a general principle, for the acts of those they control. But the very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appears that the government has failed to use promptly and with appropriate force its constituted authority, it cannot reasonably be said that it should be responsible for a condition of affairs created without its volition."[78]

[75] *Annual Digest and Reports of Public International Law Cases, 1933-1934* (London, Butterworth and Co., 1940), case No. 98.

[76] *Annual Digest of Public International Law Cases, 1919-1922* (London, Longmans, Green and Co., 1932), case No. 117.

[77] *Papers relating to the Foreign Relations of the United States—1902* (Washington, D.C., Government Printing Office, 1903), p. 878.

[78] Briggs, *op. cit.*, pp. 715 and 716.

18. Acts of the constituted authority and of successful insurgents

28. In the preceding sections, this report has referred to situations in which the State may become responsible as a result of the conduct of its organs or officials in relation to the injurious acts of private persons acting either individually or as members of a group. In these situations, responsibility originates in the failure of the organ or official concerned to exercise "due diligence" to prevent the wrongful act or to punish the offender; in other words, it originates in an unlawful *omission* imputable to the State. In the course of internal disturbances, however, an alien may also suffer injuries to his person or property in consequence of the very measures taken by the constituted authority to restore order or to suppress a revolutionary movement. It has been thought that such *acts*, too, engage or may engage the international responsibility of the State.

29. Of all the codifications that have been examined, only one envisages the responsibility of the State for such acts. The text in question is basis of discussion No. 21 drawn up by the Preparatory Committee of The Hague Conference, which reads as follows:

> "A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.
>
> "The State must, however:
>
> "(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;
>
> "(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;
>
> "(3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States;
>
> "(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances."[79]

30. In considering these cases of responsibility, Bustamante drew a distinction and formulated a rule containing what appears to be a much more accurate statement of the circumstances or conditions which must in fact be present before the State can be held responsible. In his opinion, the acts or omissions of public officials—whether civilian or military—in these cases can fall into one of two distinct categories: those of a general character, which are not directed against any specific persons (e.g. an attack by firearms or shelling on a locality), and those which affect

[79] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 107.

private persons or bodies corporate directly and individually (e.g. the occupation or destruction of a railway, aqueduct or electric power station). Acts or omissions in the first category do not (according to Bustamante) give rise to responsibility, because there is no intention of causing injury solely to aliens, and aliens are in exactly the same position as nationals. If the measures employed injure an alien's person or property, the injury is but the consequence of the State's normal exercise of its right of self-defence, and whoever exercises his right is not answerable to anybody. If any other contention were accepted, it would be difficult to explain why identical acts in an international war do not engage the State's responsibility but do engage it in the case of a civil war. The situation is different, however, in the case of acts or omissions in the second category. In these cases, a State which temporarily expropriates private property for its own profit and for public use, or destroys or damages such property, may be held responsible. The duty to indemnify for such expropriation, destruction or damage of property—generally public concessions—arises out of the very nature of the act and is not connected with the nationality of the injured owners. By law, the State owes the duty to indemnify to all, whether they be citizens or aliens, not by reason of their nationality but by reason of the character and consequences of the act. It is, in fact, a case of internal rather than of international responsibility; but the case may have international repercussions, especially if the internal responsibility is not duly discharged.[80]

31. For the purpose of determining whether a State is or is not responsible for the acts of insurgents or revolutionaries, some codifications distinguish between an unsuccessful revolution and a successful revolution, and between acts committed by the rebels before their recognition as belligerents and those committed after such recognition. Basis of discussion No. 22 (*c*) of the Preparatory Committee of The Hague Conference brings out the first of these distinctions as follows:

> "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [81]

Article 13 of the Harvard Research draft makes both the distinctions indicated above, in the following manner:

> "(*a*) In the event of an unsuccessful revolution, a State is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the State of which the alien is a national.
>
> "(*b*) In the event of a successful revolution, the State whose government is established thereby is responsible under article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution." [82]

The situation envisaged in article 13, paragraph (*a*), of the Harvard Research draft presupposes the recognition of belligerency, which raises all the legal difficulties inherent in any act or relationship of such a distinctly political nature. By contrast, the case of a successful revolution is different, since there is at least some basis for drawing an analogy with the case of injuries caused by the predecessor authority or Government, so far as the measures taken affected aliens directly and individually.

[80] Bustamante, *op. cit.*, vol. III, pp. 549 and 550.

[81] League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 118.

[82] Harvard Law School, *op. cit.*, p. 195.

ANNEX

Draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens

(PART I: ACTS AND OMISSIONS)

CHAPTER I

Nature and scope of responsibility

Article 1

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligation of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

CHAPTER II

Acts and omissions of organs and officials of the state

Article 2. Acts and omissions of the legislature

1. The State is responsible for the injuries caused to an alien by the enactment of any legislative (or, as the case may be, constitutional) provisions which are incompatible with its international obligations, or by the failure to enact the legislative provisions which are necessary for the performance of the said obligations.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if, without amending its legislation (or its constitution), it can in some other way avoid the injury or make reparation therefor.

Article 3. Acts and omissions of officials

1. The State is responsible for the injuries caused to an alien by some act or omission on the part of its officials

which contravenes the international obligations of the State, if the officials concerned acted within the limits of their competence.

2. The international responsibility of the State is likewise involved if the official concerned exceeded his competence but purported to be acting by virtue of his official capacity.

3. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved if the lack of competence was so apparent that the alien should have been aware of it and could, in consequence, have avoided the injury.

Article 4. Denial of justice.

1. The State is responsible for the injuries caused to an alien by some act or omission which constitutes a denial of justice.

2. For the purposes of the provisions of the foregoing paragraph, a "denial of justice" shall be deemed to have occurred if the court, or competent organ of the State, did not allow the alien concerned to exercise any one of the rights specified in article 6, paragraph 1 (*f*), (*g*) and (*h*) of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to have occurred if a judicial decision has been rendered, or an order of the court made, which is manifestly unjust and which was rendered or made by reason of the foreign nationality of the individual affected.

4. Cases of judicial error, whatever may be the nature of the decision or order in question, do not give rise to responsibility within the meaning of this article.

Chapter III

Violations of fundamental human rights

Article 5

1. The State is under a duty to ensure to aliens the enjoyment of the same civil rights, and to make available to them the same individual guarantees as are enjoyed by its own nationals. These rights and guarantees shall not, however, in any case be less than the "fundamental human rights" recognized and defined in contemporary international instruments.

2. In consequence, in cases of violation of civil rights, or disregard of individual guarantees, with respect to aliens, international responsibility will be involved only if internationally recognized "fundamental human rights" are affected.

Article 6

1. For the purposes of the foregoing article, the expression "fundamental human rights" includes, among others, the rights enumerated below:

(*a*) The right to life, liberty and security of person;

(*b*) The right of the person to the inviolability of his privacy, home and correspondence, and to respect for his honour and reputation;

(*c*) The right to freedom of thought, conscience and religion;

(*d*) The right to own property;

(*e*) The right of the person to recognition everywhere as a person before the law;

(*f*) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

(*g*) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the determination of any criminal charge or in the determination of rights and obligations under civil law;

(*h*) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to speak in his defence or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

2. The enjoyment and exercise of the rights and freedoms specified in paragraph 1 (*a*), (*b*), (*c*) and (*d*) may be subjected to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

Chapter IV

Non-performance of contractual obligations and acts of expropriation

Article 7. Contractual obligations in general

1. The State is responsible for the injuries caused to an alien by the non-performance of obligations stipulated in a contract entered into with that alien or in a concession granted to him, if the said non-performance constitutes an act or omission which contravenes the international obligations of the State.

