

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1960

Volume II

*Documents of the twelfth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1960

Volume *II*

*Documents of the twelfth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS
New York, 1961



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

A/CN.4/SER.A/1960/ADD.1

UNITED NATIONS PUBLICATION

Sales No.: 60. V. 1. Vol. II

Price: \$U.S. 2.00 ; 14/- stg. ; Sw. fr. 8.50
(or equivalent in other currencies)

CONTENTS

	<i>Page</i>
FILLING OF CASUAL VACANCY IN THE COMMISSION (ARTICLE 11 OF THE STATUTE) (agenda item 1)	
<i>Document A/CN.4/127</i> : Note by the Secretariat	1
CONSULAR INTERCOURSE AND IMMUNITIES (agenda item 2)	
<i>Document A/CN.4/131</i> : Second report by Jaroslav Zourek, Special Rap- porteur	2
<i>Document A/CN.4/L.86</i> : Provisional draft articles submitted by Jaroslav Zourek, Special Rapporteur	32
STATE RESPONSIBILITY (agenda item 3)	
<i>Document A/CN.4/125</i> : International responsibility: Fifth report by F. V. García Amador, Special Rapporteur	41
LAW OF TREATIES (agenda item 4)	
<i>Document A/CN.4/130</i> : Fifth Report by Sir Gerald Fitzmaurice, Special Rapporteur	69
<i>Ad hoc</i> DIPLOMACY (agenda item 5)	
<i>Document A/CN.4/129</i> : Report by A. E. F. Sandström, Special Rapporteur	108
<i>Document A/CN.4/L.87</i> : Provisions proposed by Mr. Jiménez de Aréchaga for insertion in the draft articles on diplomatic intercourse and immunities prepared by the International Law Commission at its tenth session . . .	115
<i>Document A/CN.4/L.88</i> : Memorandum by Mr. Jiménez de Aréchaga in explanation of his proposal concerning <i>ad hoc</i> diplomacy (A/CN.4/L.87)	115
<i>Document A/CN.4/L.89</i> : New alternative proposal submitted by the Special Rapporteur	117
GENERAL ASSEMBLY RESOLUTION 1400 (XIV) ON THE CODIFICATION OF THE PRIN- CIPLES AND RULES OF INTERNATIONAL LAW RELATING TO THE RIGHT OF ASYLUM (agenda item 6)	
<i>Document A/CN.4/128</i> : Note by the Secretariat	118
GENERAL ASSEMBLY RESOLUTION 1453 (XIV) ON THE STUDY OF THE JURIDICAL RÉGIME OF HISTORIC WATERS, INCLUDING HISTORIC BAYS (agenda item 7)	
<i>Document A/CN.4/126</i> : Note by the Secretariat	119
CO-OPERATION WITH OTHER BODIES (agenda item 8)	
<i>Document A/CN.4/124</i> : Report by Mr. Yuen-li Liang, Secretary of the Com- mission, on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists	120
REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY	
<i>Document A/4425</i> : Report of the International Law Commission covering the work of its twelfth session, 25 April-1 July 1960	
CHECK LIST OF COMMISSION DOCUMENTS REFERRED TO IN THIS VOLUME	182

INTERNATIONAL LAW COMMISSION
DOCUMENTS OF THE TWELFTH SESSION, INCLUDING THE REPORT
OF THE COMMISSION TO THE GENERAL ASSEMBLY

FILLING OF CASUAL VACANCY IN THE COMMISSION
(article 11 of the Statute)

[Agenda item 1]

DOCUMENT A/CN.4/127

Note by the Secretariat

[Original text: English]
[1 March 1960]

1. On 29 September 1959, Mr. Ricardo J. Alfaro was elected a member of the International Court of Justice.

2. By a letter dated 11 January 1960 and addressed to the Chairman of the Commission, Mr. Thanat Khoman tendered his resignation from the Commission.

3. There are therefore two casual vacancies in the membership of the Commission. Article 11 of the Commission's Statute prescribes:

“In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.”

Article 2 reads:

“1. The Commission shall consist of twenty-one members who shall be persons of recognized competence in international law.

“2. No two members of the Commission shall be nationals of the same State.

“3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.”

Article 8 reads:

“At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.”

4. The terms of the two members to be elected by the Commission will expire at the end of 1961.

CONSULAR INTERCOURSE AND IMMUNITIES

[Agenda item 2]

DOCUMENT A/CN.4/131

Second report by Jaroslav Zourek, Special Rapporteur

[Original text: French]
[30 March 1960]

CONTENTS

Paragraphs Page

PART I

QUESTION OF THE PERSONAL INVOLABILITY OF CONSULS AND THEIR IMMUNITY FROM CRIMINAL JURISDICTION

SECTION I: HISTORICAL INTRODUCTION

1. Development of custom	1-10	3
2. Case-law	11-20	5
3. International conventions	21-33	6
4. Scope of the so-called personal immunity clause	34-36	8
5. Doctrine and practice	37-40	9
6. Draft codes	41-43	9

SECTION II: THE EXISTING LAW

1. Official acts	44-45	10
2. Acts other than those performed in the exercise of the consular function	46-83	11
(a) The case-law of local courts	49-54	11
(b) International treaties	55-66	13
(c) National law and practice	67-83	16

SECTION III: PROPOSED CODIFICATION 17

SPECIAL ARTICLE

Personal inviolability	18/19
----------------------------------	-------

PART II

THE MOST-FAVoured-NATION CLAUSE AND CONSULAR INTERCOURSE AND IMMUNITIES

SECTION I

1. Introduction	1- 2	19
2. General considerations	3-15	19
3. The conditional most-favoured-nation clause in conventions concerning consular intercourse and immunities	16-20	21

SECTION II: SCOPE OF THE MOST-FAVoured-NATION CLAUSE IN THE MATTER OF CONSULAR INTERCOURSE AND IMMUNITIES

1. Introduction	21	22
2. Most-favoured-nation clause mentioning the powers, privileges and immunities of consuls	22-27	22
3. Most-favoured-nation clause mentioning the treatment of consuls in general	28-29	23
4. Most-favoured-nation clause mentioning consular privileges and immunities	30-32	23
5. Most-favoured-nation clause mentioning a specific immunity	33	24
6. Most-favoured-nation clause mentioning the establishment and location of consulates	34-36	24
7. Interpretation of the clause	37	25

SECTION III: IS IT DESIRABLE TO INCLUDE A MOST-FAVoured-NATION CLAUSE IN THE DRAFT ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES? 38 25

PART III

ADDITIONAL ARTICLES

Article I: Staff employed in the consulate	26
Article II: Persons deemed unacceptable	26

	Paragraphs	Page
<i>Article III: Exemption from obligations in the matter of registration of aliens and residence permits</i>		27
<i>Article IV: Notification of arrival and departure</i>		27
<i>Article V: Acquisition of nationality</i>		27
<i>Article VI: Members of the consular staff who are nationals of the receiving State</i>		28
<i>Article VII: Duration of consular privileges and immunities</i>		28
<i>Article VIII: Estates of deceased members of the consular staff or of deceased members of their families</i>		29
<i>Article IX: Duties of third States</i>		29
<i>Article X: Duty to respect the laws and regulations of the receiving State</i>		30
<i>Article XI: Right to leave the territory of the receiving State and facilitation of departure</i> . . .		30
<i>Article XII: Protection of premises, archives and interests</i>		31
<i>Article XIII: Non-discrimination</i>		31

PART I

Question of the personal inviolability of consuls and their immunity from criminal jurisdiction

SECTION I: HISTORICAL INTRODUCTION

1. *Development of custom*

1. At the time when they were regarded as public ministers and were invested with judicial and diplomatic functions,¹ consuls enjoyed complete immunity from the jurisdiction of the receiving State. Their legal status in no way differed from that of the diplomatic agents of the present time.¹

2. At that time, an act of violence committed against a consul was regarded as a breach of international law, as is evidenced by a number of cases well known in diplomatic history. For example, Wicquefort (1606-1682 reports that the States-General of the United Provinces, whose consul at Cadiz had suffered an affront and had been detained for six or eight months by the Governor of Cadiz, made representations to the Court of Madrid, complaining of a breach of the *Droit des gens* (*jus gentium*).²

3. In 1634, the Republic of Venice severed relations with Pope Urban VIII by reason of the offensive conduct of the Governor of Ancona towards the Venetian consul, Michele Oberti. The Governor, who suspected consul Oberti of having advised the Republic of Venice to send some galleys for the purpose of seizing a few vessels from Ragusa for non-payment of the duties

levied in the Gulf, instituted proceedings against the consul and, when the latter went to Venice to complain to the Senate, sent soldiers to his house and ordered the removal therefrom of the furniture and papers, even those relating to the exercise of the consular function. The Venetian Senate protested vehemently, and, to prevent an open breach with the Pope, the French ambassador interposed with a view to settling the dispute. But before a settlement could be reached, the Governor obtained a sentence of banishment against the consul *in contumacia*, on the ground that the consul had unloaded goods at a time of epidemic. After a further intervention by the French Ambassador, this incident was settled on the terms that the Governor would rescind the ban and agree to consul Oberti's reinstatement and that the consul would then be replaced by the Venetian Senate. The consul having died in the meantime, he was replaced by his brother, whom the Governor imprisoned and refused to release until he had given his word to leave the town and not to return. Outraged by these proceedings, the Venetian Senate expressed its indignation by refusing to give audience to the Pope's envoys and by forbidding its ambassador to enter the Pope's presence until the Governor of Ancona had been forced to give satisfaction.³

4. Wicquefort reports that the United Provinces wished to have their Consul at Genoa recognized as minister. But the Senate of Genoa answered that it did not recognize him as a public minister and that Genoa could not be expected to agree to more than the peaceful enjoyment of the rights and privileges attaching by custom to that type of office.⁴ And Wicquefort adds a sentence which indicates the profound change in the conception of the consular function that occurred in the second half of the seventeenth century—a change of which he himself was one of the main initiators:

“The *Consuls* are but merchants who, though responsible for adjudicating disputes which may arise between the nationals of their country, nevertheless

¹ See the Special Rapporteur's first report, in *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), pp. 74 and 75 and Special Rapporteur's article entitled *Histoire des relations consulaires*, in *Revue de Droit International pour le Moyen-Orient*, Sixth Year, No. 2 (December 1957), pp. 193-194.

² *L'Ambassadeur et ses fonctions*, latest edition, Cologne, 1715, Part I (the first edition was published in 1681), Book I, Section V, p. 76; cf. also 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, chapter II, section 34, p. 282.

³ Wicquefort, *op. cit.*, pp. 76 and 77; see also Vattel, *loc. cit.*

⁴ Wicquefort, *op. cit.*, p. 76.

engage in business and are subject to the jurisdiction of the courts, both civil and criminal, of their place of residence. In this respect, therefore, their position is incompatible with the status of Public Minister.”⁵

5. In his *Mémoires touchant les ambassadeurs et ministres publics*, published in 1676-1679, Wicquefort cites the case of Gerbrant Sas, a lawyer at The Hague, who, in 1659, received a commission from George Downing, resident representative of the Protector of England, “to serve, to the exclusion of others, the English merchants in the conduct of their private business”. Wicquefort adds that Sas was authorized to exercise this function on the express condition that he could not claim any other rights or prerogatives than those enjoyed by the other lawyers. Believing that his status as a public minister made him immune from judicial proceedings, Sas wounded in the street a man by whom he thought he had been insulted. The Court of Justice ordered his arrest and imprisonment, and, despite the representations of the English envoy, sentenced Sas to a fine of a thousand pounds, to six years’ banishment, to payment of the costs of the trial and to imprisonment until payment was effected. A few days later, the States of Holland, acting under pressure by the States-General, declared that the sentence would not be executed and Sas was released. Wicquefort adds that Sas could in no case be regarded as a public minister, for he was not furnished with credentials for the States, did not negotiate with them and was employed only at the Court of Justice in the private business of the English merchants.⁶

6. The profound transformation which occurred in the consular institution in the countries of Europe after the second half of the seventeenth century in consequence of the change in international economic relations produced a change in the legal status of consuls. As permanent diplomatic missions became increasingly general in the seventeenth century, the consuls lost certain powers which were henceforth regarded as diplomatic functions. They ceased to be public ministers and hence were no longer entitled to claim the privileges and immunities they had enjoyed at a time when they were the only official representatives of States abroad. It would be wrong, however, to think that this transformation of the consular institution meant that the consuls lost all their immunities. The fact that the consuls ceased to be public ministers and to enjoy the privileges and immunities attaching to public ministers, in no way implies that they ceased to enjoy any privileges or immunities whatsoever. The lessening in the extent and importance of the consular functions was not so great as to reduce the consuls, so far as privileges and immunities are concerned, to the level of private individuals. Nevertheless, some learned authorities did go as far as to assert precisely that. A current of opinion hostile to the consuls emerged, and Wicque-

fort set himself up as the spokesman of this school of thought. He says that the princes who employ consuls “protect them as persons who are in their service and as any good master protects his servant and domestic; but not as Public Ministers”.⁷ It is really surprising that Wicquefort puts consuls, the official envoys of the sovereign, on the same level as servants, or the private staff. The hostile movement of opinion towards the consuls may be accounted for in several ways. First of all, the new methods of production radically transformed the trade which was an essential part of the new industrial relations, and gave rise to an imperative need for establishing the broad national market required for the new economy. With the support of the new class claiming political power, the monarchical State issued victorious from the centuries-old struggles with feudal particularism, affirmed its sovereignty and claimed exclusive jurisdiction in its territory. The jurisdiction previously exercised by the consuls, in both civil and criminal cases, became absolutely incompatible with the sovereign power of the territorial State and was bound to be frowned upon by governments. Another, closely related, reason for the change of opinion on the status of consuls is the fact that in the seventeenth century the consuls were usually merchants who were themselves engaged in commerce. It is very understandable that neither authors nor governments were disposed to concede privileges to merchant-consuls, especially since at that time, under the influence of mercantilist ideas, foreigners in general and foreign trade in particular were regarded with frank hostility. Lastly, the establishment of diplomatic missions and of the diplomatic profession, which was placed in the centre of political life and attended by a much greater degree of ceremony, caused the consular institution to be relegated to the background in a manner which was not perhaps entirely free of a certain amount of professional jealousy.

6A. An expression of this hostility towards the consuls is to be found in the late seventeenth and early eighteenth centuries in the provisions inserted in the treaties concluded between France and the Netherlands at Ryswick in 1697 (art. 30), Utrecht in 1713 (art. 38) and Versailles in 1739 (art. 40), which stipulate that in future consuls would not be admitted by either of the two Parties and that, if one of them should decide to send residents, agents or commissioners, these could choose as their place of residence only the habitual residence of the Court.⁸

7. Wicquefort, himself a diplomat, did not realize the exact nature of the transformation of the consular institution which was occurring in the second half of his life and could not correctly appreciate the status of the consuls in international life. He was wrong to base his opinion on old incidents such as the arrest of the consuls of the United Provinces at Cadiz and the offensive conduct of the Governor of Ancona towards the

⁵ *Ibid.*

⁶ *Mémoires touchant les ambassadeurs et les ministres publics*, by L.M.P. (Le Ministre prisonnier), Cologne, 1676-1679, vol. I, pp. 57-60.

⁷ Wicquefort, *L'Ambassadeur et ses fonctions*, vol. I, p. 63.

⁸ Fauchille, *Traité de droit international public*, 8th ed. (Paris, Arthur Rousseau, 1926), vol. I, part III, p. 115.

Venetian consul (see above, paras. 2 and 3). In both these cases, which occurred at a time when the consuls, as public ministers, still enjoyed inviolability and full immunity from jurisdiction, a violation of international law was involved, and these two cases cannot be regarded as providing the basis for a new international custom. It is not surprising, therefore, that Vattel should have seized on this weak point and observed that the examples quoted were contrary to the convictions of Wicquefort,⁹ who elsewhere resolutely defended the privileges and immunities of public ministers. Nevertheless, Wicquefort's ideas found a favourable echo in doctrine and practice.

8. Among the authors of the seventeenth century, Bynkershoek (1673-1743) firmly supported Wicquefort's viewpoint in his comments on the Decree of 13 October 1679 in which the States-General replied to a widow who had asked where she could bring an action against a consul of the States-General at Lisbon who had previously been domiciled at Rotterdam. The Decree stipulates that "in this country, she should bring the action in the court in which he could be sued if he were still living at Rotterdam". Bynkershoek, stressing the words "in this country" (*hier te Lande*), concludes that the consul may be sued or prosecuted in the country where he discharges his functions as well as in his country of domicile.¹⁰ He expresses the following opinion on the subject of consuls:

"And in truth, these consuls are but the defenders of their country's merchants, and sometimes also their judges; moreover, they are usually merchants themselves, sent out not to represent their prince in the country of another prince, but to protect their prince's subjects in matters concerning trade and often to administer justice between them in commercial disputes."¹¹

Basing himself on the opinions expressed by Wicquefort in his *Mémoires sur les ambassadeurs* and *Traité sur les ambassadeurs*, Bynkershoek criticizes the practice of the States of United Belgium, which sometime granted to consuls "the privileges of the *jus gentium*".¹²

9. Vattel reacted against the opinions of Wicquefort and Bynkershoek and, basing himself on the examples cited by Wicquefort, defended a correct view in his treatise published in 1758, which made him famous. After admitting that a consul is not a public minister and cannot lay claim to the latter's prerogatives, he adds:

"Since, however, he is entrusted with a commission by his Sovereign and is received in that capacity by

the Sovereign in whose territory he resides, he should, to a certain extent, enjoy the protection of the *jus gentium*. The Sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary for the proper performance of his functions; for otherwise the admission of the consul would be nugatory and delusive."¹³

He goes on to say that the functions of the consul "even seem to require that the consul should be independent of the ordinary criminal justice of the place where he resides, so that he cannot be molested, or imprisoned, unless he himself violates the law of nations by some enormous crime".¹⁴ He ended his polemic with Wicquefort with the correct judgement that, in the absence of treaties, custom should serve as the rule on these occasions, for the person who receives a consul is considered to do so on the footing established by usage.¹⁵

10. But though Vattel held the correct view, it was the opinions of Wicquefort which long influenced the case-law as reflected in judicial decisions.

2. Case-law

Barbuit's case (1737)

11. Mr. Barbuit, a tallow-chandler established in Great Britain, received in 1717 from the King of Prussia a commission as agent of commerce expressed in the terms of a consular commission, addressed not to the King of England, but to "all whom it may concern". In the King's absence, the commission was accepted by the Lords-Justices. In 1725, an action was brought against Barbuit for non-payment of debts and, ten years later, when a warrant for his arrest was issued, he claimed immunity on the grounds that he was a public minister. In a decision which has become famous and which is regarded as a leading case, Lord Talbot, the Lord Chancellor, after analysing Barbuit's functions according to the terms of the commission, reached the conclusion that he could not regard him otherwise than as a consul and in 1737, relying on the authority of Barbeyrac, Bynkershoek, Grotius and Wicquefort, refused to recognize his immunity.¹⁶

Triquet v. Bath (1761)

12. The decision in this case follows that in Barbuit's case.¹⁷

Heathfield v. Chilton (1767)

13. It was decided in this case that the law of the nations does not take in consuls, or agents of commerce, though received as such by the courts to which they

⁹ Vattel, *loc. cit.*

¹⁰ He cites by analogy the passage concerning a senator in *Digest*, I. IX 11, *De senatoribus* (Bynkershoek), *De Foro Legatorum tam in causa civili, quam criminali Liber Singularis*, 1721, cap. X, Collection *The Classics of International Law* (Oxford University Press, 1946), vol. 21, p. 482.

¹¹ "Et si verum amamus, Consules illi non sunt nisi Mercatorum Nationis suae defensores et quandoque etiam judices, quin fere ipsi Mercatores, non missi, ut Principem suum repraesentent apud alium Principem, sed ut Principis sui subditos tueantur in iis, quae ad mercaturam pertinent, saepe et ut de iis inter eos jus dicant." (*loc. cit.*)

¹² *Ibid.*

¹³ Vattel, *loc. cit.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Cases in Equity under Lord Talbot*, p. 281; Robert Phillimore, *Commentaries upon International Law*, vol. II. Third ed. 1882 (London, Butterworths), pp. 329-332.

¹⁷ 1 Taunton 107; Phillimore, *op. cit.* p. 332; Ellery C. Stowell, *Consular Cases and Opinions*, Washington, 1909, pp. 375 and 376.

are employed. Barbut's case was again referred to in this decision.¹⁸

Clarke v. Cretico (1808)

14. In this case, Sir James Mansfield, C.J., likewise held that the consul was not a public minister. Counsel for the defence argued that his client was immune from arrest on the ground that he was consul-general of the Sublime Porte, and cited Vattel in support of his argument. Relying on an affidavit produced during the trial, to the effect that the defendant's appointment had been revoked in December 1806, the court rejected the argument for the defence without ruling on the substance.¹⁹

Viveash v. Becker (1814)

15. In 1814, a merchant named Becker, resident in Great Britain, was appointed consul of the Duke of Oldenburg. In an action brought against him for debt, he claimed immunity from arrest. After a detailed analysis, in which reference was again made to Barbut's case, the judge held that consuls were not public ministers and that international law does not confer such immunity upon consuls. He rejected the defence.²⁰

The arrest of consul Croxal (1834)

16. In 1834, Mr. Croxal, United States Consul at Marseilles, was charged with doing grievous bodily harm to a maidservant who, on being dismissed, refused to leave the accused's service; Croxal was remanded in custody for thirteen days before the trial and was not allowed bail. He was acquitted on the criminal charge, but was ordered in the civil proceedings to pay 2,000 francs damages to the plaintiff, and costs.²¹

Arrest of the British consul Pritchard (1843)

17. When France, by the treaty imposed upon the sovereign of the Tahiti Islands on 9 September 1842, established its protectorate over these islands, Mr. Pritchard, British consul on Tahiti, was arrested and expelled by the French authorities, who accused him of trying, by word and deed, to oppose the establishment of the authority of France. He was released on the intervention of the captain of the warship *Cormorant*, on condition that he did not return to the Tahiti Islands. The French Government later paid damages to Mr. Pritchard.²²

Arrest of the Papal consul at Naples in 1863

18. In 1863, the Papal consul at Naples was imprisoned and expelled.²³

Arrest of the consul-general Carlier D'Abaunza in Paris (1840)

19. When in 1840 the consul-general of the Republic of Uruguay was arrested in Paris on the suit of a creditor even before he had obtained the exequatur, he claimed immunity from jurisdiction, but the courts rejected his claim.²⁴

20. In France, before the Act of 22 July 1867 which abolished imprisonment for debt in civil and commercial cases and in cases involving aliens, consuls who carried on business were subject to the jurisdiction of the French courts in respect of undertakings entered into by reason of their trade and could be imprisoned in default of payment. They could not claim immunity. Thus, in 1787, Barclay, the consul of the United States of America at Bordeaux, was arrested for debt by the Parliament, i.e., the court, of Bordeaux. On being released some days later, he tried, through Thomas Jefferson, to obtain a safe-conduct which would protect him in Paris. For this purpose, the consent of the creditors was necessary.²⁵

3. International conventions

21. Patently, the practice of the local courts of ruling that consuls were subject to the ordinary law was very unsatisfactory, especially at a time when, in most cases, the consuls engaged in commerce and when, in consequence, there was no lack of occasion for suing them or even imprisoning them for debt. The imprisonment of a consul, however, prevented him from discharging a function entrusted to him by a sovereign State and was, furthermore, regarded as an affront to the Government which had appointed him. Reacting against part of the doctrine which was unfavourable to consuls, and with the object of safeguarding themselves against the practice of certain local courts, the States sought to secure personal immunity for the consuls by treaty or convention.

22. The first instance of a personal immunity clause is apparently that contained in the Convention of Pardo, signed on 13 March 1769 between France and Spain. Article II of this Convention provides:

"Les Consuls étant Sujets des Princes qui les nomment, jouiront des immunités personnelles, de sorte qu'ils ne pourront être arrêtés, ni mis en prison, excepté pour des crimes atroces, ou en cas que lesdits Consuls fussent Négociants, car alors cette immunité personnelle doit s'entendre de ce qui regarde des dettes, ou d'autres causes civiles, qui ne sont pas criminelles, ou quasi criminelles ou qui ne proviennent

¹⁸ 4 Burrows 2016; Phillimore, *op. cit.*, pp. 332-333; Stowell, *op. cit.*, p. 187.

¹⁹ 3 Burrows 1481; Phillimore, *op. cit.*, pp. 334 and 335; Stowell, *op. cit.*, pp. 105-107.

²⁰ 3 Maule and Selwyn 297; Phillimore, *op. cit.*, pp. 334 and 335; Stowell, *op. cit.*, pp. 423-432; cf. Karl Strupp, *Wörterbuch des Völkerrechts und der Diplomatie*, vol. III, p. 167.

²¹ Article "Consul" by Camille Jordan in *Répertoire de droit international* (La Pradelle-Niboyet), vol. V, p. 59.

²² Phillimore, *op. cit.*, pp. 247 and 275.

²³ De Louter, *Le droit international public positif*, vol. II, 1920, p. 77, referring to Calvo, vol. I, para. 464.

²⁴ Phillimore, *op. cit.*, p. 262.

²⁵ Camille Jordan, *Les consuls dans les pays faisant partie de la communauté internationale. Revue de droit international privé*, 1906 pp. 500 and 501.

pas du commerce, qu'eux-mêmes, ou leurs dépendants exercent; mais ils ne doivent pas manquer aux attentions dues aux gouverneurs et aux autres personnes qui représentent le Roi et la Magistrature."²⁶

The Consular Convention of Pardo was partially amended by the Convention of 7 January 1862.²⁷

23. A similar clause occurs in the Consular Convention between the United States of America and France, of 23 February 1853. Article II contains the following stipulation:

"The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the United States and France shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, exemption from military billettings, from service in the militia or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, state or municipal. If, however, the said Consuls-General, Consuls, Vice-Consuls or Consular Agents are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to Commercial Agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants."²⁸

24. Article 12 of the Consular Convention of 7 January 1862 between France and Spain repeats almost literally the text of article II of the Convention of Pardo of 13 March 1769, the text being changed in two respects only: the word *atroces* is omitted, and the words *qui ne sont pas criminelles, ou quasi criminelles* are replaced by the words *n'impliquant pas de délit ou l'idée de délit*.²⁹

25. The Consular Convention between France and Venezuela of 24 October 1856 (denounced in 1876) contained a very explicit personal immunity clause in article 2, paragraph 2:

"Ces agents jouiront dans tous les cas de l'immunité personnelle; ils ne pourront être arrêtés, traduits

*en jugement, ou mis en prison, excepté dans le cas de crime atroce."*³⁰

26. The inclusion of a personal immunity clause rapidly became a general practice, as is shown by the numerous instances in which such a clause was inserted in consular conventions entered into by France, e.g., those concluded with Italy on 26 July 1862 (art. 2, para. 2), with Portugal on 11 July 1866 (art. 2), with Austria-Hungary on 19 December 1866 (art. 2), with Russia on 1 April 1874 (art. 2, para. 2), with Greece on 7 January 1876 (art. 8), with the Dominican Republic on 25 October 1882 (art. 8), with El Salvador on 5 June 1878 (art. 8) and with Bolivia on 5 August 1897 (art. 8).

27. Other European and American States by their conventions made provision for the "personal immunity" of their consuls. Examples are the Consular Conventions concluded by Germany with Spain on 12 January 1872 (art. 4), with Costa Rica on 18 May 1875 (art. XXVII, para. 4), with Italy on 18 May 1875 (art. 3), with Brazil on 10 January 1882 (art. 4) and with the Dominican Republic on 30 January 1885 (art. 21, para. 3).³¹

28. Some conventions of the same period use a much more precise formula, giving consuls immunity only from detention pending trial. An example of such a clause is article 7 of the Consular Convention of 27 (15) November 1880 between Greece and Italy.³²

29. Other consular conventions, on the other hand, give a wider personal immunity, stipulating that consuls shall neither be arrested nor imprisoned except for acts which are defined as crimes and are punishable as such under the legislation of the country of residence. Examples are the Conventions concluded between Germany and Greece on 26 November 1881 (art. II), between Germany and Serbia on 6 January 1883 (art. II, para. 2) and between Germany and the Republic of South Africa on 22 January 1885 (art. 9, para. 3).

30. The ambiguity of the expression "personal immunity" and the controversies to which it gave rise (see paras. 34-36 below) probably explain why in later conventions the personal immunity clause is drafted in more precise language which restricts its application to the case of detention pending trial. For example, the Consular Convention of 21 August 1911 between Belgium and Bolivia contains the following provision in article 3:

*"Les consuls ne pourront être arrêtés préventivement que dans le cas de crime qualifié et puni comme tel par la législation locale."*³³

²⁶ De Martens, *Recueil des traités*, second edition, vol. I, p. 630. (Translation: "As the Subjects of the Princes who appoint them, the Consuls shall enjoy personal immunity, so that they may not be arrested or imprisoned, except for atrocious crimes, or in cases where the consuls are merchants, for in such cases personal immunity should be understood to apply in respect of debts or other civil causes which are not of a criminal, or quasi-criminal, nature and which do not arise from any commerce in which they themselves, or their dependants, are engaged; but they must not fail in the attentions due to the Governors and other Persons who represent the King and the Judiciary.")

²⁷ Niboyet-Goulé, *Recueil de textes usuels de droit international*, vol. I, p. 450 ff.

²⁸ William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers* (Washington, 1910), vol. I, p. 529.

²⁹ *British and Foreign State Papers*, vol. 52 (1861-1862), p. 143.

³⁰ De Clercq, *Recueil des traités de la France*, vol. VIII, p. 378. (Translation: "These agents shall in all cases enjoy personal immunity, they may not be arrested, tried or imprisoned, except in the case of atrocious crime.")

³¹ Jordan, *Revue de droit international privé*, 1906, p. 721.

³² De Martens, *Nouveau Recueil général de traités*, second series, vol. VIII, p. 624.

³³ *Répertoire de droit international*, vol. VII, p. 64. (Translation: "Consuls may not be detained pending trial except for acts which are defined and punishable as crimes under the local legislation.")

31. There are, however, some nineteenth-century conventions which do not contain any personal immunity clause. Thus, after confirming the inviolability of consular offices and the papers therein contained to which consuls, vice-consuls and their chancellors and secretaries are entitled, the Consular Convention of 14 November 1788 between France and the United States provides (art. II) that the consuls are exempt from all personal service, from soldiers' billets, militia, watch, guard, guardianship, trusteeship, as well as from all duties, taxes, impositions and charges whatsoever, except on the estate real and personal of which they may be the proprietors or possessors, and except for those to which they may be liable as merchants. In all other respects, the article says, they are subject to the laws of the land as the natives are.³⁴

32. Article IV of the Commercial Convention concluded on 3 July 1815 between the United States of America and Great Britain provides that "in case of illegal or improper conduct towards the laws or Government of the country to which he is sent, such consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended Government assigning to the other the reasons for the same."³⁵

33. In many consular conventions the place of the personal immunity clause is taken by the most-favoured-nation clause, which became current in the nineteenth century (see part II of this report). Thus, the Consular Convention of 15 September 1846 between France and Chile stipulates simply that it is the duty of consuls to comply in all respects with the laws of the respective countries; but it contains the most-favoured-nation clause (art. 20, *in fine*).³⁶ As a consequence, the personal immunity conceded by either of the two contracting States to a third State automatically became applicable to the consuls of the other contracting party.

4. Scope of the so-called personal immunity clause

34. The scope of the personal immunity clause was for long the subject of much controversy. Some authors regarded it as conferring virtual exemption from civil and criminal jurisdiction (though not exemption from jurisdiction in the case of crimes).³⁷ Others, on the contrary, interpreted it as conferring exemption from arrest and detention pending trial (unless the act charged constitutes a crime) and as immunity from imprisonment for debt in civil cases.³⁸

35. Nor is the expression "personal immunity" interpreted uniformly in the caselaw of national courts. For example, the Paris Court of Appeal, in its judgement of 2 March 1868 given in the case of *G. versus G.*, consul-general of Italy at Lyons, declined to admit that

the personal immunity clause contained in article 2, paragraph 2, of the Franco-Italian Consular Convention of 26 July 1862 constituted a provision recognizing immunity from jurisdiction.³⁹ In a judgement given on 8 January 1866 in the case of *Syndic Cercle Taitbout versus d'Oliveira*, vice-consul of Portugal at Paris, the same Court of Appeal, overruling a judgement of the commercial court of the Seine department of 2 May 1883, affirmed its competence to deal with the civil and criminal proceedings brought against Mr. d'Oliveira, who, to place himself beyond the reach of the French jurisdiction, had pleaded the terms of article 2, paragraph 3, of the Franco-Portuguese Consular Convention of 11 July 1886. This paragraph stipulated that consuls "*jouiront . . . de l'immunité personnelle, excepté pour les faits et actes que la législation pénale de chacun des deux pays qualifie de crimes et punis comme tels; et, s'ils sont négociants, la contrainte par corps ne pourra leur être appliquée que pour les seuls faits de commerce, et non pour causes civiles.*"⁴⁰ On the other hand, by a judgement rendered on 8 July 1890 in proceedings instituted against Manolopoulo, a Greek national who was *chancelier* at the consulate-general of Greece, for defamation and assault and battery, the correctional court of the Seine department ruled that it had no jurisdiction, construing the sentence "they may neither be arrested or imprisoned" in article 8 of the Consular Convention of 7 January 1876 between France and Greece as meaning that the consular officials referred to in the convention could not be sentenced to a penalty of imprisonment.⁴¹ In a judgement rendered on 10 July 1890 in the case of *Lafforgue versus del Pedroso*, the Toulouse court interpreted article 12 of the Franco-Spanish Consular Convention of 7 January 1862 as expressly conferring immunity from jurisdiction in cases of debt and other civil cases which did not at the same time involve a criminal offence or criminal intent.⁴²

36. If one studies the conventions providing for personal immunity as a whole, and in particular if, in construing the force of the word "personal" (qualifying "immunity"), one reads it in conjunction with the provision granting consuls engaged in commerce exemption from imprisonment for debt "in civil matters", one is driven to the inevitable conclusion that the conventions containing the personal immunity clause had as their sole object that of ensuring the personal inviolability of the consuls covered by these conventions, subject to a proviso relating to the exceptional cases (crimes, etc.) in which the clause was expressly declared not to be applicable. Correctly construed, the clause in no way means that consuls could not be tried, but simply that they could not be arrested or imprisoned; and it is unnecessary to

³⁴ William M. Malloy, *op. cit.*, vol. I, p. 491.

³⁵ *British and Foreign State Papers*, vol. 3, p. 81.

³⁶ De Clercq, *op. cit.*, vol. V (1843-1849), p. 465.

³⁷ Clunet, *Journal du droit international privé*, 1886, p. 76 (d'Oliveira case) and 1890, p. 667 (Manolopoulo case).

³⁸ Jordan, *loc. cit.*, p. 498. This author cites Renault, who is said to have expressed the same view.

³⁹ Jordan, *loc. cit.*, pp. 503 and 504.

⁴⁰ *Journal du droit international privé*, 1886, p. 76. (Translation: "shall enjoy . . . personal immunity, except for acts which are defined and punishable as crimes under the criminal law of each of the two countries; and, if they are merchants, they shall not be liable to imprisonment for debt except by reason of acts performed in the course of their trade, not being so liable in civil cases.")

⁴¹ *Ibid.*, p. 667, *Snacos v. Manolopoulo*.

⁴² *Ibid.*, p. 908.

differentiate between detention pending trial and imprisonment after conviction, unless of course the immunity in question is limited to detention pending trial by an express provision of the convention. For if, by this expression, the contracting Parties had wished to concede an exemption from jurisdiction, and hence an important derogation from their territorial sovereignty and a privilege at variance with the established custom, which denies consuls diplomatic status, they would surely have used the expression "immunity from jurisdiction" instead of "personal immunity". Besides, if there should be any lingering doubt, the principle of the sovereignty of States demands a strict interpretation.

5. Doctrine and practice

37. From quite early times, the majority of learned authors declined to recognize that consuls possessed diplomatic immunities, including immunity from jurisdiction. In particular, this was the opinion of Wicquefort, Bynkershoek, Vattel, Klüber, Holtzendorff, de Martens, Geffcken and others.⁴³ But most authors, influenced by Vattel, recognized that in principle consuls had personal immunity except in case of crime (serious offences). Vattel's opinion was often cited in the courts, and the opinions of the authors were reinforced by the conclusion of numerous conventions providing that consuls enjoyed personal immunity, an expression which, on the strength of the analogous usage in the law relating to diplomatic intercourse, could be interpreted as meaning exemption from ordinary jurisdiction.⁴⁴ Thus, G. F. de Martens recognizes that, though subject to the civil and criminal jurisdiction of the country in which they reside, consuls may not be arrested and imprisoned except for a crime.⁴⁵ This opinion is shared by Bulmerincq.⁴⁶

38. An unfavourable attitude towards consular privileges was adopted in the Anglo-Saxon countries in the 18th and 19th centuries. In Great Britain, for example, the law officers of the Crown expressed the opinion that consuls were not entitled to any privilege. This point of view is well illustrated by Mr. Harding's report of 13 November 1856, in which he advanced the opinion that foreign consuls in Great Britain and its colonies could not claim any privilege as of right, other than privileges accorded to them by treaty.⁴⁷ According to the same report, advantages are granted to consuls by the executive or local authorities at their discretion, or else by usage and courtesy. English law regards con-

suls as subject to the civil and criminal jurisdiction and does not grant them any *de jure* privilege whatsoever.⁴⁸

39. The position of the United States is defined in the reply of Secretary of State Lansing, dated 15 July 1915, to a question put by the United States Minister Plenipotentiary to Venezuela. The reply says that in the absence of treaty provisions between the United States and Venezuela defining the rights, privileges and immunities of consular officers, such officers would be entitled only to those rights, privileges and immunities necessarily incident to the proper performance of their duties or supported by long-established custom or the particular laws of the place, and that otherwise they are subject to the laws of the land precisely as other persons, irrespective of the question of their nationality.⁴⁹ This point of view is in keeping with the earlier case-law of the United States courts.⁵⁰

40. Certain learned authors, however, ignoring the profound transformation which had occurred in the consular functions, continued for a long time to maintain that the consuls were public ministers and that they formed a class of diplomatic representatives of the State. This diversity of opinion on the question of consular immunities, and in particular on the question of the inviolability of consuls, derived from the disagreement as to the very nature of the consular institution and the status of consuls, and it explains the division of opinion among writers on international law on the subject dealt with in this study which persisted until the end of the nineteenth century. De Cussy maintains that by virtue of their functions consuls are public ministers and that they should participate with other public ministers of higher rank in the immunities accorded to public ministers by international law.⁵¹ Engelhardt submitted, at the session of the Institute of International Law held at Hamburg in 1891, a set of draft regulations under which consuls (who, he had suggested, should be described as "commercial agents") would have the status of public ministers and as such enjoy diplomatic privileges and immunities (art. 2), but would be subject to the territorial laws for all acts unconnected with their public functions (art. 4).⁵² At the Venice session in 1896, however, he proposed that a provision should be inserted whereby consuls could not be arrested or detained except for acts defined as crimes by the legislation of the country in which they reside.⁵³

6. Draft codes

41. It is interesting to note that the opinion favourable to personal immunity, defended by eminent authors and confirmed in numerous consular conventions, found

⁴³ *Op. cit.*, p. 126.

⁴⁴ See on this subject Jordan, *loc. cit.*, p. 505.

⁴⁵ *Le Guide diplomatique*, 4th edition (Paris-Leipzig, 1854), vol. 1, p. 250.

⁴⁶ *Das Völkerrecht oder das internationale Recht* (Freiburg im Breisgau, and Tübingen, 1884), p. 321.

⁴⁷ "Apart from the privileges, if any, which may be secured to them by any existing treaty with the power whose agents they are (...), I am not aware of any privileges to which foreign consuls are strictly or legally entitled, as a right, in Great Britain or in any of her colonies." Lord McNair, *International Law Opinions*, selected and annotated (Cambridge, 1956), vol. I, p. 221

⁴⁸ *Ibid.*

⁴⁹ Hackworth, *Digest of International Law*, vol. IV, p. 699.

⁵⁰ Cf. the opinion of Attorney-General Cushing dated 9 August 1855. Kent, *Commentaries*, vol. I, p. 44.

⁵¹ *Dictionnaire du diplomate et du consul* (Leipzig, 1846), p. 193.

⁵² *Annuaire of the Institute of International Law*, vol. XI (1889-1892), p. 382. New abridged edition, 1928, vol. II, p. 1136.

⁵³ *Ibid.*, vol. XV, p. 287. New abridged edition, 1928, vol. III, p. 934.

its expression both in the draft codes prepared by particular authors and in those prepared by learned societies. Bluntschli allows the arrest of a consul, but only in case of necessity (*Notfall*). He observes that in such a case the position of the sending State must be taken into account to the extent required by the interests of the consular office and the dignity of that State.⁵⁴

42. Dudley Field, in his draft code (sect. IV, art. 181, para. 4), is rather reserved on this point and proposes immunity from arrest in civil cases only. He points out in the commentary that arrest in criminal cases is generally sanctioned by the authorities, and that there seems to be good reason for allowing it, notwithstanding the interruption of the consular functions thereby caused. He attaches importance to the question whether arrest should be allowed only for offences which are crimes under the local law or even also for *délits*.⁵⁵

43. In the first edition of his draft code,⁵⁶ Fiore, after correctly noting (art. 801) that consuls are not diplomatic agents and do not represent the State in its international political relations, states (art. 802) that consuls are placed under the protection of international law in the exercise of the functions vested in them by the international conventions. He adds that it is always the particular treaties authorizing the establishment of these functions which must be consulted on all points concerning the exercise thereof, and with respect to the rights and prerogatives of which the enjoyment may be claimed.⁵⁷

But in the fourth edition of his work, Fiore endorses the opinion which upholds the inviolability of consuls and maintains that consuls cannot be arrested or detained except for offences involving severe punishment (art. 518).⁵⁸

The regulations concerning consular immunities adopted on 26 September 1896 by the Institute of International Law on Mr. Engelhardt's report (see above) contains, in article 5, a provision conferring exemption for acts performed by consuls in their official capacity and within the limits of their powers. Article 6 provides that, except as specified in article 5, consuls are amenable to the courts of the country in which they exercise their functions, as regards both civil and criminal mat-

ters. This article stipulates, however, that every proceeding directed against a consul is suspended until his Government, duly notified through the diplomatic channel, has been able to confer with the Government of the receiving State on a fitting settlement of the incident. The article provides, however, that this notice is not necessary:

(a) In case of a flagrant offence or of a crime;

(b) In suits *in rem*, including suits for possession, whether relating to personal property or to real estate situated in the country;

(c) When the consul himself has begun the litigation or accepted suit in the local courts.