2. For the purposes of the provisions of the foregoing paragraph, the repudiation or breach of the terms of a contract or concession shall be deemed to constitute an "act or omission which contravenes the international obligations of the State" in the following cases, that is to say, if the repudiation or breach:

(*a*) Is not justified on grounds of public interest or of the economic necessity of the State;

(*b*) Involves discrimination between nationals and aliens to the detriment of the latter; or

(*c*) Involves a "denial of justice" within the meaning of article 4 of this draft.

3. None of the foregoing provisions shall apply if the contract or concession contains a clause of the nature described in article . . . *

* The article referred to in this paragraph will be drafted when the subjects remaining pending are studied.

Article 8. Public debts

The State is responsible for the injuries caused to an alien by the repudiation, or the cancellation, of its public debts, save in so far as the measure in question is justified on grounds of public interest and does not discriminate between nationals and aliens to the detriment of the latter.

Article 9. Acts of expropriation

The State is responsible for the injuries caused to an alien by the expropriation of his property, save in so far as the measure in question is justified on grounds of public interest and the alien receives adequate compensation.

Chapter V

Acts of individuals and internal disturbances

Article 10. Acts of ordinary private individuals

The State is responsible for injuries caused to an alien by acts of ordinary private individuals, if the organs or officials of the State were manifestly negligent in taking the measures which are normally taken to prevent or punish such acts.

Article 11. Internal disturbance in general

The State is responsible for injuries caused to an alien in consequence of riots, civil strife or other internal disturbances, if the constituted authority was manifestly negligent in taking the measures which, in such circumstances, are normally taken to prevent or punish the acts in question.

Article 12. Acts of the constituted authority and of successful insurgents

1. The State is responsible for injuries caused to an alien by measures taken by its armed forces or other authorities for the purpose of preventing or suppressing an insurrection or any other internal disturbance, if the measures taken affected private persons directly and individually.

2. In the case of a successful insurrection, the international responsibility of the State is involved in respect of injuries caused to an alien if the injuries were the consequence of measures which were taken by the revolutionaries and which were analogous to the measures referred to in the foregoing paragraph.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/3623*

Report of the International Law Commission covering the work of its ninth session, 23 April—28 June 1957

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* Also issued as *Official Records of the General Assembly, Twelfth Session, Supplement No. 9.*

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto, held its ninth session at the European Office of the United Nations, Geneva, from 23 April to 28 June 1957. The work of the Commission during the session is described in the present report. Chapter II of the report contains a provisional draft on diplomatic intercourse and immunities, which is to be circulated to Governments for their comments, in accordance with the statute of the Commission. Chapter III consists of progress reports on the work on the subjects of State responsibility, arbitral procedure, the law of treaties and consular intercourse and immunities. Chapter IV deals with certain administrative matters.

I. Membership and Attendance

2. The Commission consists of the following members, who were all present at the session:

Name	*Nationality*
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Abdullah El-Erian	Egypt
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García-Amador	Cuba
Mr. Shuhsi Hsu	China

Mr. Thanat Khoman	Thailand
Faris Bey El-Khouri	Syria
Mr. Ahmed Matine Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

3. The General Assembly, at its eleventh session, by resolution 1103 (XI) of 18 December 1956, decided to increase the membership of the Commission from fifteen to twenty-one. On the same date, the Assembly elected the above-mentioned members for a period of five years from 1 January 1957, in accordance with its resolution 985 (X) of 3 December 1955, by which the term of office of the members was fixed at five years.

II. Officers

4. At its meeting on 23 April 1957, the Commission elected the following officers:

Chairman: Mr. Jaroslav Zourek;

First Vice-Chairman: Mr. Radhabinod Pal;

Second Vice-Chairman: M. Luis Padilla Nervo;

Rapporteur: Sir Gerald Fitzmaurice.

5. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

III. Agenda

6. The Commission adopted an agenda for the ninth session consisting of the following items:

1. Arbitral procedure.
2. Law of treaties.
3. Diplomatic intercourse and immunities.
4. Consular intercourse and immunities.
5. State responsibility.
6. Date and place of the tenth session.
7. Planning of future work of the Commission.
8. Other business.

7. In the course of the session, the Commission held forty-nine meetings. It considered all the items on the agenda with the exception of the law of treaties (item 2) and consular intercourse and immunities (item 4); regarding the two latter items, see chapter III, section III.

CHAPTER II

DIPLOMATIC INTERCOURSE AND IMMUNITIES

I. Introduction

8. In the course of its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered desirable and feasible. Among the items in this list was "Diplomatic intercourse and immunities". The Commission, however, did not include this subject among those to which it accorded priority [1].

9. At its fifth session, in 1953, the Commission was apprised of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and to treat it as a priority topic. In view of the fact that the periodical election of members of the Commission was due to take place at the eighth session of the General Assembly beginning in September 1953, the Commission decided to postpone a decision on the matter until its sixth session, to be held in 1954 [2].

10. At its sixth session, the Commission decided to initiate work on the subject, and appointed Mr. A. E. F. Sandström as special rapporteur for it [3].

11. "Diplomatic intercourse and immunities" was included as an item on the agenda of the Commission's seventh session. The special rapporteur submitted to the Commission a report (A/CN.4/91) containing a draft for the codification of the law relating to the subject. Because of lack time, the Commission did not, however, consider the item, and referred the study of it to its eighth session [4]. At that session, the Commission had also before it a memorandum on the subject prepared by the Secretariat (A/CN.4/98). The Commission was, however, again obliged, because of work on the law of the sea, to postpone consideration of the item until the following session [5].

12. During the present session, the Commission, at its 383rd to 413th and 423rd to 430th meetings, considered the topic on the basis of the special rapporteur's above-mentioned report (A/CN.4/91). It adopted a provisional draft with commentaries, which is reproduced in the present chapter. In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the draft through the Secretary-General, to Governments for their observations.

13. The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume

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[1] *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), paras. 16 and 20.

[2] *Ibid., Eight Session, Supplement No. 9* (A/2456), para. 170.

[3] *Ibid., Ninth Session, Supplement No. 9* (A/2693), para. 73.

[4] *Ibid., Tenth Session, Supplement No. 9* (A/2934), paras. 8 and 9.

[5] *Ibid., Eleventh Session, Supplement No. 9* (A/3159), paras. 5 and 6.

other forms that might go under the heading of "*ad hoc* diplomacy", which covers roving envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report to it at its next session. The Commission will thus be able to discuss that part of the subject simultaneously with the present draft and any comments on it submitted by Governments.

14. Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. These matters are, as regards most of the organizations, governed by special conventions.

15. The draft was prepared on the provisional assumption that it would form the basis of a convention. A final decision as to the form in which the draft will be submitted to the General Assembly will be taken in the light of the comments received from Governments.

16. The text of the draft concerning diplomatic intercourse and immunities as adopted by the Commission is reproduced below:

II. Draft articles concerning diplomatic intercourse and immunities

The commentary to the draft should be regarded as provisional. It has been drafted so as to afford the minimum of necessary explanation of the articles. In the final draft which the Commission will prepare at its next session in the light of the comments of Governments, a fuller commentary will be provided.

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

Establishment of diplomatic relations and missions

Article 1

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Commentary

The Commission here confirms the general practice of States.

Functions of a diplomatic mission

Article 2

The functions of a diplomatic mission consist *inter alia* in:

(a) Representing the Government of the sending State in the receiving State;

(b) Protecting the interests of the sending State and of its nationals in the receiving State;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.

Commentary

Without attempting to be exhaustive, this article is believed to reproduce the actual practice of States as it has existed for a very long time.

Appointment of the head of the mission: agrément

Article 3

The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

Appointment of the staff of the mission

Article 4

Subject to the provisions of articles 5, 6 and 7, the sending State may freely appoint the other members of the staff of the mission.

Appointment of nationals of the receiving State

Article 5

Members of the diplomatic staff of the mission may be appointed from among the nationals of the receiving State only with the express consent of that State.

Persons declared persona non grata

Article 6

1. The receiving State may at any time notify the sending State that the head of the mission, or any member of the staff of the mission, is *persona non grata* or not acceptable. In such case, the sending State shall, according to circumstances, recall this person or terminate his functions with the mission.

2. If a sending State refuses or fails within a reasonable time to comply with its obligations under paragraph 1, the receiving State may refuse to recognize the person concerned as a member of the mission.

Commentary

(1) Articles 3-6 deal with the appointment of the persons who compose the mission. The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities proper; administrative and technical staff; and service staff. While it is the sending State which makes the appointments, the choice of the persons and, in particular, of the head of the mission, may considerably affect relations between the countries, and it is naturally in the interest of both States concerned that the mission should not contain members whom the receiving State finds unacceptable. In practice, the receiving State can exercise certain powers to that end.

(2) Procedure differs according as the person concerned is the head of the mission or another member of the staff. As regards the former, it was thought desirable that the

sending State should ascertain in advance whether the person it proposes to accredit as head of its mission to another State is *persona grata* with that State. The fact that a head of mission has been approved does not, however, prevent a receiving State which has meanwhile found reasons for objecting to him from subsequently notifying the sending State that he is no longer *persona grata*, in which case he must be recalled and, if the sending State fails to recall him, the receiving State may declare his functions terminated.

(3) As regards other members of the mission, they are as a rule freely chosen by the sending State; but, if at any time—if need be, before the person concerned arrives in the country to take up his duties—the receiving State finds that it has objections to him that State may, as in the case of a head of mission who has been approved, inform the sending State that he is *persona non grata*, with the same effect as for the head of mission.

(4) This procedure is sanctioned by articles 3, 4 and 6 of the draft. The fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed, should be interpreted as meaning that this question is left to the discretion of the receiving State. The words in paragraph 1 of article 6 "or terminate his functions with the mission", refer mainly to the case of the person concerned being a national of the receiving State.

(5) As is clear from the reservation stated in article 4, the free choice of the staff of the mission is a principle to which there are exceptions. One of these exceptions is mentioned in paragraph (3) of this commentary.

(6) Another exception is that arising out of article 5 of the draft, concerning cases where the sending State wishes to choose as a member of the diplomatic staff a national of the receiving State or a person who is a national of both the receiving State and the sending State. The Commission takes the view that this should only be done with the express consent of the receiving State. While the practice of appointing nationals of the receiving State as members of the diplomatic staff has now become fairly rare, the majority of the members of the Commission think that the case should be mentioned. Certain members of the Commission, however, stated that they were in principle opposed to the appointment of nationals of the receiving State as members of the diplomatic staff, and to according diplomatic privileges and immunities to such persons.

Limitation of staff

Article 7

1. In the absence of any specific agreement as to the size of the mission, the receiving State may refuse to accept a size exceeding what is reasonable and customary, having regard to the circumstances and conditions in the receiving State, and to the needs of the particular mission

2. The receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category. It may decline to accept any persons as military, naval or air attachés without previous *agrément*.

Commentary

(1) There are also questions other than the choice of the persons comprising the mission, which are connected with the latter's composition and may cause difficulties; in the Commission's view, they require regulation. Article 7 deals with such questions.

(2) Paragraph 1 of the article refers to cases where the staff of the mission is inordinately increased; experience in recent years having shown that such cases may present a problem. Such an increase may cause the receiving State real difficulties. Should the receiving State consider the staff of a mission unduly large, it should first endeavour to reach an agreement with the sending State. Failing such agreement, the receiving State should, in the view of the majority of the Commission, be given the right, but not an absolute right, to limit the size of the staff. Here there are two sets of conflicting interests, and the solution must be a compromise between them. Account must be taken both of the mission's needs, and of prevailing conditions in the receiving State. Any limitation of the staff must remain within the bounds of what is reasonable and customary.

(3) Paragraph 2 gives the receiving State the right to refuse to accept officials of a particular category. But its right to do so is circumscribed in the same manner as its right to limit the size of the staff, and must, furthermore, be exercised without discrimination between one State and another. In the case of military, naval and air attachés, the receiving State may, in accordance with what is already a fairly common practice, require their names to be submitted beforehand for its approval.

Commencement of the functions of the head of the mission

Article 8

The head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented a true copy of his credentials to the Ministry for Foreign Affairs of the receiving State. (*Alternative:* when he has presented his letters of credence.)

Commentary

So far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving State—which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the head of State. The Commission, however, decided also to mention the alternative stated in the text of the article.

Chargé d'affaires ad interim

Article 9

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of

the mission shall be handled by a *chargé d'affaires ad interim*, whose name shall be notified to the Government of the receiving State.

2. In the absence of notification, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list shall be presumed to be in charge.

Commentary

This article provides for situations where the post of head of the mission falls vacant, or the head of the mission is unable to perform his functions. The *chargé d'affaires ad interim* here referred to is not to be confused with the *chargé d'affaires* mentioned in article 10, sub-paragraph (c), who is called *chargé d'affaires en pied* and is appointed on a more or less permanent footing.

Classes of heads of mission

Article 10

Heads of mission are divided into three classes, namely:

(a) That of ambassadors, legates or nuncios accredited to heads of State;

(b) That of envoys, ministers and other persons accredited to heads of State;

(c) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

Article 11

States shall agree on the class to which the heads of their missions are to be assigned.

Precedence

Article 12

1. Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the rules of the protocol in the receiving State, which must be applied without discrimination.

2. Any change in the credentials of a head of mission shall not affect his precedence in his class.

3. The present regulations are without prejudice to any existing practice in the receiving State regarding the precedence of the representative of the Pope.

Mode of reception

Article 13

A uniform mode shall be established in each State for the reception of heads of missions of each class.

Commentary

(1) Articles 10-13 are intended to incorporate in the draft the gist of the Vienna Regulation concerning the rank of diplomats.[6] Article 10 lists the different classes of heads of mission, the classes conferring rank according to the order on which they are mentioned.

(2) In view of the recent growing tendency—intensified since the Second World War—on the part of States to appoint ambassadors rather than ministers to represent them, the Commission considered the possibility of abolishing the title of minister or of abolishing the difference in rank between these two classes.