Lastly, article 7 provides for the inviolability of consuls in the following terms:

"In no case may consuls be arrested or detained, except for grave infractions of the law."⁵⁹

SECTION II: THE EXISTING LAW

1. Official acts

44. It was established in the Rapporteur's first report that, under general international law, consuls and the members of the consular staff are outside the jurisdiction of the judicial and administrative authorities of the receiving State in respect of acts performed in the exercise of their functions (official acts).⁶⁰ The immunity accorded to consuls in respect of official acts is not *stricto sensu* a personal immunity of the consul, but an immunity on the part of the sending State in respect of the official acts of a sovereign State. These acts are entirely outside the jurisdiction, whether *civil*, *criminal* or *administrative*, of the receiving State. So far as this point is concerned, the conclusion reached on the subject of the juridical status of consuls by the Sub-Committee set up by the Committee of Experts for the Progressive Codification of International Law does not seem to go far enough. Whereas the Sub-Committee's report concedes that consuls enjoy immunity from civil jurisdiction "in connexion with the exercise of their function", it states in categorical terms that consuls do not possess immunity from criminal jurisdiction, and it recognizes no exception for official acts.⁶¹ If consuls are immune from the civil jurisdiction in respect of official acts, then, *a fortiori*, they should be immune from the criminal jurisdiction in respect of those same acts. For the basis of the immunity is the same in both cases: the respect due to the sovereignty of a foreign State.

⁵⁴ *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*. Nördlingen, 1868, p. 160, art. 268. See also the French translation by M. C. Lardy, *Le droit international codifié*, fifth ed., Paris, 1895. English text of section IV (consuls) in *Research in International Law*, under the auspices of the Harvard Law School, Cambridge, Mass., 1932, II. Legal Position and Functions of Consuls, p. 403. (This compilation is hereinafter cited as "*Harvard Law Research*".)

⁵⁵ David Dudley Field, *Outlines of an International Code* (New York, 1872), vol. 1, pp. 73 and 74.

⁵⁶ French translation from the Italian by A. Chrétien, *Le droit international codifié et sa sanction juridique* (Paris, 1890), p. 272.

⁵⁷ *Ibid.*

⁵⁸ French translation from the Italian by Ch. Antoine, *Le droit international codifié et sa sanction juridique*, Paris, 1911, pp. 293 and 294. Cf. also English translation, from the fifth Italian edition, by Edwin M. Borchard, *International Law Codified*, New York, 1818, pp. 249-258 (art. 523).

⁵⁹ *Annuaire* of the Institute of International Law, vol. 11, p. 305; *Tableau général des résolutions de l'Institut de droit international* (1873-1956), published by Hans Wehberg (Bâle, 1957), p. 29. For English translation, see J. B. Scott (ed.), *Resolutions of the Institute of International Law* (New York, 1916), from which extracts are quoted in *Harvard Law Research* II, pp. 393-396.

⁶⁰ See article 27 of the draft, and commentary, in *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 57. V. 5. Vol. II), pp. 99 *et seq.*

⁶¹ League of Nations publication, Committee of Experts for the Progressive Codification of International Law, *Second Report to the Council of the League of Nations*, League of Nations publication, V. Legal, 1928. V. 4, p. 44.

45. The opinion which prevailed in the League's Committee of Experts will perhaps help to explain why some authors hesitate on this point. For example, the early editions of Oppenheim's well-known treatise noted that the numerous conventions on the subject limit criminal jurisdiction, so far as consuls are concerned, to crimes of a more serious nature,⁶² whereas the later editions, referring to the general practice, seem to hesitate on this point.⁶³

2. Acts other than those performed in the exercise of the consular function

46. As regards acts which are not performed in the exercise of the consular function, it is nowadays almost universally admitted that, except as otherwise provided by treaty, consuls are subject to both the civil and the criminal jurisdiction of the receiving State.⁶⁴

47. While it is today almost universally recognized that consuls are subject to the jurisdiction of the receiving State in respect of acts not performed in their official capacity, there is at the same time, both in the doctrine and in the practice of States, a strong body of opinion which recognizes the personal inviolability of consuls. Unlike the inviolability of diplomatic representatives, the inviolability of consuls is not absolute, but confined to minor offences. The thesis of consular inviolability is supported by many writers on international law,⁶⁵ most of them being in general agreement that exceptions should be made in the case of a particularly serious crime or offence committed by a consul. On this point their views are in agreement also with the language used in a large number of consular conventions.

⁶² Cf. for example the first edition, 1905, vol. I, para. 435; 4th edition (by A. D. McNair), 1928, vol. I, p. 665; 5th edition (by H. Lauterpacht), 1937, vol. I, p. 657.

⁶³ "... according to the generally accepted practice, they (consuls) are not liable in civil nor, perhaps, in criminal proceedings in respect of acts which they perform in their official capacity on behalf of their States and which fall within the scope of consular functions as recognised by International Law." (6th, 7th and 8th editions, 1947, 1948 and 1958.)

⁶⁴ This is the view held by: Liszt, *Das Völkerrecht systematisch dargestellt*, 10th edition (Berlin, 1915), p. 142; Bonfilis, *Manuel de droit international public (Droit des Gens)*, 3rd edition by Paul Fauchille (Paris, 1901), p. 421; Jordan, *Revue de Droit international privé*, 1906, p. 509; Strupp, *Eléments du droit international public*, vol. I (Paris, 1930), p. 229; Hershey, *The Essentials of International Public Law and Organization*, revised edition (New York, 1927), p. 423; Stewart, *Consular Privileges and Immunities*, New York, 1926, p. 156; Verdross, *Völkerrecht*, 3rd edition (Vienna, 1955), p. 270; Puente, *The Foreign Consul: his Juridical Status in the United States* (Chicago, 1926), p. 123; Graham Stuart, *American Diplomatic and Consular Practice*, 2nd edition (New York, 1952), p. 388; V. L. Sanchov, *Uchebnik konsul'skogo prava* (Moscow-Leningrad, 2nd edition, 1926), pp. 38 and 39; Fenwick, *International Law*, 3rd edition, 1934, p. 485; François, *Handboek van het volkenrecht*, vol. I, 1949, p. 777; Guggenheim, *Traité de droit international public*, vol. I (Geneva, 1953), p. 514; Sibert, *Traité de droit international public*, vol. II (Paris, 1951), p. 58; Lawrence, *The Principles of International Law*, 7th edition (London, 1930), p. 297; Hyde, *International Law chiefly as Interpreted and Applied by the United States*, 2nd edition (Boston, 1947), vol. II, 475, p. 1342; Rousseau, *Droit international public* (Paris, 1953), p. 354; Hackworth, *Digest of International Law*, vol. IV, p. 699, p. 726 ff. and p. 736 ff.; A. V. Sabanin, *Posolskoe i konsul'skoe pravo* (Diplomatic and Consular Law) (Moscow, G92, 1930).

48. The opinion in favour of inviolability has likewise found expression in the more recent draft codes. For example, while article 19 of the draft prepared by the Inter-American Commission of Jurists in 1927 provides that consuls are subject, in respect of non-official acts, to the courts of the State in which they exercise their functions, article 16 provides that they are subject to imprisonment or arrest for serious crime.⁶⁶ It follows therefore that they may not be imprisoned or arrested for offences which cannot be described as serious crimes. A similar formula is to be found in article 20 of the Harvard draft, which provides that the receiving State shall exempt a consul from arrest, except for a serious offence.⁶⁷ The commentary on this article explains that the exemption from arrest for minor offences is so generally recognized in national regulations, treaties and diplomatic practice that it has been said to constitute a rule of general international law.⁶⁸

(a) The case-law of local courts

49. Although, strictly speaking, it cannot be regarded as constituting the practice of States, the case-law of local courts on points of international law nevertheless offers interesting evidence of the interpretation placed by the courts on international conventions and on the rules of international law in matters where there is no well-established state practice. In addition, it provides some useful guidance in questions with regard to which international law is not sufficiently developed in the practice of States or is the subject of controversy. In this connexion, it is interesting to note that the case-law of the local courts interprets the expression "personal immunity", used in many of the consular conventions concluded in the last century, as meaning personal inviolability and not immunity from jurisdiction.

50. It is true that in the late nineteenth century several French courts, in construing consular conventions, ruled in favour of the immunity of consuls from the jurisdiction of the receiving State. Examples of such rulings are provided by the case (cited earlier) of Mr. Manolopoulos, *chancelier* of the consulate-general of Greece in Paris in 1890⁶⁹ and by the proceedings against Lee Jortin, British vice-consul at Dieppe, in 1900.⁷⁰ Already, however, in the proceedings instituted against Mr. King, United States consul in France, in the cor-

⁶⁵ See in particular the following: Hershey, *op. cit.*, p. 423; Scelle, *Manuel de droit international public*, p. 554; Guggenheim, *Traité de droit international public*, vol. I (Geneva, 1953), p. 515; the treatise *Mezhduarodnoye Pravo* (International Law), published under the editorship of Durdenevsky and Krylov (Moscow, 1947), p. 328; Rousseau, *op. cit.*, p. 353; Bartos, *Medunarodno javno pravo* (Belgrade, 1956), vol. II, p. 552; Sanchov, *op. cit.*, p. 39; Sabanin, *op. cit.*, p. 305.

⁶⁶ International Conference of American States, International Commission of Jurists, 1927, Project No. VIII, Consuls, *American Journal of International Law*, vol. XXII, Spec. Supplement, p. 255.

⁶⁷ *Harvard Law Research* (Cambridge, Mass., 1932), p. 611.

⁶⁸ *Ibid.*, p. 612.

⁶⁹ *Journal du droit international* (Clunet), 1890, pp. 667 *et seq.* The ruling in this case was not challenged by appeal.

⁷⁰ *Ibid.*, 1900, pp. 130 and 858. These decisions, incidentally, are at variance with the case-law of other French courts (*Second Report of the Committee of Experts to the Council of the League of Nations*, p. 43).

rectional court of the Seine a change is discernible. This court, basing itself on the text of the Consular Convention of 23 February 1853 (art. 2), interpreted this article as meaning that United States consuls and consular agents cannot be prosecuted in the French courts, except for crime, and decided that the United States consul could not be summoned before the correctional court (judgement of 3 July 1911). The Paris Court of Appeal, relying on the circumstantial report of Judge Le Poittevin, upheld the judgement of the lower court (judgement of 14 December 1911). But the Court of Cassation quashed the judgement of the Court of Appeal by its order of 23 February 1912, principally on the strength of two communications from the Ministry of Foreign Affairs dated 15 November and 4 December 1911, which stated that the personal immunity clause, as interpreted by the two contracting Parties, should be held to confer not immunity from criminal jurisdiction but only immunity from arrest and detention pending trial.⁷¹ In 1926, this interpretation of the 1853 Convention was contested by the Department of State when Mr. Bigelow, Director of the Passport Section at the United States Consulate at Paris, was summoned before the correctional court of the Seine for defamation (alleged disclosure to a journalist of the reasons for refusing to *viser* a passport). In reply to the summons the consul challenged the court's jurisdiction and affirmed that, by reason of his personal immunity under article 2 of the Consular Convention of 23 January 1853, he could not validly be summoned in a French court. Secondly, he contended that, by virtue of the most-favoured-nation clause in article 12 of the said Convention, he enjoyed the personal immunity granted to Greek consuls in France by the Consular Convention of 7 January 1876 between France and Greece, which provided that "les consuls généraux, consuls, élèves-consuls, chanceliers et vice-consuls ou agents consulaires, citoyens de l'Etat qui les nomme, jouiront de l'immunité personnelle; ils ne pourront être arrêtés ni emprisonnés excepté pour les faits et actes que la législation pénale du pays de leur résidence qualifie de crime et punit comme tels" (art. 8). And thirdly, the consul argued that the court had no jurisdiction under international law, on the grounds that consuls can never be proceeded against in the courts of the receiving country for acts committed in the discharge of their official duties or even for wrongs committed in the performance of those acts. In the course of this trial, a communication was produced to the court in which the Department of State contested the interpretation placed on the expression "personal immunity" by the French Ministry of Foreign Affairs in the King case in 1911. According to the State Department's communication, "the phrase in question was intended to insure to American consuls in France and French consuls in the United States immunity from arrest or imprisonment under the judgement of a court as well as preventive arrest or imprisonment".⁷² The court affirmed its competence to deal with the case. In setting out the

reasons for its ruling the court referred to the earlier decision in the King case and stated that although, unlike the 1853 Convention, the French-Greek Convention of 1876 expressly provided for immunity from arrest and imprisonment, it did not expressly exempt the consular officials of the two contracting countries from the jurisdiction of the local courts. So far as the acts complained of were concerned, the court held that, by disclosing to others the reasons for his refusal of a visa, consul Biglow had not remained within the limits of his functions.⁷³

51. In answer to proceedings for defamation instituted against him in the court of Graz in Austria, the Italian consul-general claimed that, under the consular convention signed on 15 May 1874 between the former Austro-Hungarian Empire and Italy, the court was not competent to deal with the case. The court of first instance dismissed the objection, but the Court of Appeal decided that no proceedings could be brought against the consul in question. The Austrian Supreme Court, overruling this decision, affirmed that personal immunity from jurisdiction is not identical with the total exclusion of the jurisdiction of national courts. It expressed the view that personal immunity consists only in the exclusion of execution and arrest, against the person of the consular official.⁷⁴

52. In Italy, the Yugoslav consul-general at Genoa was accused of fatally wounding a pedestrian with his motor vehicle in 1930 and was sentenced by the court of first instance to imprisonment for eight months and a fine. The Court of Appeal set aside the conviction on the ground that no prosecution could be undertaken against a foreign consul. The Court of Cassation, reversing the judgement of the Court of Appeal, held that the conviction must be restored. In stating the grounds for its decision, the Court of Cassation observed that the most-favoured-nation clause contained in the Consular Convention of 21 August 1924 between Italy and Yugoslavia should be interpreted by reference to the Franco-Italian Consular Convention of 26 July 1862, since in the opinion of the two Parties France was the most favoured nation. It also expressed the quite mistaken view that such immunity as was enjoyed covered only "procedural" arrest, e.g. for contempt of court.⁷⁵

53. In the United States in a civil suit brought against Tarcuano, the Romanian consul, before the Southern District Court of New York on 5 February 1935, the consul pleaded the most-favoured-nation clause contained in article 2 of the Consular Convention of 17 June 1881 between the United States and Romania, and claimed immunity from civil jurisdiction under article 2 of the Consular Convention of 23 February 1853 between the United States and France. The Court, ruling against the defendant's argument, held that consuls were subject to the jurisdiction, civil and criminal, of the courts of the receiving country. It maintained

⁷¹ *Journal du droit international* (Clunet), 1913, pp. 183-207.

⁷² Hackworth, *Digest of International Law*, vol. IV, p. 743.

⁷³ *Journal du droit international* (Clunet), vol. 59 (1928), pp. 142-146.

⁷⁴ Lauterpacht, *Annual Digest*, 1927-1928, case No. 267, pp. 387 and 388.

⁷⁵ Lauterpacht, *op. cit.*, 1933-1934, case No. 171, p. 329.

that there was no reason for construing personal immunity as meaning more than immunity from arrest or imprisonment (except in case of crime).⁷⁶

54. In Argentina, in a case where a Chilean consul at Rio Gallegos was accused of a criminal offence, the court of first instance transmitted the case to the Supreme Court pursuant to Act No. 48, of which article 1, paragraph 1, vests jurisdiction in the Supreme Court to deal with cases affecting the privileges and immunities of foreign consuls and vice-consuls in connexion with their official duties. The Supreme Court, however, referred the case back to the court of first instance on the grounds that, under article 2 of the same Act, the provincial court was competent to deal with all cases relating to the private business of foreign consuls and vice-consuls (para. 3). In taking this action, the Supreme Court stated that among the actions which turn on the private affairs of consuls there must be considered to be included all those which, in criminal as well as in civil matters, originate in private acts of such functionaries, apart from the exercise of the proper functions of their office. It added that the circumstances that in criminal actions there may take place deprivation of liberty of the accused does not change the nature of these cases for the purposes of jurisdiction.⁷⁷

(b) *International treaties*

55. It is chiefly from the study of recent consular conventions and like instruments that one can learn the trend of modern State practice. This study provides the correct answer to the question whether States are prepared to grant foreign consuls virtual immunity from jurisdiction in respect of acts other than those performed in the exercise of their functions, or merely a personal inviolability, i.e. exemption from arrest and imprisonment, and, where applicable, from execution of judgement if the execution would involve a limitation of their personal liberty.

56. It is true that some of the recent treaties contain provisions granting consuls exemption not only from arrest but also from prosecution, except in cases where they had committed a crime. But such provisions are very rare nowadays. Thus, under the Convention of 12 January 1948 between the United States and Costa Rica (art. II), a consular officer who is a national of the sending State and not engaged in a private occupation for gain in the receiving State, is exempt from arrest or prosecution in the receiving State except when charged with the commission of a crime which, upon conviction, might subject the individual guilty thereof to a sentence of imprisonment for a period of one year or more.⁷⁸

57. The Havana Convention of 20 February 1928 regarding consuls [the Convention actually speaks of "consular agents"] stipulates that, in the absence of a special agreement between two nations, the consuls

[consular agents] who are nationals of the State appointing them shall neither be arrested nor prosecuted except in the cases when they are accused of committing an act classed as a crime (*délit, delito*) by local legislation (art. 14). The scope of this provision is not clear, for article 16 provides that consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority, and article 17 stipulates that in respect to unofficial acts consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the State where they exercise their functions.⁷⁹

58. But the vast majority of recent or contemporary conventions go no further than to confer upon consuls exemption from arrest and detention and from all restrictions on their personal liberty, except in cases where they have committed an offence of a degree of seriousness which is usually defined in the conventions. This exception to personal inviolability is formulated in different terms in the various treaties relating to consuls, and it determines the extent of the inviolability, that privilege being enlarged or diminished according to whether the exceptions are expressed in restrictive or extensive terms.

59. Several methods are employed for the purpose of defining the exceptions in question:

The first method, which is very frequently used in the conventions, is to refer to the classification of the offence committed.

(a) Some of the conventions, while recognizing the personal immunity of consuls, make an exception in the case of "serious criminal offences". This is a very vague expression, open to very different interpretations. Such an expression occurs, for example, in the Treaty of Friendship, Commerce, Navigation and Consular Relations of 4 February 1896 between Germany and Nicaragua (art. 22, para. 4),⁸⁰ which was renewed by the Exchange of Notes of 11 January, 27 February and 6 March 1924.⁸¹

(b) Other conventions allow the arrest of consuls in those cases only where they are charged with offences defined and punished as crimes by the criminal law of the receiving country. Examples of these are the Consular Convention of 26 August 1909 between Belgium and Denmark (art. 3), the Convention of 23 September 1903 between Greece and Spain (art. XI, para. 2) and the Convention of 13 January 1934 between the United States and Finland (art. XX); and there are many others. Sometimes, the conventions specify that the offences must be offences which the local law defines as crimes as distinct from misdemeanours (*délits, faltas*). This formula is very common in the conventions concluded by the United States of America; it occurs, for example, in that country's conventions with Germany of 8 December 1923 (art. 18), with Cuba of 22 April 1926 (art. 5), with Honduras of 7

⁷⁶ Judgement of 5 February 1935. H. Lauterpacht, *op. cit.*, 1935-1937, case No. 186, pp. 397 and 398.

⁷⁷ *In re Gonzales*, H. Lauterpacht, *op. cit.*, 1943-1945, case No. 85, pp. 262 and 263.

⁷⁸ United Nations, *Treaty Series*, vol. 70, p. 58.

⁷⁹ League of Nations, *Treaty Series*, vol. CLV, p. 299.

⁸⁰ De Martens, *Nouveau Recueil général de traités*, second series vol. XXIII, p. 232.

⁸¹ League of Nations, *Treaty Series*, vol. XLI, p. 264

December 1927 (art. 17), with Austria of 19 June 1928 (art. 14) and with the Republic of the Philippines of 14 March 1947 (art. II).

(c) Other conventions restrict the inviolability of career consular officials by allowing their arrest in all cases in which they are charged before a court with an act which constitutes a crime or offence under the law of the receiving country, but not in the case of acts which are regarded as mere contraventions and dealt with administratively. This formula is used in the Consular Convention of 9 June 1928 between Mexico and Panama (art. V, para. 1); see also the Consular Treaty of 23 September 1926 between Spain and Greece (art. 8, para. 2), and the Treaty of 20 March 1948 on Civil Rights and Consular Prerogatives between Spain and the Philippines (art. VIII, para. 1; the English text of this Treaty uses the term "crime").

(d) Sometimes, the offences by reason of which the immunity from imprisonment is removed are defined by reference to the type of penalty applicable. Thus, the Consular Convention of 4 June 1929 between Germany and Bulgaria allowed imprisonment pending trial in cases of prosecution for an offence punishable by death or penal internment (art. 12, para. 1).

The method of using the classification of the offence as a criterion has serious disadvantages. In the first place, the gradation "crime", "lesser offence" (*délit*) and "contravention" is not known in many legal systems. Secondly, even in cases where this classification exists in the legislation of both contracting Parties, the same unlawful act may well not be classified in the same way in both legislations, with the consequence that there is inequality of treatment for consular officials.

60. One group of treaties, instead of distinguishing between crimes and misdemeanours on the one hand and contraventions on the other, uses as a criterion for determining the cases in which the arrest of consuls is permissible the term of the sentence prescribed for the offence committed.

(a) Under some of these conventions, consular officials who are nationals of the sending State are not liable to arrest or imprisonment pending trial unless they are prosecuted for offences punishable under the local law by a penalty involving deprivation of liberty for a term of one year or more. Examples of these are the Consular Conventions of 22 June 1926 between Albania and Yugoslavia (art. 10, para. 1), of 17 December 1929 between Poland and Romania (art. 6, para. 8), of 22 December 1934 between Belgium and Poland (art. 6, para. 6), of 22 December 1934 between Bulgaria and Poland (art. 12, para. 1), of 12 January 1928 between the United States of America and Costa Rica (art. II, para. 1) and of 24 April 1926 between Hungary and Poland (art. 11, para. 1).

(b) Other conventions, while applying this criterion (i.e. that the term of the sentence applicable must be one year or more), provide that consular officials can only be arrested or detained pending trial by the police or the agents of the Court if they are apprehended

flagrante delicto. See the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (art. 7, para. 1).

(c) There are some conventions which allow provisional arrest in cases of prosecution for an offence (*délit*) which, under the legislation of the receiving country, is punishable by imprisonment for a term of not less than three years. See the Consular Convention of 28 May 1929 between Germany and Turkey (art. 11, para. 2).

(d) Under other conventions, arrest pending trial is excluded in cases in which the consul is charged with an offence which under the local law is punishable by imprisonment for a term of less than five years. See among others the Consular Conventions of 5 February 1928 between Albania and France (art. 4, para. 3), of 30 December 1925 between France and Poland (art. 4, para. 3), of 31 December 1951 between the United Kingdom and France (art. 15) and of 20 March 1954 between the United Kingdom and Mexico (art. 4, para. 1, read in conjunction with art. 2, para. 9).

(e) Some recent consular conventions lay down different conditions for immunity from arrest and detention pending trial for each of the two contracting Parties. For example, article 14 of the Consular Convention of 14 March 1952 between the United Kingdom and Sweden provides that a consul shall not be subjected to detention in custody pending trial in respect of acts performed otherwise than in his official capacity, unless he is accused of a grave offence as defined in article 2, paragraph 9. Under the terms of this latter provision, "grave offence" means:

(i) in the case of the territory of the United Kingdom and the other territories for whose international relations Her Britannic Majesty's Government is responsible, an offence for which a sentence of imprisonment for five years or over may be awarded; and

(ii) in the case of the territory of Sweden, an offence for which a sentence of imprisonment for four years or over may be awarded.

The Convention of 17 April 1953 between the United Kingdom and Greece defines the scope of the exception to immunity by reference to the duration of the penalty (five years or more) as regards the territory of the United Kingdom and the other British territories to which the convention applies, and by reference to the classification of the crime under Greek law, so far as Greece is concerned.

(f) Apart from the provisional arrest allowed under certain conditions, immunity from imprisonment is excluded in several conventions in cases where the execution of a penalty imposed by the courts is involved. This formula is used in the Consular Conventions of 28 May 1929 between Germany and Turkey (art. 11, para. 2), of 4 June 1929 between Germany and Bulgaria (art. 12, para. 1), of 25 April 1958 between the USSR and the Federal Republic of Germany (art. 8, para. 2), and of 28 February 1959 between the USSR and Austria (art. 7, para. 2).

(g) Lastly, there is the enumerative method, which

has been used in isolated cases for the purpose of specifying the offences the prosecution of which might justify provisional arrest. See, for example, the Consular Convention of 12 October 1925 between the USSR and Germany (art. 11, para. 1), which provides another means of defining the cases in which the arrest of consular officials pending trial is allowed.

61. Patently, the conventions which allow the detention of consular officials in those cases only where they are charged with, or convicted of, an offence punishable by a term of imprisonment of a specified duration, exclude arrest as a measure of execution or security in civil and commercial cases, as well as arrest for contraventions and offences which can only be dealt with administratively, if the offence is punishable by imprisonment for a period less than that prescribed in the convention in question. In cases, however, where the convention merely allows consular officials immunity from arrest pending trial, the contracting Parties sometimes expressly specify what is the situation in the other circumstances mentioned above. For example, the Consular Convention of 24 April 1936 between Hungary and Poland provides that career consuls and consular officials may not be placed under arrest either as a preventive measure or as a measure of execution in civil and commercial cases or for a contravention, or as a punishment for offences for which only an administrative penalty is imposed (art. 11, para. 1). This provision is followed by the usual clause excluding arrest during the judicial proceedings, unless the offence is punishable by a penalty involving deprivation of liberty for a term of one year or more. Other conventions expressly exclude arrest in civil or commercial cases; see, for example, the Consular Conventions of 28 May 1929 between Germany and Turkey (art. 11, para. 1) and of 30 December 1925 between France and Poland (art. 4, para. 3).

62. It should be emphasized that many treaties which recognize immunity from arrest and imprisonment, restrict the scope of this immunity in two ways on grounds connected with the status or activities of the person concerned.

(a) These treaties usually deny the benefit of the immunity clause to consular officials who are nationals of the receiving State;

(b) In cases where they provide for immunity from imprisonment for debt, these treaties exclude consular officials who are merchants from the benefit of this provision so far as acts are concerned which are connected with their business.

63. Lastly, it should be noted that the consular conventions and the other applicable agreements contain different definitions of the persons entitled to inviolability. Some agreements deal only with consular officers, some also refer to other consular officials and some even apply to certain classes of consular employees (cf., for example, the Consular Convention of 3 June 1927 between France and Czechoslovakia, art. 5, para. 3, in conjunction with art. 4, para. 1).

64. It would be wrong, however, to think that all

consular conventions provide for personal inviolability. Many of them merely stipulate immunity from jurisdiction for acts performed in an official capacity; examples are the Consular Conventions of 9 September 1929 between Italy and Turkey (art. 11, para. 2), of 18 September 1957 between the USSR and Albania (art. 6), of 24 May 1957 between the German Democratic Republic and Czechoslovakia (art. 7), of 16 December 1957 between the USSR and the Democratic People's Republic of Korea (art. 6), of 24 August 1957 between the USSR and the Hungarian People's Republic (art. 5), of 5 October 1957 between the USSR and Czechoslovakia (art. 4), of 4 September 1957 between the USSR and the Romanian People's Republic (art. 6), of 12 December 1957 between the USSR and the People's Republic of Bulgaria (art. 6), between the USSR and the Mongolian People's Republic (art. 6), of 5 June 1959 between the USSR and the Democratic Republic of Viet-Nam (art. 6) and of 23 June 1959 between the USSR and the People's Republic of China (art. 6).

65. Many consular conventions provide that, in cases where the head of a consular mission or a consular official is prosecuted, arrested or charged with an offence, it is the duty of the Government in whose territory the person in question is prosecuted, arrested or charged to report the matter without delay, or even before action is taken, to the diplomatic representative of the State by which the consular official is employed. Such provisions occur in the Conventions of 21 August 1924 between Italy and Yugoslavia (art. 16), of 1 March 1924 between Italy and Czechoslovakia (art. 7, para. 2), of 30 December 1925 between France and Poland (art. 4, para. 3), of 12 June 1928 between Belgium and Poland (art. 6, para. 7) of 22 December 1934 between Bulgaria and Poland (art. 12, para. 2), of 23 June 1959 between the USSR and the Federal Republic of Germany (art. 8, para. 3), and of 28 February 1959 between the USSR and Austria (art. 7, para. 3).

66. Lastly, some conventions specify that in all matters not connected with the performance of their duties, consuls are subject to jurisdiction of the receiving State. This provision seems to exclude all inviolability except that which is implied in the immunity from jurisdiction enjoyed by consuls for acts performed in their official capacity. Thus, the Treaty of Friendship and Consular Relations of 18 July 1903 between Denmark and Paraguay provides that as regards their person and property, in all that does not relate to their official functions, consuls shall be subject to the laws of the country in which they reside, in the same manner as are other private individuals.⁸² A similar formula occurs in the Consular Convention of 9 September 1929 between Italy and Turkey (art. 11, para. 2).⁸³

⁸² *British and Foreign State Papers*, vol. XCVI, p. 573; also cited in *United Nations Legislative Series, Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (ST/LEG/SER. B/7) (United Nations publication, Sales No. 58.V.3), p. 430.

⁸³ League of Nations, *Treaty Series*, vol. CXXIX, p. 196; *United Nations Legislative Series, op. cit.*, p. 452.

(c) *National law and practice*

67. Provisions of great interest from the point of view of the subject with which this part of the report deals are also found in national law. These provisions may be divided into four groups. In the first place, there are provisions which recognize the inviolability of consuls subject to exceptions which are similar to those found in the consular conventions. In the second group are the provisions which make the institution of proceedings against consuls conditional of the previous consent of the executive authority, or which reserve jurisdiction over consuls to the higher courts. Then there are legislations which do not confer any inviolability on consuls and consular officials, but guarantee them certain advantages or facilities if they are arrested. Lastly, the fourth group includes the provisions of criminal law which are designed to protect the person of the consul.

68. Among the provisions which give consuls a broad inviolability, the Order of 14 January 1927 concerning the diplomatic and consular missions of foreign States in the territory of the Union of Soviet Socialist Republics should be cited first. This Order lays down the principle that the consular representatives of foreign States enjoy, subject to reciprocity, the rights and privileges attaching to their status under the rules of international law (art. 11). The article then goes on to enumerate, for purposes of illustration, the principal rights and privileges and, after recognizing immunity from jurisdiction in respect of offences committed by consuls in their official capacity (sub-para. (c)), stipulates that consuls are not liable to deprivation of liberty otherwise than in virtue of a final judicial decision. The "preventive detention" of consuls (i.e. detention pending trial) is permitted only by order of the competent organ of judicial investigation where judicial proceedings have been instituted against them in respect of an act falling within the jurisdiction of the Supreme Court of the USSR, the Supreme Courts of a Union Republic, a provincial (or equivalent) court or a military tribunal (art. 11, sub-para. (d)).⁸⁴ This Order is in force in all the republics of the Union.

69. Under article 84 of the Administrative Code of the Ukrainian Soviet Socialist Republic, organs of the police and the criminal investigation department are not entitled to detain the consular representative of foreign States.⁸⁵

70. In Norway, the Rescript of 8 April 1771 states that every consul is immune, as regards his own person while carrying on his consular business, from Norwegian jurisdiction. The Rescript is careful to provide that in cases where the consul possesses a house or other property in Norway he is under a duty to bear and be responsible for the charges attaching thereto. It adds that if he engages in trade or business, he is subject in respect thereof to the constitution and laws

of the country, and hence also to the local authority of the place where he is resident, on the same footing as other Norwegian subjects.⁸⁶

71. Article 26 of the Haitian Act of 27 August 1912 provides that, if equal treatment is accorded to Haitian consuls, the members of the foreign consular service who are citizens of the country which has appointed them and who exercise no commerce or industry may be arrested only in the case of an act defined and punished as a crime by Haitian law.⁸⁷

72. Under the Irish Consular Conventions Act of 1954, a consular officer who is a national of the sending State and not a citizen of Ireland and not engaged in private occupation for gain in the State is exempt from arrest or prosecution except when charged with the commission of a crime punishable by imprisonment for a period of one year or more of by penal servitude.⁸⁸

73. The Foreign Service Regulations published by the Republic of the Philippines include, among the immunities usually secured to consular officers in most countries, exemption from arrest except for crimes under local law (chapter III, sect. 2, note 2, para. (a)).⁸⁹

74. In some States whose legislation does not contain special provisions recognizing the inviolability of consuls, a practice favourable to inviolability has been evolved under government directives. For example, in France, exemption from arrest seems to be recognized, subject to strict reciprocity, to enable the consul to continue to safeguard the interests of his country and its nationals.⁹⁰

75. In Belgian practice, consuls enjoy certain consular immunities which are defined in the consular conventions concluded by Belgium or which are recognized by international usage. Consuls may not be arrested or imprisoned prior to trial, except for offences punishable by imprisonment for a term of at least one year or by a more severe penalty.⁹¹

76. In Finland, whose statute law does not contain any provisions concerning the inviolability of members of the consular staff, immunity from jurisdiction is accorded to career consuls and senior consular officials for minor offences.⁹²

77. The legislation of some States, while expressly making consuls amenable to the jurisdiction of the receiving State in civil and criminal matters, provides that the institution of proceedings against consuls is conditional on the consent of the Government or of another organ of the State, or reserves jurisdiction over consuls, in both civil and criminal matters, to the higher courts. Thus, the Brazilian Decree No. 855 of

⁸⁶ *Ibid.*, p. 224.

⁸⁷ A. H. Feller and Manley O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington, D.C., Carnegie Endowment for International Peace, 1933), vol. I, p. 628.

⁸⁸ *United Nations Legislative Series*, op. cit., p. 173.

⁸⁹ *Ibid.*, p. 238.

⁹⁰ *United Nations Legislative Series*, op. cit., p. 122.

⁹¹ *Ibid.*, p. 24.

⁹² *Ibid.*, p. 114.

⁸⁴ *United Nations Legislative Series*, op. cit., p. 339; Sabanin, op. cit., p. 328.

⁸⁵ *United Nations Legislative Series*, op. cit., p. 328.

8 November 1851 regulating the exemptions and attributions of foreign consular agents [i.e. consuls] provides that they are subject in civil matters and in individual offences committed by them to the Brazilian authorities (art. 17). It stipulates, however, that only in cases of offences committed as a merchant, or of such gravity as do not admit bail, may a consular officer be imprisoned without the authorization of the Brazilian Government. The Brazilian Government may authorize the competent court to try the consul in question or, for weighty motives, deliver him to the Government of the sending State or, if that is not sufficient, expel him from the country or deprive him of the *exequatur*.⁹³ The Japanese rules of 1923 relating to the duties of judiciary police fall within the same category of legislative provisions, for they provide that in case consuls and consular officers who are nationals of the country appointing them are suspect, no action may be taken against them unless the Public Prosecutor gives instructions for the purpose. This provision is not, however, applicable to cases where grave offences have been committed and no delay is permissible.⁹⁴

78. According to Swiss practice, senior consular officials enjoy immunity from jurisdiction in respect of those acts only which are performed in their official capacity, whether they are career or honorary consuls and whether they are of Swiss or of foreign nationality. Nevertheless, no civil or criminal proceedings may be instituted against the head of a consular post before the Political Department has expressed its views. Furthermore, according to Swiss practice, it is recommended, in keeping with international usage and courtesy, that the following rules should be observed with respect to senior consular officials:

(a) They should not be subjected to the local jurisdiction for offences of minor importance (punishable by fine);

(b) Notices of fines should be sent to their private address and printed forms should not be used for this purpose;

(c) They should not be required to give evidence in court, but should be invited to furnish it, in writing or orally, before the representative of a court.⁹⁵

79. Among the legislations which reserve jurisdiction over foreign consuls to the higher courts, reference should be made in the first place to the Constitution of Argentina, under which it is the Supreme Court which is competent to try any case concerning the privileges and immunities of foreign consuls and vice-consuls acting in their official capacity (Constitution, art. 100 and 101, and Act No. 48, art. 1), whereas their private business comes within the competence of the national district judges (Act No. 48, art. 2, para. 3).⁹⁶ In the United States of America, the federal district courts have original jurisdiction, exclusive of the courts of the

States of the Union, of all actions and proceedings against consuls or vice-consuls of foreign States (United States Code, 1952 edition, Title 28, sect. 1351).⁹⁷

80. Examples of provisions which, without granting any exemption from imprisonment or arrest, confer certain advantages or privileges on foreign consuls on arrest, occur in particular in the laws of the United States and Honduras.

81. According to the regulations of the United States foreign consular officers in the United States are subject, save as otherwise provided by international treaty, to process of local courts, except with respect to their official acts. With regard to arrest or prosecution for other acts, the regulations provide that consular officers and employees are entitled to be treated with courtesy and respect.⁹⁸ In Honduras, Act No. 109 of 14 March 1906 regarding foreign consular missions gives any consular official who is arrested the right to be escorted to the consular office and to be given sufficient time to put in order, seal and place in safekeeping the consulate's records and papers (art. 51 and 52).⁹⁹

82. Several legislations protect the consuls of a foreign State against assault or attack by third parties. Thus, under the Polish Penal Code of 1932 it is an offence punishable by imprisonment or detention for a term not exceeding two years to insult a foreign consul during the exercise of his functions (art. 132). Any person who commits an assault on the consul of a foreign State during or on account of the consul's exercise of his official functions is liable to imprisonment for a term not exceeding five years.¹⁰⁰

83. In Israel, under section 77 of the Criminal Code Ordinance of 1936, any person who publishes anything intended to be read, or any sign or visible representation tending to degrade, revile or expose to hatred or contempt any dignitary of a foreign State (an expression which includes the consul) is guilty of a misdemeanour and is liable to a fine of one hundred pounds. If such publication is likely or intended to disturb peace and friendship between Israel and any other State or territory, the person responsible is guilty of a misdemeanour.¹⁰¹

SECTION III: PROPOSED CODIFICATION

A

The question is: Should consular officials be recognized as exempt from arrest and imprisonment during the period preceding conviction only (subject, of course, to a proviso concerning particularly serious offences)? In other words, should the exemption have the effect

⁹³ Feller and Hudson, *op. cit.*, vol. I, p. 156.

⁹⁴ *Ibid.*, p. 729.

⁹⁵ *United Nations Legislative Series, op. cit.*, p. 311.

⁹⁶ For an English translation of these laws, see H. Lauterpacht, *Annual Digest, 1933-1934*, p. 394.

⁹⁷ *United Nations Legislative Series, op. cit.*, p. 384.

⁹⁸ *U.S. Foreign Service Manual*, vol. I, part I, section 232.1; *United Nations Legislative Series, op. cit.*, p. 375.

⁹⁹ *Ibid.*, p. 159.

¹⁰⁰ *Ibid.*, p. 245.

¹⁰¹ *Ibid.*, pp. 179 and 180. The legislation of the State of Israel, enacted in 1948, provides that as far as that State is concerned, the word "Israel" should replace the word "Palestine" used in the 1936 Ordinance.

of barring only arrest or imprisonment pending trial, or should it be accorded even in cases in which consular officials are convicted of minor offences? There seem to be cogent reasons for preferring the latter alternative. The imprisonment of a consul or consular official makes it impossible or at least extremely difficult for the consulate to carry on its day-to-day work, and this is particularly serious since the disposal of the manifold duties performed by the consulate must not suffer delay (issue of passports, visas and other travel documents, legalization of signatures, documents and commercial invoices, issue of certificates of origin, discharge of many functions connected with shipping). The imprisonment of such an official is detrimental not only to the sending State but also to the receiving State and seriously affects the consular relations between the two States concerned. It would be dangerous therefore to expose the work of a consulate to the risk of being stopped or seriously hampered at any time through the action taken by the local courts in connexion with the most trivial offence. By reason of the importance of the consular functions, the imprisonment of consular officials should not be allowed except in cases where they have been convicted of a crime. There do not seem to be any objections to this solution in principle. Nor can this solution be criticized on the ground that, because it would become impossible to enforce sentences in respect of minor offences, the conviction would be meaningless, and that the exemption barring the execution of a sentence imposed by a court would frustrate the exercise of the judicial power. In the first place, under the criminal law of many countries minor offences are punishable either by a fine alone or by a fine as an alternative to a penalty involving deprivation of liberty. Secondly, in many legal systems the offender may be eligible for a stay of execution, i.e., the suspension of the execution of the sentence, on condition that he does not commit another offence within the period specified by law. Lastly, a sentence for a minor offence, even if it cannot be enforced against the consular official for so long as he is exercising official functions in the receiving State, may still be used by the receiving State as grounds for requesting his recall if in the opinion of the Government of the receiving State the offence committed was sufficiently serious to require such action. Besides, the fact that this solution has been adopted in several consular conventions is the strongest argument in its favour. Its adoption, while leaving intact the exercise of the criminal jurisdiction of the receiving State *vis-à-vis* consular officials, would give the latter personal inviolability in all cases in which the advantages gained by the execution of the sentence would manifestly bear no relation to the prejudice which the execution would cause to the conduct of the consular functions and relations. The legitimate interests of the receiving State would be fully safeguarded, for the exemption in question would not be granted in cases of conviction of a particularly serious offence. For the reasons given it is also desirable to accord to consular officials exemption from any measure of execution that involves a curtailment of personal liberty (imprisonment for debt, imprisonment to compel the debtor

to perform an act which cannot be performed by a proxy, etc.), except in cases where they engage in trade or some other private gainful occupation.