(3) Although several members of the Commission expressed their support for a change designed to abolish any difference in rank between these two classes of representative, the Commission took the view that unless all States agree—which is rather improbable—difficulties could easily arise, *e.g.*, through the possibility of two different systems existing in the same capital.

(4) The Commission therefore preferred to maintain the broad lines of the Vienna Regulation, the more so since the rate at which the tendency to give heads of mission the title of ambassador is now growing suggests that in time the problem will solve itself.

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[6] The text of the Regulation of Vienna on the classification of diplomatic agents is as follows:

"In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the Plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite the representatives of other crowned heads to adopt the same regulations.

"*Article 1.* - Diplomatic officials shall be divided into three classes: that of ambassadors, legates or nuncios; that of envoys, whether styled ministers or otherwise, accredited to sovereigns; that of *chargés d'affaires* accredited to Ministers of Foreign Affairs.

"*Article 2.* - Only ambassadors, legates or nuncios shall possess the representative character.

"*Article 3.* - Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank.

"*Article 4.* - Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified.

"The present regulation shall not in any way modify the position of the Papal representatives.

"*Article 5.* - A uniform method shall be established in each State for the reception of diplomatic officials of each class.

"*Article 6.* - Ties of relationship or family alliances between Courts shall not confer any rank on their diplomatic officials. The same shall be the case with political alliances.

"*Article 7.* - In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

"The present Regulation was inserted in the Protocol concluded by the plenipotentiaries of the eight Powers which have signed the Treaty of Paris at their meeting on 19 March 1815."

(The Regulation was signed by the following countries: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden. Translation taken from the report of a subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, C.203. M.77. 1927.V, p. 2.)

(5) In article 10, which corresponds to article 1 of the Vienna Regulation, the Commission does not refer to envoys and ministers as being accredited to "sovereigns", but, in keeping with the changes which have occurred since the Congress of Vienna, has replaced that term by "heads of State".

(6) Nor was it deemed necessary to refer—as was done in the Protocol of the Congress of Aix-la-Chapelle [7]—to a special class of "ministers resident", since appointments of representatives with that title have become very rare.

(7) Having regard to the practice adopted by a number of States of deciding precedence in the respective classes according to the date of presentation of letters of credence, and not according to the date of official notification of arrival, as laid down in article 4 of the Vienna Regulation, the Commission proposes in article 12 of the draft, to give States a choice between one or other of those dates, provided that the alternative adopted is applied uniformly and without discrimination. From the replies received from Governments, the Commission will be able to determine whether a single criterion can be adopted for the final draft.

(8) Paragraph 2 of article 12 establishes the principle that no change in the credentials of the head of a mission, for instance as a result of the death of the head of State by whom he is accredited, shall affect his rank in his class.

(9) The rule stated in article 12, paragraph 3, corresponds to the second paragraph of article 4 of the Vienna Regulation. The object of the amended wording is to remove any possible source of ambiguity. The rules of precedence laid down in the draft will not affect the practice of those countries in which the Pope's representative always has precedence over all other heads of mission.

(10) Some of the provisions of the Vienna Regulation have not been included in the draft: articles 2 and 6, because the questions dealt with therein are no longer of current interest, article 3 because the draft has exclusive reference to permanent missions, and article 7 because it deals with a matter which falls rather within the province of the law of treaties.

Equality of status

Article 14

Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

This article requires no commentary.

[7] The text of the Protocol signed at Aix-la-Chapelle on 21 November 1818 by the plenipotentiaries of Austria, Great Britain, Prussia, Russia and France, is as follows:

"In order to avoid the possibility of unpleasant disputes with regard to a point of diplomatic etiquette for which the Annex to the Decision of Vienna, regulating the question of rank, seems to have made no provision, it is decided, as between the five Courts, that the ministers resident accredited to them shall take rank as an intermediate class between ministers of the second class and *chargés d'affaires.*"

(Translation taken from the report of a sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, C.203. M.77. 1927.V, p. 2.)

SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the "exterritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.

(2) There is now a third theory which appears to be gaining ground in modern times, namely, the "functional necessity" theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.

(3) The Commission was guided by this third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.

(4) Privileges and immunities may be divided into the following three groups, although the division is not completely exclusive:

(*a*) Those relating to the premises of the mission and to its archives;

(*b*) Those relating to the work of the mission; and

(*c*) Personal privileges and immunities.

SUBSECTION A. MISSION PREMISES AND ARCHIVES

Accommodation

Article 15

The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

Commentary

The laws and regulations of a given country may make it impossible for a mission to acquire the necessary premises. For that reason, the Commission has inserted in the draft an article which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. If the difficulties are due to a shortage of premises, the receiving State must facilitate the accommodation of the mission as far as possible.

Inviolability of the mission premises

Article 16

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter the premises, save with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any invasion or damage and to prevent any disturbance of the peace of the mission or detraction from its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

Commentary

(1) This article deals firstly with the inviolability of the premises of the mission, commonly referred to as the "*franchise de l'hôtel*". From the point of view of the receiving State, this inviolability has two aspects. In the first place, the receiving State is obliged to prevent its agents from entering the premises for any official act whatsoever (para. 1). Secondly, it is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or detraction from its dignity (para. 2). The receiving State must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty to ensure order.

(2) A special application of this principle is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

(3) The inviolability confers on the premises, their furnishings and fixtures, immunity from any search, requisition, attachment or execution.

(4) While the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated for carrying out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State should co-operate in every way in the implementation of the plan which the receiving State has in mind; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State.

(5) In connexion with the "*franchise de l'hôtel*" of the head of the mission, it is sometimes stated that the head of the mission may have in his residence a chapel of the faith to which he belongs [8]. The inviolability of the premises of the mission undoubtedly includes freedom of private worship, and nowadays it can hardly be disputed that the head of the mission and his family, together with all members of the staff of the mission and their families, may exercise this right, and that the premises may contain a chapel for the purpose. It was not thought necessary to insert a provision to this effect in the draft.

Exemption of mission premises from tax

Article 17

The sending State and the head of the mission shall be exempt from all national or local dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent *payment for services actually rendered*.

This article requires no commentary.

Inviolability of the archives

Article 18

The archives and documents of the mission shall be inviolable.

Commentary

The inviolability applies to archives and documents, regardless of the premises in which they may be. As in the case of the premises of the mission, the receiving State is obliged to respect the inviolability itself and to prevent its infringement by other parties.

SUBSECTION B. FACILITATION OF THE WORK OF THE MISSION, FREEDOM OF MOVEMENT AND COMMUNICATION

Facilities

Article 19

The receiving State shall accord full facilities for the performance of the mission's functions.

Commentary

A diplomatic mission may often need assistance to perform its functions satisfactorily. The receiving State (in whose own interests it is that the mission should be able to do this) is obliged to furnish all assistance required, and is under a duty to make every effort to provide the mission with all facilities for the purpose.

Free movement

Article 20

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Commentary

One of the facilities necessary for the performance of a mission's functions is that its members should enjoy freedom of movement and travel. This freedom of movement is subject to the laws and regulations of the receiving State concerning zones entry into which is prohibited or regulated for reasons of national security. The establishment of prohibited zones must not, on the other hand, be so extensive as to render freedom of movement and travel illusory.

Freedom of communication

Article 21

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission

[8] Article 8 of the 1929 draft of the Institute of International Law on diplomatic immunities. *Annuaire de l'Institut de Droit international*, 1929, Vol. II, p. 307.

may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The diplomatic bag may not be opened or detained.

3. The diplomatic bag may contain only diplomatic documents or articles intended for official use.

4. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial.

Commentary

(1) This article deals with another generally recognized freedom, which is essential for the performance of the mission's functions, namely free communication. In accordance with paragraph 1, this freedom shall be accorded for all official purposes, whether for communications with the Government of the sending State, with the officers and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments or with international organizations. Paragraph 1 of this article sets out the general principle, and states specifically that, in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. If a mission wishes to make use of a wireless transmitter belonging to it, it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. If the regulations applicable to all users of such communications are observed, such permission should not be refused.

(2) Paragraph 2 states that the diplomatic bag is inviolable, while paragraph 3 indicates what the diplomatic bag may contain. In accordance with the terms of the latter paragraph, the diplomatic bag may be defined as a bag (sack or envelope) containing diplomatic documents or articles intended for official use.

(3) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 3 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

(4) Paragraph 4 deals with the inviolability and the protection enjoyed by the diplomatic courier in the receiving State. The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft who is not provided with such a document, he is not regarded as a diplomatic courier under the terms of this paragraph.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

Personal inviolability

Article 22

1. The person of a diplomatic agent shall be inviolable. He shall not be liable to arrest or detention, whether administrative or judicial. The receiving State shall treat him with due respect and take all reasonable steps to prevent any attack on his person, freedom or dignity.

2. For the purposes of the present draft articles, the term "diplomatic agent" shall denote the head of the mission and the members of the diplomatic staff of the mission.

Commentary

This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including a special guard where circumstances so require. Being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion. This principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.

Inviolability of residence and property

Article 23

1. The private residence of a diplomatic agent shall enjoy the same inviolability and the same protection as the premises of the mission.

2. His property, papers and correspondence, *likewise, shall enjoy inviolability.*

Commentary

This article concerns the inviolability attaching to the diplomatic agent's residence and property. As regards movable property, the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account and other goods which are for his personal use, or essential to his livelihood.

Immunity from jurisdiction

Article 24

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction save in the case of:

(a) A real action relating to private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity and not on behalf of his Government for the purposes of the mission;

(b) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee;

(c) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions.

2. A diplomatic agent is not obliged to give evidence.

3. A diplomatic agent cannot be subjected to measures of execution, except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1, and provided that the measures of execution can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State shall not exempt him from the jurisdiction of the sending State, to which he shall remain subject in accordance with the law of that State. The competent court for this purpose shall be that of the seat of the Government of the sending State, unless some other is designated under the law of that State.

Commentary

(1) A diplomatic agent is exempt from the receiving State's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also from its civil and administrative jurisdiction. On the other hand, it should be recalled that he has the duty to respect the laws and regulations of the receiving State as laid down in article 33 of the present draft.

(2) The exemption from criminal jurisdiction is complete, whereas the exemption from civil and administrative jurisdiction is subject to the exceptions stated in the text.

(3) The first exception concerns immovable property belonging to the diplomatic agent personally. All States claim exclusive jurisdiction over immovable property, which is the very substratum of the national territory. This exception is subject to the conditions that the diplomatic agent holds the property in his private capacity and not on his Government's behalf for the purposes of the mission.

(4) The second exception is based on the consideration that, in view of the general importance of not preventing a succession from proceeding, diplomatic immunity cannot be invoked by a diplomatic agent in order to refuse to appear in a process or action relating to a succession.

(5) The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. If the diplomatic agent engages in such an activity, those with whom he has had dealings in so doing cannot be deprived of their remedy at law.

(6) There may be said to be a fourth exception, in the case referred to in article 25, paragraph 3 (counter-claim directly connected with the diplomatic agent's principal claim).

(7) Paragraph 2 of the article derives from the diplomatic agent's inviolability. Should the diplomatic agent agree to give written or oral testimony, there is nothing to prevent him from doing so.

(8) The effect of immunity from jurisdiction, together with the privileges mentioned in articles 22 and 23, is that the diplomatic agent must also be exempted from measures of execution, with the exceptions mentioned in paragraph 3 of the present article.

(9) The first sentence of paragraph 4 states that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country, on condition, however, that a court in that country is competent under its laws. To bring this jurisdiction into operation, it is not however sufficient that the case should come within the general competence of the country's courts under its laws; these laws must also designate a local court before which the action can be brought. Where no such court exists, the second sentence of paragraph 4 provides that the competent court shall be that of the seat of the Government of the sending State.

Waiver of immunity

Article 25

1. The immunity of diplomatic agents from jurisdiction may be waived by the sending State.

2. In criminal proceedings, waiver must always be effected expressly by the Government of the sending State.

3. In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

4. Waiver of immunity of jurisdiction in respect of civil proceedings shall not be held to imply waiver of immunity regarding measures of execution of the judgement, which must be separately made.

Commentary

(1) It is generally held that immunity from jurisdiction can be waived in legal proceedings. As to who is entitled to waive immunity, the Commission took the view that this is a right of the sending State, since the latter represents the end to which the immunity is granted, namely, that the diplomatic agent may discharge his duties in full freedom and with the dignity befitting them. This is the idea underlying the provision contained in paragraph 1.

(2) Another question is how the waiver should be effected in order to be valid. This question is answered in paragraphs 2 and 3, a distinction being drawn between criminal and civil proceedings. In the former case, the waiver must be effected expressly by the Government of the sending State. In civil proceedings, it may be express or implied, and paragraph 3 explains the circumstances in which it is presumed to be implied. Thus, if, in civil proceedings, a valid waiver may be inferred from the diplomatic agent's behaviour, his expressly declared waiver must naturally also be regarded as valid. He is presumed to have the necessary authorization.

(3) It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal where an express or implied waiver was given in the court of first instance.

(4) Under paragraph 3, the initiation of proceedings by a diplomatic agent precludes him from invoking immunity in respect of counter-claims directly connected with the principal claim. In such a case the diplomatic agent is

deemed to have accepted the jurisdiction of the receiving State as fully as may be required to settle the dispute in all stages closely linked to the basic claim.

Exemption from taxation

Article 26

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national or local, save:

(a) Indirect taxes;

(b) Dues and taxes on private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity and not on behalf of his Government for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State;

(d) Dues and taxes on income which has its source in the receiving State;

(e) Charges levied for specific services rendered.

Commentary

(1) In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemption exists, subject to certain exceptions.

(2) The Commission's intention in wording sub-paragraph (*e*) was to indicate that the charge must be in payment for a specific service, rendered or to be rendered.

Exemption from customs duties and inspection

Article 27

1. Customs duties shall not be levied on:

(a) Articles for the use of a diplomatic mission;

(b) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative.

Commentary

(1) Articles for the use of the mission are in practice exempted from customs duties, and this is generally regarded as a rule of international law.

(2) As a rule, no customs duties are levied on articles for the personal use of the diplomatic agent or members of his family belonging to his household, including articles intended for his establishment. This exemption has been regarded rather as based on international comity. In view of the widespread nature of this practice, the Commission considers that it should be accepted as a rule of international law.