B

A summary analysis of the consular conventions and other relevant agreements, of the opinions of authorities on international law, of the case-law of national courts and of the practice of States discloses a sufficiently wide area of agreement to justify the reasonable hope that a proposal based on the following conclusions may be acceptable to States:

1. The official acts of consuls and other members of the consular staff are immune from the jurisdiction of the receiving State in all respects, and consequently also from its criminal jurisdiction.

2. So far as acts other than official acts are concerned, consuls and other members of the consular staff are subject, save as otherwise provided by international treaty, to the jurisdiction of the receiving State.

3. Consular officials who are not nationals of the receiving State and who do not engage in any private activity for gain in the receiving State enjoy personal inviolability, except:

(a) for the purpose of serving a court sentence possessing the force of *res judicata*, for an offence punishable by a term of imprisonment for one year or more, or

(b) if the consular official is taken *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom.

4. If criminal proceedings are to be instituted against a consular official, the interests of the consular office and the respect due to the State to which the consular official in question belongs require that the proceedings should be conducted in a way which will not interfere with the work of the consulate and will not cause unnecessary prejudice to the interests to be protected by the consulate.

C

In the light of the foregoing considerations, the Special Rapporteur proposes that the following article be inserted in the provisional draft articles on consular intercourse and immunities:

Article ...

Personal inviolability

1. Consular officials who are not nationals of the receiving State and do not engage in commerce or any other gainful occupation shall not be liable to arrest or detention pending trial, except when they are caught *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom.

2. Except in the case specified in paragraph 1 of this article, the consular officials referred to in that paragraph may not be committed to prison or subjected to any other restriction upon their personal freedom save for the purpose of serving a court sentence, possessing the force of *res judicata*, for an offence punishable by a term of imprisonment of one year or more.

3. In the event of criminal proceedings being instituted against a consular official, that official may in no event be compelled to appear before the court. He may be invited in writing to give his deposition in person. If he refuses to do so, the court shall request him to send his deposition in writing, if the law of the receiving State so permits. Otherwise, the judicial authority shall visit his residence for the purpose of taking his deposition in the form prescribed by the law of the receiving State.

4. In the event of the arrest of, or of criminal proceedings being instituted against, one of the consular officials referred to in paragraph 1 above, the receiving State shall immediately notify the diplomatic representative of the State to which the consular official belongs (unless the letter was taken *in flagrante delicto*).

PART II

The most-favoured-nation clause and consular intercourse and immunities

SECTION I

1. Introduction

1. Since the functions and immunities of consuls are largely based on international treaties which give the consuls powers, privileges and immunities in excess of those accorded by customary international law, the most-favoured-nation clause plays quite an important part in this sphere. If one studies the treaties, and particularly the consular conventions, one will see that States have long been using this clause as a means of securing the right to establish consulates in towns and ports open to the consular representatives of any country for the purpose of generalizing the system of privileges, exemptions, immunities and other advantages granted to consuls and securing for their consuls any wider powers that might be conferred upon the consuls of any foreign State.

2. In order to judge whether it is possible and desirable to insert a most-favoured-nation clause in the codification of consular law, it is necessary to recapitulate the essential principles governing the operation of the most-favoured-nation clause and to see how far they can be applied in the particular matter of consular intercourse and immunities.

2. General considerations

3. The most-favoured-nation clause is a contractual provision whereby the contracting Parties grant to each other the right to participate in the most considerable advantages which they have granted or may in future grant to a third State.¹⁰² Fundamentally, therefore,

its effect is to generalize the advantages which one of the contracting Parties might grant, either generally or in certain particular respects, to a third State. Hence it is an important means of achieving the purpose expressed in Article 1, paragraph 2, of the Charter of the United Nations, viz. "To develop friendly relations among nations based on respect for the principle of equal rights... of peoples".

4. The clause therefore constitutes an undertaking to accord, as of right and without compensation, to the other contracting Party, and to its agents, nationals, goods or ships, treatment equal to that accorded to any third State. A State which accepts the most-favoured-nation clause binds itself either in general or in some specific area of international relations, not to permit any discrimination against the other contracting Party and to give the other contracting Party automatically the benefits enjoyed or in future to be enjoyed by any third State.¹⁰³

5. It follows from the above that the automatic extension to the other contracting Party of any advantage conceded or to be conceded to a third State (most favoured State) is the essence of the clause. The main purpose of the clause is to place the beneficiary State in the same position as third States in a particular market or territory. But equality of treatment *vis-à-vis* third States is not coterminous with equality of advantages in the same sphere *vis-à-vis* the granting State, for the treatment of third States is not necessarily identical in the two States bound by the clause. If two States A and B have subscribed to a most-favoured-nation clause and State B subsequently grants an advantage (covered by the clause) to State C, State A automatically becomes entitled to the same advantage, without being itself under any obligation to grant any advantage to State B.

6. Most-favoured-nation treatment is usually granted by treaty, but it may also be granted to another State autonomously by legislative act, decree or government declaration.¹⁰⁴

7. Except in the case mentioned in the preceding paragraph, the legal basis of most-favoured-nation treatment is the original treaty in which the two States undertook to give to each other most-favoured-nation treatment. It is this original treaty which establishes the legal *vinculum* between the beneficiary State and the advantage granted to a third State, whether the

¹⁰² See: Calvo, *Droit international théorique et pratique*, 4th edition, vol. IV, p. 1597; Suzanne Basdevant, *Clause de la nation la plus favorisée*, *Répertoire de droit international* (Paris, 1927), vol. 3, p. 467; Anzilotti, *Cours de droit international* (Paris, 1929), pp. 432-439; Scelle, *Règles générales du droit de la paix*, *Recueil des cours*, vol. 46/1933-IV, pp. 461-464; McNair, *The Law of Treaties* (Oxford, 1938), pp. 285-306; Rousseau, *Principes généraux de droit international public* (Paris, 1944), pp. 464 ff.; Kozhevnikov, *Uchebnoe posobie po mezhdunarodnomu publichnomu pravu* (Moscow, 1947), pp. 124 ff.; H. F. Oppenheim, *La clause de la nation la plus favorisée dans la pratique internationale de la Suisse* (Zürich, 1948), p. 23; Hershey, *The Essentials of International Public Law and Organization*, Revised Edition (New York, 1927), pp. 448 and 449; Guggenheim, *Traité de*

droit international public (Geneva, 1953), vol. I, pp. 104-109; A. Verdross, *Völkerrecht*, 2nd edition (Vienna, 1950), p. 468; L. Oppenheim, *International Law*, 8th edition by Sir H. Lauterpacht (London, 1955), vol. I, p. 972; Genkin, *Printsip naibolshego blagopriyatstvovaniya v torgovykh dogovorakh gosudarstv*, *Sovetskoe gosudarstvo i pravo*, 1958, No. 9, pp. 22-32; A. S. Korolenko, *Torgovye dogovory i soglasheniya SSSR s innostranymi gosudarstvami* (Moscow, 1953); Korovin, *Soviet Treaties and International Law*, *American Journal of International Law*, vol. XXII, 1928, pp. 754-762.

¹⁰³ Genkin, *loc. cit.*, p. 22; see also Sibert, *Traité de droit international public* (Paris, 1951), vol. II, p. 254.

¹⁰⁴ It is in this way that the United States of America and Switzerland granted each other most-favoured-nation treatment from 1899 to 1936. H. F. Oppenheim, *op. cit.*, pp. 47 and 48.

advantage is granted under an international treaty or by national legislation, or whether it results from the *de facto* circumstances.¹⁰⁵

8. If a convention granting an advantage to a third State expires, the effects of the most-favoured-nation clause arising out of that convention also cease. Consequently, the beneficiary State loses the advantage which it had acquired through the clause. This logical solution has been confirmed both by learned authorities¹⁰⁶ and by the case-law of the International Court of Justice.¹⁰⁷

9. The scope of the clause is vast. In particular, it may cover commercial relations and especially Customs advantages, the conditions of residence and legal status of foreigners, the status of diplomatic and consular representatives, access to courts and judicial protection, the charging of taxes and duties, shipping and especially the use of ports, and favours granted in the matter of the protection of industrial or literary and artistic property.¹⁰⁸

10. The most-favoured-nation clause appears variously either in the form of a general clause of unlimited scope, even though its scope is sometimes qualified by a few exceptions, or in the form of a special clause specifying its scope, or else in the form of a limited clause (sometimes also called a "specialized" or "specific" clause) applying only to certain goods or only to certain acts or services.¹⁰⁹ It is these last two forms of the clause which occur in instruments concerning consular intercourse and immunities.

11. In such instruments, as in treaties governing other matters, the most-favoured-nation clause appears sometimes in a positive form, whereby the contracting States grant to each other most-favoured-nation treatment in general or in particular respects, and sometimes in a negative form, whereby they agree that consuls or consular officials will not be treated less favourably than like officials of any third State. An example of the positive form, which is the more common, occurs in article 4 of the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal, which deals with the issue of the *exequatur* to consuls (consuls-general, consuls, vice-consuls and consular agents) and provides in its last paragraph that "The persons mentioned above shall enjoy on a reciprocal basis all the rights, privileges, exemptions and immunities that are accorded to persons of corresponding status of any other State".¹¹⁰ An example of the negative form of the clause

occurs in article II of the Treaty of Friendship between Persia and Belgium of 23 May 1929, under which the contracting Parties agree that "the diplomatic and consular representatives of each of them shall receive in the territory of the other, subject to reciprocity, the treatment consecrated by general international law, a treatment which shall not be less favourable than that granted to the diplomatic and consular representatives of the most favoured nation".¹¹¹ The same formula is in the Provisional Agreement between the United States of America and Afghanistan of 26 March (art. II, *in fine*) and in the Exchange of Notes of 4 May 1946 between the United States of America and Yemen constituting an Agreement relating to Friendship and Commerce (art. II, *in fine*).

12. The most-favoured-nation clause often appears in conjunction with the reciprocity clause, already in the treaties of the nineteenth century. For example, the Treaty of Navigation of 30 December 1881 between France and Sweden and Norway contains the following provision (art. 9):

*"Les consuls généraux, consuls, vice-consuls et agents consulaires, ainsi que leurs chanciers, jouiront à charge de réciprocité, des mêmes privilèges, pouvoirs et exemptions dont jouissent ou jouiront ceux des nations les plus favorisées."*¹¹²

The article excludes from the benefit of this provision, however, consular officials who engage in trade, and stipulates that, in such cases, they "*seront tenus de se soumettre aux mêmes lois et règlements auxquels sont soumis, dans le même lieu, par rapport à leurs transactions commerciales, les particuliers de leur nation*" (shall be subject to the same laws and regulations as those to which, in the same place, private persons of their nation are subject in respect of their commercial transactions).¹¹³

13. The term "reciprocity" describes the position where a State assures to another State and to its representatives, nationals, ships and products, treatment equal or equivalent to that which that other State assures to it.¹¹⁴ Like the most-favoured-nation clause, the reciprocity clause may take either a general form, a special form or a limited form. It may denote an abstract or *formal* reciprocity, or else a material reciprocity. Under a formal reciprocity, identity of treatment in a particular sphere is guaranteed but not necessarily identity of advantages in a specific case, as for example where one of the two States grants to a third State national treatment in some particular respect.¹¹⁵ Material

¹⁰⁵ See on this subject the decision of the International Court of Justice in the Anglo-Iranian Oil Company case, International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, Judgment of 22 July 1952, p. 109.

¹⁰⁶ See para. 3 of the resolution of the Institute of International Law on the effects of the most-favoured-nation clause in trade and navigation, 23 April 1936. *Tableau général des résolutions de l'Institut (1873-1956)*, Bâle, 1957, p. 132.

¹⁰⁷ I. C. J., *Reports of Judgments, Advisory Opinions and Orders*, Judgment of 27 August 1952, pp. 204 and 205.

¹⁰⁸ Cf. the article by Suzanne Basdevant (Mrs. Bastid), cited above, *op. cit.*, p. 470.

¹⁰⁹ Guggenheim, *op. cit.*, pp. 108 and 109; H. F. Oppenheim, *op. cit.*, pp. 36 *et seq.*

¹¹⁰ United Nations, *Treaty Series*, vol. 94, p. 6.

¹¹¹ League of Nations, *Treaty Series*, vol. CX, p. 371.

¹¹² De Martens, *Nouveau Recueil général des traités*, second series, vol. IX, p. 195. (Translation: "The consuls-general, consuls, vice-consuls and consular agents, and their *chanciers*, shall enjoy, subject to reciprocity, the same privileges, powers and exemptions as are or may in future be enjoyed by those of the most favoured nations").

¹¹³ *Ibid.*

¹¹⁴ Cf. *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960, p. 504.

¹¹⁵ Formal reciprocity in this sense is to be distinguished from the concept of reciprocity inherent in every international treaty.

reciprocity, on the other hand, entitles a State to claim for itself, its representatives, nationals, ships and products, the same effective treatment as it grants in its territory to the other State, even though, in the case in question, the grantor State does not discriminate between the nationals of the beneficiary State and the nationals of other foreign States.

14. The practice of inserting a reciprocity clause in the most-favoured-nation clause used in instruments concerning consular intercourse and immunity has become very widespread. Among recent conventions, reference may be made in particular to the following: the Convention of 12 May 1933 between France and Canada (art. 8, para. 2); and the Treaty of Peace and Friendship between India and Nepal of 31 July 1950 (art. 4, third para.).

15. Very often the reciprocity clause in consular conventions takes a more explicit form. A good example occurs in article 14, paragraph 2, of the Consular Convention of 9 September 1929, between Italy and Turkey:

"The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its consular officials privileges or immunities other or more extended than those granted by the Party itself to the consular officials of the other Party."¹¹⁶

A large number of conventions use this formula, for example: the Convention of 22 June 1926 between Albania and the Kingdom of the Serbs, Croats and Slovenes regarding Establishment and the Consular Service (art. 8, para. 2); the Treaty of Commerce and Navigation of 24 March 1928 between Germany and Greece (art. 26, para. 2); the Consular Convention of 7 November 1928 between Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes (art. 5, para. 2); the Treaty of Commerce and Navigation of 2 November 1927 between Greece and the Kingdom of the Serbs, Croats and Slovenes (art. 27, para. 2, *in fine*); and the Consular Treaty of 28 May 1929 between Germany and Turkey (art. 14, para. 2).

3. The conditional most-favoured-nation clause in conventions concerning consular intercourse and immunities

16. The importance attached by the mercantilists, in the seventeenth and eighteenth centuries, to foreign trade, which some of them, including for example Colbert, regarded as a sort of financial war,¹¹⁷ explains the appearance in international treaties of the clause which is known as the conditional most-favoured-nation clause (also known as the *clause onéreuse*). According to this clause, an advantage granted to a third State in return for compensation furnished by the latter cannot accrue to the beneficiary State unless that State itself furnishes equivalent compensation. In this form, the clause was introduced into international practice by the United States in its Treaty of Amity and Com-

merce with France of 6 February 1778.¹¹⁸ This conception of the clause was subsequently, by interpretation, extended in the practice of some States even to cases in which the most-favoured-nation clause was expressed in the unconditional form.

17. At first applied in commerce, the conditional most-favoured-nation clause was also extended to consuls in certain nineteenth century treaties. For example, the Treaty of Friendship, Commerce and Navigation signed on 9 December 1834 between France and Bolivia, after providing in article 30 that the diplomatic and consular agents, citizens of all classes, ships and goods of one of the two States will enjoy as of right in the other State any freedoms, privileges and immunities whatsoever which are or may be granted to the most favoured nation, adds;

"et ce gratuitement si la concession est gratuite, ou avec la même compensation si la concession est conditionnelle".

(And these favours are granted without compensation, if they are granted to the other States without compensation, and subject to the same compensation if the grant is conditional).¹¹⁹

The conditional clause was also inserted in the Consular Convention of 7 January 1876 between France and Greece (art. 25)¹²⁰ and certain other conventions of that period.

18. The application of the conditional clause presupposes an agreement with the grantor State on the subject of the compensation offered, which that State has the discretionary power to accept or to refuse. In some treaties, there is express provision for such an agreement. This type of clause therefore introduces the possibility of all kinds of demands for compensation, both of an economic and of a political nature, which may be unacceptable to the beneficiary State. Instead of ensuring equality of treatment, which is the principal purpose of the most-favoured-nation clause, the conditional clause is a source of discrimination. For this reason, there is everything to be said for Mr. H. F. Oppenheim's view that to call the conditional clause a most-favoured-nation clause is a misnomer.¹²¹ And the conditional clause has in fact been attacked precisely on these grounds by the great majority of European writers on international law. It has not been used by the United States of America in commercial treaties since the conclusion of the treaty with Germany of 8 December 1923 (art. VII, para. 4).¹²² Even since then, however, the Department of State has interpreted all most-favoured-nation clauses in treaties concluded with foreign

¹¹⁸ Under art. II of this Treaty, the two States undertook mutually "not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional". W. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909*, vol. I, p. 469.

¹¹⁹ De Clercq, vol. 4 (1824-1842), p. 294.

¹²⁰ De Martens, *Nouveau Recueil général de traités*, second series, vol. IV, p. 381.

¹²¹ H. F. Oppenheim, *op. cit.*, p. 41.

¹²² League of Nations, *Treaty Series*, vol. LII, pp. 134 *et seq.*

¹¹⁶ League of Nations, *Treaty Series*, vol. CXXIX, p. 204.

¹¹⁷ Ellul, *Histoire des institutions*, vol. 2, p. 351.

Governments as conditional, so far as consular privileges and immunities are concerned.¹²³

19. It is interesting to note that the conditional clause was expressly condemned by the Economic Committee of the League of Nations precisely because of its discriminatory nature.¹²⁴ It may nowadays be regarded as having been abandoned. Accordingly, when the most-favoured-nation clause is mentioned in the following pages of this report, it is the unconditional clause which is meant.

20. The last question to be considered in this section is whether the exceptions admitted by customary international law to the operation of the most-favoured-nation clause may have any significance so far as consular intercourse and immunities are concerned. It is generally agreed that the most-favoured-nation clause does not apply to:

(a) Frontier zone traffic, and

(b) Customs unions,

even in cases where these exceptions are not expressly stipulated by the contracting Parties.¹²⁵ The reasons for these exceptions are inherent in the very essence of the clause and in the specific nature of the economic and legal relations envisaged. For the same reasons, the most-favoured-nation clause does not apply to agreements concluded between landlocked States and the countries by which they are separated from the sea for the purpose of regulating the right of free access to the sea which every landlocked State possesses.¹²⁶

Cases are conceivable in which the exceptions in question, or at least some of them, might operate even in consular law. If a State bound by an appropriate most-favoured-nation clause permitted one of its neighbours to set up a consulate mainly with a view to facilitating frontier zone traffic—which might be of practical value, especially in the case of cession of territory—third States could not claim the benefit of the most-favoured-nation clause for the purpose of establishing their own consulates in the same locality.

SECTION II: SCOPE OF THE MOST-FAVOURLED-NATION CLAUSE IN THE MATTER OF CONSULAR INTERCOURSE AND IMMUNITIES

1. Introduction

21. In the matter of consular intercourse and immu-

¹²³ Hackworth, *Digest of International Law*, vol. IV, p. 702, and the examples he quotes.

¹²⁴ "... the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and to establish it on firmer foundations." (*League of Nations Publications*, II. Economic and Financial, 1933, II.B.1 (document E/805), p. 7; quoted by H. F. Oppenheim, *op. cit.*, p. 43).

¹²⁵ Riedel, *Ausnahmen von der Meistbegünstigung* (Vienna, 1931), p. 5.

¹²⁶ This exception to the most-favoured-nation clause was recognized by the Preliminary Conference of Landlocked States held at Geneva from 10 to 14 February 1958: see the preamble to the final declaration of principles, inserted at the Conference on the Law of the Sea in document A/CONF.13/C.5/L.1.

nities, the most-favoured-nation clause most often refers to:

(a) The powers, privileges and immunities of consuls;

(b) The treatment of consuls in general;

(c) The privileges, immunities and prerogatives of consuls;

(d) Particular immunities or advantages;

(e) The establishment and location of consulates.

2. Most-favoured-nation clause mentioning the powers, privileges and immunities of consuls

22. There are many treaties which extend the most-favoured-nation clause to the functions of consuls, though they use different expressions for describing them (powers, functions, duties, competence, general legal status, rights). For example, the early Treaty of Commerce and Navigation of 18 December 1832 between Russia and the United States of America, which authorized the contracting Parties to maintain in each other's ports consuls, vice-consuls, agents and commissaries of their own appointment, provided that the latter should enjoy the *same privileges and powers* as those of the most favoured nation (art. VIII).¹²⁷ The word "powers" occurs in other treaties, e.g. the Treaty of Commerce and Navigation of 14 May 1926 between Germany and Sweden (art. 22) and the Commercial Agreement of 14 December 1927 between Finland and Sweden (art. 14, para. 2).

23. The Treaty of Commerce and Navigation of 6 August 1863 between Great Britain and Italy contains a similar clause in article XIII. After stipulating that consuls-general, consuls and vice-consuls and consular officials shall not enter upon their duties until after they have been approved and admitted in the usual form by the Government to which they are sent, this article goes on to say:

"They shall exercise whatever functions, and enjoy whatever privileges, exemptions and immunities are or shall be granted there to consuls of the most favoured nation."¹²⁸

24. In addition to referring to privileges, exemptions and immunities, other treaties refer to attributions (powers). Examples are the Treaty of Commerce of 31 March 1927 between Hungary and Czechoslovakia (art. XXIX, para. 2, and the Provisional Commercial Agreement of 4 April 1925 between Germany and the Economic Union of Belgium and Luxembourg (art. 14, para. 2). More rarely, the clause mentions the competence of consuls; an example occurs in the Treaty of Commerce of 2 November 1927 between Greece and the Kingdom of the Serbs, Croats and Slovenes (art. 27, para. 2). The Convention of 15 December 1925 between the USSR and Norway contains a most-favoured-nation clause which also mentions the general legal status of consuls. It says: "As regards prerogatives, immunities, exemptions and the general

¹²⁷ *British and Foreign State Papers*, vol. XX, p. 271.

¹²⁸ *Op. cit.*, vol. LIII, p. 39.

legal status of consular representatives admitted to perform their duties in the territory of the other Party, the High Contracting Parties agree to grant each other most-favoured-nation treatment" (art. 1, para. 2).¹²⁹

25. But it is the term "rights" which occurs most frequently juxtaposed to the reference to consular privileges and immunities. As is evident from a comparison of this term with the terms used in other authentic treaty texts, it means in most cases the powers of the consuls.

26. The treaties in which a most-favoured-nation clause covering also, in one form or another, the powers or functions of consuls occurs are very numerous. It will be sufficient to mention by way of example: the Economic Agreement of 1 September 1920 between Germany and Austria (art. 25, para. 2); the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States of America and Germany (art. XVII, second para.); the Treaty of 22 November 1921 between the United Kingdom and Afghanistan for the Establishment of Neighbourly Relations (art. 5); the Treaty of Commerce and Navigation of 16 July 1926 between the United Kingdom and Greece (art. XXII, para. 2); the Commercial Convention of 10 September 1926 between Greece and Sweden (art. 10, para. 2); the Convention of 1 December 1927 between Greece and Switzerland regarding Conditions of Residence and Legal Protection (art. 12, para. 3); the Commercial Agreement of 17 August 1927 between France and Germany (art. 46, para. 2); the Treaty of Commerce and Navigation of 6 October 1927 between Germany and the Kingdom of the Serbs, Croats and Slovenes (art. 29, para. 2); the Convention on Commerce and Navigation of 29 June 1927 between Greece and Norway (art. 10, para. 2); the Treaty of Friendship of 19 March 1927 between Poland and the Persian Empire (art. III); the Convention of Commerce and Navigation of 8 November 1928 between Hungary and Sweden (art. 13, para. 2); the Treaty of Commerce of 9 March 1928 between Colombia and Sweden (art. 3, second para.); the Treaty of Commerce of 6 April 1928 between Austria and Denmark (art. XIX, second para.); the Convention of Commerce and Navigation of 22 August 1928 between Denmark and Greece (art. XI, para. 2); the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States of America and Germany (art. XVII, second para.); the Consular Convention of 14 March 1947 between the United States of America and the Philippines (art. XIV); the Treaty on Civil Rights and Consular Prerogatives of 20 May 1948 between Spain and the Philippines (art. IV, fourth para.); the Consular Convention of 12 January 1948 between the United States of America and Costa Rica (art. I, para. 2); and the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal (art. 4, para. 3).

27. The Treaty of Commerce and Navigation of 24 March 1928 between Germany and Greece uses, in

addition, the term "rights", the term "facilities" (*Be-fugnisse*) in article 26, paragraph 1.

3. *Most-favoured-nation clause mentioning the treatment of consuls in general*

28. In other treaties and conventions, the most-favoured-nation clause speaks of the treatment accorded to consuls in general terms. An example is article 1, fourth paragraph, in the Exchange of Notes of 30 July and 9 August 1928 between Persia and Sweden:

"The treatment accorded, on condition of reciprocity, to the diplomatic and consular representatives of Persia in Swedish territories shall in no case be inferior to that accorded to the most favoured nation."

29. Provisions of this type are found in several treaties, e.g. the Provisional Agreement of 26 March 1936 between the United States and Afghanistan (art. II); the Treaty of Friendship of 23 May 1929 between Belgium and Persia (art. II, second para.); the Provisional Agreement of 7 November 1933 between the United States of America and Saudi Arabia (art. I); the Provisional Agreement of 4 July 1946 between the United States of America and the Philippines (art. III, *in fine*) and others.

4. *Most-favoured-nation clause mentioning consular privileges and immunities*

30. States very frequently use the most-favoured-nation clause to secure for their consular officials the privileges, immunities and advantages of all kinds which may be granted to the consular officials of a third State. For example, the Convention of 12 May 1933 between Canada and France concerning the Rights of Nationals and Commercial and Shipping Matters contains the following provision (art. 8, para. 2):

"The heads of posts, titular or acting, as well as the agents of the consular service, chancellors, attachés or others, on condition of reciprocity, shall enjoy the personal privileges, immunities and exemptions such as are or may be accorded to similar agents of the same class and grade of the most favoured foreign nation."¹³⁰

By another provision in the same article, the contracting Parties undertake to conclude a convention with a view to determining and defining the powers and functions of these agents (para. 3).

31. Some conventions define the essential privileges and immunities and stipulate most-favoured-nations treatment in respect of advantages not specified in the convention. An illustration of this formula is provided by article 13 of the Convention of 31 December 1913 between Cuba and the Netherlands:

"Cuban Consuls General, Consuls, Vice-Consuls and Consular Agents in the Netherlands Colonies shall enjoy, in addition to those privileges agreed upon in the present Convention, all privileges, exemp-

¹²⁹ League of Nations, *Treaty Series*, vol. XLVII, p. 10.

¹³⁰ United Nations, *Treaty Series*, vol. 253, p. 293.

tions and immunities which have been granted or may in the future be granted to officials of the same category belonging to the most favoured nation.”¹³¹

A similar formula occurs in the Consular Convention of 4 November 1913 between Chile and the Netherlands (art. 13) and also in the Treaty on Consular Arrangements, Navigation, Civil and Commercial Rights of 6 October 1948 between Greece and the Lebanon 1948 (art. 32).

32. Many of the more recent conventions contain a most-favoured-nation clause whose scope is restricted to consular privileges and immunities; examples are: the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (art. 5), which mentions prerogatives, immunities, honours and privileges; the Convention of 22 June 1926 between the Albanian Republic and the Kingdom of the Serbs, Croats and Slovenes regarding Establishment and the Consular Service (art. 8, para. 1); the Treaty of Friendship, Commerce and Navigation of 16 July 1926 between Norway and Siam (art. XVII, para. 3); the Treaty concerning Consular Matters, Navigation, Civil and Commercial Rights, and Establishment of 23 September 1926 between Spain and Greece (art. 10, para. 1); the Convention of Commerce and Navigation of 9 February 1927 between Chile and Norway (art. 4, para. 2); the Convention of Commerce and Navigation of 2 March 1927 between Finland and Czechoslovakia (art. 14, para. 2); the Exchange of Notes of 25 April 1947 between the United States of America and Nepal relating to Diplomatic and Consular Representation (art. 2, *in fine*); the Exchange of Notes of 4 May 1946 between the United States of America and Yemen constituting an Agreement relating to Friendship and Commerce (art. II); and the Provisional Agreement of 4 July 1946 between the United States of America and the Philippines concerning Friendly Relations and Diplomatic and Consular Representation (art. III).

5. *Most-favoured-nation clause mentioning a specific immunity*

33. In some cases, the most-favoured-nation clause covers only a specified advantage or immunity. For example, the Consular Convention of 25 April 1958 between the Union of Soviet Socialist Republics and the Federal Republic of Germany, after stipulating that consuls, consular officials and consular employees who are citizens of the sending State enjoy immunity from taxation in respect of the remuneration they receive at the consulate, goes on to provide that the said persons are entitled, in addition to the immunity referred to, and subject to reciprocity, to exemption from taxation to the same extent to which the consular staff of any third State is eligible for such exemption (art. 10, para. 2). The Consular Convention of 28 February 1959 between the Union of Soviet Socialist Republics and Austria contains a similar clause (art.

7, para. 2). The clause in question also covers the wives and minor children of members of the consular staff.

6. *Most-favoured-nation clause mentioning the establishment and location of consulates*

34. In a large number of consular conventions and other international treaties, the scope of the most-favoured-nation clause is restricted to the establishment and location of consulates. The contracting Parties accord to each other the right to appoint consuls in all ports, towns and places open to the consular representatives of any third State. For example, the Treaty of Commerce and Navigation of 30 October 1936 between Chile and Sweden contains the following provision (art. 6, para. 1):

“The Government of each of the two countries may appoint consuls-general, consuls, vice-consuls and other officials or consular agents in all ports, towns and centres of the other country where the right of appointing consular representatives has been granted to any third State.”¹³²

35. Other treaties, after reserving to the contracting Parties the right to designate the places where the establishment of consulates will not be allowed, provide that this right may not be exercised by either of the contracting Parties against the other *unless it is also exercised against all other Powers*.

36. A provision of this kind is to be found in article I of the Agreement of Caracas of 1911, on the functions of the respective consuls in each of the contracting republics.¹³³ A clause relating to the establishment of consulates occurs in the following treaties, among others: the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States and Germany (art. XVII, first para.); the Treaty of 21 August 1924 between Italy and the Kingdom of the Serbs, Croats and Slovenes (art. 10, second para.); the Provisional Commercial Agreement of 4 April 1925 between Germany and the Economic Union of Belgium and Luxembourg (art. 14, para. 1); the Consular Convention of 30 December 1925 between France and Poland (art. 1, para. 1); the Treaty of Commerce and Navigation of 14 May 1926 between Germany and Sweden (art. 22, para. 1); the Treaty of Friendship, Commerce and Navigation of 16 July 1926 between Norway and Siam (art. XVII, para. 1); the Treaty of Commerce and Navigation of 16 July 1926 between the United Kingdom and Greece (art. 22, para. 1); the Commercial Convention of 10 September 1926 between Greece and Sweden (art. 10, para. 1); the Treaty regarding Consular Matters, Navigation, Civil and Commercial Rights, and Establishment, concluded between Spain and Greece on 23 September 1926 (art. 8, para. 1); the Convention of Commerce and Navigation of 9 February 1927 between Chile and Norway (art. 4, para. 1); the Commercial Agreement of 17 August 1927 between France and Germany

¹³¹ League of Nations, *Treaty Series*, vol. XIV, p. 45.

¹³² League of Nations, *Treaty Series*, vol. CLXXXVIII, p. 289.

¹³³ *United Nations Legislative Series*, op. cit., p. 417.

(art. 46, para. 1); the Convention regarding Conditions of Residence and Legal Protection of 1 December 1927 between Greece and Switzerland (art. 12, para. 1); the Commercial Agreement of 14 December 1927 between Finland and Sweden (art. 14, para. 1); the Treaty of Commerce of 9 March 1928 between Colombia and Sweden (art. 3, para. 1); the Consular Convention of 9 June 1928 between Mexico and Panama (art. 1); the Convention of Commerce and Navigation of 22 August 1928 between Denmark and Greece (art. XI, para. 1); the Consular Treaty of 28 May 1929 between Germany and Turkey (art. 2, para. 1); the Treaty of Friendship, Commerce and Navigation of 8 December 1937 between Japan and Siam (art. 25, first para.); the Treaty of Friendship, Commerce and Navigation of 5 November 1937 between Denmark and Siam (art. 20, first para.); the Consular Convention of 7 October 1938 between the United States of America and Liberia (art. I, first para.); the Consular Convention of 14 March 1952 between the United Kingdom and Sweden (art. 3, para. 1); the Consular Convention of 17 April 1953 between the United Kingdom and Greece (art. 3, para. 1); and the Consular Convention of 20 March 1954 between the United Kingdom and Mexico (art. III, para. 1). The Consular Convention of 4 November 1913 between Chile and the Netherlands lays down a similar rule with regard to ports which are open to the trade of all nations.

7. Interpretation of the clause

37. The use of the most-favoured-nation clause in relation to consular intercourse and immunities raises two important questions of interpretation. Firstly, does the most-favoured-nation clause, whether entered into in a separate instrument or incorporated in general form in an international treaty, also apply *ipso facto* to the powers, privileges and immunities of consuls? Secondly, in order that its benefit can be claimed, should the special clause referring expressly to the powers, privileges and immunities of consuls specify some particular consular competence?¹³⁴ These questions can be answered only by reference to the will of the Parties as reflected in the terms of the clause, construed according to their ordinary and natural meaning and taken in their logical context. It has been rightly said that, in law, there is no such thing as a most-favoured-nation clause, but as many separate provisions as there are treaties containing it.¹³⁵ The purpose and scope of the treaty containing the clause will obviously have an important bearing on the interpretation, but there are no ready-made answers to the questions raised above.

SECTION III: IS IT DESIRABLE TO INCLUDE A MOST-FAVOURLED-NATION CLAUSE IN THE DRAFT ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES?

38. Before replying to the question whether it is

desirable to include the most-favoured-nation clause in the draft articles which the Commission is preparing, it is necessary to recall the Commission's decision that the draft should be prepared on the assumption that it would form the basis of a convention.¹³⁶ It must also be remembered that at its fourteenth session the General Assembly of the United Nations decided, by resolution 1450 (XIV) of 7 December 1959, to convoke at Vienna, in the spring of 1961, a conference of plenipotentiaries to consider, on the basis of the draft articles prepared by the Commission,¹³⁷ the question of diplomatic intercourse and immunities and to embody the results of its work in an international convention, together with such additional instruments as might be necessary. There are good reasons for hoping that the same procedure will be adopted in relation to the draft convention on consular intercourse and immunities.

Accordingly, the question whether a most-favoured-nation clause should be included in the draft of a multilateral convention must be discussed.

The above survey of the consular conventions and other treaties governing the status of consuls has shown that not all instruments contain the most-favoured-nation clause, although the use of the clause is very widespread. What is more important, however, is the great diversity of the advantages covered by the clause. This proves decisively that in the matter of consular intercourse and immunities States are not prepared to grant most-favoured-nation treatment of the same scope to all other States and, consequently, that a uniform most-favoured-nation clause would hardly be acceptable to all States. That being so, it would accordingly be more reasonable to leave States free to include whatever clause they consider appropriate in bilateral conventions than to include the clause in a multilateral convention. There is still another reason in favour of this solution. Inasmuch as existing bilateral conventions will not be affected by the multilateral convention being prepared by the Commission (see art. 38 of the draft submitted by the Special Rapporteur), the inclusion of a uniform most-favoured-nation clause in the multilateral convention might create difficulties in practice, for in many cases the clause would necessarily differ from the clause appearing in existing bilateral conventions. Besides, there is much less need for a most-favoured-nation clause in a multilateral convention of world-wide scope, since the multilateral form of the undertakings assumed itself ensures that the advantages granted are general in nature.

Moreover, the solution proposed is in keeping with that adopted in the case of the draft articles on diplomatic intercourse and immunities. Though in some respects they deal with similar questions, those draft articles likewise do not contain a most-favoured-nation clause. For all the reasons explained above, the Special Rapporteur does not propose any most-favoured-nation

¹³⁴ Cf. Suzanne Basdevant, *loc. cit.*, p. 506.

¹³⁵ Anzilotti, *op. cit.*, p. 438.

¹³⁶ Report of the International Law Commission covering the work of its eleventh session, *Official Records of the General Assembly, fourteenth session, Supplement No. 9*, paragraph 37.

¹³⁷ *Ibid.*, thirteenth session, *Supplement No. 9*, chap. III.

clause for inclusion in the draft articles on consular intercourse and immunities.

PART III

Additional articles

Having now obtained the documentary material which was not available to him when he prepared his first report in the autumn of 1956, the Special Rapporteur proposes below a number of additional articles concerning questions not covered by the first report. In drafting these articles, the Special Rapporteur was at pains to bring the draft on consular intercourse and immunities into line, as far as appropriate, with the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session.¹³⁸ The additional articles, numbered provisionally with Roman numerals, will be placed in their appropriate context in the final draft.

Article I

Staff employed in the consulate

Subject to the provisions of articles 8 and 11, the sending State is entitled to employ in its consulate the requisite number of consular officials and employees, whose titles and legal status it shall itself determine.

Commentary

1. This article deals with the staff employed in the consulate, other than the head of consular post, whose appointment is governed by articles 5 *et seq.* of the draft provisional articles on consular intercourse and immunities.¹³⁹

2. The receiving State's obligation to accept the necessary number of consular officials and employees results from the agreement whereby the receiving State consented to the establishment of the consulate. Obviously, the consulate could not function if the consular officials and employees were not admitted to the receiving State. The issue of the exequatur to the head of consular post is not enough for this purpose, for the consul could not discharge his duties without the help of colleagues whose rank and number depend on the importance of the consulate.

Article II

Persons deemed unacceptable

1. The receiving State may, upon being notified of the name of a member of the consular staff (art. IV), inform the sending State that the said person is not acceptable.
2. Were the conduct of a member of the consular staff other than the head of post gives serious grounds for complaint, the receiving State may request the sending State to recall this person or to terminate his functions, as the case may be. The sending State shall then recall the person concerned or terminate his functions, as the case may be.
3. If the sending State refuses to comply with this request or

fails within a reasonable period to fulfil its obligations under paragraph 2, the receiving State may refuse to recognize the person concerned as a member of the consular staff.

Commentary

1. In keeping with practice, the draft articles on consular intercourse and immunities distinguish the following categories of consular staff:

(a) The *head of consular post*, i.e. the person appointed by the sending State to take charge of the consulate;

(b) *Consular officials*, i.e. persons in the consular service who exercise consular functions, and

(c) *Consular employees*, i.e. persons who perform administrative, technical or similar work in a consulate. This category also includes the service staff.

2. Since the procedure for the appointment and recognition of the head of post, and the withdrawal of recognition, is governed by articles 6, 8, 9, 10, 11, 13 and 18 of the draft, this article relates only to members of the consular staff other than the head of post.

3. Persons employed in the service of a consulate are in principle freely chosen by the sending State, which is not obliged to submit their names in advance to the receiving State for approval.

4. The interests of the receiving State are fully safeguarded by the text of Article II, which gives the receiving State every facility for refusing a member of the consular staff or for getting rid of him, if there are serious grounds for considering him unacceptable. Article II covers two possible situations. First, in the case of newly-appointed officials and employees, if the receiving State has any objections to a newly-appointed member of the consular staff, it may, at the time when it is notified of the appointment, inform the sending State that the person in question is not acceptable. In some circumstances, it may do this before the person concerned has arrived in the country to take up his duties. Like the draft articles on diplomatic intercourse and immunities (art. 8), this paragraph is silent on the point whether, in declaring unacceptable a person appointed by the sending State, the receiving State must give reasons for its decision. The absence of any express provision on this point should be interpreted as meaning that the matter is left to the discretion of the receiving State. Secondly, in the case of a member of the staff who is already carrying out his duties in the receiving country, the latter may, if it has serious grounds for complaint, request the sending State to recall the person concerned or to terminate his functions. This last clause is concerned with the case in which the person in question is a national of the receiving State, and with the case in which, though a national of the sending State or of a third State, he was resident in the territory of the receiving State before his appointment.

5. If the sending State refuses to carry out its obligations under paragraphs 1 and 2, or fails to carry them out within a reasonable time, the receiving State

¹³⁸ *Ibid.*, pp. 11-27.

¹³⁹ *Ibid.*, pp. 23 ff.

may refuse to recognize the person concerned as a member of the consular staff. In that case, the person concerned will cease to enjoy consular privileges and immunities except in respect of acts performed up to that time in the discharge of his official duties.

6. Article 8, already adopted by the Commission, imposes a further limitation on the sending State's right to choose freely the staff engaged by its consulate. Under this article, if the sending State wishes to choose consular officials from among the nationals of the receiving State, it may do so only with the express consent of the latter.

7. The expression "not acceptable", used in paragraph 1 of article II, corresponds to the expression *persona non grata* which is customarily used with reference to diplomatic personnel.

Article III

Exemption from obligations in the matter of registration of aliens and residence permits

Subject to reciprocity, members of the consular staff, members of their families and their private staff, if they are not nationals of the receiving State, shall be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits, provided that their names have been notified to the Ministry of Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Commentary

1. The legislation of many countries requires aliens to have their names entered in the register of aliens kept by the police or municipal authorities. Some legislations have introduced a residence permit which any alien has to apply for if he wishes to make a prolonged stay and which constitutes an identity card. To facilitate the exercise of the consular functions, many States exempt the members of the consular staff and members of their families from this obligation. Under the regulations or practice of a large number of countries, the names of such persons are notified to the Ministry of Foreign Affairs, which issues special identity cards to them. This practice is even expressly mentioned in some consular conventions. That being so, it would be excessive to require the persons in question to submit to the general regulations governing the registration of aliens. Since under article IV of the present draft the names of members of the consular staff and of members of their families are to be notified both on their arrival and on their final departure, the persons in question ought to be exempted from the obligations relating to the registration of aliens and residence permits. For this reason a special article has been inserted.

2. The exemption also applies, for reasons of practical convenience, to persons not nationals of the receiving State who are employed in the private service of members of the consular staff.

3. It should be noted that the exemption is subject to reciprocity. Hence, the receiving State will be under no obligation to grant this exemption except to States which

grant the same exemption and to the extent to which they grant it.

4. The exemption does not apply to members of the consular staff and to members of their families who are nationals of the receiving State.

Article IV

Notification of arrival and departure

1. The Ministry of Foreign Affairs, or the authority designated by that Ministry, shall be notified of:

(a) the arrival of members of the consular staff after their appointment to the consulate and of members of their families and of their private staff who are not nationals of the receiving State;

(b) the departure of the persons referred to in the foregoing subparagraph, when they cease to be part of the consular staff or of the families of members of the consular staff.

2. A similar notification shall be given whenever members of the consular staff are engaged (or discharged) locally.

Commentary

The receiving State ought to be advised of the names of the persons on the staff of the consulate and of the members of their families, for, in varying degrees, these persons may claim the benefit of consular privileges and immunities. For this reason, the article makes it compulsory to notify the Ministry of Foreign Affairs or an authority designated by that Ministry of the names of persons newly appointed to the consulate and of persons whose appointment is terminated.

The duty to report the arrival of newly-appointed members of the staff and of members of their families and private staffs, together with the duty to give notice of their final departure, is a counterpart, as it were, to the exemption granted by article III.

Article V

Acquisition of nationality

Members of the consular staff, not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Commentary

1. This article is taken from the draft articles on diplomatic intercourse and immunities, for the purpose of its insertion in the present draft is the same: to prevent the automatic acquisition of the nationality of the receiving State

(a) by a child born, in the territory of the receiving State, of persons who are members of the consular staff but not nationals of the receiving State, where the legislation of the receiving State regarding the acquisition of nationality applies the *jus soli*;

(b) by a woman member of the consular staff who marries a national of the receiving State.

The Rapporteur would have preferred to limit the scope of this article to the case mentioned under (a), but he reproduced the text already adopted by the Commission so as to bring the two drafts into harmony on this point.

2. The article is not intended to deal with the acquisition of nationality by a child born in a *jus soli* State of parents whom only one is a member of the consular staff and a national of the sending State, while the other is a national of the receiving State or of a third State.

Article VI

Members of the consular staff who are nationals of the receiving State

1. A consular official who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of acts performed in the exercise of his functions.

2. Other members of the consular staff who are nationals of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State.

Commentary

1. This article does not cover the case in which the sending State appoints as consul a national of the receiving State who does not receive a regular, fixed salary from the sending State and is authorized to engage in commerce or carry on a gainful occupation in the receiving State. In such cases, the consul is an honorary consul, whose legal status is governed by the provisions of chapter III (art. 35 to 37) of the Special Rapporteur's draft.

2. It is accepted in practice, however, that, even apart from the case mentioned in paragraph 1 above, nationals of the receiving State may be appointed career consular officials in the consulate of a foreign State. Besides, the Commission recognized this practice when it adopted article 8 of the draft on consular intercourse and immunities, which provides that consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

3. But it is chiefly consular employees who are more commonly recruited by many States from among the nationals of the receiving State.

4. Accordingly, it seemed necessary to determine, first, whether and to what extent consular officials who are nationals of the receiving State enjoy consular privileges and immunities. There are cogent arguments against the granting of any privileges and immunities to such consular officials. The practice of States is not uniform and the writings of learned authorities do not offer conclusive guidance. As in the case of diplomatic agents, two extreme opinions may be argued. One is that these officials, even if not nationals of the sending State, should enjoy the same consular privileges and immunities as officials who are nationals of the sending State. The other is that, if they are not nationals of the sending State, consular officials should enjoy only those privileges and immunities which are expressly granted to them by the receiving State.

5. In the light of the Commission's prolonged discussion of a similar problem in connexion with the draft articles on diplomatic intercourse and immunities, the Special Rapporteur proposes an intermediate solution

which gives these consular officials immunity from jurisdiction in respect of acts performed in the exercise of their functions.

6. This solution may be justified on two grounds. In the first place, the official acts of the consulate are acts of the sending State. It may therefore be justly affirmed that in this case the immunity is not the personal immunity of the consular official but an immunity which attaches to the foreign State as such. Since, secondly, the appointment of nationals of the receiving State as consular officials is conditional on that State's consent, it is arguable that its consent implies assent to the official's enjoying the minimum immunity he needs in order to be able to carry out his functions. And this minimum consists precisely of the exemption from the local jurisdiction, both civil and criminal, in respect of acts performed in the discharge of the consular office.

7. Admittedly, this solution does not dispose of all the difficulties; but it has the merit of being in line with the course of the discussion on diplomatic intercourse and immunities and should therefore receive—such at least is the hope of the Special Rapporteur—sufficiently broad support to qualify for inclusion in the draft articles under preparation.

8. A fully satisfactory solution would be to recruit consular officials exclusively from among nationals of the sending State. A fairly large number of States have adopted this practice, which has even found expression in some consular conventions, e.g. the Consular Convention of 4 September 1957 between the USSR and the Romanian Peoples' Republic (art. 2, para. 2).

9. As regards consular employees who are not nationals of the sending State, there is no evidence in the practice of States for the existence of a rule giving them any privileges or immunities whatsoever. They may, however, enjoy such privileges and immunities as are granted to them by the receiving State of its own accord. It seemed useful to express this idea in paragraph 2 of the article.

10. The draft says nothing about the status of members of the families and of the private staff of the persons referred to in this article. The absence of any provision regarding them should be interpreted as meaning that they do not enjoy consular privileges and immunities.

Article VII

Duration of consular privileges and immunities

1. Every person entitled to consular privileges and immunities shall enjoy them from the moment when he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory at the time of his appointment, from the moment when his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

2. When the functions of a person enjoying consular 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 consular staff, immunity shall continue to subsist.

Commentary

1. This article deals with the commencement and termination of consular privileges and immunities. Even though consular privileges and immunities are in some respects much less extensive than those of the members of a diplomatic mission it is nevertheless desirable to specify the dates on which they begin and end. The draft follows the provisions adopted concerning persons entitled to diplomatic privileges and immunities in article 38 of the draft articles on diplomatic privileges and immunities and to a large extent reproduces the text of that article.¹⁴⁰

2. Paragraph 1 deals with two possible situations. The first is the case in which the member of the consular staff arrives in the receiving State after being appointed to a consular post in that State. In this case, it seems right that he should be regarded as entitled to consular privileges and immunities as soon as he enters the territory of the receiving State. He should of course disclose his identity and his status as a member of the consular staff of a consulate situated in the territory of the receiving State. The second case is that of a person who, being already in the territory of the receiving State, is appointed to the staff of a consulate. In this case, he begins to be eligible for consular privileges and immunities as from the time when his appointment is notified to the Ministry of Foreign Affairs. The Ministry may of course designate another authority to which such notifications should be sent. This may be particularly convenient in a federal State.

3. On the subject of the termination of consular privileges and immunities the learned authorities are not in agreement. It seems right to recognize consular privileges and immunities up to the time when the person in question leaves the territory of the receiving State, if he leaves within a period which gives him a reasonable interval in which to prepare his departure or, in other cases, before the expiry of whatever reasonable period is allowed by the receiving State for that purpose.

4. The annoyances which consular officials have often suffered in the past in cases where an armed conflict has broken out between the sending State and the receiving State are a decisive argument in favour of maintaining the words "even in case of armed conflict" in the text of the article.

5. The reason for the immunity from jurisdiction in respect of acts performed by members of the consular staff in the course of their duties is the special immunity which, as explained in the commentary on article IV, attaches to the acts of a foreign sovereign State.

Article VIII

Estates of deceased members of the consular staff or of deceased members of their families

In the event of the death of a member of the consular staff, or of a member of his family, who is not a national of the receiving State, that State shall permit the withdrawal of the movable property of the deceased, with the exception of any property which was acquired in the country and the export of which was prohibited at the time of his death. In such an event, estate, succession or inheritance duties shall be levied only on immovable property situated in the receiving State.

Commentary

This rule, which was adopted with respect to members of a diplomatic mission in the draft articles on diplomatic intercourse and immunities (art. 38, para. 3), is also fully justified in the case of members of the consular staff. Since it is concerned not with consular immunities in general but with a particular event, the Special Rapporteur thought that, at least provisionally, it should form the subject of a separate article.

Article IX

Duties of third States

1. If a consular official 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 the inviolability he enjoys by virtue of these articles and such immunities as may be required to ensure his transit or return.

2. The third State shall accord the same immunities to the members of the family of a consular official as referred to in paragraph 1 above who are accompanying the official or who are travelling separately to join him or to return to their country.

3. In the circumstances specified in paragraph 1, third States shall not hinder the passage of other members of the consular staff and of members of their families through their territories.

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving State.

Commentary

1. In connexion with the rules concerning consular intercourse, the question arises whether a member of the consular staff who is in the territory of a third State, either in transit or for some other reason, may claim the privileges and immunities he enjoys in the receiving State. Since no precise guidance on this point is provided by the practice of States, the Special Rapporteur believed he would be justified in following the provisions of article 39 of the draft articles on diplomatic intercourse and immunities, subject to the adjustments necessitated by the differences between the two institutions.

2. Paragraph 1 relates to consular officials, i.e. any person carrying out consular duties in the receiving State, including the head of post, and lays down the rule that the third State is bound to accord to consular officials in transit the inviolability they enjoy under these articles and any immunities required for the pur-

¹⁴⁰ Document A/3589, p. 25.

pose of their transit or return. Unlike the inviolability enjoyed by the members of a diplomatic mission, the personal inviolability of consular officials under the terms of the proposal contained in part I, section III, of this second report on consular intercourse and immunities is a limited inviolability. Moreover, the scope of this inviolability may vary from one consular convention to another. It was necessary, therefore, to define "inviolability" by a reference to the articles on consular intercourse and immunities which the Commission is preparing. As regards the immunities to be granted to officials in transit, it should be noted that the State of transit is not bound to accord all the immunities for which such officials are eligible under the present articles or under other relevant agreements, but only such immunities as are necessary for the purpose of their transit or return.

3. It should be noted that the third State assumes the obligation in question *vis-à-vis* those States only whose consular officials:

- (a) Are passing through its territory,
- (b) Are in its territory while
 - (i) Proceeding to take up their posts, or
 - (ii) Returning to their posts, or
 - (iii) Returning to their countries.

4. The same immunities should be granted to the members of the families of consular officials who are accompanying the officials concerned or who are travelling separately in order to join them in the receiving country or to return to the sending State. The reasons for which these immunities are granted to consular officials in the third State are also sufficient to justify the grant of the same immunities to the members of their families.

5. Paragraph 3, which corresponds to article 39, paragraph 2, of the draft articles on diplomatic intercourse and immunities, stipulates that the third State should not hinder the transit through its territory of other members of the consular staff and of members of their families. This provision is conducive to smooth consular intercourse, so important to all States.

6. For the sake of the efficiency of the consular service and of the development of consular intercourse between States, official correspondence and other communications should enjoy in third States a freedom and protection equal to those which they enjoy in the receiving State. Paragraph 4 lays down a rule to this effect.

Article X

Duty to respect the laws and regulations of the receiving State

Without prejudice to their consular 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.

Commentary

1. This article lays down the fundamental rule that consuls and any other persons enjoying consular pri-

ileges and immunities must respect the legislation of the receiving State, with the exception of those provisions from the observance of which they are relieved by these articles, by the consular conventions and other relevant agreements. In particular, legislation providing for the rendering of any kind of personal service (service in the militia, personal service in case of public disaster, service as juryman or lay judge, etc.) is not binding on those members of the consular staff who are not nationals of the receiving State. Nor are such persons bound to comply with laws and regulations which manifestly conflict with the recognized principles of general international law (e.g. legislation providing for racial discrimination).

2. While the first sentence of the article expresses a positive duty, the second lays down a negative obligation. It provides that members of the consular staff must not interfere in the domestic affairs of the receiving State. In particular, they must refrain from taking part in political campaigns. Obviously, there is no interference in the domestic affairs of the receiving State if consular officials make representations to the authorities of that State for the purpose of defending the interests of the sending State or of its nationals in conformity with these articles and with other relevant international agreements. Since the Charter of the United Nations prohibits the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations (art. 2, para. 4), consular officials must not resort to the threat or use of force in carrying out their consular functions.

Article XI

Right to leave the territory of the receiving State and facilitation of departure

1. Upon the termination of the functions of persons enjoying consular privileges and immunities, the receiving State shall, save as otherwise provided in the present articles, allow such persons and the members of their families who are not nationals of that State to leave its territory, even in case of armed conflict.

2. The receiving State shall grant the persons referred to in paragraph 1 the necessary time and facilities to enable them to leave its territory for their own country. It must treat those persons with respect and courtesy and protect them until their departure, which shall take place within a reasonable time. If need be, the receiving State must place at their disposal the necessary means of transport.

Commentary

1. In the past, consuls have quite often been prevented from leaving the territory, on the termination of their functions, particularly in the case of armed conflict. Since their right to leave the territory in such a contingency has been questioned even by learned authorities (see, for example, the Harvard Draft, commentary on art. 10, *in fine*, in *Harvard Law Research*, *op. cit.*, p. 527), it seemed indispensable to lay down first of all in paragraph 1 of the article the sending State's right to secure the departure from the receiving State's territory of its nationals who enjoy consular privileges and immunities.

2. Since the members of the consular staff are subject in principle to the jurisdiction of the receiving State, it was necessary to qualify their right to leave by a general proviso concerning the cases in which such persons may be prevented from leaving the territory of the receiving State by reason of their subjection to the local jurisdiction. If, for example, a consular official is serving a sentence imposed upon him by a final judgement he cannot exercise this right. The obligation in question extends not only to the members of the consular staff, but also to those members of their families who are not nationals of the receiving State.

3. Paragraph 2 of this article lays down the duty of the receiving State to allow the persons referred to in paragraph 1 the necessary time for preparing their departure and facilities enabling them to leave the territory of the receiving State for their own country. It also lays down the receiving State's duty to protect such persons until their departure, which should take place within a reasonable time, and to place at their disposal, if need be, the necessary means of transport.

4. The right of consuls to return to their country was recognized in Field's Code of 1876 (art. 180) and in Bluntschli's Code of 1868 (art. 275). The obligation to allow the members of the consular staff and the members of their families to leave the country when a consulate is closed owing to armed conflict or the severance of relations between the sending State and the receiving State, and to grant them the necessary facilities and protection, has been laid down in several recent conventions. See the first Protocol of Signature attached to the Consular Conventions concluded by the United Kingdom with Norway on 22 February 1951, with the United States of America on 6 June 1951, with France on 31 December 1951, with Greece on 17 April 1953 (United Nations, *Treaty Series*, vol. 191, p. 181), with Italy on 1 June 1954, with Sweden on 14 March 1952 (United Nations, *Treaty Series*, vol. 202, p. 235), with Mexico on 20 March 1954 and with the Federal Republic of Germany on 30 June 1956.

Article XII

Protection of premises, archives and interests

If consular relations are broken off between the sending State and the receiving State, or if a consulate is closed temporarily or permanently:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the consulate, together with its property, and the consular archives;

(b) the sending State may entrust the custody of the premises of the consulate, together with its property and archives, to the consulates or diplomatic mission of a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests to the consulates or diplomatic mission of a third State acceptable to the receiving State.

Commentary

1. The draft articles prepared by the Special Rapporteur in his first report contained provisions relating to the termination of consular functions (art. 18) and

to the breaking off of consular relations (art. 19). Accordingly, this draft ought likewise to contain an article specifying the rights and duties of the receiving and sending States in the circumstances described, especially since an analogous provision appears in the draft articles on diplomatic intercourse and immunities (art. 43). The present draft virtually reproduces the text of the said provision concerning the severance of diplomatic relations or the withdrawal of a diplomatic mission. Since, however, a study of the practice of States which have represented the interests of foreign States after the severance of diplomatic and consular relations shows that in the vast majority of cases these States secured the consent of the State in whose territory they were asked to protect foreign interests, the expression *d'un Etat tiers acceptable pour* in the French text is here amended to *d'un Etat tiers accepté par* ("of a third State acceptable to" in both English texts). The consent may be express or tacit. From a practical point of view, it will not make much difference whichever wording is adopted.

2. In the event of the severance of consular relations in consequence of a state of war declared as the result of armed aggression, the aggressor State cannot claim that the provisions contained in this article give it any rights to the respect and protection of the consular premises and archives and to the protection of its interests. For, inasmuch as under the law of nations aggression is an international crime, the aggressor cannot claim any right by reason of his crime, nor can he claim the benefit of international treaties, other than the humanitarian conventions (which by their very nature apply to every armed conflict, whether it was started by an aggression or by international military sanctions ordered in conformity with the Charter of the United Nations).

Article XIII

Non-discrimination

1. In the application of the present rules, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place if the receiving State:

(a) applies one of the present rules restrictively because of a restrictive application of that rule to its consulate in the sending State;

(b) grants subject to reciprocity privileges and immunities in respect of which the condition of reciprocity is expressly provided for in the present articles or in other relevant international agreements.

Commentary

1. Paragraph 1 applies to consular intercourse and immunities the general principle of international law which is inherent in the sovereign equality of States. The fundamental principle having been stated in paragraph 1, paragraph 2 mentions two cases in which inequality of treatment does not constitute a violation of that fundamental principle because the inequality is justified by the principle of reciprocity, which is widely applicable in this sphere, especially as regards fiscal immunities, exemption from customs duties and the

other material advantages granted to members of the consular staff.

2. In the first case, the principle of reciprocity operates with negative effect, in that the receiving State is authorized to apply one of the present rules in a restrictive manner in cases where that rule is so applied to its consulate in the sending State. It should be emphasized that the restrictive application by the sending State must be in keeping with the strict terms of the rule in question; otherwise, there is an infringement of the rule, and the action of the receiving State becomes an act of reprisal.

3. In the second case, the receiving State may, pursuant to the principle of reciprocity, restrict the consular

privileges and immunities which it accords to the members of the consular staff of the sending State, because the latter's practice in this respect is less liberal than its own; or, conversely, it may, pursuant to the same principle, grant to members of the consular staff of the sending State more extensive privileges and immunities than to the staff of other foreign consulates in its territory, because the sending State grants more extensive privileges and immunities to the staff of the receiving State's consulates.

4. The text of the article and of the commentary is largely taken from the text of article 44 of the draft articles on diplomatic intercourse and immunities and the commentary thereon.

DOCUMENT A/CN.4/L.86

Provisional draft articles submitted by Jaroslav Zourek, Special Rapporteur

[Original text : French]

[21 April 1960]

[NOTE : This text, prepared by the Special Rapporteur for the convenience of members of the International Law Commission and to expedite the Commission's work, comprises the articles already adopted by the Commission at its eleventh session, the texts contained in the first report submitted by the Special Rapporteur at the Commission's ninth session (A/CN.4/108, *Yearbook of the International Law Commission*, 1957, vol. II, pp. 71 *et seq.*) and the additional articles contained in the second report which the Special Rapporteur is submitting to the Commission at its twelfth session. The structure of the draft prepared before the adoption by the Commission of the draft articles concerning diplomatic intercourse and immunities has been adapted to bring it into line, wherever this seems justified, with the draft articles concerning diplomatic intercourse and immunities. To that end, also, the wording of certain articles which have not yet been discussed by the Commission has been amended or expanded.]

CHAPTER I

Article 1 (adopted). Definitions

For the purposes of this draft:

(a) The term "consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(b) The expression "consular premises" means any building or part of a building used for the purposes of a consulate;

(c) The expression "consular district" means the area within which the competence of the consulate is exercised in relation to the receiving State;

(d) The term "exequatur" means the final authorization granted by the receiving State to a foreign consul to exercise consular functions on the territory of the receiving State, whatever the form of such authorization;

(e) The expression "consular archives" means official correspondence, documents and other chancery papers, as well as any article of furniture intended for their protection or safe keeping;

(f) The term "consul", except in article 6, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise those functions in conformity with articles 11 or 12 of this draft;

A consul may be:

(i) A "career consul", if he is a government official of the sending State, receiving a salary and not exercising in the receiving State any professional activity other than that arising from his consular function;

(ii) An "honorary consul", if he does not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State.

(g) The expression "head of consular post" means any person appointed by the sending State to take charge of a consulate;

(h) The expression "consular official" means any person, including a head of post, who exercises consular functions in the receiving State and who is not a member of a diplomatic mission;

(i) The expression "consular employee" means any person who performs administrative, technical or similar work in a consulate;

(j) The expression "members of the consular staff" means consular officials and employees;

(k) The expression "private staff" means persons employed in the private service of a consular official.

SECTION I. CONSULAR INTERCOURSE IN GENERAL

Article 2. Establishment of consular relations

Paragraph 1 (adopted)

The establishment of consular relations takes place by mutual consent of the States concerned.

Paragraph 2 (reserved)

The establishment of diplomatic relations includes the establishment of consular relations.

Article 3 (adopted). Establishment of a consulate

1. No consulate may be established on the territory of the receiving State without that State's consent.

2. The seat of the consulate and the consular district shall be determined by mutual agreement between the receiving and sending States.

3. Subsequent changes in the seat of the consulate or in the consular district may not be made by the sending State except with the consent of the receiving State.

4. Save as otherwise agreed, a consul may exercise his functions outside his district only with the consent of the receiving State.

5. The consent of the receiving State is also required if the consul is at the same time to exercise consular functions in another State.

Article 4 (adopted). Consular functions

1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are:

(a) To protect the interests of the nationals of the sending State, and the interests of the sending State itself;

(b) To help and assist nationals of the sending State;

(c) To act as notary and civil registrar, and to exercise other functions of an administrative nature;

(d) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State;

(e) To further trade and promote the development of commercial and cultural relations between the sending State and the receiving State;

(f) To acquaint himself with the economic, commercial and cultural life of his district, to report to the Government of the sending State, and to give information to any interested persons;

2. Subject to the exceptions specially provided for by the present articles or by the relevant agreements in force, a consul in the exercise of his functions may deal only with the local authorities.

Second more detailed variant

1. The task of consuls is to defend, within the limits of their consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant international agreements in force or entrusted to them by the sending State, the exercise of which is compatible with the laws of the receiving State.

2. Without prejudice to the consular functions deriving from the preceding paragraph, consuls may perform the under-mentioned functions:

I. Functions concerning trade and shipping

1. To protect and promote trade between the sending State and the receiving State and to foster the development of economic relations between them;

2. To render all necessary assistance to ships and merchant vessels flying the flag of the sending State;

3. To render all necessary assistance to aircraft registered in the sending State;

4. To render all necessary assistance to vessels owned by the sending State, and particularly its warships, which visit the receiving State;

II. Functions concerning the protection of nationals of the sending State

5. To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the receiving State and under the international customs and conventions in force and to take appropriate steps to obtain redress if these rights have been infringed;

6. 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 persons lacking full capacity who are nationals of the sending State;

7. To represent in all cases connected with succession, without producing a power of attorney, the heirs and legatees, or their successors, in title, who are nationals of the sending State and who are not represented by a special agent; to approach the competent authorities of the receiving State in order to arrange for an inventory of assets or for the winding up of the estate; and, if necessary, to apply to the competent courts to settle disputes and claims concerning the estates of deceased nationals of the sending State;

III. Administrative functions

8. To perform and record acts of civil registration (births, deaths, marriages), without prejudice to the obligation of declarants to make whatever declarations

are necessary in pursuance of the laws of the receiving State ;

9. To solemnize marriages in accordance with the laws of the sending State, where this is not contrary to the laws of the receiving State ;

10. To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by the conventions in force or in any other manner compatible with the laws of the receiving State ;

IV. Notarial functions

11. To receive any statements which nationals of the sending State may have to make, to draw up, attest and receive for safe custody wills and deeds-poll executed by nationals of the sending State and indentures the parties to which are nationals of the sending State or nationals of the sending State and nationals of other States, provided that they do not relate to immovable property situated in the receiving State or to rights *in rem* attaching to such property ;

12. To attest or certify signatures and to stamp, certify or translate documents in any case in which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consul ;

13. To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to the consuls by nationals of the sending State. Transfers of sums of money or other valuables, especially works of art, are governed (in the absence of an international agreement) by the laws and regulations of the receiving State.

V. Other functions

14. To further the cultural interests of the sending State, particularly in science, the arts, the professions and education ;

15. To act as arbitrators or mediators in any disputes submitted to it by nationals of the sending State, where this is not contrary to the laws of the receiving State ;

16. To gather information concerning aspects of economic, commercial and cultural life in the consular district and other aspects of national life in the receiving State and to report thereon to the Government of the sending State or to supply information to interested parties in that State ;

17. A consul may perform additional functions as specified by the sending State, provided that their performance is not prohibited by the laws of the receiving State.

Article 5 (adopted). *Carrying out of consular functions on behalf of a third State*

No consul may carry out consular functions on behalf of a third State without the consent of the receiving State.

Article 6 (adopted). *Classes of heads of consular posts*

Heads of consular posts are divided into four classes, viz :

- (1) Consuls-general ;
- (2) Consuls ;
- (3) Vice-consuls ;
- (4) Consular agents.

Article 7 (adopted). *Acquisition of consular status*

A consul within the meaning of these articles is an official who is appointed by the sending State to one of the four classes enumerated in article 6, and who is recognized in that capacity by the State in whose territory he is to carry out his functions.

Article 8 (adopted). *Competence to appoint and recognize consuls*

1. Competence to appoint consuls, and the manner of its exercise, is governed by the internal law of the sending State.

2. Competence to grant recognition to consuls, and the form of such recognition, is governed by the internal law of the receiving State.

Article 9 (adopted). *Appointment of nationals of the receiving State*

Consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

Article 10 (adopted). *The consular commission*

1. Heads of consular posts shall be furnished by the State appointing them with full powers in the form of a commission or similar instrument, made out for each appointment and showing, as a general rule, the full name of the consul, the consular category and class, the consular district and the seat of the consulate.

2. The State appointing a consul shall communicate the commission through the diplomatic or other appropriate channel to the Government of the State on whose territory the consul is to exercise his functions.

3. If the receiving State so accepts, the commission may be replaced by a notice of the appointment of the consul, addressed by the sending State to the receiving State. In such case the provisions of paragraphs 1 and 2 of this article shall apply *mutatis mutandis*.

Article 11 (adopted). *The exequatur*

Without prejudice to the provisions of articles 12 and 14, heads of consular posts may not enter upon their duties until they have obtained the final recognition of the Government of the State in which they are to exercise them. This recognition is given by means of an *exequatur*.

Article 12 (adopted). *Provisional recognition*

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefits of

the present articles and of the relevant agreements in force.

Article 13 (adopted). Obligation to notify the authorities of the consular district

The Government of the receiving State shall immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions. It shall also ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to admit him to the benefits of the present articles and of the relevant agreements in force.

Article 14 (adopted). Acting head of post

1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, the direction of the consulate shall be temporarily assumed by an acting head of post whose name shall be notified to the competent authorities of the receiving State.

2. The competent authorities shall afford assistance and protection to such acting head of post, and admit him, while in charge of the consular post, to the benefits of the present articles and of the relevant agreements in force on the same basis as the head of the consular post concerned.

Article 15 (adopted). Precedence

1. Consuls shall rank in each class according to the date of the grant of the *exequatur*.

2. If the consul, before obtaining the *exequatur*, was recognized provisionally, his precedence shall be determined according to the date of the grant of the provisional recognition; this precedence shall be maintained even after the granting of the *exequatur*.

3. If two or more consuls obtained the *exequatur* or provisional recognition on the same date, the order of precedence as between them shall be determined according to the dates on which their commissions were presented.

4. Heads of posts have precedence over consular officials not holding such rank.

5. Consular officials in charge of a consulate *ad interim* rank after all heads of posts in the class to which the heads of posts whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of posts.

Article 16 (adopted). Occasional performance of diplomatic acts

In a State where the sending State has no diplomatic mission, a consul may, on an occasional basis, perform such diplomatic acts as the Government of the receiving State permits in the particular circumstances.

Article 17 (adopted). Grant of diplomatic status to consuls

In a State where the sending State has no diplomatic mission, a consul may, with the consent of the receiving State, 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.

Article 18 (adopted). Withdrawal of exequatur

1. Where the conduct of a consul gives serious grounds for complaint, the receiving State may request the sending State to recall him or to terminate his functions, as the case may be.

2. If the sending State refuses, or fails within a reasonable time, to comply with a request made in accordance with the preceding paragraph, the receiving State may withdraw the *exequatur* from the consul.

3. A consul from whom the *exequatur* has been withdrawn may no longer exercise consular functions.

Article 19. Staff employed in the consulate

Subject to the provisions of articles 9 and 20, the sending State is entitled to employ in its consulate the requisite number of consular officials and employees, whose titles and legal status it shall itself determine.

Article 20. Persons deemed unacceptable

1. The receiving State may, upon being notified of the name of a member of the consular staff (article 21), inform the sending State that the said person is not acceptable.

Where the conduct of a member of the consular staff other than the head of post gives serious grounds for complaint, the receiving State may request the sending State to recall this person or to terminate his functions, as the case may be. The sending State shall then recall the person concerned or terminate his functions.

2. If the sending State refuses to comply with this request or fails within a reasonable time to fulfil its obligations under paragraph 1, the receiving State may refuse to recognize the person concerned as a member of the consular staff.

Article 21. Notification of arrival and departure

1. The Ministry of Foreign Affairs, or the authority, designated by that Ministry, shall be notified of:

(a) the arrival of members of the consular staff after their appointment to the consulate and of members of their families and of their private staff;

(b) the departure of persons referred to in the foregoing sub-paragraph, when they cease to be part of the consular staff or of the families of members of the consular staff.

2. A similar notification shall be made in respect of locally recruited members of the consular staff.

SECTION II. CONSULAR PRIVILEGES AND IMMUNITIES

Article 22. Use of the State coat-of-arms

The sending State is entitled to display its coat-of-arms, with an inscription identifying the consulate, on the building occupied by the consulate, and above, or by, the entrance door thereto.

Article 23. Use of the national flag

The receiving State is bound to permit:

(a) the national flag of the sending State to be flown by the consulate on solemn public occasions and on other occasions for which this right is recognized by custom;

(b) heads of consular posts to fly the national flag of the sending State on all means of transport used by them in the exercise of their functions.

SUB-SECTION A

CONSULAR PREMISES AND ARCHIVES

The sending State has the right to procure on the territory of the receiving State, in accordance with the internal law of the latter, the premises necessary for its consulates. The receiving State is bound to facilitate, as far as possible, the procuring of suitable premises for such consulates.

Article 25. Inviolability of consular premises

1. The premises used for the purposes of the consulate shall be inviolable. If the authorities of the receiving State wish to inspect the consular premises, they must first obtain the permission of the head of consular post. Even in that case, however, on no pretext whatever may the said authorities examine, seize or place under seal the files, papers or other documents which are in the consular premises.

2. The buildings and premises used by a consulate, and its equipment, furniture and means of transport, shall be exempt from military requisitioning or billeting.

3. The receiving State must ensure that the inviolability of consular premises is respected. In particular, it is under a special duty to take all appropriate steps to protect the consular premises against any invasion or damage, and to prevent any disturbance of the peace of the consulate or detraction from its dignity.

Article 26. Exemption of consular premises from taxation

The sending State and the head of consular post shall be exempt from all taxes and dues levied by the receiving State or by any of its territorial subdivisions in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

Article 27. Inviolability of the archives and documents

The archives and documents of the consulate shall be inviolable.

SUB-SECTION B. FACILITATION OF THE WORK OF THE CONSULATE, FREEDOM OF COMMUNICATION

Article 28. Facilities

The receiving State shall accord full facilities for the performance of the consular functions.

Article 29. Freedom of communication

The receiving State shall accord and protect free communication on the part of the consulate for all official purposes, in particular with the Government of the sending State, its diplomatic missions and other consulates, wherever situated. To that end, the consulate may employ all appropriate means, including messages in code or cipher.

Article 30. Communication with authorities of the receiving State

The procedure for communication between consuls and the authorities of the receiving State shall be determined by usage or by the laws of that State.

Article 31. Consular fees and exemption of such fees from taxation

1. For official acts performed by its consuls, the sending State is entitled to charge on the territory of the receiving State the fees payable under its national laws.

2. Neither the receiving State nor any of its territorial subdivisions shall levy any tax or similar duty in respect of the consular fees referred to in the preceding paragraph or of the issuance of receipts on payment of such fees.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

Article 32. Duty to accord special protection to consuls

The receiving State is bound to accord special protection to foreign consuls by reason of their status as official representatives of the sending States.

Article 33. Personal inviolability

1. Consular officials who are not nationals of the receiving State and do not engage in commerce or any other gainful occupation shall not be liable to arrest or detention pending trial, except when they are caught *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom.

2. Except in the case specified in paragraph 1 above, the consular officials referred to in that paragraph may not be committed to prison or subjected to any other restriction upon their personal freedom save for the purpose of serving a court sentence, possessing the force of *res judicata*, for an offence punishable by a term of imprisonment of one year or more.

3. In the event of criminal proceedings being instituted against a consular official, that official may in no event be compelled to appear before the court. He may be invited in writing to give his deposition in person. If he refuses to do so, the court shall request him to send his deposition in writing, if the law of the receiving State so permits. Otherwise, the judicial authority shall visit his residence for the purpose of taking his deposition in the form prescribed by the law of the receiving State.

4. In the event of the arrest of, or of criminal proceedings being instituted against, one of the consular

officials referred to in paragraph 1 above, the receiving State shall immediately notify the diplomatic representative of the State to which the consular official belongs.

Article 34. Immunity from jurisdiction

1. Members of the consular staff shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions.

2. Where a member of the consular staff invokes the above immunity before an authority of the receiving State, that authority shall refrain from pronouncing upon the matter, the rule being that all difficulties of this kind must be settled solely through the diplomatic channel.

Article 35. Exemption from obligations in the matter of registration of aliens and residence permits

Subject to reciprocity, members of the consular staff, members of their families and their private staff, if they are not nationals of the receiving State, shall be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits, provided that their names have been notified to the Ministry of Foreign Affairs of the receiving State or to the office designated by that Ministry.

Article 36. Exemption from social security legislation

1. Members of the consular staff and members of their families belonging to their household, if they are not nationals of the receiving State, shall be exempt from the social security legislation in force in that State.

2. The exemption provided for in paragraph 1 shall also apply to the private staff in the sole employ of members of the consular staff, if they are neither nationals of, nor permanently established in, the receiving State.

3. The exemption set forth in paragraphs 1 and 2 above shall not preclude voluntary participation in the social security system in so far as such participation is allowed by the legislation of the receiving State.

Article 37. Exemption from taxation

1. Subject to reciprocity, the receiving State is bound to exempt members of the consular staff and members of their families from payment of all taxes and dues, personal or real, levied by the receiving State or by any of its territorial subdivisions, save:

(a) Indirect taxes incorporated in the price of goods or services;

(b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consular staff on behalf of his Government for the purposes of the consulate;

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of article 44 concerning the estates of deceased members

of the consular staff or of deceased members of their families;

(d) Taxes and dues on income which has its source in the receiving State;

(e) Taxes and dues levied for specific services rendered.

Article 38. Exemption from customs duties

Subject to reciprocity, 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 consulate;

(c) Personal possessions and effects which members of the consular staff and members of their families proceeding to the receiving State bring with them, or have brought in from the sending State within six months [one year] of their arrival in the receiving State.

Article 39. Exemption from personal services

The receiving State shall:

(a) exempt members of the consular staff, members of their families, and members of the private staff who are in the sole employ of members of the consular staff, provided that they are not nationals of the receiving State, from all personal services and from all public service of whatever kind;

(b) exempt the persons referred to in sub-paragraph (a) above, provided that they are not nationals of the receiving State, from material military obligations (requisitioning, taxation or billeting).

Article 40. Attendance as witnesses in courts of law and before the administrative authorities

1. Members of the consular staff are liable to attend as witnesses in the courts and before the administrative authorities.

2. In the case of a consular official or employee who is not a national of the receiving State, the judicial or administrative authority concerned must ask him in writing whether he wishes his oral evidence to be taken at the consulate or at his residence or is prepared to appear in person before the court or administrative authority. A reply to that inquiry must be given immediately in writing.

3. If the evidence of a consular official or employee is to be taken at the consulate or at his residence, the date fixed for the deposition shall be such as to enable it to be taken within the time-limit prescribed by the judicial or administrative authority concerned.

4. Members of the consular staff may decline to give evidence on circumstances connected with the exercise of their functions and to produce correspondence and documents relating thereto, on the grounds of professional or State secrecy. In that event, the judicial or administrative authority shall refrain from taking any coercive measures against the person con-

cerned, the rule being that all difficulties of this kind must be settled solely through the diplomatic channel.

Article 41. Acquisition of nationality

Members of the consular staff who are not nationals of the receiving State, and members of their families belonging to their household, shall not acquire the nationality of that State solely by virtue of its nationality laws.

Article 42. Members of the consular staff who are nationals of the receiving State

1. A consular official who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of acts performed in the exercise of his functions.

2. Other members of the consular staff who are nationals of the receiving State shall enjoy only such privileges and immunities as may be granted to them by the receiving State.

Article 43. Duration of consular privileges and immunities

1. Any person entitled to consular privileges and immunities shall enjoy them from the moment when he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory at the time of his appointment, from the moment when his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

2. When the functions of a person enjoying consular 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 consular staff, immunity shall continue to subsist without limitation as to time.

Article 44. Estates of deceased members of the consular staff or of deceased members of their families

In the event of the death of a member of the consular staff, or of a member of his family, who are not nationals of the receiving State, that 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. In that event, estate, succession or inheritance duties shall be levied only on immovable property situated in the territory of the receiving State.

Article 45. Duties of third States

1. If a consular official 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 the inviolability he enjoys in virtue of the present articles and such immunities as may be required to ensure his transit or return.

2. Third States shall accord the same immunities to the members of the family of the consular officials referred to in paragraph 1 above who accompany such officials or who travel separately to join them or to return to their own country.

3. In the circumstances specified in paragraph 1, third States must not hinder the transit through their territory of other members of the consular staff and members of their families.

4. Third States shall accord correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State itself.

SECTION III. CONDUCT OF THE CONSULATE AND OF THE CONSULAR STAFF TOWARDS THE RECEIVING STATE

Article 46. Duty to respect the laws and regulations of the receiving State

Without prejudice to their consular 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.

Article 47. Jurisdiction of the receiving State

Subject to the privileges and immunities recognized by the present articles and by other relevant agreements, members of the consular staff shall be amenable to the jurisdiction of the State in which they exercise their functions.

Article 48. Obligations of the receiving State in certain special cases

To facilitate the exercise of consular functions, the receiving State shall:

(a) in the case of the death on its territory of a national of the sending State, send a copy of the death certificate to the consulate in whose district the death occurred;

(b) notify immediately the competent consulate of any cases where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State;

(c) when a vessel flying the flag of the sending State is wrecked or runs aground on the coast or in the territorial sea of the receiving State, inform immediately the competent consulate or, failing such consulate, the one nearest to the scene of the occurrence.

SECTION IV. END OF CONSULAR RELATIONS AND IMMUNITIES

Article 49. Termination of consular functions

A consul's functions are terminated by, *inter alia*:

1. His recall by the sending State;
2. His resignation;
3. His death;

4. Withdrawal of his *exequatur* (article 18);
5. Breaking-off of consular relations (article 50).

Article 50. Breaking-off of consular relations

Except where a state of war has arisen in conformity with international law between the sending State and the receiving State, the breaking-off of diplomatic relations shall not automatically entail the breaking-off of consular relations.

Article 51. Right to leave the territory of the receiving State and facilitation of departure

1. Upon the termination of the functions of persons enjoying consular privileges and immunities, the receiving State shall, save as otherwise provided in the present articles, allow such persons, the members of their families and the private staff in their employ, who are not nationals of that State, to leave its territory, even in case of armed conflict.

2. The receiving State shall grant the persons referred to in paragraph 1 above the necessary time and facilities to enable them to leave its territory for their own country. It must treat those persons with respect and courtesy and protect them until their departure, which shall take place within a reasonable time. If need be, the receiving State must place at their disposal the necessary means of transport.

Article 52. Protection of premises, archives and interest

If consular relations are broken off between the sending State and the receiving State, or if a consulate is closed temporarily or permanently:

(a) The receiving State, even in case of armed conflict, shall respect and protect the premises of the consulate, together with its property and archives;

(b) The sending State may entrust the custody of the premises of the consulate, together with its property and archives, to the consulates or diplomatic mission of another State acceptable to the receiving State;

(c) The sending State may entrust the protection of its interests to the consulates or diplomatic mission of a third State acceptable to the receiving State.