(3) It is not inconsistent with the exemptions proposed, that the receiving State should, with possible abuses in mind, impose reasonable restrictions on the quantity of goods imported for the diplomatic agent's use, or limit the period during which articles for his establishment must be imported if they are to be exempted from duties.

(4) While the Commission did not wish to prescribe exemption from inspection as an absolute right, it endeavoured to invest the exceptions proposed to the rule with all necessary safeguards.

(5) In framing the exceptions, the Commission referred not only to articles in the case of which exemption from customs duties exceptionally does not apply, but also to articles the import or export of which is prohibited by the laws of the receiving State, although without wishing to suggest any interference with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use.

Persons entitled to privileges and immunities

Article 28

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27.

2. Members of the service staff of the mission shall enjoy immunity in respect of acts performed in the course of their duties. They shall also, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment.

3. Private servants of the head or members of the mission shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such manner as will avoid undue interference with the conduct of the business of the mission.

4. Private servants who are not nationals of the receiving State shall be exempt from dues and taxes on the emoluments they receive by reason of their employment.

Commentary

(1) It is the general practice to accord members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities. Some States include members of the administrative and technical staff among the beneficiaries, and some even include members of the service staff. There are also differences in the privileges and immunities granted to the different groups. In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned.

(2) The solutions adopted for this problem will differ according to whether the privileges and immunities re-

quired for the exercise of the functions are considered in relation to the work of the individual official or, alternatively, in relation to the work of the mission as an organic whole.

(3) In view of the differences in State practice, the Commission had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any additional rights to be accorded should be decided by bilateral agreement, or to try to establish a general and uniform rule based on what would appear to be reasonable.

(4) A majority of the Commission favoured the latter course, in the knowledge that the rule proposed is a step towards the progressive development of international law.

(5) The Commission differentiated between members of the administrative and technical staff on the one hand, and members of the service staff on the other.

(6) As regards persons belonging to the administrative and technical staff, it took the view that there are good grounds for granting them the same privileges and immunities as members of the diplomatic staff. These occupations, it is true, vary a good deal, and consideration was given to a proposal that each member of this group should be accorded only such privileges and immunities as are required for the performance of his particular duties. By a large majority, however, the Commission adopted the other view, believing that serious difficulties would arise in determining the measure of protection required by the duties in each individual case. Duties are often combined, and conditions in general vary considerably. The Commission accordingly, by majority vote, recommends that the administrative and technical staff as a whole should be given the same privileges and immunities as members of the diplomatic staff (para. 1).

(7) With regard to service staff, the Commission took the view that it would be sufficient for them to enjoy immunity only in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment (para. 2). States will, of course, remain free to accord members of this group any additional privileges and immunities they think fit.

(8) In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals of the receiving State. The Commission did not feel it desirable to lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse and children under age at least, are universally recognized as members of the family, but cases may arise where other relatives too come into the matter. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties and special circumstances are necessary qualifications.

(9) With regard to private servants of the head or members of the mission, a majority of the Commission took the view that they should not enjoy privileges and immunities as of right. However, it thought that, except in the case of nationals of the receiving State, these persons should enjoy exemption from dues and taxes on the emoluments they receive by reason of their employment. In the majority view, the mission's interest would be adequately safeguarded if the receiving State were under a duty to exercise its jurisdiction over their persons in such manner as will avoid undue interference with the conduct of the mission's business.

(10) In connexion with this article, the Commission considered what value as evidence could be attached to the lists of persons enjoying privileges and immunities which are normally submitted to the Ministry for Foreign Affairs. It took the view that such a list might constitute presumptive evidence that a person mentioned therein was entitled to privileges and immunities, but did not constitute final proof.

Acquisition of nationality

Article 29

As regards the acquisition of the nationality of the receiving State, no person enjoying diplomatic privileges and immunities in that State, other than the child of one of its nationals, shall be subject to the laws of the receiving State.

Commentary

This article is based on the idea that a person enjoying diplomatic privileges and immunities shall not, by virtue of the laws of the receiving State, acquire the nationality of that State against his will. This rule does not apply to the case of a child of a national of the receiving State.

Diplomatic agents who are nationals of the receiving State

Article 30

A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts performed in the exercise of his functions. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State.

Commentary

(1) This article deals with the privileges and immunities of a diplomatic agent who is a national of the receiving State. On this subject practice is not uniform, while the opinions of writers are also divided. Some hold the view that a diplomatic agent who is a national of the receiving State should enjoy full privileges and immunities, subject to any reservations which the receiving State may have made at the time of the *agrément*, while others are of opinion that he should enjoy only such privileges and immunities as have been expressly granted him by the receiving State.

(2) This latter opinion was supported by a minority of the Commission. The majority favoured an intermediate solution. It considered it essential for a diplomatic agent who is a national of the receiving State to enjoy at least a minimum of immunity to enable him to perform his

duties satisfactorily. That minimum, it was felt, is immunity from jurisdiction in respect of official acts performed in the exercise of his functions.

(3) The privileges and immunities to be enjoyed beyond this minimum by a diplomatic agent who is a national of the receiving State, will depend on the decision of the receiving State at the time when it agrees to his appointment.

(4) Attention is drawn to the fact that, as is stated in article 22, paragraph 2, the phrase "diplomatic agent" includes not only the head of the mission but also members of the diplomatic staff.

(5) The rule proposed in this article implies that members of the administrative and service staff of a mission who are nationals of the receiving State will not enjoy any privileges and immunities other than those granted to them by that State. The same applies to members of the family of a diplomatic agent who is such a national.

Duration of privileges and immunities

Article 31

1. Any person entitled to diplomatic privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time even in case of armed conflict. However, with respect to acts performed by him in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any such property acquired in the country and the export of which was prohibited at the time of his death.

Commentary

The first two paragraphs of this article deal with the times of commencement and termination of entitlement, in the case of persons entitled to privileges and immunities in their own right. For those who derive their entitlement from such persons, other dates may apply, namely the dates of commencement and termination of the relationships which constitute the grounds of the entitlement.

Duties of third States

Article 32

1. If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return.

2. Third States shall accord diplomatic couriers in transit the same inviolability and protection as the receiving State.

Commentary

(1) In the course of diplomatic relations it may be necessary for a diplomatic agent or a diplomatic courier to pass through the territory of a third State. Several questions were raised on this subject during discussion in the Commission.

(2) The first problem is whether the third State is under a duty to grant free passage. The view was expressed that it is in the interest of all States belonging to the community of nations that diplomatic relations between the various States should proceed in a normal manner, and that in general, therefore, the third State should grant free passage to the member of a mission and to the diplomatic courier. It was pointed out, on the other hand, that a State is entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to resolve this problem, which only arises rarely.

(3) Another problem concerns the position of the member of the mission who is in the territory of a third State either in transit or for other reasons, and who wishes to take up or return to his post or to go back to his country. Has he the right to avail himself of the privileges and immunities to which he is entitled in the receiving State, and to what extent may he avail himself of them? Opinions differ, and practice provides no clear guide. The Commission felt it should adopt an intermediate position, in suggesting that the third State should accord the agent inviolability, and such other immunities as may be required to ensure his transit or return.