SECTION V

Article 53. Non-discrimination

1. In applying the present rules, the receiving State shall not discriminate between States.

2. The following acts by the receiving State shall not, however, be deemed discriminatory:

(a) the restrictive application of one of the present rules by reason of the fact that the same rule is applied restrictively to its consulate in the sending State;

(b) the granting subject to reciprocity of privileges and immunities in respect of which the condition of reciprocity is expressly provided for in the present articles or in other relevant international agreements.

CHAPTER II

PRIVILEGES AND IMMUNITIES OF HONORARY CONSULS AND OFFICIALS ASSIMILATED TO HONORARY CONSULS

Article 54. Honorary consuls

For the purposes of the present articles the term "honorary consul" shall mean a consul (article 5), whether a national of the sending State or not, who does not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State.

Article 55. Powers of honorary consuls

1. The powers of honorary consuls shall be determined by the sending State in accordance with international law.

2. The sending State shall inform the Government of the receiving State through the diplomatic or some other appropriate channel of the extent of the powers conferred upon the consuls in question.

Article 56. Legal status of honorary consuls

1. Honorary consuls shall enjoy the consular privileges and immunities set forth in articles 22, 23 (a), 28, 29, 30, 31, 34 and 38 (a).

2. The official correspondence, official documents and papers, and consular archives of honorary consuls 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 honorary consuls may be engaged.

3. Honorary consuls 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.

Article 57. Precedence of honorary consuls

Honorary consuls shall rank in each class after career consuls in the order and according to the rules laid down in article 15.

Article 58. Officials assimilated to honorary consuls

The provisions of this chapter shall also apply *mutatis mutandis* to consular officials who, although officials of the sending State receiving a regular salary, are authorized by the laws of that State to engage in commerce or other gainful occupation in the receiving State.

CHAPTER III

GENERAL PROVISIONS

Article 59. Relationship between the present articles and previous conventions

1. The provisions contained in the present articles shall in no way affect conventions previously concluded between the Contracting Parties and still in force

between them. Where conventions regulating consular intercourse and immunities between the Contracting Parties already exist, these articles shall apply solely to questions not governed by the previous conventions.

2. Acceptance of the present articles shall be no impediment to the conclusion in the future of bilateral conventions concerning consular intercourse and immunities.

Article 60. Complete or partial acceptance

1. Ratifications of and accessions to the present articles may relate :

(a) Either to all the articles (chapters I, II, III and IV) ;

(b) Or only to the provisions concerning consular intercourse in general and the privileges and immunities of career consuls (chapter I) and to chapters III and IV.

2. The Contracting Parties may benefit by the ratifications or accessions of other Contracting Parties only in so far as they have themselves assumed the same obligations.

CHAPTER IV

FINAL CLAUSES

The final clauses will be formulated at a later stage of the work.

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/125

International responsibility. Fifth 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—
MEASURES AFFECTING ACQUIRED RIGHTS (*continued*) AND CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY

[Original text : Spanish]

[9 February 1960]

CONTENTS

	<i>Page</i>
INTRODUCTION	42
A. Measures affecting acquired rights	
I. EXTRATERRITORIAL EFFECTS OF MEASURES AFFECTING ACQUIRED RIGHTS	
35. Rights acquired under a foreign law	42
36. Validity of measures affecting acquired rights	43
37. Circumstances in which measures have extraterritorial effect	44
(a) Property situated in the State	44
(b) Property situated in a third State	45
38. Some observations concerning these requirements	47
II. SYSTEMS FOR SETTLEMENT OF DISPUTES	
39. Settlement between the States concerned	49
(a) Diplomatic settlement (direct negotiation)	50
(b) Claims commissions and arbitration clauses	50
40. Direct settlement between the State and the private individual	51
(a) The system of treaties under which powers are vested in private individuals	51
(b) The system of arbitration clauses contained in contracts between States and private individuals	51
(c) Proposals relating to such systems of direct settlement	54
41. Some observations concerning these systems of settlement	56
B. Constituent elements of international responsibility	
I. HOW INTERNATIONAL RESPONSIBILITY ARISES	
1. The prevailing view: responsibility arises out of the non-performance of an international "obligation"	57
2. The doctrine of "abuse of rights": opinions of authors	58
3. Recognition and application of the doctrine in practice	59
4. When "abuse of rights" gives rise to international responsibility	60
II. THE BASIS OF INTERNATIONAL RESPONSIBILITY	
5. Opinions of authors on this question	60
6. The position in international jurisprudence	62
7. Consideration of the problem from the standpoint of codification	63
8. Special situation created by technical developments	64
C. Amendments and additions to the draft	
1. Constituent elements of international responsibility (article 1 of the draft)	65
(a) Nature of the acts and omissions giving rise to international responsibility	65
(b) The basis of imputation	66
2. Measures affecting acquired rights (chapter IV of the draft)	67
(a) Measures giving rise to international responsibility	67
(b) Extraterritorial effect of such measures	67
(c) Systems for the settlement of disputes	67

Introduction

1. In the introduction to his fourth report (A/CN.4/119)¹ the Special Rapporteur indicated that he had been unable because of lack of time to deal with other aspects and matters of relevance to measures affecting acquired rights, in particular the extraterritorial effects of such measures and the methods and procedures applicable to the settlement of international disputes arising in consequence of them. The present report is largely concerned with these matters.

2. Part B of the report deals with the constituent elements of international responsibility. During the brief discussion at the previous session and on various other occasions, members of the Commission raised the question of the imputability of acts or omissions, in particular whether fault or some other subjective element is required. The Special Rapporteur has hitherto preferred to avoid raising this question, which is in his view chiefly academic and largely resolved in international case-law. A brief discussion of the matter is, however, included in the present report in the hope that it will be of value if the point is raised again. Another subject which, in the Special Rapporteur's opinion, deserves particular attention in connexion with the constituent elements of international responsibility is the applicability of the "doctrine of abuse of rights". In his first three reports,² the Special Rapporteur, following the prevailing view in the matter, discussed international responsibility as arising solely in consequence of "the non-performance of an international obligation". On further review, it became clear, however, that acceptance of the principle which prohibits the abusive exercise of rights by the State would strengthen the notion of international responsibility in the draft to be prepared by the Commission.

3. As in the previous report, certain conclusions are reached which point to the need for revision of the relevant portions of the preliminary draft submitted to the Commission. The suggested amendments and additions to the original preliminary draft are set out in the last part of the report.

A. MEASURES AFFECTING ACQUIRED RIGHTS

I. Extraterritorial effects of measures affecting acquired rights

4. The question of the extraterritorial validity of the law is, in general, studied as part of the subject usually known as "private international law" or conflict of laws. The phrase "in general" is used advisedly because the subject as a whole is normally considered an integral

part of municipal law, although from a strictly legal viewpoint the basic principles governing it are international in nature and are therefore necessarily principles of *public* international law. This aspect of the question, which continues to be debated by the proponents of nationalist and internationalist theories,³ need not detain us, since we are concerned in this section to determine the extraterritorial effect of measures involving expropriation, nationalization or confiscation, the latter being the type of act most frequently encountered in practice in this context.

5. It may be useful first to consider briefly the "doctrine of acquired rights" in private international law. It should be pointed out that the approach is, of course, different from that taken in the study of this doctrine in the fourth report (principle of respect of acquired rights); in the present context we are concerned with the international validity of rights acquired "under foreign laws" or, more specifically, of rights acquired by a State (or its assignees) as a consequence of measures taken by it with respect to the property of private persons, whether national or alien. As will be seen below, the case or situation considered is basically, if not exclusively, that of the individual as holder of the right and that of rights acquired under legislation in force in any country or under rulings of its courts.

35. RIGHTS ACQUIRED UNDER A FOREIGN LAW

6. The "doctrine of acquired rights" occupies a special place in private international law, particularly in the writings of scholars. However, whereas in intertemporal or transitional law its application affects only the temporal validity of legislation, in private international law it has been applied in various ways.⁴ One of the earliest of these is, in fact, simply a derivation of the theory of non-retroactivity of law. Varennes-Sommières, for instance, held that, if a person who had committed certain acts in the territory of one State moved to the territory of a third State, he was in the same position as a person to whom two laws were successively applied in a single State, the second law being at variance with the first. By analogy with the principle of non-retroactivity, the law of the third State should respect the rights acquired by the person concerned under the law of the first State.⁵

7. On the basis of certain ideas expressed by the Dutch authors, notably Ulrich Huber, a group of Anglo-American jurists developed a new theory of conflict of laws entirely based on the doctrine of acquired rights. In the opinion of Dicey, their principal spokesman, any

¹ *Yearbook of the International Law Commission*, 1959, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II).

² *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96; *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), document A/CN.4/106; and *Yearbook of the International Law Commission*, 1958, vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), document A/CN.4/111.

³ See García Amador, *Introducción al Estudio del Derecho Internacional Contemporáneo* (Madrid, 1959), pp. 80-85.

⁴ With regard to the precursors of the modern doctrines, particularly among the Dutch authors of the seventeenth century, see Arminjon, "La notion des droits acquis en droit international privé", *Recueil des cours de l'Académie de droit international* (1933-II), vol. 44, pp. 8 et seq.

⁵ *Synthèse du droit international privé*, vol. I, Nos. 40-41. See also by the same author, "La quintessence du droit international privé", *Journal Clunet* (1900), pp. 5 and 58.

right duly acquired under the law of a civilized country is recognized and, in general, sanctioned by English courts.⁶ This theory was subsequently accepted by other writers, some of whom developed it considerably. One of these was Beale in the United States. In his explanation and reaffirmation of the territoriality of law, as reporter for the American Law Institute's *Restatement of Conflict of Laws*, he considers every right to be created by a given law, by which law alone it can be changed. If it is not so modified, the right must be recognized everywhere, such recognition being merely recognition of the existence of a fact.⁷ The conception of the conflict of laws as a system of rules applicable to the recognition and enforcement of foreign acquired rights has gained some acceptance in Anglo-American case-law, although it has been severely criticized by some publicists.⁸

8. The French approach differs from the Anglo-American in that it does not reduce the entire problem of the conflict of laws to the extraterritorial recognition and enforcement of acquired rights. Pillet, its first exponent, held that private international law is essentially concerned with the legal status of aliens and the solution of conflicts of laws in space and, subsidiarily, with the principle of international respect of acquired rights.⁹ This conception has been developed by various authors, notably by Niboyet. The latter considers that conflict of laws is concerned solely with determination of the law which is competent to "create" a right, but that this is not sufficient to ensure that the right will be effective internationally; the principle of international respect for acquired rights is absolutely necessary if laws are to have full effect everywhere.¹⁰ This view appears to have been reflected in the Inter-American Convention on Private International Law ("Bustamante Code"), article 8 of which provides explicitly that "the rights acquired under the rules of this Code shall have full extraterritorial force in the contracting States, except when any of their effects or consequences is in conflict with a rule of an international public order".¹¹

9. In private international law recognition of rights acquired under foreign laws involves another problem to which attention should be drawn. Problems of intertemporal or transitory law may arise in connexion with the "temporal" aspect of the application of the rules of conflict, i.e. in connexion with the retroactivity or non-retroactivity of rules of private international law. Attempts have been made to solve these problems by

applying the principle of retroactivity, modifying it where the juridical relationship had any contact with the *forum* while the former rule of conflict still applied; by employing the entirely opposite principle of non-retroactivity, or by applying the general principles and criteria governing questions of transitory law in the State in which the change in the rule of conflict occurs. Whatever the criterion applied, the substantive problem is to determine the effect of the new rule of private international law on rights acquired under the old.

36. VALIDITY OF MEASURES AFFECTING ACQUIRED RIGHTS

10. It will be seen that in private international law the "doctrine of acquired rights" is applicable in connexion with only some aspects of the problems raised by the extraterritorial validity of measures of confiscation, expropriation or nationalization. As will be seen below, the same is true of other notions, concepts or principles of private international law. The reason is not far to seek; the problems are not the same as those commonly dealt with by private international law. It follows that, in order to deal with the other aspects of the matter and to define the boundaries of the validity of such measures, further criteria must be invoked, and if these cannot be provided by private international law, they will be found in legal principles of another character.

11. Thus, in accordance with universally accepted principles, national courts apply foreign laws and recognize and enforce judgements or judicial decisions made by foreign courts, since the validity of municipal law is not exclusively circumscribed to the territory of the State concerned. Municipal law may in fact have extraterritorial effect. When and in what circumstances may a law of one country be relied upon in another? In more specific terms, when and in what circumstances may measures affecting patrimonial rights taken in one country be relied upon in another? What is the territorial validity of the laws governing private property?

12. Even the legal systems most heavily influenced by territorialist doctrines do not entirely exclude the application of foreign laws in property matters. Under the Anglo-American system whose territorialism is particularly marked, a distinction is still made between movable and immovable property and the former is not always subject to the *lex rei sitae*. Although the Code of Private International Law or "Bustamante Code" states that "All property of whatever description, is subject to the law of the place where it is situated" (article 105), it nevertheless provides that successions, both intestate and testamentary, shall be governed "... by the personal law of the person from whom the rights are derived, whatever may be the nature of the estate and the place where it is found" (article 144). Many further examples could be quoted, but these suffice to show that the law may have extraterritorial effects in property matters in certain cases. These cases and the conditions and circumstances in which laws or measures affecting patrimonial rights may have extraterritorial effect have in the past been determined

⁶ *A Digest of the Laws of England with reference to the Conflict of Law*, Introduction.

⁷ *Summary of the Conflict of Laws*, No. 47.

⁸ See, in this connexion, Arminjon, *loc. cit.*, pp. 29 *et seq.*; Nussbaum, *Principles of Private International Law*; Cheshire, *Private International Law* (3rd ed., 1947), pp. 46 and 52.

⁹ *Principes de droit international privé* (1903), p. 495.

¹⁰ *Manuel de droit international privé* (2nd ed., 1928), p. 429. See also, by the same author, *Cours de droit international privé français* (2nd ed., 1949), pp. 4 *et seq.*

¹¹ See *International Conferences of American States 1889-1928* (Carnegie Endowment for International Peace), p. 327. On the application of the theory of acquired rights in the Bustamante doctrine, see Bustamante, *Derecho Internacional Privado* (1934), vol. I, pp. 158, 169 and 394.

by reference to the rules and principles of private international law. The question that must be considered is whether these rules and principles can suffice to restore the specific problems that arise when it is necessary to determine the territorial validity of laws providing for the expropriation or confiscation of property which is situated in a third State or has been transferred to such State following the taking of such measures? In spite of the evident similarities which are found on examining judicial practice in this field, serious doubts must exist and the matter has been discussed by a number of authors.

13. Van Hecke, for example, finds no difficulty in setting aside the general rules of private international law when determining the territorial reach of confiscatory measures, as he considers that the question at stake is not the determination of the law applicable to private relations, but rather the determination of the sovereign power of the State. He points out that penal, revenue and political laws are outside the province of private international law because they are manifestations of State sovereignty and, as such, are part of public law.¹² Adriaanse, on the other hand, although he considers that determination of the extraterritorial effects of measures of confiscation, is in the domain of private international law, admits that the importance of State interference in such matters cannot be ignored in considering the rules of conflict to be applied.¹³ In another connexion, Hjerter wrote recently that if problems raised by foreign confiscations were solved in accordance with the normal or ordinary rules of private international law, it would be sufficient to apply the *lex rei sitae*. However, since this is not appropriate for various reasons and it is not the judicial practice, it is more appropriate to think in terms of the "law of confiscation" or of the "law of contract" in the case of measures affecting debts, in order that the court may decide the case in accordance with other factors which cannot be ignored.¹⁴

14. As will be seen in the next two sections, the problems involved in the extraterritorial validity of measures of confiscation or nationalization cannot be properly solved without resort to legal concepts and principles which do not always coincide with those of private international law. In view of the nature of systems of private international law, it is unlikely that decisions would be uniform and courts would perforce act with a strong localist bias in examining and resolving questions which, notwithstanding the form in which they are brought before the national courts concerned, involve clearly international substantive issues. It should be noted also that the reason for raising the question of the extraterritorial effects of a measure of confiscation or expropriation is that property situated abroad is considered an integral part of the assets affected

by the measure. In these circumstances, the principle of territoriality must be conceived in a way different from that in which it has traditionally been conceived and applied. The position is similar with regard to other concepts taken over from national systems of private international law.

37. CIRCUMSTANCES IN WHICH MEASURES HAVE EXTRATERRITORIAL EFFECT

15. In examining the conditions or requirements that must be fulfilled for a measure of confiscation or expropriation to have extraterritorial effect it is necessary to classify the various cases and situations found in practice. A first distinction must be made between cases in which the property is situated in the State taking the measure and those in which the property is situated in a third State when the measure is taken. In the first case, the State is required merely to decide on the validity of the acquisition of the property, whereas in the second it must also make the title effective in respect of property situated within its territory. This distinction is reflected in the two parts into which this section is divided. Other distinctions or classifications may be made, of which one is of particular importance: that between measures of confiscation in the strict sense and measures of expropriation or nationalization accompanied by compensation. As will be seen below, the courts have dealt more frequently with cases of the first type than with those of the second.

(a) Property situated in the State

16. We are here concerned with cases resulting from the transfer to a third State of property which was situated in the territory of the State taking the action at the time when the action was taken. The cases of this type found in practice may be divided into the following categories: (a) cases in which the property is transferred to a third State by the acquiring State or by an assignee or new owner, and the former owner takes action in the local courts to recover the property (this in the most frequent case); and (b) cases in which the acquiring State (or an assignee or new owner) loses possession of the property and attempts to recover it in the courts of the State in which it is situated. The principle which appears to have been accepted by national courts in deciding such cases is that measures affecting property situated in the territory of the State, regardless of their nature (expropriation or confiscation), the nature of the property or the nationality of the former owners, must be "recognized" in other States. In other words, such measures have extraterritorial effect.

17. The courts have based their decisions on one or occasionally both of two principles: the principle of the immunity of foreign States ("Acts of State" doctrine) and the principle of territoriality (of laws governing property). The first of these principles, which has been invoked most frequently, is embodied in the decision of the United States Supreme Court in *Underhill v. Hernandez* (1897): "Every sovereign State is bound to respect the independency of every

¹² "Confiscation, Expropriation and the Conflict of Laws", *International Law Quarterly* (1951), vol. 4, pp. 349 and 354.

¹³ Adriaanse, *Confiscation in Private International Law* (1956), pp. 10 and 11.

¹⁴ "The General Approach to Foreign Confiscations", *Scandinavian Studies in Law* (1958), pp. 200-202.

other sovereign State, and the courts of one country will not sit in judgement on the acts of the Government of another done within its own territory." In a later case (*Oetjen v. Central Leather Co.*, 1909), the Court reaffirmed that action of a foreign Government "is not subject to re-examination and modification by the courts of this country". The decisions of English courts, although based on the same principle, differ in that they require recognition of the Government whose laws or acts are involved, as was shown in *Luther v. Sagor* (1921). In this case the confiscation was held invalid owing to the fact that the Soviet Government had not been recognized, although the validity of the confiscation was subsequently recognized with retroactive effect. Another decision of the same nature was that given in *Princess Paley Olga v. Weisz* (1929). The principle of the immunity of the State, whether or not coupled with the requirement of recognition, has been reaffirmed by innumerable court decisions in other countries.¹⁵

15. National courts have also recognized that confiscations may have extraterritorial effects through application of the *lex rei sitae*. This is the basis of certain German decisions.¹⁶ These and various Austrian and Belgian decisions are based on the principle that the territoriality of the laws governing property requires that title acquired under those laws to property situated in the enacting State should be recognized as valid in any other State.¹⁷ In *Luther v. Sagor* this principle was invoked together with the principle of the immunity of the State. However, as will be seen below, the principle of territoriality has chiefly been applied by the courts in determining the validity of confiscations of property situated outside the State.

19. In contrast to the many decisions recognizing the extraterritorial effects of confiscations in the case under consideration, some decisions have refused to recognize the extraterritorial effect of such measures on the ground that the measure was contrary to public policy or international law, quite apart from the fact of recognition or non-recognition of the confiscating Government, to which reference was made earlier. The first of these grounds—public policy—appears mainly in French decisions relating to Soviet confiscations. In the *Ropit* case (1925), for example, the court held that the Soviet legal provisions were of a political and social nature that conflicted with French law which was based on respect for private property.¹⁸ As regards the second of the grounds mentioned, the Supreme Court of Aden recently held that the Iranian Nationalization Act had no extraterritorial effect; the Act, being of a confiscatory nature, was illegal from an international point of view and could not be recognized as valid in other countries (case of the *Rose Mary*, 1953). The Court distinguished the case from the earlier

English cases (*Luther v. Sagor* and *Princess Olga v. Weisz*) pointing out that the case involved subjects of the country of the *forum*, not nationals of the confiscating State. In this connexion it has been pointed out that the Aden Court disregarded the fact that the English courts had not refused to recognize confiscations of credits situated in Russia even when the creditor was a British subject; similarly United States courts had not refused to recognize certain Mexican acts even when the persons affected had the nationality of the *forum* and the acts themselves were held inconsistent with international law.¹⁹ Subsequent decisions of Italian and Japanese courts on similar claims concerning the extraterritorial effects of Iranian nationalization reaffirmed the principle of recognition of such effects, the latter not being considered contrary to public policy.²⁰

20. Finally, with regard to measures other than measures of confiscation, *stricto sensu*, such as expropriations or nationalizations in which compensation has been provided but is not deemed adequate, the situation cannot and should not present any difficulty. Since such measures are wholly consistent with international law and should not be contrary to local public policy, their extraterritorial effect might necessarily be recognized. However, the distinction between these two categories of measures (confiscation *stricto sensu* and expropriation or nationalization with compensation) is, to the extent that it can be made in practice, of great importance when the measure affects property which was not situated in the territory of the State when the measure was taken.

(b) Property situated in a third State

21. This sub-section differs from the preceding one in that it deals with cases in which the property intended to be affected by the measure was situated in a third State when the measure was taken. Owing to this fact—the *situs* of the property—and others which will be indicated in due course, the principle followed by national courts is, except in certain special cases or situations, that measures taken by a State to affect property situated in a third State are not, if of a confiscatory nature, "enforceable" (or recognized) in the place in which the property is situated, regardless of the nationality of the owners or the nature of the property. In other words, such measures are without extraterritorial effect. In the case of measures of expropriation this principle is applied less strictly, as will be seen below.

22. Judicial decisions in this matter are based on two principles, which are frequently invoked simul-

¹⁵ See Adriaanse, *op. cit.*, pp. 64–75.

¹⁶ *Ibid.*, pp. 75 and 76.

¹⁷ See Seidl-Hohenveldt, "Extraterritorial Effects of Confiscations and Expropriations", *Michigan Law Review* (1951), vol. 49, p. 859.

¹⁸ See this and other French, Italian and German decisions in Adriaanse, *op. cit.*, pp. 62 and 63.

¹⁹ Seidl-Hohenveldt, "Recognition of Nationalizations by Other Countries", *International Bar Association, Fifth Conference* (Monaco, 1954), pp. 35–36. For the legal, political and commercial reasons advanced for recognizing the extraterritorial validity of such confiscations, even with respect to nationals of the *forum*, see the article by the same author referred to in footnote 17, p. 861.

²⁰ See D. P. O'Connell, "A Critique of the Iranian Oil Litigation", *International and Comparative Law Quarterly* (1955), vol. 4, pp. 280 *et seq.*

taneously, the principle of public policy and the principle of the territoriality of laws governing property. The latter principle is applied in a dual sense which is explained below. Other factors which have been taken into account on occasion are the territorialist intent or purpose of the measure, although these factors appear not to have constituted the basis of the court's decision. The position is similar with regard to non-recognition of the Government taking the measures, in cases or decisions in which this factor was taken into account in denying the extraterritorial validity of a confiscation.

23. Public policy appears to be the principle most frequently applied by national courts, taking into account the frequency of explicit or implicit references to it in judicial decisions based primarily on the principle of territoriality. Following the *Ropit* case, which was mentioned earlier, many subsequent decisions have been based on, or have taken into account, the fact that the measure in question was inconsistent with the principles of private property. *Bessel c. Société des auteurs*, etc. (1931) and other French decisions are implicitly based upon the principle of public policy, and in others, such as the decision of the Cour d'Appel of Paris in *Crédit National Industriel c. Crédit Lyonnais* (1926), the principle is expressly mentioned. In one of the Belgian decisions relating to Nazi anti-Jewish measures, the court stated that the measure in question "... in fact, authorized expropriation without prior compensation and therefore conflicted with the Belgian principle of international order". Similar decisions were given in Germany and Switzerland in regard to the confiscation of the property of the Carthusian Congregation; also in Switzerland in the case of *Banque internationale de commerce de Péetrograd c. Hausner* (1924). Several similar decisions in the United States were given in cases concerning the Russian confiscations. To this group may be added the decisions of courts in other countries based on the maxim *odiosa sunt restringenda*, as for example the decision of the court of Buenos Aires in *Lecouturier v. Rey* (1905).²¹

24. The principle of the territoriality of the law has not always been expressed in the same way in the decisions, the reason being that, in each case, due regard has to be paid to the particular nature of the measure in question. Thus, for example, one set of decisions is concerned with laws on police and security matters, the scope and validity of which is confined to the territory of the State which enacted them. Another set deals with criminal laws, which have been held to be similarly limited in scope; this was the view taken, for instance, in the English and Italian judgements relating to the confiscation of the property of ex-King Alfonso. Lastly, there is a further set of decisions, including some given in the Netherlands and in Switzerland, which deal with the political character of the measures whose application was being considered. Decisions in which it was held that a measure could not be applied on the ground that it had never been intended or designed to be applied *extra territorium* should also be included

among those which rely on the principle of territoriality.²²

25. Consideration should now be given to the exceptional cases or circumstances referred to above. As nearly all the authorities rightly point out, the decisions in question were given for special reasons. Often, although not always, the "special reasons" were a treaty which specifically provided for the extraterritorial enforcement of the law in question. In fact, some court decisions in the Netherlands, Italy, Tunis and Georgia (prior to its incorporation in the Soviet Union), recognized that confiscatory measures had extraterritorial effect.²³ The other judgements, however, were based on treaty stipulations. The practice began with the treaties signed by the Soviet Union with a number of East European countries shortly after the end of the First World War. Under these treaties, property belonging to Russian nationals was transferred to the State in whose territory the property was situated, the object being that, once the transfer had been completed, the steps contemplated in each of these treaties could be taken as between States. What made the practice famous, however, was the so-called Litvinov Assignment, which took the form of an exchange of letters with the United States, dated 26 November 1933, whereby the Federal Government was recognized as the successor to the property of companies nationalized by the USSR. In the well known *Pink* case (1942), the Supreme Court held "that the right to the funds of property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors".²⁴ When one considers these cases, the most noteworthy feature is in some respects not so much the extraterritorial recognition or execution of confiscatory measures relating to property situated in a third State as the surrender and transfer of the property to that third State by the confiscating State. The extraterritorial recognition and execution of the measure did of course take place, but rather as a preliminary step which was necessary before the surrender and transfer of the property could be effected.

26. Where it is not a matter of confiscation *stricto sensu*, nor of measures which may be said to partake of that nature, the question of recognition and execution does not arise in the same way. For, even though a strict interpretation of the principle of territoriality would lead to the same conclusions, there is a difference with regard to the doctrine of public policy since the taking of private property for a public purpose, against payment of compensation, is a universally recognized right of the State. Nevertheless, as has been rightly pointed out, until comparatively recently it was

²² *Ibid.*, pp. 84-88.

²³ *Ibid.*, p. 89. Consequently, contrary to what certain authorities have maintained (e.g., Seidl-Hohenveldten, *loc. cit.*, p. 853, note 6), it is not correct that the sole legal basis for such exceptions is the existence of a treaty between the two countries concerned.

²⁴ Cf. Adriaanse, *op. cit.*, pp. 90-96.

²¹ See Adriaanse, *op. cit.*, pp. 81-84 and 86-87.

considered in most States that the enforcement of foreign expropriations of domestic assets was just as incompatible with their sovereignty as the enforcement of confiscations. Yet, during the Spanish Civil War, France tolerated the requisitioning of Spanish vessels which, though begun on the high seas, had been completed in French ports. During the Second World War, courts in the United Kingdom and the United States recognized decrees of the Norwegian and Netherlands Governments in exile, whereby those Governments acquired property belonging to their respective nationals which was situated in foreign territory. The best known cases belonging to this period are *Lorentzen v. Lydden* (1942) and *Anderson v. Transandine, etc.* (1941), together with the decision of the Supreme Court of Sweden in the *Rigmor* case (1941), particularly if the neutral status of the country in which that judgement was given is borne in mind. In it, the Court held that a Norwegian decree transferring the ownership of a Norwegian tanker did not depart from the principles of Swedish law. After the war, the Austrian Supreme Court and English and Canadian courts declared their readiness to grant foreign expropriations effect on domestic assets provided that the indemnity was found to be just.²⁵

27. Although practical instances of it have not yet come to their notice, some authors have drawn attention to the problem which would arise as the result of a lump-sum agreement between the expropriating State and the State of nationality of the person concerned, if some of the property affected by the expropriation or nationalization was to be found in the territory of the latter State. According to Seidl-Hohenveldten, the terms of such agreements do not have any effect on assets situated in the State of nationality. Since the sum agreed on as compensation does not presuppose an "adequate" indemnity, there can be no question of considering such assets as having passed into the ownership of the other State by virtue of expropriation.²⁶ Van Hecke considers the matter from another angle. In his view, the courts of the State of nationality would be free to ascertain whether the lump sum was an adequate compensation and, if it was found not to be, to consider the measures confiscatory and contrary to public policy. Even though the agreement, as is usually the case with such instruments, includes a final renunciation by the claimants, the courts would still be free to ascertain whether their consent had not been given under duress.²⁷ With regard to this question, it must above all be borne in mind that in the circumstances here envisaged, in contrast with the previous cases, the persons in question are nationals of the State of the *forum* and, where their interests are concerned, the courts will necessarily have to conform more strictly to the public policy followed in that country. But, apart from this consideration, which is more or less of a practical nature, the situation must be considered in the light of the practice which has received

conventional endorsement in the lump-sum agreements. If, as was stated in the fourth report²⁸ nationalization need not necessarily be accompanied by the payment of "adequate, prompt and effective" compensation, why should it be supposed that the courts would examine and adjudicate the question on the basis of criteria applicable to expropriations of the ordinary and common type?

38. SOME OBSERVATIONS CONCERNING THESE REQUIREMENTS

28. In the first place, attention should be drawn to the contention of some authors that judicial precedents regarding the legal concepts and principles to be followed in considering and adjudicating problems of the extraterritorial validity of confiscations and expropriations are not as consistent as one might wish.²⁹ If it had been possible to give a more lengthy account here of judicial practice on this point, the truth of this observation could have been demonstrated; and its importance should not be underestimated, should codification of the subject of responsibility eventually be extended to cover this subsidiary aspect of the right of expropriation. In any case, this factor justifies certain general observations with regard to the requirements or conditions on which the extraterritorial application of measures affecting patrimonial rights has been made to depend. In this connexion, reference will be made in turn to the principle of territoriality, the notion of public policy and the immunity of the foreign State, i.e. the doctrine of acts of State.

29. So far as the principle of territoriality is concerned, possibly because judicial decisions have basically tended to identify it with the *lex rei sitae*, there has been some inconsistency in its application. Thus, for example, whatever the interpretation given to it or whatever the aspect from which it is considered—non-extraterritoriality of the measures in question or the exclusive authority of a State over assets in its territory—application of this principle is in fact inconsistent with recognition of the validity of the title acquired by confiscation to assets brought to the State of the *forum* subsequently, and still more so with the execution of acts of expropriation affecting assets abroad. Neither the existence of compensation in the latter case nor the immunity of the foreign State in the former—these being the reasons advanced in the respective cases for abandoning the principle—has any logical connexion with it. From another point of view, as Hjerner has pointed out, not even with respect to tangibles is there any unanimity as to how this territoriality operates, and this is still less the case where

²⁸ See *Yearbook of the International Law Commission*, 1959, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, pp. 16–24.

²⁹ See in this connexion Seidl-Hohenveldten, *loc. cit.*, p. 868; O'Connell, *loc. cit.*, pp. 267 and 293. Hjerner says "If only those reasons which are openly stated in the judgements were to be taken into consideration, the attitude of courts towards foreign confiscations would make a contradictory and confusing impression." (*Loc. cit.*, pp. 205 and 206).

²⁵ Cf. Seidl-Hohenveldten, *op. cit.*, p. 865.

²⁶ *Ibid.*, pp. 867 and 868.

²⁷ *Loc. cit.*, p. 350.

debts and industrial and literary property rights, which can have no *situs* in the strict sense of that word are concerned.³⁰ In the view of Seidl-Hohenveldten, the principle is further weakened by another doctrine, which in his opinion is controversial, namely that, on the strength of the allegiance which a national owes to his home country, that country may require him to hand over his assets held abroad and may gain a title to such assets, which should be recognized everywhere.³¹ For these and other reasons, it is clear that the principle of territoriality cannot be more than a relative factor in determining the extraterritorial effect of confiscation and expropriation. This only applies, of course, to territoriality in the orthodox sense, i.e. purely and simply as an expression of the *lex rei sitae*, for if it were conceived in different terms and given a more flexible character, it could undoubtedly serve as a basis for sound rules offering logical and adequate solutions for the problems in question.

30. The notion of public policy has, in some ways, even more serious drawbacks. The principle of territoriality undoubtedly has the very great advantage that, intrinsically, it does not constitute a legal obstacle to the extraterritorial recognition of measures affecting patrimonial rights or to the enforcement of such measures. But in practice this advantage is offset by the fact that the doctrine of public policy is not merely affected by domestic legal concepts and principles, but is also liable to arbitrary interpretation by the courts of the State where the issue arises. For example, as Van Hecke has pointed out, where questions of expropriation are concerned, it would be the foreign judge's task to appreciate whether the amount and the terms of compensation are so unjust that they impart a confiscatory character to the expropriation.³² When it is a question of a confiscatory measure properly so called, it will be alleged that its penal or fiscal character justifies the application of the principle *odiosa sunt restringenda*.³³

31. With regard to expropriations, should the question of the powerfulness of an indemnity really be submitted to the judgement of a foreign court, which will necessarily decide it according to the principles and legal doctrine prevailing in its country, not to mention the extra-judicial considerations which might affect its decision if the persons concerned were of the same nationality as the court? Nor would recourse to the principle of public policy be justified in all circumstances in cases of confiscation. Although such cases might be exceptional, it is possible to visualize confiscatory measures taken in the form of penal sanctions fully justifiable under any legal system, or fiscal or taxation measures, required by the higher interests of the State, which would also be consistent with very generally

accepted principles and practices. With regard to the first of these suppositions, it is also necessary to take into account the special case of a Government which takes a given measure in order to lay claim to and recover misappropriated assets which have been deposited abroad. It is usual in extradition treaties and practice to request and obtain the delivery of the offender and of the specific goods which are the proceeds of his crime; and a foreign court could not refuse to enforce such a measure without being manifestly guilty of an abuse of the principle of public policy. If it is true, as is often asserted,³⁴ that the real basis of the court decisions in such cases is the "protection of private property" situated within the jurisdiction of the judging country against confiscatory measures which the court deems contrary to the principle of respect for acquired rights, could the same courts extend that protection to goods or assets obtained through manoeuvres involving acts punishable in any part of the world? In this connexion, it should be remembered that, in two well-known judgements, the courts went so far as to say that "public policy" required the extraterritorial recognition and execution of decrees of expropriation.³⁵

32. Lastly, consideration should be given to a problem which has recently arisen in connexion with the principle of the immunity of the foreign State from domestic jurisdiction (the "Act of State" doctrine). The problem derives from the tendency to advocate the abandonment of this principle on the ground that its application prevents domestic courts from protecting the acquired rights of private individuals which have been affected by confiscatory measures or by acts which do not provide for the payment of adequate compensation. Predominant among those supporting this tendency is the American branch of the International Law Association.³⁶ In section 37 (a) reference was made to the cases or circumstances in which the principle is applied and to the results to which its application leads in practice; bearing that in mind, it is not difficult to see that the aim of this new tendency is to restrict the extraterritorial effect of foreign measures by permitting domestic courts to examine them and to amend them if they find them to be contrary to the principle of respect for private property which such tribunals are bound to uphold. But is there in fact any real justification for abandoning this principle when, in this case, the measures in question are classifiable as acts done *jure imperii*? In other words, is it right for a foreign court to determine the validity of State acts of this kind solely from the point of view of establishing whether the patrimonial rights of private individuals have been respected? Judge Lauterpacht, after examining the

³⁰ *Ibid.*, pp. 202 and 203.

³¹ *Loc. cit.*, p. 866.

³² *Loc. cit.*, p. 349.

³³ Cf. B. A. Wortley, "Expropriation in International Law", *Transactions of the Grotius Society of International Law* (1947), vol. 33, pp. 33 and 34.

³⁴ Seidl-Hohenveldten, *loc. cit.*, p. 860; and Hjerner, *loc. cit.*, p. 207.

³⁵ The reference is to *Lorentzen v. Lydden* (1942) and *Anderson v. Transandine* etc. (1941), mentioned earlier.

³⁶ Cf. International Law Association, *New York University Conference (1958)*, *International Committee on Nationalization (Report)*, pp. 16-17. For a more detailed defence of this tendency, see J. N. Hyde, "The Act of State Doctrine and the Rule of Law" *American Journal of International Law* (1959), vol. 53, pp. 635-638.

whole question with his customary thoroughness, reaches the conclusion that immunity must remain the rule with respect to legislative acts and measures taken in pursuance thereof. This would include, for instance, immunity of a foreign State—as distinguished from persons who acquire title from it—in respect of nationalization of property of aliens by virtue of a general statute or decree even if considered to be contrary to international law.³⁷ While the advantages which might be derived from a gradual revision of this principle should not be overlooked, the form of revision advocated by this new school of thought does not seem appropriate, at any rate so long as domestic courts persist in determining the validity of such measures on the basis of domestic public policy.

33. Before concluding this section and in connexion with the matters referred to above, attention should be drawn to a tendency which seems to be developing among authors who specialize in this question. This school holds that problems connected with the extraterritorial application of measures affecting patrimonial rights should be considered and solved in accordance with the principles and rules of (public) international law governing the validity of such measures. For instance, F. Morgenstern has drawn attention to the increased significance of a State's refusal to follow legislation emanating from another on the grounds that such legislation is incompatible with international law.³⁸ In Van Hecke's view, it is quite obvious that progress of the law in this matter will only be achieved by the "international judicial protection of the rights of man".³⁹ In a recent study, Professor Wortley surveys all the problems arising from the extraterritorial application of confiscation, expropriation and nationalization measures in the light of one basic requirement, namely, whether or not such measures are in conformity with (public) international law.⁴⁰

34. The above-mentioned considerations, together with many others which have been omitted here, show that the whole question of the theory and practice of the extraterritorial application of measures affecting patrimonial rights needs to be reconsidered. It is not for the Special Rapporteur even to essay such a task, especially on the basis of a study so superficial as this. Nevertheless, at the end of this chapter of the report, it would seem appropriate to make some general observations. The principle of territoriality should be entirely divorced from the traditional doctrine of the *lex rei sitae*, thus, *inter alia*, enabling all assets, of whatever kind and wherever they may be located, which are affected by a given measure to be conceived of as constituting a single "patrimonial unit". In this way alone can the right of expropriation, which the State

is universally held to possess, be rendered truly effective. And as to the doctrine of public policy—also transplanted without any appreciable change from domestic concepts of private international law—this should be replaced *in toto* by those principles and rules of (public) international law which determine the conditions governing the lawful exercise of the right of expropriation. If these factors establish that measures affecting acquired rights are valid in international law, then there is no reason whatever why the extraterritorial effect of such measures should remain subject to other factors of a domestic nature, more especially when it is remembered that several judicial decisions based on the doctrine of public policy also place occasional reliance on concepts and principles pertaining to the relevant branch of international law.

II. Systems for settlement of disputes

35. During the past few years, as is evident from the increasing number of proposals made to deal with it, growing importance has been attached to the problem of settling disputes relating to acquired rights. Amongst other things, this is due to the fact that such disputes possess a number of characteristic features which distinguish them from other controversies.

36. In the first place—except in cases covered by treaties and certain contracts or concessions of the type referred to in the fourth report—disputes relating to acquired rights differ from those concerning injuries caused to aliens (including cases of injury to aliens' property) by illegal acts or omissions imputable to the State in that, in the case of acquired rights, international responsibility does not derive from the mere existence of the measure affecting those rights but from the conditions and circumstances in which it was adopted or enforced. In other words, save in the exceptional cases referred to, it is not an "unlawful" act or omission, but the "arbitrary" exercise of the State's right to take measures affecting private patrimonial rights which gives rise to international responsibility. Consequently, although the commonest cases are those dealing with the amount of compensation to be paid, such disputes can arise in connexion with any of the conditions or requirements to which the lawful exercise of this right is subject in international law. With regard to "contractual claims", a special situation arises where the dispute is over the non-fulfilment, interpretation or application of a contract or concession containing a Calvo Clause.

39. SETTLEMENT BETWEEN THE STATES CONCERNED

37. The methods and procedures most frequently employed in settling such disputes are the orthodox ones, i.e. those where the attempt at settlement is made by the States concerned—the respondent State and the State of nationality of the private individual who has suffered the injury. Sometimes this method of settlement takes the form of direct negotiations between the two States which, if successful, usually result in the conclusion of a treaty or agreement setting out the

³⁷ "The Problem of Jurisdictional Immunities of Foreign States", *British Year Book of International Law* (1951), p. 237.

³⁸ "Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law", *International Law Quarterly* (1951), vol. 4, p. 344.

³⁹ *Loc. cit.*, p. 357.

⁴⁰ "The General Principles of Private International Law", *Recueil des cours de l'Académie de droit international* (1958-II), vol. 94, pp. 192 et seq.

terms of the settlement. In other cases, however, the parties agree to submit the matter to arbitral bodies, which hear the case and decide it. In the last-mentioned instance, the settlement is still one between the States concerned, provided that they appear as the parties to the dispute.

(a) *Diplomatic settlement (direct negotiation)*

38. Excellent examples of settlements of this type can be found in the treaties and conventions concluded between the States involved in the nationalization of Mexican petroleum, and in the context of the nationalizations carried out after the war by the East European States. The settlements referred to here are not so much the so-called lump-sum agreements considered in the fourth report as other agreements where no stipulation was made as to the total amount of compensation which would be paid for assets expropriated from the nationals of the two contracting parties. Although these other agreements were also primarily designed to settle the matter of compensation, there were differences in the procedures and methods which they envisaged for the ultimate solution of that problem.

39. In one set of conventions of this type, the settlement of the dispute arising out of nationalization was not the sole purpose of the instrument; sometimes indeed it was not even the chief purpose. Thus, for example, the intention of the conventions concluded in 1946 between the United States and Czechoslovakia, and between the United States and Poland, appears to have been, in the former case, to establish commercial relations and, in the latter, to make arrangements for a loan. However that may be, they contained a clause whereby the contracting parties undertook to pay "adequate and effective compensation" to nationals of the other party with respect to their rights or interests in properties which had been or might be nationalized. In another variety of convention belonging to this group, also concluded in connexion with commercial negotiations, it is stipulated that the party which has nationalized property or assets belonging to nationals of the other shall grant them "most favoured nation" rights with respect to procedure, the basis for the calculation of compensation and the determination of the amount thereof.⁴¹

40. Under the arrangements made in a second group of agreements of this kind, it is the private individual concerned who must lodge a claim with the competent authorities of the State which has nationalized his property; but at the same time he is granted certain specific facilities to enable him to do so, such as the right to visit nationalized undertakings, to obtain information regarding their condition and value and to participate in preparing inventories. Moreover, some of these agreements provide for the setting up of mixed

commissions to watch over the implementation of the terms of the agreement. Lastly, there is a third type of agreement, the provisions of which, as Foighel points out, are in close conformity with those traditionally used to obtain compensation for injuries suffered by foreigners as a result of acts or omissions imputable to the State. Some of these agreements provide for the appointment of a group of experts who are to give an estimated valuation of the nationalized property. On the basis of the reports submitted by these experts, the two Governments concerned then agree on the sum payable as compensation to the owners of the expropriated property. This practice was followed, in particular, in the Mexican nationalizations.

(b) *Claims commissions and arbitration clauses*

41. In the past, the method adopted in most cases for the settlement of disputes relating to patrimonial rights was to submit them to claims commissions consisting of representatives of the States parties to the dispute, under the chairmanship of a third person appointed by agreement between the representatives in question or by some other procedure. But this statement needs qualification: the settlement of disputes of this nature was not the sole *raison d'être* for these joint commissions, which were usually set up for the purpose of examining a number of pecuniary claims arising from acts or omissions of a very different kind. What is more, it has on occasion been argued that commissions empowered to decide "all claims for loss or damage" were not competent to deal with claims of a contractual nature. Generally speaking, however, commissions have dismissed these demurrers relating to competence and have proceeded to settle claims of this nature as well.⁴² In addition to commissions of this nature and arbitral tribunals which have ruled on claims affecting patrimonial rights, mention should also be made of the former Permanent Court of International Justice, to which some disputes on matters of this kind were submitted for judgement; these were considered in the previous report.⁴³

42. In recent times, provision for settlement between the States directly concerned has often been made through an expedient which is of particular interest in connexion with disputes over patrimonial rights. We are referring to the insertion in some post-war instruments of arbitration clauses specifically related to disputes which might arise in connexion with the exercise of the right of expropriation. Typical instances of such undertakings are to be found in the economic co-operation agreements concluded between the United States and a number of other countries under the Economic Co-operation Act of 1948. These agreements contain provisions whereby any dispute regarding the compensation due to a United States citizen as a consequence of governmental measures affecting his

⁴¹ This is the type of convention which was concluded by the Scandinavian countries with Czechoslovakia, Poland and Hungary. On such instruments and the others mentioned below, see Foighel, *Nationalization* (1957), pp. 88 *et seq.*

⁴² In this connexion see Feller, *The Mexican Claims Commissions, 1923-1934* (1935), p. 173.

⁴³ For a general account of the organization and working methods of these claims commissions and of other arbitral bodies, see Hudson, *International Tribunals, Past and Future* (1944), chaps. II and VI.

patrimonial rights is to be submitted to arbitration. The so-called Agreements relating to Guaranties authorized by the Mutual Security Act of 1954 contains similar arbitration clauses.⁴⁴ It is hardly necessary to point out that, under the arrangements for arbitral settlement envisaged in these instruments, it is the State of nationality which will be a party to the dispute, not the private individual affected by the measure in question.

40. DIRECT SETTLEMENT BETWEEN THE STATE AND THE PRIVATE INDIVIDUAL

43. Under the arrangements now to be considered, in contrast to those referred to in the preceding section, the attempt to settle the dispute is made directly between the State and the private individual affected. Sometimes this takes place only at a late stage in the claim, but in other instances it does so from the very beginning of the dispute. This difference is reflected in the two practices at present followed, namely, the conclusion of treaties under which private individuals are given the right to lodge a claim direct, and the insertion of arbitration clauses in contracts between the State and a private individual.

(a) *The system of treaties under which powers are vested in private individuals*

44. This practice will already be fairly familiar, since it was referred to in previous reports in connexion with the *locus standi* before international tribunals conferred on private individuals by a number of treaties.⁴⁵ No purpose would therefore be served by reverting to what has already been stated there, especially as it is not always relevant to the type of dispute now under consideration. Nevertheless, the arbitral tribunals set up pursuant to articles 291 and 304 of the Treaty of Versailles, and more especially that established by the German-Polish Convention of 15 May 1922 which heard numerous disputes relating to acquired rights, should be borne in mind.⁴⁶

(b) *The system of arbitration clauses contained in contracts between States and private individuals*

45. Secondly, there is a type of settlement under which the (respondent) State enters into a direct agreement with the foreign private individual as to the system, method or procedure to be followed for the solution of disputes which have arisen or may arise between them over the interpretation or application of

a contract which they have signed. Of the two alternatives which have been mentioned, the second occurs more frequently and in present circumstances it is the one which most warrants examination. An instance of the first-mentioned practice is to be found in the arbitration agreement of 23 February 1955 signed by the Government of Saudi Arabia and the Arabian-American Oil Company (Aramco). The arbitral tribunal set up under article 1 of this agreement was to decide—and did so in its award of 23 August 1958—questions relating to the rights and obligations of either party under the Aramco Concession Agreement submitted to it by one or the other of the parties.⁴⁷

46. There are several varieties of the second type, some of which are in a sense of little interest within the context of this report. We refer here to those arbitration clauses which provide for arbitration or some other method or procedure for reaching a settlement on a purely internal basis, i.e., they do not place the dispute on a genuinely international level because in fact they do not take it out of the jurisdiction of the State. An example of this type of clause is to be found in the contract of 13 December 1947 between the Government of Haiti and a private citizen of Cuban nationality (Vicente Domínguez) relating to the establishment of a sugar factory and a sugar-growing enterprise:⁴⁸

“Any dispute between the contracting parties relating to the performance of this contract shall be submitted to arbitration, one arbitrator being appointed by the State and one by Mr. Vicente Domínguez. The joint decision of the two arbitrators shall be final and subject to appeal, and the parties undertake faithfully to carry out such decision and to act in accordance therewith. Should the arbitrators be unable to agree, they shall, within thirty days of the date on which they have failed to come to an agreement on the matters in dispute, choose a third arbitrator who shall be neither a Haitian nor a Cuban national. If they are unable to agree on the choice of a third arbitrator, such arbitrator shall be appointed by the *Doyen* of the Civil Court of Port au Prince. The decision of the third arbitrator shall be final.”

47. In some contracts this internal form of arbitration will be found in association with a Calvo Clause, on the lines of the following provision in the contract which gave rise to the *Shufeldt Claim* (*United States of America v. Guatemala*, 1930):⁴⁹

“17. It is also agreed upon that in case of any question arising from failure of fulfilment or

⁴⁴ Cf. M. Domke, “American Protection Against Foreign Expropriation in the Light of the Suez Canal Crisis”, *University of Pennsylvania Law Review* (1957), vol. 105, pp. 1036 and 1037. For a more exhaustive study of the matter, see “The Settlement of International Investment Disputes” by the same writer in *The Journal of Business Law* (1957), vol. 12, pp. 262 *et seq.*

⁴⁵ Cf. *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, chap. V, sect. 18, p. 197; and *Yearbook of the International Law Commission*, 1958, vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II, document A/CN.4/111, chap. VIII, p. 62).

⁴⁶ Cf. Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), *passim*.

⁴⁷ Cf. *Arbitration between Saudi Arabia and the Arabian-American Oil Company (Aramco)*, Ward (*s.l. et a.*), pp. i-iii.

⁴⁸ Cf. *Bulletin des lois et actes* (1947), p. 78. Another case which may be quoted as an example is the telephone concession granted on 23 December 1926 by the Province of Mendoza (Argentina), which provided for settlement through the good offices of arbitrators appointed by the parties.

⁴⁹ Cf. *Reports of International Arbitral Awards*, vol. II, United Nations publication, Sales No.: 49.V.1, p. 1085. Similar provisions are to be found in the contracts in the *Salvador Commercial Co.* and the *Beales, Noble and Garrison* cases mentioned in Eagleton, *The Responsibility of States in International Law* (1928), p. 168.

misinterpretation of any of the clauses of this contract the subject will not be taken by any means to the courts of justice nor shall the case be referred to diplomatic channels but that any question which may arise will be submitted to two arbitrators, appointed one by each party, and in case of disagreement between both arbitrators they will appoint a third arbitrator whose action or finding on the subject will be deemed final or just without appeal."

48. As will have been noted, particularly in those instruments containing a Calvo Clause, the whole purpose of the undertaking to arbitrate is to keep the settlement of disputes, both as regards the composition of the body which is to deal with it and the law to be applied, within domestic jurisdiction.

49. On the basis of these two criteria, which make it possible to determine the true nature of such arbitration clauses, it is not difficult to perceive the fundamental difference between the methods just referred to and those whereby a dispute is placed on the international level. In the case of some of the instruments now under consideration, the criterion is the nature of the applicable law. It will be recalled that, in the fourth report, reference was made to a number of instruments which were to be governed by international juridical systems or principles; in some of them it was indeed stated that the principles to be applied in resolving any disputes which might arise with regard to their interpretation or application were to be those of international law. Such a provision would enable the courts before which any dispute might eventually be brought to investigate and settle it without reference to the law of the contracting State. Since all these topics were dealt with in detail in that report, further reference to the instruments and decisions in question will be omitted in order to avoid unnecessary repetition.⁵⁰

50. On the other hand, there is one feature or aspect to which attention must be drawn, since it was barely referred to in the previous report, and that is the way in which the body provided for in the arbitration clause is to be established or organized. In this connexion, the relevant provisions of three comparatively recent agreements are of special interest. One of them is contained in the Concession Agreement of 9 September 1953 between the Government of the Republic of Liberia and the International African American Corporation, as completed and amended by the Agreement of 31 March 1955. By the terms of this,

"19. Any dispute existing between the Government and the Corporation... with respect to the terms and conditions of this Agreement shall be submitted to arbitrators for decision. Each party shall appoint an arbitrator, and the two so appointed shall select the third, and they shall give decision within sixty days after the question is submitted to their

deliberation. If they cannot agree as to the designation of a third arbitrator, then the President of the International Chamber of Commerce shall appoint said third arbitrator. Any arbitration shall be final and obligatory, it being understood that the parties renounce all appeals."

51. In the other two instruments, the manner in which the settlement is to be made and the procedure to be followed are set out and regulated in much greater detail.

52. Let us next examine, therefore, the relevant provisions of a concession granted to an oil company on 19 June 1955 by the Government of the United Kingdom of Libya:⁵¹

Arbitration

(1) Any dispute between the parties arising out of or in connection with this Concession, unless otherwise resolved, shall be settled by arbitration proceedings between the Commission as one party and the Company as the other party and such proceedings shall determine the measures to be taken by the parties including, if appropriate, payment of compensation, to put an end to or remedy the damage caused by any breach of this Concession.

(2) The institution of proceedings shall take place upon the receipt by one party from the other of a written request for arbitration. Each party shall within thirty days of the institution of proceedings appoint an arbitrator. If the arbitrators fail to settle the dispute they shall appoint an umpire within sixty days of the institution of proceedings. If they do not do so either party may request the President, or if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice, to make the appointment.

(3) If either of the parties within sixty days of the institution of proceedings either fails to appoint its arbitrator or does not advise the other party of the appointment made by it, the other party may request the President or, if the President is a national of Libya or of the country in which the Company was originally registered, the Vice-President of the International Court of Justice to appoint a sole arbitrator who shall hear and settle the dispute alone.

(4) The umpire, however appointed, or the sole arbitrator shall not be either a national of Libya or of the country in which the Company was originally registered; nor shall he be or have been in the employ of any party to this Concession or of the Government of the aforesaid country.

(5) Should the International Court of Justice be replaced by or its functions be substantially transferred to any new international tribunal, the functions of the President or Vice-President (as the case may be) of the International Court of Justice exercisable under this Concession shall be exercisable by the President or Vice-President (as the case may be) of the new international tribunal without further agreement between the parties hereto.

(6) The procedure of arbitration shall be determined by the umpire or the sole arbitrator who shall be guided generally by the relevant rules of procedure established by Articles 32-69 inclusive of the rules of the International Court of Justice of 6th May, 1946. The umpire or sole arbitrator shall likewise fix the place and time of the arbitration.

(7) This concession shall be governed by and interpreted in accordance with the Laws of Libya and such principles and rules of international law as may be relevant, and the umpire or sole arbitrator shall base his award upon those laws, principles and rules.

⁵⁰ See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, chap. III, part II, sect. 25.

⁵¹ Cf. clause 28, *The Official Gazette of the United Kingdom of Libya*, 19 June 1955, pp. 72 and 73. The concession granted on 8 April 1957 to the Gulf Oil Co. contains a clause (28) to the same effect.

(8) There shall be no appeal against the award and the parties to this Concession shall faithfully abide thereby.

(9) The expenses of the arbitration shall be borne by the parties in such proportion and manner as may be provided in the award.

It will be noticed in the first place that sub-section (1) of the clause refers in fairly comprehensive terms to the questions concerning which either party may have recourse to arbitration. The arrangements made for the constitution of the arbitral tribunal are also noteworthy; they provide not only that the umpire is to be appointed by an authority unconnected with and independent of the parties, but also that the person appointed by such authority may, if either of the parties has failed to appoint its arbitrator, act as sole arbitrator and settle the dispute. Lastly, the applicable law mentioned in the clause includes "such principles and rules of international law as may be relevant".

53. The third and last instrument to which we shall refer is the Iran-Consortium Agreement of 19-20 September 1954, concluded between the Government of Iran, a corporation organized under the laws of Iran and a number of foreign companies of different nationalities. As an example of the degree to which the system of inserting arbitration clauses in instruments between States and private individuals has developed, we reproduce below the greater part of that Agreement.⁵²

Art. 42. A. If in the opinion of any party to this Agreement any other party is in default in the performance of any obligation hereunder, the first party shall first give the other party written notice specifying the respects in which a default is believed to exist and calling upon such other party to remedy the default. Unless the matter is disposed of by agreement within thirty days after the receipt of such notice or such longer period as may be agreed to by the parties, then the complaint may be referred to a Conciliation Committee under Article 43 of this Agreement. Any complaint which either party does not wish to refer to a Conciliation Committee, or which is not determined by a binding ruling of a Conciliation Committee, may then be submitted by the first party to arbitration under Article 31 or 44 of this Agreement as the case may be.

B. For the purposes of this Article and of the said Articles 43 and 44, a Trading Company shall be represented by the Consortium member which nominated it.

Art. 43. The parties to any complaint arising under Article 42 of this Agreement may agree that the matter shall be referred to a mixed Conciliation Committee composed of four members, two nominated by each party, whose duty shall be to seek a friendly solution of the complaint. The Conciliation Committee, after having heard the representatives of the parties, shall give a ruling within three months from the date on which the complaint was referred to it. The ruling, in order to be binding, must be unanimous.

Art. 44. A. (1) Except as provided in Article 31 of this Agreement, arbitration in accordance with the provisions of this Article shall be the sole method of determining any dispute between the parties to this Agreement arising out of, or relating to, the execution or interpretation of this Agreement, the determination of the rights and obligations of the parties hereunder, or the operation of this Article, and which is neither resolved under Article 42 nor determined under

Article 43.

(2) Arbitration proceedings shall be instituted by a notice in writing given by the complainant to the respondent.

B. (1) If the dispute relates to technical or accounting questions it may by agreement between the parties be referred either to a single expert or to a body of three experts, of whom two shall be appointed by the parties (one by each) and the third shall be appointed by mutual consent. If the parties cannot agree upon the single or the third expert either party may request the Director of the . . .

. . .

C. (1) If the parties do not agree that a dispute shall be referred to an expert or experts under Section B of this Article, or if they do so agree but the appointments provided for are not made or a decision is not given within the time limited for the purpose, or if in the circumstances set out in Paragraph (4) of Section B of this Article either of the parties seeks the determination of a question of law, each of the parties shall appoint an arbitrator, and the two arbitrators before proceeding to arbitration shall appoint an umpire who shall be the President of the Arbitration Board. If the two arbitrators cannot within four months of the institution of proceedings agree on the person of the umpire, the latter shall, if the parties do not otherwise agree, be appointed at the request of either party, by the President of the International Court of Justice.

(2) If one of the parties does not appoint its arbitrator or does not advise the other party of the appointment made by it within two months of the institution of proceedings, the other party shall have the right to apply to the President of the International Court of Justice to appoint a sole arbitrator.

(3) If the President of the International Court of Justice is a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated, he shall not make the appointments referred to in Paragraphs (1) and (2) of this Section. If for this or any other reason whatsoever the appointment of a sole arbitrator or an umpire is not made in accordance with Paragraphs (1) and (2) of this Section then, unless the parties shall have otherwise agreed in writing, the said appointment shall be made at the request of either party by the Vice-President of the International Court of Justice (provided that he is not a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated) or, failing him, by the President of the Swiss Federal Tribunal or, failing him, by the President or equivalent judge of the highest court of any of the following nations in the order stated: Denmark, Sweden, Brazil.

(4) The appointment of an umpire or sole arbitrator under Paragraphs (1), (2) or (3) of this Section shall be within the complete discretion of the person authorized to make it, and the exercise of his discretion may not be questioned by either party. The person so appointed should not be closely connected with, nor have been in the public service of, nor be a national of, Iran, the nations in which the other parties to this Agreement are incorporated, any member of the British Commonwealth of Nations, or a Protectorate, Colony or country administered or occupied by any of the above nations.

(5) If the arbitration is referred to an Arbitration Board the award may be given by a majority. The parties shall comply in good faith with the award of a sole arbitrator or of an Arbitration Board.

D. The place and procedure of arbitration shall be determined by the parties. In case of failure to reach agreement, such place and procedure shall be determined by the experts, the third expert, the umpire or the sole arbitrator (as the case may be).

E. The parties shall extend to the expert or experts or the Arbitration Board or the sole arbitrator all facilities (including access to the Area) for obtaining any information required for the proper determination of the dispute. The absence or default of any party to an arbitration shall not be permitted to prevent or hinder the arbitration procedure in any or all of its stages.

F. Pending the issue of a decision or award, the operations or

⁵² The complete text of the Agreement is reproduced in J. C. Hurewitz, *Diplomacy in the Near and Middle East, a Documentary Record*, vol. II, 1914-1956 (1956), pp. 348 *et seq.*

activities which have given rise to the arbitration need not be discontinued. In case the decision or award recognizes that the complaint was justified, provision may be made therein for such reparation as may appropriately be made in favour of the complainant.

G. The costs of an arbitration shall be awarded at the entire discretion of the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be).

H. If for any reason an expert, member of an Arbitration Board or sole arbitrator after having accepted the functions placed upon him is unable or unwilling to enter upon or to complete the determination of a dispute, then, unless the parties otherwise agree, either party may request the President of the International Court of Justice to decide whether the original appointment is to be treated as at an end. If he so decides, he shall request the person or persons who made the original appointment to appoint a substitute within such time as he shall specify, and if within the time so specified no substitute has been appointed, or if the original appointment was made by him, he shall himself appoint a substitute. If the President of the International Court of Justice is a national of Iran or of any of the nations in which the other parties to this Agreement are incorporated, or if for this or any other reason his functions under this Paragraph are not performed by him, they shall devolve on one of the other persons referred to in Paragraph (3) of Section C of this Article in the order therein provided.

I. Should the International Court of Justice be replaced by or its functions substantially devolve upon or be transferred to any new international tribunal of similar type and competence, the functions of the President of the International Court of Justice exercisable under this Article shall be exercisable by the President of the new international tribunal without further agreement between the parties hereto.

J. Wherever appropriate, decisions and awards hereunder shall specify a time for compliance therewith.

K. Either party may, within fifteen days of the date of the communication of the decision or award to the parties, request the expert or experts or the Arbitration Board or the sole arbitrator (as the case may be) who gave the original decision or award, to interpret the same. Such a request shall not affect the validity of the decision or award. Any such interpretation shall be given within one month of the date on which it was requested and the execution of the decision or award shall be suspended until the interpretation is given or the expiry of the said month, whichever first occurs.

Art. 45. A. If any final decision or award given under Article 44 of this Agreement contains no order other than that a defined sum of money specified in the decision or award shall be paid to Iran or NIOC by any other party, and if that sum shall not have been paid within the time limited by such decision or award or, if no time is therein limited, within three months thereof, Iran shall have the right to prohibit all exports of crude oil and petroleum products from Iran by the party in default until such sum is paid.

B. If the party liable to execute a final award given in accordance with Article 44 of this Agreement, fails to comply therewith within the time specified in such award for compliance or, if no time is therein specified, within six months after the communication thereof to the parties, the party in favour of which the award has been given shall be entitled to seek the termination of this Agreement by a decision of an Arbitration Board or sole arbitrator made in accordance with Section C of this Article. Any such decision shall be without prejudice to any accrued or accruing rights and liabilities arising out of the operation of this Agreement prior to its termination hereunder, including such other rights, sums or damages as may have been awarded by the Arbitration Board or sole arbitrator.

C. The power to make the decision provided for by Section B of this Article shall only be exercisable subject to the conditions following, namely:

(1) the decision shall be made only by the Arbitration Board or sole arbitrator who made the final award concerned;

(2) if the Arbitration Board or sole arbitrator who made such award is for any reason unable or unwilling to act, the question of termination for non-compliance with an award shall be referred to arbitration in accordance with Article 44 of this Agreement in the manner provided for determination of disputes;

(3) no decision terminating this Agreement shall be made unless the Arbitration Board or sole arbitrator shall first have prescribed a further period (not being less than 90 days) for compliance with the award and after the expiration of such further period shall have found that the award has not then been complied with.

Art. 46. In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals."

The foregoing provisions are so explicit as to require no comment, which would in any case be substantially the same as that already made on the arbitration clause quoted in the previous paragraph. It should be added, however, that as a whole they represent a system of direct settlement between the State and private contracting parties which embodies the essential elements of an "international" settlement of disputes.

(c) Proposals relating to such systems of direct settlement

54. Apart from these practical examples of the two systems of direct settlement between the State and foreign private individuals, it is of interest to refer to some of the numerous proposals which have been put forward with a view to developing both systems, particularly the first, but always in connexion with disputes on patrimonial rights, since the time when the Permanent Court of International Justice was set up. In the period immediately following the end of the First World War, mention should be made of the argument put forward by de Lapradelle in the Advisory Committee of Jurists which drafted the Statute of the Permanent Court of International Justice (1920): that it was necessary to guard the possibility of extending the Court's competence to disputes based on economic relations between a State and an individual unless the dispute was political in character. A few years later André-Prudhomme proposed the establishment of an international court to hear appeals from national courts in disputes arising out of "contracts" between States and private individuals. All the other proposals belonging to that period, to some of which we have already referred in previous reports, envisage direct settlement between States and foreign individuals, but not exclusively in connexion with disputes regarding patrimonial rights.⁵³

55. Another proposal made during the same period, the draft arbitration clause prepared by the League of Nations Committee for the Study of International Loan Contracts, is also worthy of mention. In accordance with

⁵³ For a brief account of these proposals, see L. Sohn, "Proposals for the Establishment of a System of International Tribunals", in *International Trade Arbitration* (brochure *s.l.*), pp. 5 *et seq.*

its terms of reference, the Committee was supposed, *inter alia*, "to prepare model provisions—if necessary with a system of arbitration—which could, if the parties so desired, be inserted in such contracts". In its report, the Committee presented the following model text which the parties could modify to suit their requirements:⁵⁴

"(3) *Draft arbitration clause*

89. (a) Any dispute concerning the rights and obligations arising out of the loan contract shall be submitted to the Arbitration Tribunal constituted as provided hereunder. The Tribunal's decisions shall be final and binding.

(b) The following parties may seize the Tribunal – namely, the debtor Government; any bondholder or bondholders in possession of securities not less than 10 per cent of the amount outstanding; any official representative of the bondholders; any officially recognized authority concerned with the protection of bondholders; the supervisor.

(c) Failing agreement between the parties for the submission of the case, any party may seize the Tribunal directly by means of a unilateral application. The Tribunal may give judgement, by default if necessary, in any dispute so brought before it.

(d) The Tribunal shall decide all questions relating to its competence.

(e) The Tribunal shall consist of three persons nominated at the request of one or more of the parties mentioned above, by the President of the Permanent Court of International Justice, from a standing panel of nine persons chosen by the Court.

The persons chosen for this panel shall remain in office for five years and shall be re-eligible.

(f) The Court shall fix the remuneration for each day's sitting of the persons appointed by it and settle the method of payment. The cost of such remuneration shall be borne by the borrower, but the Tribunal may, if it thinks an action frivolous, order those bringing the action to pay the whole or part of such remuneration.

(g) The Tribunal shall fix where it shall sit in any particular case.

(h) The Tribunal shall decide its own procedure, having regard to any agreement on the subject between the parties: similarly, it shall lay down rules as to the right of intervention.

90. In proposing the appointment of the arbitrators by the Permanent Court of International Justice, the Committee hopes that the latter, in its selection of the members of the Tribunals for the various loans, will have recourse, as far as possible, to the same persons, so as to facilitate the establishment of a uniform jurisprudence.

91. The Committee is unanimously of opinion that the Arbitral Tribunal should try disputes exclusively from a legal point of view, and should in consequence confine itself to declaring what are the rights and obligations of the parties. It is necessary to emphasize this point, because the task of arbitral tribunals has sometimes been, not only to declare the law, but to make arrangements which, in point of fact, constitute modifications of the contract. Arbitration in this sense may take on the character of negotiations under the auspices of a third party, with the object of reaching a compromise acceptable to both sides. In the Committee's view, a clear distinction must be drawn between these two functions – viz., on the one hand, the arbitral award – that is to say, the definition of the rights and obligations of the parties and, on the other, the modification of the contract either by negotiation or by decision of a third party. The role of the Tribunal in the foregoing draft arbitral clause is clearly limited to the first of these two functions – that of judge."

The clause obviously envisages the establishment of a truly international arbitral authority, not only in the membership of the tribunal but also in the final and the binding character of its decisions. Moreover, it shows certain special features, such as the requirements as to the status of the parties, which are in keeping with the highly specialized nature of the type of dispute to which the clause refers.

56. The other proposals referred to hereunder do not envisage the insertion of such clauses in contracts between States and private individuals, but rather the creation by the States of some arbitration machinery which could settle disputes of that kind. That is the system suggested in the draft "International Code of Fair Treatment for Foreign Investments", approved by the International Chamber of Commerce at its Quebec Congress (1919). The draft provides for the establishment of an "International Court of Arbitration" (articles 13 and 14), to which representatives of bondholders in an international loan could apply if national courts failed to act within a reasonable period or in the case of unfair treatment not amenable to the jurisdiction of a court (article 10). But the draft contains no provision on the constitution and operation of the arbitral tribunal.⁵⁵

57. The idea of establishing an "international court of arbitration" is more fully developed in the response submitted by the American Branch of the International Law Association at the New York session (September 1958). That court, to which holders of property or contractual rights would have equal access with States, would be designed to resolve disputes between States and aliens and would be constituted along the lines of the Permanent Court of Arbitration at The Hague. It should be animated by those general principles of law recognized by civilized nations, and would supply the advantages of arbitration to the many alien investors whose interests are not contractual or whose contracts do not provide for *ad hoc* arbitration.⁵⁶

58. Substantially the same idea was taken up in the draft convention on foreign investments, prepared by a group of German, Netherlands and British international lawyers and submitted by the Government of the Federal Republic of Germany to a committee of the Organization for European Economic Co-operation (OEEC). Article VII provides for the establishment of an "Arbitral Tribunal" competent to hear any dispute which may arise between the States parties concerning the interpretation or application of the convention, and also authorizes the nationals of any of the parties who have suffered damage through measures alleged to be infringements of the convention to bring a claim against the party responsible, always provided that that party has declared its acceptance of the Tribunal's jurisdiction in respect of such claims. The provisions relating to the organization of the Tribunal

⁵⁴ League of Nations, *Report of the Committee for the Study of International Loan Contracts*, document C.145.M.93.1939, pp. 26 and 27.

⁵⁵ Cf. International Chamber of Commerce, Brochure 129 (Paris, August 1949), pp. 16 and 17.

⁵⁶ *Proceedings and Committee Reports of the American Branch of the International Law Association, 1957–1958*, p. 74.

and the procedure to be followed are set forth in an annex to the convention.⁵⁷

59. The establishment of an Arbitral Tribunal to settle disputes on patrimonial rights is again envisaged in a draft convention prepared by the Committee on a World Investments Code of the Parliamentary Group for World Government. This draft would also allow access to the Tribunal to individuals and companies, on the grounds that only a large undertaking can induce the State of its nationality to provide diplomatic protection. The members of the Tribunal could be appointed by the International Court of Justice.⁵⁸

60. Finally, reference should be made to the draft recommendation submitted to the Consultative Assembly of the Council of Europe by its Economic Committee, relating to the adoption of an investment Statute. Although no proposal concerning the organization and procedure of a tribunal was submitted, there is a declaration to the effect that in the context of "economic co-operation between European and African countries", compulsory arbitration would appear to be the best solution. And it is added that recourse to arbitration for the settlement of disputes should be open both to the contracting parties and to their nationals.⁵⁹

41. SOME OBSERVATIONS CONCERNING THESE SYSTEMS OF SETTLEMENT

61. In analysing the various systems for the settlement of disputes relating to patrimonial rights, it is perhaps inappropriate to raise the question of which of them is the most suitable. In fact, even disputes having a common denominator with regard to the question at issue do not all possess the same characteristics or arise in the same circumstances. In each specific case both factors will have to be taken into account in estimating the advantages or disadvantages of following one or the other system. This comment, however, does not alter the fact that, in principle, it is desirable to follow the system of direct settlement between the respondent State and the alien affected. And although the third report pointed out the advantages of that system in connexion with all disputes arising on the grounds of injury to the persons or property of aliens, there are special reasons for considering it the most suitable method of settling disputes over patrimonial rights. In the last (fourth) report, in defining the scope of international protection for acquired rights, it was shown that such protection was "relative" by comparison with that available for other rights enjoyed by aliens (A/CN.4/119, chap. I, sect. 4). This comment is only introduced with the purpose of emphasizing the fact that in the matter of

patrimonial rights, the grounds for the exercise of diplomatic protection are reduced to a minimum; not to mention the possibility that such rights have been acquired under a contract or concession containing a Calvo Clause.

62. In these circumstances, as has already been pointed out, the question at issue should be the right and obligation of the alien to pursue through international channels a claim already instituted and exhausted within the municipal system. As the claim is one and the same, if the consequences of the act or omission do not go beyond the private injury suffered by the alien, on what grounds or by what title could the State of nationality really object to the private individual himself exercising that right? It should not be forgotten that the entire doctrine of diplomatic protection was based on the premise that, at the international level, private individuals could take no action whatsoever and that as soon as domestic remedies had been exhausted, they were completely without protection against denial of justice by the State from which they were claiming reparation. In such circumstances, protection by the State of nationality was, whether good or bad, the only possible solution. But at the present time, when States themselves have even voluntarily agreed to allow their nationals to bring direct claims before international tribunals, what objection could there be to those nationals agreeing with the respondent State that, with regard to matters and subjects of concern to those persons alone, the dispute should be referred for settlement to an international body? (See third report, A/CN.4/111, chap. VII, sect. 9.)

63. Advocates of the establishment of an international court of arbitration to which private individuals would have access have sometimes raised the question of the exhaustion of local remedies. Thus, for instance, in the report of the American Branch of the International Law Association, to which reference has already been made, it was suggested that the rule should be modernized, in the sense that in situations such as maladministration of the judicial process, or where there has been some enactment of legislation or decree altering the municipal law and preventing the municipal courts from providing a remedy, aliens should have recourse to an alternative forum of the first instance, namely, the international court. Thus, the report added, the alien would be required either to exhaust municipal remedies or the remedies of the international court of arbitration before the diplomatic intervention of his State would be permissible.⁶⁰

64. The question of the exhaustion of municipal remedies could in fact be raised again in connexion with the establishment of a tribunal of the kind indicated, but not in precisely the same terms. The rule has a very clearly defined and precise function in relation to the

⁵⁷ As is stated in the commentary appearing in the pamphlet (published in April 1959, but without a reference symbol) the structure of the Tribunal is not substantially different from that of the Arbitral Tribunal provided for in Loan Regulations 3 and 4 of the International Bank for Reconstruction and Development.

⁵⁸ Cf. Parliamentary Group for World Government, 590715.196, July 1959.

⁵⁹ Cf. Council of Europe, Consultative Assembly, 8 September 1959, document 1027, p. 19.

⁶⁰ *Op. cit.*, p. 75. See also K. S. Carlston, "Concession Agreements and Nationalization", *American Journal of International Law* (1958), vol. 52, p. 275.

exercise of diplomatic protection, and there is no reason to change that function in the case of international claims in which the only parties are the respondent State and the alien individual. When, however, the problem does not arise in connexion with the exercise of diplomatic protection, but in connexion with the recognized right of a private individual to bring a claim before an international tribunal, the situation is different, or may be different if, under the instrument setting up the tribunal, the private individual is authorized to institute proceedings before he has exhausted municipal remedies. In that respect, the situation would be the same as with contracts or concessions where the State and the alien stipulate that there should be recourse to international arbitration to settle any dispute which may arise between them in connexion with the interpretation or application of the instrument. For instance, under any of the instruments whose provisions are quoted in sub-section (b) or the proposals to which reference is made in sub-section (c), the recourse to international jurisdiction as envisaged is not subject to the requirement that local remedies must be exhausted, although there is actually no reference in them to that point. When, in another connexion, we dealt with the possibility of States expressly consenting to the local remedies rule being dispensed with, we observed that, given the nature of the rule, exceptions to its application could not be presumed (third report, A/CN.4/111 para. 24). But in the hypothesis now under consideration no exception would be introduced, for the said instruments would be deemed to contain a tacit waiver, by the State making the contract with the alien, of the right to require the exhaustion of local remedies. Furthermore, if the essential purpose of the arbitration clause in those instruments is precisely to empower the parties to present a claim before an international tribunal whenever a dispute arises, what would be the sense of requiring recourse to municipal jurisdiction? And, in strict accuracy, is it not also the essential design of such instruments that all disputes concerning their interpretation and application should be removed from local jurisdiction?

65. In another context, related to some extent to the foregoing, these arbitration clauses also contain an implicit waiver of the right of private individuals to seek diplomatic protection from the State of their nationality. This aspect of the question, however, has already been dealt with and there is no need to return to it (third report, A/CN.4/111, chap. VII, sect. 10).

B. CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY

I. How international responsibility arises

66. The breach or non-observance of a rule of international law is the first constituent element of the institution of responsibility. This may take the form of either an "act" or an "omission", according to the type of conduct covered by the rule in question. Two problems arise in connexion with this requirement. One is to ascertain whether the act or omission must involve

the non-performance of a well-defined and specific international "obligation" or whether it is sufficient that there has been an "abuse of rights". The second problem is to decide whether responsibility is dependent on a wilful attitude (*culpa* or *dolus*) or on the mere occurrence of an act objectively contrary to international law. We shall begin by considering the first of these problems, namely, how international responsibility arises.

1. THE PREVAILING VIEW: RESPONSIBILITY ARISES OUT OF THE NON-PERFORMANCE OF AN INTERNATIONAL "OBLIGATION"

67. According to the prevailing view, which is set forth in earlier reports and embodied in article 1 of the draft submitted to the Commission (see A/CN.4/111, annex), responsibility arises out of the non-performance of an international "obligation". The term is placed in inverted commas to stress the true meaning or scope given to it in practice and by the authorities, namely, that of an international obligation which, whatever the source wherefrom it stems, has a clearly defined and specific content. This does not mean, of course, that obligations recognized as being of this type are necessarily always so, but that is another aspect of the question which will be dealt with below.

68. This concept is repeatedly reflected in codification drafts and in international jurisprudence. In its 1927 draft, the Institute of International Law states that "the State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations..."⁶¹ The texts adopted in first reading by the Third Committee of the Hague Conference (1930) are based on the same concept. One of these contains the statement 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".⁶² Innumerable statements to the same effect are to be found in international jurisprudence. In the decisions of claims commissions reference may be made, by way of illustration, to the statement in the *Dickson Car Wheel Company* case (1931): "Under International Law, apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard."⁶³ With regard to the jurisprudence of the Permanent Court of International Justice and the present Court, we have already seen, when examining the juridical nature of international responsibility on another occasion, that "the duty to make reparation" was deemed to arise out of the

⁶¹ See *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, annex 8, article I.

⁶² *Ibid.*, annex 3, article 3. See also Bases of discussion Nos. 2, 7, 12, 13, 16 and 5, *ibid.*, annex 2.

⁶³ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1931), p. 187.

State's "breach of an engagement", that is, of an international obligation.⁶⁴ This rigid—or at least apparently rigid—concept of responsibility has not prevented other more flexible interpretations from also being accepted in international jurisprudence, as will be seen further on, but the vast majority of international decisions has clearly endorsed it. The same trend is evident in doctrine, where the existence of responsibility is generally contingent upon the non-performance of an international obligation.⁶⁵

69. Even if the other features or constituent elements of international responsibility are present, it is not always possible to impute to the State the non-performance of an "obligation" which is both clearly defined and specific. The question therefore arises whether, from a strictly legal point of view, when injury has been caused as the result of an unjustified act or omission on the part of the State, responsibility can be deemed to have been incurred although there are no grounds for imputing the violation or non-observance of a rule of international law establishing a sufficiently precise and unequivocal prohibition concerning the act or omission in question. In the theory and practice of international law situations of this type may, in fact, be quite frequent, on account of the lacunae and uncertainties which are still to be found within its complex of rules, including the sphere of conventional or written law. Even in municipal law, in spite of its considerably greater normative development, gaps and uncertainties are far from being entirely overcome. In order to meet the various situations arising as a result, recourse is had, particularly in a municipal juridical system, to general principles of law, to analogy, to interpretation of the applicable standard, to equity, etc. But in the matter of responsibility, in which the first requirement is to determine whether or not the act or omission which has occasioned the injury is contrary to a juridical precept, recourse is mainly had to the principle which forbids the "abuse of rights". This is easily explained if account is taken of the reasons underlying this prohibition and the central part it plays with regard to the exercise of subjective rights.

2. THE DOCTRINE OF "ABUSE OF RIGHTS": OPINIONS OF AUTHORS

70. Relatively few authors have troubled to study the applicability of the doctrine of "abuse of rights" in international relations. The majority of those who have done so, however, have not only reached the conclusion that the doctrine can and should be applied in order to solve particular problems, but also contend that its applicability has already been adequately

demonstrated in practice. The question was first raised officially in the proceedings of the Advisory Committee of Jurists which drafted the Statute of the former Permanent Court. In discussing the provisions concerning sources (art. 38), the Italian member, Ricci-Busatti, referred to the principle "which forbids the abuse of rights" as one of the "general principles of law recognized by civilized nations" which the Court would apply when deciding, in accordance with international law, disputes submitted to it. By way of illustration, he mentioned the disputes which might arise concerning the exercise of the right of the coastal State to fix the breadth of its territorial sea. Assuming that there was no rule of international law in existence which defined the outer limit of this sea area, he suggested that the Court should admit the rulings of each country in this regard, as "equally legitimate in so far as they do not encroach on other principles, such as for instance, that of the freedom of the seas".⁶⁶

71. Since then, a number of authors have emphasized the extent to which the doctrine of abuse of rights has been recognized in international practice, particularly in the jurisprudence of international tribunals and claims commissions, and advocated its progressive application as one of the "general principles of law" referred to in paragraph 1 (c) of article 38 of the Statute of the International Court of Justice. As a source of international law of this kind, Politis considered it of particular importance for the development of the law of nations, especially in regard to the principles governing State responsibility.⁶⁷ Some years later Lauterpacht also remarked that in international law—where, in contrast to municipal law, the process of express or judicial law-making is still in a rudimentary stage—the law of torts is confined to very general principles, and the part which the doctrine of abuse of rights is called upon to play is therefore particularly important. It is one of the basic elements of the international law of torts.⁶⁸ In a more recent monograph, Kiss expresses the view that the prohibition of the abuse of rights is rather a general principle of international law, deriving from the very structure of this legal system, and promoting its development in three distinct ways: by creating a new rule of customary law, by its impact on systems of municipal law, and by contributing to the creation of conventional rules, or rather by originating a new principle.⁶⁹ Cheng considers the doctrine of abuse of rights to be merely an application of the principle of good faith to the exercise of rights. Any violation of the requirements of this principle (that is, when a right is exercised for the purpose of causing injury, in order to evade obligations, in a manner incompatible with the principles of the

⁶⁴ Cf. *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publications, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, chap. III, sect. 6. This concept is so firmly established in the jurisprudence of the Hague Court that it may be said to regard an "international illegal act" and a "breach of international obligations" as synonymous terms. Cf. Schwarzenberger, *International Law*, vol. I (3rd ed., 1957), p. 571.