(4) A third State which a diplomatic courier crosses in transit is obliged to afford him the same inviolability and protection as the receiving State.

SECTION III. CONDUCT OF THE MISSION AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

Article 33

1. Without prejudice to their diplomatic privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. Unless otherwise agreed, all official business with the receiving State, entrusted to a diplomatic mission by its government, shall be conducted with or through the Ministry for Foreign Affairs of the receiving State.

3. The premises of a diplomatic mission shall not be used in any manner incompatible with the functions of the mission as laid down in the present draft articles, or by other rules of general international law, or by any special agreements in force between the sending and the receiving State.

Commentary

(1) The first sentence of paragraph 1 states the rule already mentioned, that in general it is the duty of the diplomatic agent, and of all persons enjoying diplomatic privileges and immunities, to respect the laws and regulations of the receiving State. Immunity from jurisdiction implies merely that the agent may not be brought before the court if he fails to fulfil his obligations. The duty

naturally does not apply where the agent's privileges and immunities exempt him from it. Failure by a diplomatic agent to fulfil his obligations does not absolve the receiving State from its duty to respect the agent's immunity.

(2) The second sentence of paragraph 1 states the rule that persons enjoying diplomatic privileges and immunities must not interfere in the internal affairs of the receiving State. In particular, they must not take part in political campaigns.

(3) Paragraph 2 lays down that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission shall conduct all official business entrusted to it by its Government; in the event, however, of agreement (whether express or tacit) between the two States, the mission may deal directly with other authorities of the receiving State.

(4) Paragraph 3 stipulates that the premises of the mission shall only be used for the legitimate purposes for which they are intended. Among the agreements referred to in the paragraph may be mentioned, as example, certain treaties governing the right to grant asylum in mission premises.

SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

Modes of termination

Articles 34

The function of a diplomatic agent comes to an end, *inter alia:*

(a) If it was for a limited period, on the expiry of that period, provided it has not been extended;

(b) On notification by the Government of the sending State to the Government of the receiving State that it has come to an end (recall);

(c) On notification to the diplomatic agent by the receiving State that it considers his function to be terminated;

(d) On the death of the diplomatic agent.

Commentary

This article lists various examples of the ways in which a diplomatic agent's function may come to an end. The causes which may lead to termination under points (*b*) and (*c*) are extremely varied.

Facilitation of departure

Article 35

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment and, particularly, must place at their disposal the necessary means of transport for themselves and their property.

This article requires no commentary.

Protection of premises, archives and interests

Article 36

If diplomatic relations are broken off between two States, or if a mission is withdrawn or discontinued:

(a) The receiving State, even in case of armed conflict, shall respect and protect the premises of the mission, together with its property and archives;

(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to the mission of another State acceptable to the receiving State;

(c) The sending State may entrust the protection of the interests of its country to the good offices of the mission of a third State acceptable to the receiving State.

This article requires no commentary.

SECTION V. SETTLEMENT OF DISPUTES

Article 37

Any dispute between States concerning the interpretation or application of this Convention that cannot be settled through diplomatic channels, shall be referred to conciliation or arbitration or, failing that, shall be submitted to the International Court of Justice.

This article requires no commentary.

CHAPTER III

PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

I. State responsibility

17. By arrangement among the special rapporteurs concerned, the subject of State responsibility was discussed next in order of the agenda after diplomatic intercourse and immunities. Mr. F. V. García-Amador, the special rapporteur, in accordance with the request made by the Commission at its eighth session, submitted at the ninth session a second report (A/CN.4/106) on the subject of "International responsibility", dealing with the particular topic of "Responsibility of the State for injuries caused in its territory to the persons of property of aliens—Part I: Acts and omissions". The Commission, at its 413th to 416th meetings, held a general discussion of this report, and requested the special rapporteur to continue his work.

II. Arbitral procedure

18. At its 404th meeting, the Commission appointed a committee consisting of nine members of the Commission to consider and report to the full Commission on the questions involved by the General Assembly resolution 989 (X) of 14 December 1955, by which the Commission was invited to consider the comments made by Governments, and the discussions in the Sixth Committee, respecting the draft on arbitral procedure prepared by the Commission at its fifth session (1953), insofar as these comments and discussions might contribute further to the value of the draft, and to report to the Assembly at its thirteenth session (1958).

19. The committee came to the conclusion that, in order that detailed work could usefully be accomplished, it would be necessary for the full Commission to take a decision on the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether

this object should be a convention or simply a set of rules which might inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements. Accordingly, at its 419th meeting, the Commission considered this question in the light of a report (A/CN.4/109) submitted to it at its present session by the special rapporteur, M. Georges Scelle, and decided in favour of the second alternative. At the request of the special rapporteur, the Commission, with a view to facilitating the preparation, at its next session in 1958, of its final report on the subject to the General Assembly, held a general discussion of certain of the key articles in the revised draft submitted by the special rapporteur in his report mentioned above, in which he took into consideration the comments of Governments and the discussions in the Sixth Committee respecting the Commission's original (1953) draft. The Commission, after taking provisional decisions on certain points, adjourned the matter for final consideration and report at its next session.

III. Law of treaties; consular intercourse and immunities

20. The special rapporteurs on these subjects, Sir Gerald Fitzmaurice and Mr. Jaroslav Zourek, had both submitted reports to the present session (A/CN.4/107 and A/CN.4/108); but for want of time it was not possible to discuss them. Sir Gerald Fitzmaurice informed the Commission that he would present to its next session a report completing the work on the validity of treaties begun in his first two reports. The special rapporteurs were requested to continue their work.

Chapter IV

OTHER DECISIONS OF THE COMMISSION

I. Co-operation with other bodies

21. The Commission considered the contents of a letter dated 27 May 1957, addressed to the Secretary of the Commission by the Acting Secretary of the Asian Legal Consultative Committee, requesting co-operation with the Commission; the Chairman drew attention in that connexion to article 26 of the Commission's statute, relating to consultation with international or national organizations, and to the resolutions on co-operation with inter-American bodies adopted by the Commission at its sixth, seventh and eighth sessions.

22. The Secretary to the Commission stated that he wished first to report regarding the resolution adopted by the Commission in 1956 on the subject of co-operation with inter-American bodies. Under that resolution, the Commission requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, as an observer, the fourth meeting of the Inter-American Council of Jurists to be held at Santiago, Chile, in 1958 [9]. He had, however, been informed that, owing to the need for further preparatory work by the Rio de Janeiro Committee, the meeting would have to be postponed until 1959. No further action by the Commission was required in that connexion.

23. The Secretary went on to explain that the Asian Legal Consultative Committee, described by its Acting Secretary as an "inter-governmental committee of legal experts", had been established on 15 November 1956, for an initial period of five years, by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. According to article 3 of the Committee's statute, one of its objects was "to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission". At the Committee's first meeting at New Delhi, from 18 to 27 April 1957, it had instructed its Acting Secretary to get in touch with the Commission with a view to establishing consultative relations.

24. On the proposal of the Chairman, the Commission authorized the Secretary to reply to the Asian Legal Consultative Committee on the following lines:

(i) The Commission will ask the Secretary-General of the United Nations to put the Asian Legal Consultative Committee on the list of organizations which receive the Commission's documents.