⁶⁵ See Bustamante and authors cited by him, *Derecho Internacional Público* (1936), vol. III, pp. 474, 481.

⁶⁶ *Proceedings of the Advisory Committee of Jurists (June 16th-July 24th 1920)*, pp. 315 and 316.

⁶⁷ "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours de l'Académie de droit international* (1925-I), vol. 6, p. 108.

⁶⁸ *The Function of Law in the International Community* (1933), p. 298.

⁶⁹ *L'abus de droit en droit international* (1953), pp. 193–196.

legal order, or against the interests of others etc.), constitutes an abuse of rights, prohibited by law.⁷⁰

72. The authors who dispute the applicability of the doctrine of abuse of rights in international relations do not always do so on the same grounds. Scerni, for instance, contends that the only theoretical basis on which the doctrine could be founded would be the social and solidaristic conception of subjective rights, a conception which is out of the question on account of the highly individualistic character of international law.⁷¹ In another elaborate study, of more recent publication, J. D. Roulet considers that the doctrine is useless; he points out the primitive and often imprecise nature of the rules of international law and argues that to seek to remedy the situation by means of a doctrine which is similarly characterized by a marked flexibility and lack of precision can produce no positive results.⁷² Viewing the question from another angle, Schwarzenberger maintains that in the cases and situations usually mentioned in support of the recognition and applicability of the doctrine in international law, there have been no real "abuses of rights" but breaches of a prohibitory rule of international law.⁷³

3. RECOGNITION AND APPLICATION OF THE DOCTRINE IN PRACTICE

73. A survey of international practice, particularly in the jurisprudence of the courts and claims commissions, clearly shows that at least the basic principle of the prohibition of abuse of rights is applicable in international relations. This is apparent from the decisions of the Hague Court itself. In the case concerning *Certain German Interests in Polish Upper Silesia* (1926), the former Permanent Court admitted that, in contractual matters, the misuse of a right or the violation of the principle of good faith have the character of a breach of the treaty. The Court further stated that the misuse of the right could not be presumed, and that it rested with the party who stated that there had been such misuse to prove his allegation.⁷⁴ In a later decision, the Court pointed out that a State is guilty of an abuse of rights when it seeks to evade its contractual obligations by resorting to measures which have the same effects as acts specifically prohibited by

an agreement.⁷⁵ Likewise the new International Court of Justice, dealing with the right to draw straight baselines for the purpose of delimiting the territorial sea, mentioned the "case of manifest abuse" of this right by the coastal State.⁷⁶

74. Commenting on the arbitral decision in the *Boffolo* case and similar cases, Judge Lauterpacht observes: "The conspicuous feature of these awards is the view that the undoubted right of expulsion degenerates into an abuse of rights whenever an alien who has been allowed to take up residence in the country, to establish his business and set up a home, is expelled without just reason, and that such an abuse of rights constitutes a wrong involving the duty of reparation."⁷⁷ The doctrine of the abuse of rights has been applied in various other matters. For example, in a well-known case, the General Claims Commission (United States-Mexico) referred to "world-wide abuses either of the right of national protection or of the right of national jurisdiction", stating in that connexion that "no international tribunal should or may evade the task of finding such limitations of both rights as will render them compatible with the general rules and principles of international law".⁷⁸ The problem was also raised in the *Trail Smelter* arbitration (1938-1941) between the United States and Canada, although no explicit reference was made to the prohibition of the abuse of rights: "... under the principles of international law", the Court stated, "... 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".⁷⁹

75. The basic concept of the "abuse of rights" also appears in certain international treaties and conventions. For example, in the Inter-American Convention on Rights and Duties of States (Montevideo, 1933), it is stipulated that "the exercise of these rights has no other limitation than the exercise of the rights of other States according to international law." Although expressed differently, the same idea was embodied in the Convention on the High Seas, adopted by the Geneva Conference of 1958. Under its article 2, "... Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law" and similarly, "these freedoms [of navigation, of fishing, etc.], ... shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas". The text of these provisions and their legislative history clearly show the purpose they serve, namely,

⁷⁰ *General Principles of Law as applied by International Courts and Tribunals* (1953), pp. 121 and 136.

⁷¹ *L'Abuso di Diritto nei Rapporti Internazionali* (1930), p. 80. See in the same sense Cavaglieri, *Corso di Diritto Internazionale* (3rd ed., 1934), p. 508.

⁷² *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (1958), p. 150.

⁷³ "The Fundamental Principles of International Law", *Recueil des cours de l'Académie de droit international* (1955-I), vol. 87, pp. 309 *et seq.* In a later publication Professor Schwarzenberger seems to have altered his position concerning the "arbitrary or unreasonable exercise of absolute rights", that is, of "rights or discretion within the exclusive jurisdiction of States". Cf. "Uses and Abuses of the 'Abuse of Rights' in International Law", *Transactions of the Grotius Society of International Law* (1956), vol. 42, p. 167.

⁷⁴ Publications of the Permanent Court of International Justice, *Series A*, No. 7, pp. 30-37.

⁷⁵ *Case of the Free Zones of Upper Savoy and the District of Gex* (1932), *Ibid.*, *Series A/B*, No. 46, p. 167.

⁷⁶ *Fisheries case, Judgment of December 18th, 1951: I. C. J. Reports* 1951, p. 142.

⁷⁷ Lauterpacht, *Op. cit.*, p. 289.

⁷⁸ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1927), p. 23.

⁷⁹ *Reports of International Arbitral Awards* (United Nations publication, Sales No.: 49.V.2), vol. III, p. 1965.

that of limiting the exercise of rights which are not always well-defined and precise rules in general international law or in the particular instruments which recognize them.

4. WHEN "ABUSE OF RIGHTS" GIVES RISE TO INTERNATIONAL RESPONSIBILITY

76. In international law, as in municipal law, it is necessary to determine what, exactly, constitutes an "abusive" exercise of a right.⁸⁰ But apart from the considerable difficulties that would be encountered if we attempted an exhaustive and systematic classification of the various and varied instances of "abuse of rights", especially if such a classification were to be based on cases encountered in practice, for the purposes of the present report we are mainly concerned with the fact that the principle *per se* has been recognized as a principle applicable to international relations, either as a "general principle of law", or as a general principle of international law.⁸¹ Clearly, it is not always easy to determine whether the case is one of abuse of rights or of a breach of an international obligation *stricto sensu*. This, however, is in turn very different from saying that it is always possible to detect a breach of an international obligation stemming from a clear and specific injunction to do or abstain from doing a given act. There is no denying that as a complex of rules international law suffers, to a far greater extent than municipal law, from gaps and lack of precision, that this occurs in customary law as well as in conventional and written law and that these gaps and this lack of precision are to be found in practically all matters which the law of nations embraces.

77. In view of the foregoing, it is necessarily true that the doctrine of the abuse of rights finds its widest application in the context of "unregulated matters", that is, matters which "are essentially within the domestic jurisdiction" of States. In fact, as has been pointed out, even the most forceful opponents of the doctrine admit the possibility of the abusive exercise of this category of State rights. And in any field in which States necessarily enjoy wide discretionary powers the applicable principles are precisely those "principles of international law which govern the responsibility of the State" for injuries caused in its territory to the person or property of aliens. The example usually given is the right of the State to expel aliens, though this, of course, is not the only or the most frequent example. Whatever the aspect of the "treatment" to which aliens are entitled under those principles governing international responsibility, it is recognized, as can be seen from chapter III of the second report (A/CN.4/106), that the State possesses the right to take measures restricting human rights and fundamental freedoms for

reasons of internal security, the economic well-being of the nation, to ensure order, to protect health and morals, etc. Consequently, where this right is not governed by explicit and exact rules, the international responsibility which may be incurred by the State through a violation of human rights and fundamental freedoms in such cases will only be imputable on the grounds of an unjustified and arbitrary, i.e. "abusive", exercise of the discretionary power.

78. In the fourth report, in examining the international responsibility which may be incurred by the State through measures which affect acquired rights, a distinction was made between measures which involve "unlawful" acts and those which, by contrast, can only be reflected in "arbitrary" acts. This, as has been demonstrated in practice and recognized by some authors, is another context in which the doctrine of the abuse of rights can be applied. In view of the impossibility, at least for the present, of devising a detailed and precise set of rules governing the right of expropriation, the notion of "arbitrariness" is all that can be relied upon in any attempt to ascertain whether international responsibility exists and is imputable. The mere act of expropriation, whatever form it takes and whatever the nature of the property, constitutes the exercise of a right of the State. Consequently, except in the specific cases referred to in the fourth report (existence of treaties or a certain type of contract or concession), it would not be possible to speak of non-performance of an international obligation. The factor giving rise to responsibility, when it exists, must necessarily be something different: the absence of a reason or purpose to justify the measure, some irregularity in the procedure, the measure's discriminatory nature or, according to the circumstances, the amount, the degree of promptness or form of the compensation.

II. The basis of international responsibility

79. Consideration must now be given to the second problem arising in connexion with the circumstances which must be present before an act or omission can be described as contrary to international law. As was pointed out in paragraph 66 above, the problem is to ascertain whether international responsibility can only be incurred, and consequently imputed, if, in addition to the unlawful and harmful act, there has been some wilful act (*culpa* or *dolus*) on the part of the subject of imputation. The first step must be to consider the opinions of the authorities on the question, with a special view to assessing the two basic theories which have been propounded.

5. Opinions of authors on this question

80. The theory of "fault" was introduced into international law by Hugo Grotius. He held that "... if anyone be bound to make reparation for what his minister or servant does without his fault, it is not according to the Law of Nations, ... but according to the Civil Law, and even that rule of the Civil Law is not general...". Grotius extended this principle to cover cases of responsibility for acts by private individuals

⁸⁰ For the different criteria used in defining the institution in municipal law, see L. Josseland, *De l'esprit des droits et de leur relativité, théorie dite de l'abus des droits* (1927), *passim*.

⁸¹ For the criteria put forward in this field with a view to defining the "abuse of rights" see Roulet, *op. cit.*, pp. 67 *et seq.* See also Cheng, *op. cit.*, for a classification of the different forms the institution takes in international jurisprudence.

through the notions of *patientia* and *receptus*: "A civil community [a State], like any other community, is not bound by the act of an individual member thereof, without some act of her own, or some omission."⁸² As has been pointed out, the theory was intended to replace the Germanic doctrine of reprisals, which was based on the notion of "collective" responsibility for injuries caused to a State or its subjects by a third State or its subjects.⁸³ Subsequently, and up to the end of the nineteenth century, authors accepted the theory virtually without questioning it. For a further quarter of a century, the theory continued to be prevalent among students of international law, and even today it has a considerable number of adherents—particularly in its modern version according to which responsibility derives not from the fault or *culpa* of the State itself, but from that which may be imputed to the agency or official responsible for the act or omission which places an obligation upon the State.⁸⁴

81. Neither of these versions of the theory of "fault" should be confused with the concept of the "principle of fault" advanced by B. Cheng. On the basis of certain arbitral decisions which shall be examined further on, this author maintains that fault is synonymous with "unlawful act (or omission)", because it implies the violation of an obligation giving rise to international responsibility. In his view, contrary to the opinion of most writers, fault in modern jurisprudence is no longer identified exclusively with negligence or malice. However, the fact that it means any act or omission, which violates an obligation, does not imply that in order to be internationally unlawful such an act or omission must needs be committed "wilfully and maliciously or with culpable negligence". Certain acts are not internationally unlawful unless committed with malice or culpable negligence. But the latter is only one category of fault, namely, default in those obligations which prescribe the observance of a given degree of diligence for the protection of another person. In short, Cheng holds that the only genuine cases of "objective responsibility" are those in which "the obligation to make reparation is conditional on the happening of certain events independent of any fault or unlawful act imputable to the obligated party". In such cases, however, he does not consider that there is responsibility *stricto sensu*, but simply a legal obligation modelled on the notion of "assumed responsibility".⁸⁵

82. The other main school of thought consists of the authors who favour the theory of "risk". Although Triepel was the first to attack the theory of "culpability" (fault), he really only rejected it so far as political and moral satisfaction was concerned, and acknowledged the need for retaining the element of *culpa* or fault with regard to the duty of material re-

paration.⁸⁶ Anzilotti was the first to reject the theory entirely, postulating in its place the principle of objective responsibility. In his view, the State is responsible not because of the direct or indirect connexion which exists between its will and the action of the individual (agency or official), nor because of a possible culpable or malicious intention, but because it has not fulfilled the obligation imposed upon it by international law. It is not fault (*culpa* or *dolus*) but a fact contrary to international law which makes the State responsible; for it is the mere lack or want of diligence (in the prevention of the act of the individual or in its punishment), and not the "culpable" fault, which constitutes the violation of international law.⁸⁷

83. A number of more recent writers have adhered to the theory of "risk" or of objective responsibility. At the session of the Institut de droit international, to which reference was made earlier, Bourquin maintained that, even in cases in which international responsibility arises out of "lack of diligence", the basis of the responsibility need be sought no further. And, in the final analysis, as the intention or *culpa* is obscured by the violation of the international obligation, the idea of fault, as an independent and necessary condition for State responsibility, becomes superfluous.⁸⁸ Guggenheim also has stated that the "objectivation" of the notion of negligence imposes upon the community a duty of vigilance and diligence.⁸⁹ Sometimes the theory has been explained from the point of view of the problem of "imputability", and in this connexion, it has been submitted that if the breach of an international obligation is positively determined, this conduct (act or omission) will be imputed provided that the State agency or official concerned had the requisite competence and the action took place in such circumstances that international law would make the imputation.⁹⁰ The members of the Vienna School explain the theory merely on the grounds of the "collective" character of the institution of international responsibility.⁹¹

84. Some writers have attempted to solve the problem by adopting an eclectic approach. This was the course first followed by Shoen, who admits that *culpa* is required in all cases of responsibility for acts of private persons, where lack of diligence on the part of the State organs or officials must be established, but

⁸⁶ Cited by Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 142, footnote 5.

⁸⁷ *La Teoria Generale della Responsabilit  dello Stato nel Diritto Internazionale* (1902), pp. 172-173.

⁸⁸ Cf. *Annuaire de l'Institut de droit international* (1927), vol. I, pp. 504-505.

⁸⁹ Guggenheim, *op. cit.*, p. 54.

⁹⁰ Cf. Starke, "Imputability in International Delinquencies", *British Year Book of International Law* (1938), p. 114. The same position will be found in Diena, *Diritto Internazionale Pubblico* (4th ed., Milan, 1939).

⁹¹ See Kunz "Teoria General del Derecho Internacional", *Cursos de la Academia Interamericana de Derecho Comparado e Internacional* (Havana, 1952), vol. II, p. 431. Kelsen, however, making a distinction between the obligated party and the party against whom the sanctions are directed, concedes that the responsibility of the latter may be based on the fault of the delinquent. Cf. *Principles of International Law* (1952), p. 122.

⁸² *De Jure Belli ac Pacis*, L.ii.c.17,s.20 and c.21,5.2.

⁸³ On this point, see Nys, *Les origines du droit international* (1894), pp. 62 et seq.

⁸⁴ For these two versions of the theory, see Guggenheim, *Traite de droit international public* (1954), vol. II, pp. 50-52.

⁸⁵ Cf. *General Principles of Law*, etc., chap. 8.

not with respect to the other cases, in which responsibility is incurred simply by the violation of international law.⁹² Strupp, following a similar line of thought, would extend the application of fault to all cases of omissions (*délits d'omission*), where responsibility is engaged because of lack of diligence, but in all cases of positive acts (*delicta commissiva*) would hold the State responsible merely on account of the illegality of the act.⁹³ Authors seeking to find compromise formulae have sometimes followed other lines of reasoning. Anzilotti himself, in a later reconsideration of his original position, admitted that: "Whenever there is a rule providing for the international responsibility of the State for certain acts, it is necessary to ascertain whether such rule, tacitly or expressly, makes its imputation dependent on the fault or *dolus* on the part of the organ, or, on the contrary, points only to the existence of a fact objectively contrary to international law." It is his view that in most cases the question cannot be resolved on the basis of a specific rule; recourse must therefore be had to general principles of law, according to which, in normal circumstances, the *animus* of the individual or organ of the State is not the reason for or a condition of responsibility in international law.⁹⁴ Still other authors, though advocating the fault theory, have also made concessions by admitting that "if necessities of international life lead us to the adoption, in certain instances, of the principle of absolute liability, such cases will nevertheless, as they do in private law, constitute an exception to the generally recognized principle of responsibility based on fault".⁹⁵

6. THE POSITION IN INTERNATIONAL JURISPRUDENCE

85. This divergence of opinion among the authorities is principally due to the uncertainty and lack of a settled approach in international practice. To begin with, the decisions of international courts and claims commissions are not always consistent in the terminology they use in this connexion. Thus, in some cases, which often are cited to demonstrate the explicit acceptance of the classic theory, the word "fault" is not employed in the sense of *culpa* or of any other subjective element, but in the sense of an act or an omission constituting by itself the violation of the international obligation involved. For example, in the *Jamaica* case (1798) the term is used as synonymous with "omission of duty".⁹⁶ Likewise, in the *Russian Indemnity* case (1912), decided by the Permanent Court of Ar-

bitration, "fault" means every act or omission involving the duty to make reparation; that is to say, it is identified with the concept of an "unlawful act or omission".⁹⁷

86. Undoubtedly there are cases where the subjective element (fault, *culpa* or even *dolus*) is not only expressly mentioned, but also taken as the basis of responsibility and the foundation for the imputation of the act or omission involving a breach of international law. In the *Chattin* case (1927), the Mexican-United States General Claims Commission admitted that in a case of injustice committed by a judicial organ it is necessary to inquire whether the treatment of an alien amounts to an outrage, bad faith, wilful neglect of duty or an insufficiency of governmental action recognizable by every unbiased man.⁹⁸ And in the *Fur Seal Arbitration* (1892), the President of the Tribunal referred to an injury done "maliciously".⁹⁹ In other cases, however, the unlawful character of the act or omission was not made dependent on the *animus* behind the conduct of the State organ or official. For example, in the *Caire* case (1929), the Commission declared that "to be able to admit this so-called objective responsibility of the State for the acts committed by its officers or organs outside the limit of their competency, it is necessary that they should have acted at least apparently as competent officials or organs, or that, in acting, they had used the powers or means belonging to their official capacity."¹⁰⁰ Again, in the *Jessie* case (1921), decided by the British-United States Claims Arbitral Tribunal, it was admitted that "any Government is responsible to other Governments for errors in judgement of its officials purporting to act within the scope of their duties and vested with power to enforce their demands."¹⁰¹

87. With regard to the decisions of the former Permanent Court of International Justice, according to a widely-held view, "Until the Judgement in the *Corfu Channel (Merits)* case (1949), the practice of the World Court had been unambiguous. It was based on the assumption that any imputable and voluntary breach of an international obligation constituted an international tort. Not in a single judgement or advisory opinion did the Court pay any attention to guilty

⁹² Scott, J. B. (ed.), *The Hague Court Reports* (1916), p. 543.

⁹³ Cf. General Claims Commission (United States-Mexico), *Opinions of Commissioners* (1927), p. 429.

⁹⁴ Moore, J. B., *History and Digest of the International Arbitrations*, etc. (1898), vol. I, p. 890.

¹⁰⁰ English text quoted from Cheng, *op. cit.*, p. 205. Cf. *Jurisprudence de la Commission franco-mexicaine des réclamations, 1924-1932* (Paris, 1933), p. 221.

¹⁰¹ *Reports of International Arbitral Awards* (United Nations publication, Sales No.: 55.V.3), vol. VI, p. 59. It has recently been said that cases of responsibility for the *ultra vires* acts of organs or officials "seem to suggest that not only is an element of malice not essential to the establishment of responsibility, but even a total absence of fault will not be fatal to the claim". Cf. T. Meron, "International Responsibility of States for Unauthorized Acts of their Officials", *British Year Book of International Law* (1957), p. 96. See other awards which seem to accept "objective responsibility" in Basdevant, "Règles Générales du Droit de la Paix", *Recueil des cours de l'Académie de droit international* (1936-IV), vol. 58, pp. 670 et seq.

⁹² Quoted in Eagleton, *The Responsibility of States in International Law* (1928), p. 212. This view was shared by de Visscher, "La Responsabilité des Etats", *Bibliotheca Visseriana* (1924), pp. 86 et seq.

⁹³ *Éléments du droit international public universel, européen et américain* (2nd ed., 1930), vol. I, p. 330.

⁹⁴ *Corso di Diritto Internazionale* (3rd ed., 1928), pp. 443-444. The idea of deciding on the basis of the relevant rule whether or not responsibility depends on the presence of any subjective element was adhered to subsequently by Starke, *loc. cit.*, p. 116, and by Ross, *A Text Book of International Law* (1947), pp. 257-258.

⁹⁵ Lauterpacht, *op. cit.*, p. 143.

⁹⁶ Cf. J. B. Moore, *International Adjudications, etc., Modern Series* (1929-1933), vol. IV, p. 499.

intent or negligence as a constituent element of international torts.”¹⁰² Though it may be claimed that in the *Corfu Channel* case the International Court of Justice held Albania responsible on the basis of the fault (*culpa*) theory, there is no passage in the judgement where an unequivocal statement to that effect can be found. It is true that the Court admitted that “it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.” But the Court, when determining the “other circumstances” needed to impute responsibility, proceeded to examine only “...whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation”. In a further passage the Court included, among the international obligations relevant to the case, “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁰³ When the judgement is read as a whole, the question whether this element or circumstance of actual “knowledge” should be deemed identical with or, at least, analogous to that of *culpa*, is a matter for interpretation. The views expressed with regard to this aspect of the judgement by the judges who did not concur in it seem to lend further support to this point of view.¹⁰⁴

7. CONSIDERATION OF THE PROBLEM FROM THE STANDPOINT OF CODIFICATION

88. Obviously neither doctrine nor case-law has yet adopted a conclusive position as to the basis of international responsibility. Some general submissions can be made, however, in the light of a study of the latter. For instance, in the case of omissions related to acts of private persons, the subjective element (*culpa* or *dolus*) is so closely linked to the conduct of the organ or official as to be practically identified therewith, thus constituting, in the final analysis, the actual object of imputation. In other words, in cases of responsibility arising out of the negligence (or any other form of exercise of the will) of the organ or official, it is the negligence or volition which constitutes the conduct contrary to international law. As the Special Rapporteur indicated in his second report (A/CN.4/106, chap. V, sect. 15), 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 in which there has been failure to exercise “due dili-

gence”. On the other hand, in the case of positive acts and even of some omissions which give rise to the direct responsibility of the State, the *animus* attributable to the organ or official, if it plays any role at all, does not appear to have any serious bearing on the imputation of responsibility, which depends fundamentally on the existence of an injury and on the equally objective fact that the injury was caused through the non-performance of an international obligation (or an abuse of right, as the case may be). This second submission is made without prejudice to the fact that the rule in question may make the imputation of responsibility conditional on *culpa* or on any other subjective element or that the international court may infer such a condition from the nature or purpose of the rule. Further submissions, unless made in the same general terms as the foregoing, could fail to reflect practical realities.

89. How should this problem of the basis of international responsibility be approached from the technical standpoint of codification? Except for the draft prepared by the Institute of International Law in 1927 and that adopted by the Third Congreso Hispano-Luso-Americano de Derecho Internacional, apparently none of the official or private codifications mentioned in the Special Rapporteur’s reports has attempted to solve the problem.¹⁰⁵ The text adopted by the Institute also does not take a definite, clear-cut stand. Members were divided not only on the question of substance, but even as to the advisability of introducing into the draft a provision defining the basis of international responsibility. The majority was in favour of the “fault” theory, which the Rapporteur, Professor Strisower, had adopted in his report as applicable to all cases of responsibility.¹⁰⁶ The text finally approved, however, seems to reflect the purpose of reconciling the two schools of thought, though admitting objective responsibility rather as an exception to the general rule:

“This responsibility of the State does not exist

¹⁰⁵ It has been said that article 1 of the text approved by the Third Committee of the Hague Conference recognized the “objective responsibility” of the State for the actions of its organs and that it completed the development of this concept. Cf. Guggenheim, *op. cit.*, p. 53. It will be recalled that, according to this article, “International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.” Apart from the fact that the text only follows the usual drafting of contemporary codifications, there is nothing in the records of the Third Committee showing that either the French delegation—the sponsor of the original proposal—or any other delegation had in mind the problem of the basis of international responsibility. Cf. League of Nations Publications (document C.351(c) M.145(c)1930.V.), pp. 26–31, 236.

¹⁰⁶ The Rapporteur’s original text read as follows: “The State shall not be held responsible unless the non-performance of the international obligation is a consequence of the malice (*dol*) or negligence of its organs.” At a later stage of the discussion the Third Committee of the Institute introduced a new text leaving a door open for cases in which fault might not be required: “The State shall not be held responsible unless the non-observance of the international obligation is the consequence of a fault of its organs. The question of the cases in which the State may be held bound to make reparation for an injury when there has been no fault on the part of its organs shall remain open.” Cf. *loc. cit.*, pp. 471 and 557 and 558, respectively.

¹⁰² Schwarzenberger, *International Law*, vol. I, *International Law as Applied by International Courts and Tribunals* (3rd ed., 1957), p. 632. See a similar comment in Guggenheim, *op. cit.*, p. 52.

¹⁰³ *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, pp. 18 and 22.

¹⁰⁴ See Dissenting Opinions by Judges Badawi Pasha, Krylov and Azevedo, *ibid.*, pp. 65, 71 and 85, respectively.

if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault."¹⁰⁷

On the other hand, the second of the drafts we have mentioned adopts the "fault" theory in absolute form: "That such unlawful act be legally imputable to the State on account of duly substantiated *dolus* or *culpa* on its part."¹⁰⁸

90. It is not difficult to see that neither of the two texts reflects the traditional practice. The latter states as an absolute principle a concept that has been gradually abandoned since the end of the last century. The Institute's proposal, in turn, besides suffering from substantially the same defect, fails to provide for cases of "responsibility without fault", as they are most frequently encountered, so far as form and scope are concerned, in practice. In connexion with these draft codifications it is interesting to note that during the Institute's discussions one of its members, Le Fur, expressed the opinion that it was possible to devise a theory of responsibility without reference to the concepts of fault or risk, since the conflict between these two concepts was exaggerated and of a purely technical interest. On the same occasion de Visscher, after pointing out the shortcomings inherent in each concept, favoured a theory of responsibility based on a *système des preuves*, establishing the cases in which the State is *prima facie* responsible and in which it can exonerate itself by invoking certain circumstances.¹⁰⁹

8. SPECIAL SITUATION CREATED BY TECHNICAL DEVELOPMENTS

91. The material referred to hitherto relates exclusively, or at least primarily, to the most commonly encountered cases of responsibility. Hence the survey would be incomplete without a reference to the special situation created by the progressive application of modern technology to industrial and other activities. These developments can logically be expected to have repercussions on the law of nations similar to those already observed in the municipal law of many countries; new categories of objective responsibility will have to be created to provide for the growing number of risks entailed by the use of the new technology. Among the precedents offered by international practice, mention need be made only of the *Trail Smelter* case which, although it was cited above in connexion with "abuse of rights", may also be adduced as proof that the State is responsible for injuries caused by specific industrial activities, without reference to any question of *animus* attributable to the organ or official whose duty it is to prevent the occurrence of the accidental damage.

92. This problem has gained attention in the theoretical field because of the nuclear tests carried out in

some areas of the high seas. In defending the right of the United States to conduct these tests, McDougal and Schlei maintain that such tests can be undertaken as "preparatory measures for self-defense" within the concept of the State's "reasonable competence" beyond its territorial seas, provided that they involve only a temporary and limited interference with navigation and fishing on the high seas.¹¹⁰ Other authors, however, have expressed opposition to these tests and have pointed out the international responsibility which the State conducting them may incur. Professor Gidel, in particular, has emphasized that, from the legal point of view, nuclear tests affecting the high seas undoubtedly constitute internationally unlawful acts giving rise to a duty to make reparation for the injuries caused, regardless of the precautionary measures which may have been taken to avert such injuries.¹¹¹

93. Much the same situation arises in connexion with nuclear tests conducted within a State's territory, the use of the high seas as a receptacle for radioactive waste materials, the use of space for launching intercontinental missiles and artificial satellites, etc., all of which involve new dangers, often unforeseeable and uncontrollable, to human safety, property and the use and exploitation of the high seas and of the suprajacent space. The consideration and solution of the problem are made more difficult by the fact that in all these cases it must first be decided whether a State has the right to use the high seas and the suprajacent space—and even its own territory—to conduct tests of this type. President Eisenhower, disagreeing with the protests evoked by the Soviet Union's announced plans to test a powerful new missile in an area of the central Pacific, recently declared that the United States had always claimed the right in the high seas to use areas thereof for valid scientific experiment and had, in doing so, notified everybody concerned, and then taken the proper measures to warn away from the areas involved anyone that might be damaged; he added that the United States had assumed that that was within the meaning and spirit of international law and that it would be very unusual for the United States to protest against the Soviet Union's plans to do the same thing.¹¹² Nevertheless, the first United Nations Conference on the Law of the Sea (Geneva, 1958) recognized, in connexion with article 2 of the Convention on the High Seas cited above, that "there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas."¹¹³ Later, at its fourteenth session, the General Assembly requested France to refrain

¹¹⁰ "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security", *The Yale Law Journal* (April 1955), vol. 64, pp. 684-687.

¹¹¹ "Explosions nucléaires expérimentales et liberté de la haute mer", in *Problèmes fondamentaux du droit international, Festschrift für Jean Spiropoulos* (1957), pp. 198, 201-202, 205. For a similar view, see E. Margolis, "The Hydrogen Bomb Experiments and International Law", *The Yale Law Journal* (1955), vol. 64, pp. 635, 641, 647.

¹¹² UPI dispatch from Washington, dated 13 January 1960.

¹⁰⁷ *Loc. cit.*, vol. III, pp. 330 and 331.

¹⁰⁸ Cf. *III Congreso Hispano-Luso-Americano de Derecho Internacional, Boletín de Información No. 15, Resolución V.—La Responsabilidad del Estado por Daños Causados a los Extranjeros*.

¹⁰⁹ *Loc. cit.*, vol. III, p. 106

from undertaking nuclear tests in the Sahara, "conscious of the great concern throughout the world repeatedly expressed in the United Nations over the prospect of further nuclear tests and their effects upon mankind" (General Assembly resolution 1379 (XIV));¹¹³ some States had also suggested that the attention of France should be drawn to the fact that, in creating conditions of danger in Africa, it could not assume the responsibility for the protection of the threatened sovereign States.

94. Obviously, in view of these resolutions, it cannot be asserted that there is, *stricto sensu*, an international obligation prohibiting nuclear tests or, for that matter, the other tests which have been mentioned. Nevertheless, if States invoke the freedom to use the high seas or the suprajacent space, or even their own territory, the question arises whether the exercise of that freedom would be lawful if it involved activities potentially harmful to such important interests as the safety of human beings. From the viewpoint of international responsibility, the problem is not to determine whether or not there is a well-defined, precise prohibition against conducting a particular test under certain conditions; it is enough to know that the activities concerned imply, by their very nature and by their harmful consequences, the abusive and unlawful exercise of a right. The expression "a right" is used because scientific tests that are incapable of causing injury are entirely compatible with freedom of use of the high seas and space. But according to article 2 of the Geneva Convention which has been cited repeatedly, this freedom, whatever its manifestations, "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

95. In short, the special problem created by nuclear tests and by the other activities mentioned in this section does not, for the moment, seem to be capable of solution except by recourse to the "doctrine of abuse of rights". That doctrine clearly appears to offer the only possible chance of solving any such cases as may arise until the subject is regulated and the conditions to which the imputation of international responsibility should be subordinated are determined and fixed. In these circumstances, the question of the basis of responsibility loses some of its importance. For, in any case, since the decisive factor is the injurious act resulting from a manifest abuse of right, it would be senseless to require, as a basis for the imputation of responsibility, the proof of *culpa* on the part of the author of the injury. At the most, it may be said that the degree of diligence and the efforts made by the

State to avert all risk have, up to a certain point, the effect of an extenuating circumstance; but they can never exonerate the State from responsibility or relieve it from the duty to make reparation for the damage and injury caused.

96. As the Commission knows, the International Atomic Energy Agency has entrusted a panel of experts with the task of investigating non-military nuclear hazards and recommending any action that might seem necessary to assure maximum legal protection to the public. Part of the discussions which have taken place so far have referred to the problem of international responsibility of States for injuries caused to persons or property as a result of nuclear tests. The purpose of these deliberations has been to prepare a draft convention on the subject. One of the questions raised has been whether, in such cases, fault or negligence should be regarded as a prerequisite of the imputation of international responsibility to the State.

C. AMENDMENTS AND ADDITIONS TO THE DRAFT

97. The Special Rapporteur wishes to incorporate certain conclusions reached in this and the preceding report in the appropriate provisions of the draft he has presented to the Commission. Reference must be made first to the provisions relating to the constituent elements of the institution of international responsibility and then to those dealing with measures affecting acquired rights.

1. CONSTITUENT ELEMENTS OF INTERNATIONAL RESPONSIBILITY (ARTICLE 1 OF THE DRAFT)

98. As has been shown in part B of this report, the conditions or requirements which an act or omission must meet in order to give rise to the international responsibility of the State raises two problems: first, it has to be determined whether the act or omission must involve the non-performance of an exactly defined and specific international "obligation" or whether the fact that there has been an "abuse of rights" will suffice; and second, it must be decided whether responsibility can only be incurred if, in addition to the unlawful and injurious act, there has been a wilfully adopted attitude (*culpa* or *dolus*) on the part of the subject of the imputation. Both problems arise mainly in connexion with article 1 of the draft.

(a) *Nature of the acts and omissions giving rise to international responsibility*

99. With respect to the first of the two problems mentioned above, part B (I) (4) indicated in a general way when an "abuse of rights" gives rise to the international responsibility of the State. Here, the question will be approached from the standpoint of the technique of codification. It cannot be denied that, because of the lack of precision in the body of rules composing international law, the distinction between cases of non-

¹¹³ United Nations Conference on the Law of the Sea, *Official Records, Volume II: Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II), annexes, document A/CONF.13/L.56, resolution I: Nuclear tests on the high seas.

¹¹⁴ In two other resolutions (1402 A and B (XIV)) on the "Suspension of nuclear and thermo-nuclear tests", the Assembly referred to the negotiations which began at Geneva on 31 October 1958 on such suspension, "Considering that an agreement on the cessation of nuclear and thermo-nuclear tests with effective international control is urgent".

performance of concrete, exactly defined and specific international obligations and cases of "abuse of rights" is at times very slight and often difficult to establish. For this reason and, in particular, in order to overcome the difficulties that would be raised by any attempt to distinguish the diverse and different cases of "abuse of rights", a paragraph might be added to draft article 1, in the following terms:

"2 *bis*. The expression 'international obligation of the State' shall also include the prohibition of 'abuse of rights', which shall be construed to mean any act or omission contrary to the conventional or general rules of international law governing the exercise of the rights of the State."

Drafted in this way, the paragraph covers any case of "abuse of rights", on the understanding that an act or omission of this kind can only engage the responsibility of the State if such act or omission involves a breach of a rule established by treaty or of a rule of general international law stipulating the limitations to which the (legitimate) exercise of the right in question is subject.

100. If the Commission should, nevertheless, prefer not to include the suggested paragraph but rather to confine itself to the formula generally used in previous draft codifications, it would be advisable to place a broad interpretation on the expression "international obligations of the State" and to regard the prohibition of "abuse of rights" as inherent therein either as a "general principle of law recognized by civilized nations" or as a principle of international law. In commenting on the meaning and scope of that expression in the second report (A/CN.4/106, chap. I, sect. 4), the Special Rapporteur, after pointing out the fact that every work of codification is apt to contain "gaps", suggested a means of filling any such gaps as might be found in the draft. On that occasion it was stated that "the article [1] defines 'international obligations' as those resulting from 'any of the sources of international law'." And the report went on to say: "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". The interpretation suggested would thus be not only legally feasible, but also consistent with these remarks. Nevertheless, the addition of the paragraph proposed by the Special Rapporteur would have the advantage of defining the essential idea underlying cases of "abuse of rights" in the draft itself.

101. The foregoing naturally relates, for the most part, to the formal aspect of the problem, for the substantive question is whether or not "abuse of rights" should be accepted as a constituent element of the in-

ternational responsibility of the State and expressly mentioned in article 1. In this connexion, the Special Rapporteur would like to explain why in this report he advocates the admission of the doctrine of abuse of rights despite the fact that in his second report he asked: "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?" In that same context, it was observed that "as long as the draft does not in any way exclude such responsibility [the atomic explosion on the Bikini atoll and the *Trail Smelter* arbitration] 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". (A/CN.4/106, chap. I, sect. 3.) The more thorough study of the question which the Special Rapporteur made subsequently,¹¹⁵ particularly of the necessary applications of the doctrine with regard to measures affecting acquired rights,¹¹⁶ convinced him of the need to propose its incorporation in any such draft as the Commission may prepare. He believes that the disadvantages which it may undoubtedly entail in specific cases will be fully offset by the evident advantages inherent in the assurance of greater legal protection for interests that may be affected by the abusive exercise of a right.

(b) *The basis of imputation*

102. In part B (II) (7) of this report, the Special Rapporteur formulated some general conclusions on the position taken by international case-law regarding the problem of the basis of imputation of responsibility and the approach to this problem from the technical standpoint of codification. In order to complete and round off those conclusions, it need only be added that it is unnecessary to introduce any amendments or additions on this subject to the text of article 1 of the draft. International responsibility is in principle objective, for the decisive factor is the existence of an injury which is the result of the unjustified non-performance of an international obligation of the State or, in certain cases, of an unjustifiable abuse of a right. The new text of article 1 covers all these general constituent elements of responsibility. In cases when the existence or imputability of responsibility depend on *culpa* or on some other subjective element, or when such element constitutes the very basis on which responsibility and imputability rest, express provision therefore has to be made. And the draft duly makes such provision, for example, with respect to cases in which the State may incur responsibility as a result of the acts of individuals and internal disturbances.

¹¹⁵ Cf. García Amador, "State Responsibility—Some New Problems", *Recueil des cours de l'Académie de droit international* (1958–II), vol. 94, pp. 376 *et seq.*

¹¹⁶ See *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), document A/CN.4/119, particularly section 5.

2. MEASURES AFFECTING ACQUIRED RIGHTS (CHAPTER IV OF THE DRAFT)

103. The next point to consider is the amendments and additions that should be made to chapter IV of the draft, which is entitled, in the original text, "Non-performance of contractual obligations and acts of expropriation". These changes are based on the conclusions expressed in the fourth report and in this report.

(a) *Measures giving rise to international responsibility*

104. As was explained in the introduction to the fourth report (A/CN.4/119), the fourth report was not merely an expansion of chapter IV of the second report, for there was also a difference in the method of study adopted in each of them. The fourth report, besides giving more exhaustive treatment to the traditional doctrine and practice in the matter, dwelt on the new trends which had made their appearance, mostly since the last World War; although they do not jointly constitute a uniform movement, and some are even contradictory, there is no doubt that they have made a deep impact on the traditional notions and ideas. In this connexion, the Special Rapporteur then added that this fact was so certain that it would be wholly unrealistic to disregard it and to deny that the new tendencies could make a valuable contribution to the development and codification of the relevant rules on international responsibility. The revised text of chapter IV of the draft reads as follows:

CHAPTER IV

MEASURES AFFECTING ACQUIRED RIGHTS

Article 7. Expropriation and nationalization measures

1. The State is responsible for the expropriation of the property of an alien if the measure in question does not conform to the provisions of the domestic law in force at the time when such property was acquired by the affected holder thereof.

2. In the case of nationalization or expropriation measures of a general and impersonal character, the State is responsible if the measures are not taken for a public purpose or in the public interest, if there is discrimination between nationals and aliens to the detriment of the latter with respect to compensation for expropriated property, or if unjustified irregularities injurious to such property are committed in the interpretation or application of such measures.

Article 8. Non-performance of contractual obligations in general

1. The State is responsible for the non-performance of obligations stipulated in a contract entered into with an alien or in a concession granted to him, if the measure in question is not justified on grounds of public interest or of the economic necessity of the State or if it involves a "denial of justice" within the meaning of article 4 of this draft.

2. The foregoing provision is not applicable if the contract or concession contains a clause of the nature described in article 16, paragraph 2.

3. When the contract or concession is governed by international law or by legal principles of an international character, the State is responsible for the mere non-performance of the obligations stipulated in said contract or concession.

Article 9. Public debts

The State is responsible for the repudiation or the cancellation of its public debts, if the measure in question is not justified on grounds of public interest or if it discriminates between nationals and aliens to the detriment of the latter.

105. The reasons for the revision of chapter IV and the scope of the new provisions were discussed in the fourth report (see A/CN.4/119, in particular sections 14, 15, 21 and 29) and need not be restated here. The fundamental amendments and additions should, however, be pointed out: article 7 now draws a distinction between the common type of expropriation and nationalization measures, a distinction which affects in particular the *quantum* of compensation and the form and promptness of payment; and article 8 now contains the new provision on contracts or concessions governed by international law or by legal principles of an international character.