(ii) The Commission requests the Consultative Committee to send, whenever it sees fit, any observations it may wish to make on questions under study by the Commission.

(iii) The Commission has pleasure in acknowledging the Committee's letter and expresses a keen interest in its work. The Commission would welcome any information on the development of the Committee's programme.

II. Planning of future work of the Commission

25. The Commission decided to place on the agenda for its next session, in 1958, the following subjects and to discuss these in the order indicated:

(i) Arbitral procedure—in order to present a final report to the General Assembly at its thirteenth session in 1958, as requested in Assembly resolution 989 (X) of 14 December 1955 (see para. 18 above);

(ii) Diplomatic intercourse and immunities—with a view to presenting a final report on this subject to the General Assembly at its thirteenth session, after reviewing it in the light of the comments of governments on the draft contained in chapter II of the present report;

(iii) The law of treaties;

(iv) State responsibility;

(v) Consular intercourse and immunities.

26. In view of the increased size of the Commission following on the recent additions to the membership of the United Nations, and of the hopes expressed in the discussions in the Sixth Committee of the General Assembly at its eleventh (1956) session that it might be possible to find ways of increasing the speed of the work, the Commission had this matter under consideration. It was pointed out in the course of discussion that there were

[9] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9* (A/3159), para. 47.

solid reasons for the Commission's practice of holding only one plenary meeting a day. The nature of the work and the particular task entrusted to the Commission made it essential to leave enough time between meetings for personal preparation, reflexion and research, not only on the basic drafts and reports, but on the new points that were constantly coming up in the course of the discussions, and which required careful attention. For this necessary private and individual work of the members, it would be impossible to find adequate time on the basis of two plenary meetings a day. In addition, it would be impossible on that basis for the special rapporteur for the subject in hand, the general rapporteur and the drafting committee to keep pace with the Commission's work. The latter, indeed, would be compelled to meet mostly at night, since its meetings are usually of more than three hours' duration, and the presence of its members at plenary meetings of the Commission is considered essential.

27. It was also pointed out that, if the Commission only met once a day in plenary session, this did not mean that all activity ceased at other times. Apart from the individual work of members, the rapporteurs were continually at work, and the drafting committee was in being and at work during the greater part of the session. This year, the Commission had also appointed another committee which met outside the normal hours, it had prolonged the duration of its morning plenary meeting; and, in addition, it had held a number of extra plenary meetings, and was always ready to do so, within the limits of the available budgetary and administrative possibilities, if the state of the work so required.

28. Having regard to this position, the Commission felt that, within the confines of a ten-weeks' session, no serious increase in the speed or quantity of the work could be achieved except by the adoption of methods that would be detrimental to its quality—and the Commission believes that the quality of its work is, and must always remain, the primary consideration, both from the Commission's own point of view and that of the Assembly.

29. Nevertheless, the Commission is fully conscious of the need for doing everything possible, consistent with the maintenance of quality, to increase the pace and volume of the work, and is ready to adopt any appropriate measures conducive to that end. It proposes to keep the matter under constant review, and to give it renewed consideration at its next session in the light of the experience gained in the working of the Commission with its present membership of twenty-one.

III. Emoluments of the members of the commission

30. In view of the fact that the present allowance of the Commission's members will, together with the question of a special allowance for members of all technical committees and commissions, come up for consideration at the next session of the General Assembly, the Commission wishes to draw attention to the remarks concerning the the emoluments of its members contained in paragraph 42 of its report for 1949 [10]. In the light of the considerations therein mentioned, the General Assembly, by resolution 485 (V) of 12 December 1950, in which these considerations were stressed, decided that members of the Commission should receive a special allowance, amended article 13 of the Commission's statute accordingly, and fixed the allowance at $35 a day.

31. The Commission believes that the case of each technical commission and committee must be decided on its merits. So far as its own position is concerned, it can only draw attention to the fact that the considerations set out in paragraph 42 of its report for 1949, and on which General Assembly resolution 485 (V) was based, have in no way changed in the interval but, on the contrary, have remained fully operative. The work of the Commission makes heavy demands on the members. It meets each year for a long continuous period which, in certain years, has involved for members an absence from home of nearly three months. This means a substantial sacrifice either of time or money, or of both, which many members of the Commission might not be able to bear if conditions were changed; and a similar difficulty would be encountered in finding any suitable replacements. Even if no direct money consideration should arise, a serious burden of additional work is subsequently imposed on all members of the Commission, without exception, by reason of such a long absence from their normal activities or duties. In addition, if adequate progress is to be made with the work at the Commission's sessions, it is necessary for all its members to devote a considerable amount of time to personal research and preparation between the sessions.

32. Having regard to these considerations, and the character of the Commission's work, the Commission believes that the maintenance of this allowance, as a minimum, is essential in the interests of the Commission work and standing.

IV. Date and place of the next session

33. Consultations with the Secretary-General having shown that the period to be allowed for the Conference on the Law of the Sea, to be held in the first quarter of 1958, must extend until Friday, 25 April, the Commission's session cannot start before Monday, 28 April, and a ten weeks' session from that date would take until 4 July. The Commission therefore, subject to the considerations mentioned below, has decided, in accordance with the provisions of article 12 of its statute, as amended by General Assembly resolution 984 (X) of 3 December 1955, to hold its next session in Geneva from 28 April to 4 July 1958.

34. Having regard to the fact that the present pattern of conferences will come up for discussion at the next session of the General Assembly, the Commission wishes to draw attention to the remarks contained in paragraph 175 of its report for 1953 [11], concerning the difficulty created for a number of the members of the Commission by the present regulations, according to which the Commission must finish its session by or before the opening of

[10] *Report of the International Law Commission covering its first session, Official Records of the General Assembly, Fourth session, Supplement No. 10 (A/925).*

[11] *Ibid., Eighth Session, Supplement No. 9* (A/2456).

the summer session of the Economic and Social Council in July, and must therefore, if its own session is not to be unduly curtailed, begin it at a date in the latter half of April. The holding of a shorter session would not be satisfactory, since ten weeks is the minimum period in which the work can be done.

V. Representation at the twelfth session of the General Assembly

35. The Commission decided that it should be represented at the next (twelfth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Jaroslav Zourek.

LIST OF OTHER DOCUMENTS PERTAINING TO THE NINTH SESSION OF THE COMMISSION BUT NOT REPRODUCED IN THIS VOLUME

Document	*Title*	*Observations and references*
A/CN.4/91	Diplomatic intercourse and immunities: report by A. E. F. Sandström, Special Rapporteur	Mimeographed
A/CN.4/98	Diplomatic intercourse and immunities: memorandum prepared by the Secretariat	See *Yearbook of the International Law Commission, 1956*, Vol. II
A/CN.4/105	Provisional agenda	Adopted without change. See *Yearbook of the International Law Commission, 1957*, Vol. I, agenda
A/CN.4/110	Report of the International Law Commission covering the work of its ninth session	Same text as A/3623
A/CN.4/L.70 and Add.1 to 3	Draft report of the International Law Commission covering the work of its ninth session	Mimeographed
A/CN.4/SR.382 to A/CN.4/SR.430	Summary records of the meetings of the ninth session (382nd to 430th meetings)	See *Yearbook of the International Law Commission, 1957*, Vol. I

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