(b) *Extraterritorial effect of such measures*

106. In view of the fact that the sole purpose of the draft is to describe the conditions or circumstances in which the State incurs international responsibility for injuries caused in its territory to the person or property of aliens, it is, strictly speaking, inappropriate to add to it provisions on the extraterritorial effect of measures affecting acquired rights. Nevertheless, if the Commission considers it opportune or convenient to include such provisions in the draft it is preparing, the Special Rapporteur suggests that the following text, which assembles the fundamental considerations and conclusions expressed in section 38 of this report, be taken as a basis for discussion:

"Measures affecting acquired rights shall have extraterritorial effect and shall be recognized and executed in any State, save in so far as they are contrary to the principles of (public) international law governing the exercise of the right of the State to take measures of this category."

The principles of (public) international law mentioned in the foregoing text would be those set forth in chapter IV of the draft.

(c) *Systems for the settlement of disputes*

107. From the survey contained in this report of the various methods of settlement applicable to disputes concerning acquired rights, the Special Rapporteur concluded that the advantages or disadvantages of each system depended primarily on the circumstances in which each dispute arose. Accordingly there seems to be no need to introduce any amendment or addition to chapter VII of the draft, which covers all the systems and indicates which is to be followed in each given case. However, the Special Rapporteur feels bound to reaffirm his opinion that, given the nature of these controversies, the most appropriate system, for reasons already stated, would seem to be direct settlement between the respondent State and the alien concerned. Moreover, it may perhaps be advisable to add to the

draft a provision designed to cover the special situation created by contracts or concessions which provide for international jurisdiction without reference to the exhaustion of local remedies. Here again the reasons have been fully explained and a paragraph could accordingly be inserted in article 19 of the draft, in the following terms :

“(4 *bis*) Where there is an agreement between the respondent State and the alien, it shall not be necessary to exhaust the local remedies unless the

agreement expressly so requires as a condition for the submission of a claim to the international body specified in the agreement.”

As was indicated in the relevant part of the report, the aim here is not to introduce an exception to the local remedies rule, but rather to ensure consistency with the essential purpose behind the arbitration clauses which such instruments contain, namely, the removal from local jurisdiction of disputes concerning their interpretation, application or execution.

LAW OF TREATIES

[Agenda item 4]

DOCUMENT A/CN.4/130

Fifth report by Sir Gerald Fitzmaurice, Special Rapporteur

[Original text: English]
[21 March 1960]

CONTENTS

	Paragraphs	Page
INTRODUCTION	1-9	72
I. Text of articles		
SECOND CHAPTER. THE EFFECTS OF TREATIES		
<i>Part II. The effects of treaties in relation to third States</i>		
Division A. Definitions and basic principles		
Article 1. Definition of a third State	1-5	75
Article 2. States as subjects and as objects of treaties	1-3	75
Article 3. <i>Pacta tertiis nec nocent nec prosunt</i>	1-2	75
Article 4. Apparent or quasi-exceptions or qualifications to the principle <i>pacta tertiis nec nocent nec prosunt</i>	1-3	76
Article 5. Principles underlying the cases in which treaties may have, or result in, effects <i>in detrimentum</i> or <i>in favorem tertiis</i>	1-2	76
Division B. Rights and obligations <i>inter se</i> of the parties to a treaty, in consequence of provisions relating to third States		
Article 6. The case of <i>pacta in detrimentum tertiis</i>	1-3	77
Article 7. The case of <i>pacta in favorem tertiis</i>		77
Division C. Position of third States in relation to the treaty		
Sub-division I. Presumptions and methods of classification		
Article 8. Presumptions	1-5	77
Article 9. Methods of classification	1-8	77
Sub-division II. Effects of treaties <i>in detrimentum</i> and <i>in favorem tertiis</i>		
Section 1. Effects <i>in detrimentum tertiis</i>		
Sub-section (i). Active or positive effects or consequences <i>in detrimentum tertiis</i> - Obligations which the third State may have under, or which may be similar or parallel to, those contained in, the treaty		
Rubric (a). <i>In detrimentum</i> effects brought about by the volition of the third State		
Sub-rubric (a) 1. Effects directly brought about by the third State		
Article 10. Position of a third State signatory of, but not yet a party to, a treaty, in regard to the formal clauses of the treaty, and, in particular, to participation by other States having a faculty of participation under the treaty	1-2	79
Article 11. Case of specific agreement by the third State with the parties to the treaty, or with one or some of them, or with another interested third State	1-2	79
Article 12. Case where the third State assumes obligations or liabilities, or accepts other effects <i>in detrimentum</i> , by means of a unilateral declaration	1-3	79
Sub-rubric (a) 2. <i>In detrimentum</i> effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty		
Article 13. Rule applicable in respect of all treaties	1-2	79
Article 14. Case of the use of maritime or land territory under a treaty or international régime	1-2	79
Rubric (b). <i>In detrimentum</i> effects brought about by operation of law		
Sub-rubric (b) 1. The third State in effect is, or becomes a party to, the treaty by operation of law		
Article 15. Cases of State succession, agency and protection		80
Sub-rubric (b) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law		

CONTENTS (*continued*)

	Paragraphs	Page
Article 16. Case of customary international law obligations mediated through the operation of law-making or norm-enunciating treaties	1-2	80
Sub-section (ii). Passive or negative effects or consequences <i>in detrimentum tertiis</i> —Obligations incumbent on the third State, not under, but in relation to the treaty		
Rubric (a). <i>In detrimentum</i> effects resulting from the application of the principle of respect for lawful and valid international acts		
Sub-rubric (a) 1. In the case of all lawful and valid treaties		
Article 17. General duty of all States to respect and not impede or interfere with the operation of lawful and valid treaties entered into between other States	1-2	80
Sub-rubric (a) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character		
Article 18. General duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties	1-3	80
Rubric (b). Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty		
Article 19. Duty of States to accept and tolerate the incidentally unfavourable effects of lawful and valid treaties		81
Section 2. Effects <i>in favorem tertiis</i>		
Sub-section (i). Active or positive effects or consequences <i>in favorem tertiis</i> —Rights which the third State may have under, or which may be similar or parallel to, those contained in the treaty		
Rubric (a). <i>In favorem</i> effects brought about by the act of the parties to the treaty alone, or of a single grantor		
Sub-rubric (a) 1. Act of the parties to the treaty		
Article 20. The <i>stipulation pour autrui</i>	1-4	81
Article 21. Treaty provisions removing or modifying a disability or prohibition previously existing for a third State		81
Sub-rubric (a) 2. Act of a single State		
Article 22. Unilateral declarations conferring rights on other States	1-2	81
Rubric (b). <i>In favorem</i> effects brought about with the participation of the third State itself		
Sub-rubric (b) 1. Effects directly brought about by the parties and the third State conjointly		
Article 23. Exercise by the third State of a faculty of participation in the treaty itself	1-3	82
Article 24. Case of separate agreement between all, or one or more of, the parties, and a third State, producing for the latter <i>in favorem</i> effects similar to those of the treaty	1-3	82
Sub-rubric (b) 2. <i>In favorem</i> effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties		
Article 25. Rule applicable in the case of all treaties	1-2	82
Article 26. Case of the use of maritime or land territory under a treaty or international régime	1-2	82
Rubric (c). <i>In favorem</i> effects brought about by operation of law		
Sub-rubric (c) 1. Because the third State in effect is or becomes a party to the treaty by operation of law		
Article 27. Cases of State succession, agency and protection		82
Sub-rubric (c) 2. <i>In favorem</i> effects consequential on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law		
Article 28. Case of customary international law rights mediated through the operation of law-making or norm-enunciating treaties		82
Sub-section (ii). Indirect or incidental effects or consequences <i>in favorem tertiis</i> —Effects not under but in relation to the treaty		
Article 29. <i>In favorem</i> effects resulting from the application of the principle of respect for lawful and valid international acts	1-3	83
Article 30. Effects incidentally favourable to a third State resulting automatically from the simple operation of a treaty		83

II. Commentary on the articles

SECOND CHAPTER. THE EFFECTS OF TREATIES

Part II. The effects of treaties in relation to third States

Division A. Definitions and basic principles	1-23	83
Article 1. Definition of a third State	1-6	83

CONTENTS (continued)

	Paragraphs	Page
Article 2. States as subjects and as objects of treaties	7-9	84
Article 3. <i>Pacta tertiis nec nocent nec prosunt</i>	10-16	84
Article 4. Apparent or quasi-exceptions or qualifications to the principle <i>pacta tertiis nec nocent nec prosunt</i>	17-19	86
Article 5. Principles underlying the cases in which treaties may have, or result in, effects <i>in detrimentum</i> or <i>in favorem tertiis</i>	20-23	87
Division B. Rights and obligations <i>inter se</i> of the parties to a treaty in consequence of provisions relating to third States	24-30	87
Articles 6 and 7. Cases of <i>pacta in detrimentum</i> and <i>in favorem tertiis</i> , respectively	24-30	87
Division C. Position of third States in relation to the treaty	31-112	89
Sub-division I. Presumptions and methods of classification	31-38	89
Article 8. Presumptions	31-35	89
Article 9. Methods of classification	36-38	89
Sub-division II. Effects of treaties <i>in detrimentum</i> and <i>in favorem tertiis</i>	39-112	90
Section 1. Effects <i>in detrimentum tertiis</i>	39-81	90
Sub-section (i). Active or positive effects or consequences, <i>in detrimentum tertiis</i> —Obligations which the third State may acquire under, or which may be similar or parallel to, those contained in the treaty	39-62	90
Rubric (a). <i>In detrimentum</i> effects brought about by the volition of the third State	39-54	90
Sub-rubric (a) 1. Effects directly brought about by the third State	39-47	90
Article 10. Position of a third State signatory of, but not yet a party to, a treaty, in regard to the formal clauses of the treaty and, in particular, to participation by other States having a faculty of participation under the treaty	40-41	90
Article 11. Case of specific agreement by the third State with the parties to the treaty or with one or some of them, or with another interested third State	42-44	90
Article 12. Case where the third State assumes obligations or liabilities, or accepts other effects <i>in detrimentum</i> , by means of a unilateral declaration	45-47	91
Sub-rubric (a) 2: Effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty	48-54	91
Article 13. Rules applicable in respect of all treaties	48-49	91
Article 14. Case of the use of maritime or land territory under a treaty or international régime	50-54	92
Rubric (b). <i>In detrimentum</i> effects brought about by operation of law	54A-62	94
Sub-rubric (b) 1: The third State in effect is or becomes a party to the treaty by operation of law	54A-57	94
Article 15. Cases of State succession, agency and protection	54A-57	94
Sub-rubric (b) 2: The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law	58-62	94
Article 16. Case of customary international law obligations mediated through the operation of law-making or norm-enunciating treaties	58-62	94
Sub-section (ii). Passive or negative effects or consequences <i>in detrimentum tertiis</i> —Obligations incumbent on the third State, not under, but in relation to the treaty	63-81	96
Rubric (a). <i>In detrimentum</i> effects resulting from the application of the principle of respect for lawful and valid international acts	63-78	96
Sub-rubric (a) 1: In the case of all lawful and valid treaties	63-67	96
Article 17. General duty of all States to respect and not impede or interfere with lawful treaties entered into between other States	63-67	96
Sub-rubric (a) 2: In the case of treaties embodying international régimes or settlements or of a dispositive character	68-78	97
Article 18. General duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties	68-78	97
Rubric (b). Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty	79-81	100
Article 19. Duty of States to accept and tolerate the incidentally unfavourable effects of lawful and valid treaties	79-81	100
Section 2. Effects <i>in favorem tertiis</i>	82-112	102
Sub-section (i). Active or positive effects or consequences <i>in favorem tertiis</i> —Rights which the third State may have under, or which may be similar or parallel to, those contained in the treaty	82-107	102
Rubric (a). <i>In favorem</i> effects brought about by the act of the parties to the treaty alone, or of a single grantor	82-93	102
Sub-rubric (a) 1. Act of the parties to the treaty	82-91	102

CONTENTS (*continued*)

	Paragraphs	Page
Article 20. The <i>stipulation pour autrui</i>	82-90	102
Article 21. Treaty provisions removing or modifying a disability or prohibition previously existing for a third State	91	104
Sub-rubric (a) 2. Act of a single State	92-93	105
Article 22. Unilateral declarations conferring rights on other States	92-93	105
Rubric (b). <i>In favorem</i> effects brought about with the participation of the third State itself	94-105	105
Sub-rubric (b) 1. Effects directly brought about by the parties and the third State conjointly	94-101	105
Article 23. Exercise by the third State of a faculty of participation in the treaty itself by the third State	94-96	105
Article 24. Case of separate agreement between all, or one or more of, the parties, and a third State, producing for the latter <i>in favorem</i> effects similar to those of the treaty	97-101	105
Sub-rubric (b) 2. <i>In favorem</i> effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with, the provisions of, the treaty by the third State with the consent, express or tacit, of the parties	102-105	106
Article 25. Rule applicable in the case of all treaties	102-103	106
Article 26. Case of the use of maritime or land territory under a treaty or international régime	104-105	106
Rubric (c). <i>In favorem</i> effects brought about by operation of law	106-107	106
Sub-rubric (c) 1. Because the third State in effect is or becomes a party to the treaty by operation of law	106	106
Article 27. Cases of State succession, agency and protection	106	106
Sub-rubric (c) 2. <i>In favorem</i> effects consequent on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law	107	106
Article 28. Case of customary international law rights mediated through the operation of a law-making or norm-enunciating treaty	107	106
Sub-section (ii). Indirect or incidental effects or consequences <i>in favorem tertiis</i> —Effects not under but in relation to, the treaty	108-112	106
Article 29. <i>In favorem</i> effects resulting from the application of the principle of respect for lawful and valid international acts	108-111	106
Article 30. Effects incidentally favourable to a third State resulting automatically from the simple operation of a treaty	112	107

Introduction

1. In his fourth report (A/CN.4/120 of 17 March 1959),¹ the Special Rapporteur presented part I of a second chapter of a code on the law of treaties. The first chapter having dealt with the topic of the validity of treaties, formal, temporal and essential, under the heads respectively of the conclusion, the termination and the substantive validity of treaties,² the second chapter was to be devoted to the effects of treaties, with a third chapter to follow in due course, on the interpretation of treaties—the distinction between the topic of effects and that of interpretation being discussed in paragraphs 2 and 3 of the introduction to the fourth report referred to above. In the same introduction (para. 4), it was mentioned that the topic of the effects of treaties fell into two parts—effects as between

the parties *inter se* (this is the ordinary subject of treaty operation, execution and enforcement), and effects for or in relation to third States. The first of these subjects was dealt with as part I of the second chapter in the Special Rapporteur's fourth report; and the second subject is covered as part II of this second chapter in the present (fifth) report.

2. The topic of the effects of treaties in relation to third States presents the codifier with the usual difficulties; but in this particular case it is not that the topic itself is intrinsically difficult, but that as a matter of theory and doctrine it is in an unsatisfactory state. The literature of the subject is extremely sparse, and, in what there is of it, little attempt is made to deal with the matter systematically.³ Sir Ronald Roxburgh's *International Conventions and Third States*⁴ remains after nearly forty-five years virtually the only full length monograph devoted exclusively to the subject; and, while assembling within the confines of one volume

¹ See *Yearbook of the International Law Commission*, 1959, vol. I (United Nations Publication, Sales No.: 59.V.1), p. 37.

² These topics are covered in the first, second and third reports by the Special Rapporteur. The first report is printed in *Yearbook of the International Law Commission*, 1956, vol. II (United Nations Publication, Sales No. 1956.V.3, Vol. II), pp. 104 ff.; the second in *ibid.*, 1957, vol. II (United Nations Publication, Sales No. 1957.V.5, Vol. II), pp. 16 ff.; and the third in *ibid.*, 1958, vol. II (United Nations Publication, Sales No. 1958.V.1, Vol. II), pp. 20 ff.

³ Rousseau however is, as usual, an exception—see Charles Rousseau *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944), vol. 2, pp. 452-484.

⁴ London, Longmans, Green & Co., 1917.

much useful material, is inevitably somewhat outdated now. No later edition has appeared.⁵

3. The central problem involved by this topic is that, in a certain sense, it contains only one absolutely firm and unequivocal principle, namely, that formulated in the maxim *pacta tertiis nec nocent nec prosunt*. Thus, for State A, a treaty concluded between States B and C is *res inter alios acta*, under or by virtue of which (if the treaty is considered in, and of, itself) State A can have neither rights nor obligations. But few authorities actually leave it at that. All or most⁶ admit in varying degrees that in practice there are, if not strictly exceptions, at any rate qualifications; and that if the inroads they make on the integrity of the strict *pacta tertiis* principle are seen, on analysis, to be more apparent than real, still, in a number of cases, treaties do in fact have effects on, for, or in relation to third States which, even if often of a predominantly incidental or consequential character, give occasion for the play of legal elements. This is not surprising. It does not follow that because a third State has no obligations under the treaty concerned and is not obliged to carry out or comply with its provisions, it has no obligations at all in relation to the treaty, or that the treaty is wholly without legal effect for the third State. Any consideration of the subject makes it speedily apparent that neither of these is the case. It may be granted that save perhaps in one or two respects, there is no true exception to the *pacta tertiis* rule as such—that is to say, the apparent exceptions can mostly be accounted for on some independent legal basis that does not involve postulating that the third State is or becomes directly obliged or entitled by the treaty itself. All the same, these qualifications or quasi-exceptions, even if they can thus be accounted for, constitute in the aggregate a considerable gloss on the *pacta tertiis* rule; and, to stop simply at that rule, absolute though, in a sense, it really is, would be to give a very misleading picture of the position of third States in relation to treaties to which they are not parties. In short, there are a number of ways in which treaties do have legal effects on, for, or relative to, third States, even if directly obliging or entitling the third State under the treaty itself is not amongst them, and even if the latter remains in principle one of the effects that a treaty cannot have for a third State.

4. The next problem is to find some unifying legal principle, on the basis of which these quasi-exceptions and qualifications can be accounted for. Probably this cannot be done, because a number of different legal principles are involved. But that is no excuse for the wholly piecemeal and *ad hoc* treatment which the matter so often receives—particular cases or types of cases being cited (admittedly usually based on a fairly firm

course of international practice) but without much, if any, attempt to discover or suggest the underlying principle of the apparent deviation. Thus, to give an example, it is often stated that treaties about international waterways form an exception to the rule that treaties cannot create rights or obligations for non-parties. But if so, there must or should be some underlying principle, on the basis of which this class of case constitutes an exception—if, strictly, it does. The present Special Rapporteur has discerned—or thinks he has discerned—three or four main principles, on the basis of which treaties can and do have effects for third States, or on the basis of which third States may have rights or obligations in relation to (though not under) the treaty, and without any violation of the *pacta tertiis* principle. Leading to rights or obligations, if not under, then by reason of (or similar or parallel to those contained in) the treaty, are the principles of active consent (as when a State, without becoming a party to the treaty itself, separately agrees to observe it); and consent presumed (as when rules embodied in a treaty gain general currency as customary rules of law to which all States can be deemed to consent). Another principle having a similar effect as regards the application of treaty provisions to or by third States, is that of the automatic entailment of rights and obligations. The exercise of rights under a treaty entails performance of the corresponding obligations. The discharge of obligations probably confers a claim to exercise the corresponding rights. Making use of the territory of another State, when the conditions of such use are governed by the provisions of a treaty, entails conformity with the conditions of user—and so on. Then, leading to rights and obligations in relation to the treaty, there is the principle of respect for lawful, valid or legitimate international acts. The due execution of lawful treaties ought not to be impeded by third States. If an area is demilitarized by treaty, States not parties to it ought, in general, to respect this. If a territory is transferred by treaty, third States not themselves possessing a valid claim to the territory ought to recognize and accept the transfer. Equally, a third State has no legal cause of complaint merely because a treaty operates unfavourably for it, if the treaty is lawful, and infringes no actual legal right of the third State.

5. All the specific cases cited in the books can, it is believed, be brought under one or other of these principles—or under some principle. It is, however, but seldom that any attempt is made to group them in orderly fashion on the basis of recognizable principles. The Special Rapporteur is far from wishing to suggest that he has himself solved all the problems involved. Indeed, he is very conscious that he has manifestly not done so; for it is not easy to give an adequately definite and satisfactory shape to this amorphous and rather protean topic. In a further report, the Special Rapporteur hopes, at a later stage, to improve considerably on his present treatment of the subject. He has, however, endeavoured to introduce some order into it, and to deal with the matter as fully and systematically as an initial consideration of it (which is all that this pretends to be) will permit. The heart of the

⁵ If Sir Ronald Roxburgh, since 1946 a Judge of the High Court, London, were writing today, he might feel able to pronounce with greater certainty on a number of points than was possible in 1917.

⁶ Georg Schwarzenberger seems to be one of the few modern writers who gets near to denying altogether that there can be any gloss on the strict *pacta tertiis* rule: see *International Law*, Vol. 1 *International Law as Applied by International Courts and Tribunals*; 1, 3rd edition (London, Stevens, 1957), pp. 458 ff.

problem of treaties and third States seems to lie in three or four main questions, such as how far, if at all, can a treaty ever oblige a third State; the passive obligations of third States in relation to treaties; treaties as the source of international custom; how far, if at all, beneficiary third States can claim not merely to exercise their "rights" but to continue indefinitely to do so unless they consent to termination or modification—and so on. With these and other related matters, the Special Rapporteur has tried to come to grips.

6. There are, of course, also the usual difficulties of arrangement that seem to inhere in the subject of the law of treaties, and from which this branch of it is in no way immune. Other methods of arrangement than the one actually adopted here would be possible, and some would in certain respects be more elegant. In article 9 of the text several methods of classification are suggested and an alternative set of the articles contained in sub-division II of Division C of the text will be provided at a later stage. However, at the cost of some repetition and duplication, the Special Rapporteur has thought it preferable, for the time being, to adhere in the main to the traditional sub-divisions of the subject. After a first section covering definitions and basic principles, there follow two main sections dealing respectively with "Rights and obligations *inter se* of the parties to a treaty in consequence of provisions relating to third States" and "Position of third States in relation to the treaty". This distinction is not always clearly drawn, and sometimes not drawn at all—that is to say, only the second head is dealt with. Yet there are these two distinct aspects of the subject: what the parties owe each other under the treaty in relation to the third State, and what, if anything, they owe to or can claim from the third State itself, and, generally, what is the position of that State in relation to the treaty. Both these sections treat in separate articles or sets of articles the two cases of "obligations" and "rights",⁷ and therefore subdivide into the familiar heads of what are, for the sake of convenience, called in the draft by the portmanteau appellations of "*pacta*" (or, as the case may be "effects"), "*in detrimentum tertiis*" and "*pacta*" (or, as the case may be "effects") "*in favorem tertiis*". One of the difficulties of treating the subject is that it is too bald to speak, for instance, merely of treaties imposing, or rather purporting to impose, obligations on third States. Without attempting to do anything so positive, a treaty may purport to create a liability for a third State, place it under a disability, deprive it of rights or impair or dispose of its rights, or simply operate to its detriment or disadvantage, or be incidentally unfavourable to it. There are clearly gradations. In the same way, a treaty may purport to confer actual rights on a third State; but short of that, it may simply create a faculty or

facility for it, or (which is of some importance) remove a disability or impediment; or else confer an interest, benefit or advantage on it; or simply operate in a manner incidentally favourable to the third State. While all these possibilities can conveniently be summed up for section-heading purposes under the notions of effects *in detrimentum tertiis* and *in favorem tertiis*, they do not all fall to be treated in the same way for substantive purposes, and some of them require to be separately dealt with in the individual articles.

7. As in previous reports,⁸ the Special Rapporteur has aimed at putting as much as possible into the articles themselves rather than into the commentary, with a view to making the articles self-explanatory. In any final draft drawn up by the Commission, a fair amount of what is at present in the text could go into the commentary.

8. In conclusion, the Special Rapporteur would like to refer to, and reaffirm what was said in paragraphs 10 and 11 of the introduction to his fourth report,⁹ and (in view of what was there said, and of the fact that, being now published, these and other reports of Special Rapporteurs are no longer virtually confined to the Commission but reach a far wider public) to add the following *caveat*. Reports such as these cannot be, and are not intended to be treatises on the subjects they deal with; nor to be substitutes for the ordinary textbooks and other authorities. Still less can they normally—except perhaps incidentally—offer much in the way of original research. To do these things would increase the length of the reports to an extent that would severely diminish their value for the practical purposes of the Commission which, after all, is the entity primarily concerned with using them. Nor would it be necessary, for the Commission already possesses the basic background knowledge required for working purposes. For these reasons, a Special Rapporteur's report must usually confine itself, in practice, to discussing fairly extensively and with enough (but by no means exhaustive) citation of supporting authority, those points that may be of special difficulty or obscurity, or which are of a key character; and, for the rest, the report may have to be somewhat dogmatic or cursory. To provide argument and authority for every statement made would, in reports destined for the purposes that these are, be tedious, cumbrous and superfluous.

9. The real essence of a Special Rapporteur's task consists in the articles he presents; and what can reasonably be expected of him is that he should have analysed and tried to think through his subject with sufficient thoroughness to be able to present it in the form of an orderly, coherent and fairly complete set of articles; for it is in the marshalling of all the different aspects of a topic, their arrangement in an orderly and logical fashion, and in the actual formulation and reduction to writing of the various rules and principles involved, that the real work of codification lies.

⁷ This rigid separation is traditional, and perhaps an aid to comprehension, but it is in no way essential. In the alternative set of articles covering the material contained in sub-division II of Division C, to be provided later, "*in favorem*" and "*in detrimentum*" effects will be treated together whenever possible.

⁸ See references in note 1 above.

⁹ Ditto.

I. TEXT OF ARTICLES

Note: 1. The present (fifth) report continues a second chapter of a draft code on the law of treaties, the first chapter of which (first to third reports inclusive, 1956-8) covered the subject of the validity of treaties, formal, temporal and essential, under the heads of the conclusion, the termination and the substantive validity of treaties.

2. The present (second) chapter relates to the Effects of Treaties, and is in two parts, part I of which (Effects of treaties as between the parties—operation, execution and enforcement) appeared as a fourth report in 1959.

3. The present (fifth) report contains part II of this second chapter and covers the subject of the effects of treaties in relation to third States.

4. Arrangement

The present part II has three main divisions:

Division A. Definitions and basic principles.

Division B. Rights and obligations *inter se* of the parties to a treaty in consequence of provisions relating to third States.

Division C. Position of third States in relation to the treaty.

The contents of divisions A and B are sufficiently apparent from the table of contents of the present report.

Division C has two main sub-divisions:

Sub-division I. Presumptions and methods of classification (for detailed contents see table of contents).

Sub-division II. Effects of treaties *in detrimentum* and *in favorem tertiis*.

Sub-division II is itself divided into two sections:

Section 1. Effects *in detrimentum tertiis*.

Section 2. Effects *in favorem tertiis*.

Each of these sections has two sub-sections, each dealing respectively with:

Sub-section (i): Active or positive effects or consequences *in detrimentum* (and *in favorem*) *tertiis*.

Sub-section (ii): Passive or negative effects and consequences *in detrimentum tertiis*—and indirect and incidental effects and consequences *in favorem tertiis*.

Each of the two sub-sections in the two sections is itself subdivided into a number of rubrics and sub-rubrics. The nature of these is readily apparent from the table of contents of the present report.

Second chapter. The effects of treaties

Part II. The effects of treaties in relation to third States

DIVISION A. DEFINITIONS AND BASIC PRINCIPLES

ARTICLE 1. DEFINITION OF A THIRD STATE

1. For the purposes of the present articles, the term "third State" in relation to any treaty, denotes any State not actually a party to that treaty, irrespective of

whether or not such State is entitled to become a party, by signature, ratification, accession or other means; so long as such faculty, where existing, has not yet been exercised.

2. The term "third State" therefore comprises:

(a) States which, while not yet parties to the treaty, are entitled by its terms to become parties, such as signatories of a treaty (requiring ratification) which have not yet ratified it, or non-signatories having a faculty of accession;

(b) States which, not being entitled by the terms of the treaty to become parties to it, can only do so if especially invited by all the parties to the treaty and by any other State entitled to participate in such an invitation.

3. Alternatively, the term "third State" may be said to comprise:

(a) States which, whether original signatories or not, participate in the framing and conclusion of the treaty, but which have not yet become parties to it;

(b) States which did not so participate, whether or not entitled by the terms of the treaty to become parties to it.

4. The term "third State" may equally be said to comprise:

(a) States which, though not parties to the treaty, are not strangers to it, because they participated in its framing and conclusion, or else, though not having so participated, are entitled by its terms to become parties;

(b) States wholly strangers to the treaty, because they have neither participated in its framing and conclusion, nor are entitled by its terms to become parties to it.

5. Except by virtue of paragraphs 1 of articles 10 and 23 of the present text, no legal distinction is to be drawn between different categories of third States, nor, in any event, as regards their position in relation to the substantive rights and obligations resulting from the treaty.

ARTICLE 2. STATES AS SUBJECTS AND AS OBJECTS OF TREATIES

1. The application of a treaty is, in principle, confined to the parties to it, and to their relations *inter se*.

2. However, the fact that a State is not party to a treaty (i.e. subject to it) does not prevent it being an object of the treaty.

3. Where a State is an object of a treaty, the position of the parties in their relations *inter se* as regards that State is governed by the provisions of Division B of the present text; and their position in relation to the third State—and the position of the third State itself in relation to the treaty—is governed by the provisions of Division C.

ARTICLE 3. *Pacta tertiis nec nocent nec prosunt*

1. By virtue of the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta*, and also

of the principle of the legal equality of all sovereign independent States—but subject to the provisions of article 4 of the present text—a State cannot in respect of a treaty to which it is not a party:

(a) Incur obligations or enjoy rights under the treaty;

(b) Incur any liability, or suffer any disability or detriment, or any diminution or deprivation of right, or be entitled to claim as of right any faculty, interest, benefit or advantage under the treaty.

2. The provisions of paragraph (1) of the present article do not in any way prejudice such rights and obligations as the parties to the treaty may, by virtue of it, possess *inter se* in relation to the third State, as indicated in Division B below.

ARTICLE 4. APPARENT OR QUASI-EXCEPTIONS OR QUALIFICATIONS TO THE PRINCIPLE *pacta tertiis nec nocent nec prosunt*

1. Notwithstanding the principles referred to in paragraph 1 of article 3 of the present text, which are, in themselves, absolute, and subject to no real exception, third States may, in a number of ways, be or become affected by treaties to which they are not parties. These apparent, or quasi-exceptions, or qualifications, are set out in Division C of the present text.

2. The quasi-exceptions or qualifications referred to in paragraph 1 of the present article may have effects either *in detrimentum*, or *in favorem*, *tertiis*. These expressions are to be understood as follows:

(i) By the expression “effects *in detrimentum tertius*”, as herein employed, there is to be understood any effect (or the totality of the effects) which may operate to the detriment or disadvantage of the third State. These may range from the duty to perform active obligations, to the mere passive endurance of incidentally unfavourable consequences: and between these extremes may comprise liabilities or disabilities: the loss, diminution or impairment of rights, or, as the case may be, of advantages, benefits or interests; the coming into existence of disadvantages, impediments or other incidentally unfavourable circumstances; the recognition and acceptance of valid international acts, including the lawfully acquired rights of other States and the objective validity of any status, régime, or international settlement juridically effective *erga omnes*; and the passive obligation not to impede or interfere with the due performance of a treaty lawfully concluded between other States.

(ii) Equally, by the expression “effects *in favorem tertius*”, as herein employed, there is to be understood any effect (or the totality of the effects) which may operate to the benefit or advantage of the third State. These may range from the acquisition of positive and active rights under the treaty, to the enjoyment of purely incidental beneficial consequences resulting from it; and between these extremes may comprise the acquisition and enjoyment of faculties or facilities; the removal of disabilities, disadvantages or impediments; the enjoyment of new benefits or advantages, or the enhancements of rights; the recognition by the parties

to the treaty of the lawfully acquired rights or status of the third State; and the performance by them, to the consequential benefit of the third State, of their obligations under any international régime or settlement, or under any other treaty incidentally benefiting or favourable to the third State.

3. The extent to which an *in detrimentum* or (as the case may be) an *in favorem* position for the third State may involve, on the one hand, the active performance of obligations, or sufferance of liabilities or disabilities by it, or, on the other, the acquisition of positive rights or faculties—as opposed, respectively, to the mere acceptance of incidental disadvantages, or the enjoyment of merely casual or incidental benefits resulting from the existence of the treaty, and from its execution by the parties, is the subject of the articles contained in Division C of the present text.

ARTICLE 5. PRINCIPLES UNDERLYING THE CASES IN WHICH TREATIES MAY HAVE, OR RESULT IN, EFFECTS *in detrimentum* OR *in favorem tertius*

1. The quasi-exceptions or qualifications to the general principle *pacta tertiis nec nocent nec prosunt*, as described in article 4 of the present text, are based on, or arise from the application of the following principles of international law:

(A) Principles giving rise to rights or obligations for the third State, similar or parallel to those contained in the treaty

(i) The principle of consent given actively and *ad hoc*—such consent resulting either in the acceptance by the third State of an *in detrimentum* position for itself (whether by agreement between that State and one or more of the parties to the treaty, or by agreement with another third State, or by means of a unilateral but legally binding, declaration made by the third State); or resulting in the creation of an *in favorem* position for the third State (either by a specific agreement to that effect between the parties *inter se*, or by an agreement between them (or by one or some of them, if not inconsistent with the treaty) and the third State, or by a unilateral, but legally binding, declaration, by which a State assumes obligations *in favorem tertius*);

(ii) The principle of consent presumed, in those cases where, by operation of law, the third State becomes, or is deemed to be either a party to the treaty, or bound by its provisions, or by rules or principles, similar to those it embodies; and, correspondingly, to enjoy the rights attendant on the performance of the obligations concerned;

(iii) The principle of automatic entailment, whereby:

(a) The lawful use of the territory of another State for a specific purpose entails conformity with the conditions of such use, and, reciprocally, conformity, or readiness to conform, entails a corresponding right of user in the manner provided by the treaty;

(b) The exercise of rights or faculties, or the enjoyment of benefits or advantages, gives rise to a duty to perform the corresponding obligations, or suffer the corresponding disadvantages or disabilities; and si-

ilarly, the performance of obligations, or conformity with the conditions of the treaty, may give rise to a claim to exercise rights or enjoy benefits under it.

(B) *Principles giving rise to rights or obligations for the third State in relation to the treaty*

(iv) The principle of respect for lawful and valid international acts, such as treaties lawfully concluded and not infringing the rights of other States, for rights lawfully acquired, or for statuses, régimes, settlements, or situation of law or fact lawfully created by treaty—whereby third States are called upon to recognize and respect international statuses, régimes, settlements, or situations of law or fact, validly established by treaty; not to impede or interfere with the due performance of a lawful treaty by the parties to it; and (on the basis of *damnum sine injuria*) to accept any incidentally unfavourable consequences for them resulting from such a treaty; and whereby, correspondingly, third States may enjoy such incidental advantages as may result for them from treaties to which they are not parties;

2. The extent to which, if at all, in the case of *in favorem* effects, the third State can object to the termination or modification, without its consent, of the treaty provisions under which these effects are enjoyed, is specified in section 2 of Division C of the present text.

DIVISION B. RIGHTS AND OBLIGATIONS *inter se* OF THE PARTIES TO A TREATY, IN CONSEQUENCE OF PROVISIONS RELATING TO THIRD STATES

ARTICLE 6. THE CASE OF *pacta in detrimentum tertiis*

1. Where a treaty provides for the application of certain measures to, or provides that one or more of the parties shall ensure, or seek to procure, certain conduct on the part of, a third State, or the performance by it of certain acts, or the carrying out of obligations of a similar nature to those which the treaty imposes on the parties themselves, the party or parties concerned shall, so far as possible, and so far as they can do so without infringing any other applicable treaty or any general rule of international law, bring about, or seek to procure, the conduct in question on the part of the third State; and they may be required by the other party or parties to do so, any failure constituting a breach of the treaty giving rise to the appropriate remedies.

2. Similarly, the fact that a treaty may result in creating a liability or disability for a third State, or may operate to the disadvantage or detriment of that State, or in a manner contrary to its interest, is not *per se* a ground on which the parties can, *inter se*, refuse to carry out the treaty.

3. Equally, the non-acceptance by a third State of a treaty provision detrimentally affecting it, does not *per se* impair the obligatory force of the provision as between the parties, unless:

(a) Such acceptance or agreement is a condition of the treaty provision concerned;

(b) The object of the provision would be, or would become, unlawful in the absence of such acceptance or agreement.

ARTICLE 7. THE CASE OF *pacta in favorem tertiis*

Where a treaty provides that certain treatment shall be afforded to a third State, the parties are under a duty, *inter se*, to carry out this obligation, irrespective of whether the third State can itself claim or enforce performance of it. Any failure by one party to perform the obligation will accordingly constitute a breach of the treaty, entitling the other party or parties concerned to appropriate remedies.

DIVISION C. POSITION OF THIRD STATES IN RELATION TO THE TREATY

SUB-DIVISION I. PRESUMPTIONS AND METHODS OF CLASSIFICATION

ARTICLE 8. PRESUMPTIONS

1. In case of doubt, there is a presumption, arising from the principle *pacta tertiis nec nocent nec prosunt*, that any given treaty has neither *in detrimentum* nor *in favorem* effects on, for, or in relation to third States.

2. This presumption relates, however, only to the actual applicability of the treaty, or of analogous provisions, to third States, and not to the passive rights and obligations of such States in relation to the treaty, as referred to in articles 5 (1) (iv) and 9 (3) (c) and (d) and 4 (d), of the present text, and as elaborated in articles 17-19, and 29 and 30.

3. The presumption is weakened, and may be negated, whenever, from the character of the treaty or the surrounding circumstances, the treaty must be deemed to have, or comes to be regarded as having, effects *erga omnes*.

4. The presumption is, *per contra*, enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third States, either by leaving the treaty open for signature and subsequent ratification by States other than the original signatories, or by the inclusion of an accession clause or its equivalent.

5. In case, however, the position is as indicated in paragraph 4 of the present article, but the treaty, expressly or by implication, limits the right of participation to certain specified States, or to members of a specified class or group of States, and the third State concerned is not one of those specified, or does not belong to the group or class, as the case may be, no special presumption (beyond that indicated in paragraph 1 of the present article) arises against the possibility of effects *in detrimentum* or *in favorem tertiis* as regards such State.

ARTICLE 9. METHODS OF CLASSIFICATION

1. The position of a third State in relation to a treaty is basically that indicated in article 3, paragraph

1, of the present text, by virtue of the principle *pacta tertiis nec nocent nec prosunt*. Where however, without violation of this principle as such, treaties do, in accordance with, or subject to, the provisions of articles 4, 5 and 8 of the present text, or of sub-division II of the present division, have effects relative to third States, these may be classified as indicated in the ensuing paragraphs of the present article.

2. The effects of a treaty relative to a third State may be classified in four different ways:

- (i) According to the nature of the effects produced;
- (ii) According to the nature of the operative principles producing them;
- (iii) According to the nature of the concrete acts or processes necessary for their production;
- (iv) According to the nature of the treaty in relation to which the effects are produced.

3. Where method (i) in paragraph 2 of the present article is employed (nature of the effects for or relative to the third State), the main sub-divisions of the topic are as follows:

(a) Cases in which the third State is, or becomes subject to, or enjoys, the benefit of the actual provisions of the treaty, as such;

(b) Cases in which the third State subscribes, or becomes liable to, or enjoys the benefit of, similar provisions to, or of rules analogous or parallel to, or having the same effect as, those contained in, or embodied by, the treaty;

(c) Cases in which the third State is under an obligation to accept, recognize and not interfere with the execution of, or the rights granted by, or any status created, or régime, settlement, or situation of fact established under, a lawful treaty;

(d) Cases in which the third State is called upon passively to accept the purely incidental consequences favourable or unfavourable to itself, as the case may be, of a lawful treaty.

4. Where method (ii) in paragraph 2 of the present article is employed (nature of the principles producing the effects for third States), the main sub-divisions of the topic are as set out in article 5 above (to which reference is hereby made), and may be summed up under the following four heads:

(a) The principle of active consent—whether on the part of the third State acting in agreement with the parties (or, in some cases, with certain of them only); or, in the case of *in detrimentum* effects, with another third State; or on the part of the parties alone, acting *inter se*, in the case of effects *in favorem tertiis*; or, where legally possible, by the unilateral act or declaration of the third State, or of some other State;

(b) The principle of consent presumed—on the part of the third State, under rules or principles of international law that lead to this result;

(c) The principle of automatic entailment of obligations by exercising corresponding rights, and *vice-versa*; and of conditions of user by exercising the user, and *vice-versa*;

(d) The principle of respect for lawful and valid international acts, such as lawfully concluded treaties or régimes, statuses, settlements or situations of law or of fact, brought about by the operation of a lawful treaty; and, where some detriment for the third State is incidentally involved by the operation of such a treaty, the principle of *damnum sine injuria* affords no basis of claim in the absence of any ground of absolute liability.

In cases (a), (b) and (c) above, the principle concerned gives rise to actual rights or obligations for the third State, under, or similar to, or parallel to, those contained in the treaty. In case (d) the principle involves rights or obligations for the third State in relation to the treaty.

5. Where method (iii) in paragraph 2 of the present article is employed (the nature of the concrete acts or processes producing the effects), the main sub-divisions of the topic will be that effects on, for, or relative, to, the third State are produced:

(a) By the act of the obligee, who may, according to circumstances, be the third State itself, acting unilaterally, or in conjunction with the parties or with another third State, in assuming obligations or liabilities; or the parties to the treaty, or some of them, acting in conjunction with the third State; or, where *in favorem* effects are concerned, acting purely *inter se* (provided in that case that all the parties so act); or by a single State acting unilaterally in the creation of rights;

(b) By operation of law;

(c) By tacit acceptance or recognition, in response to an international law duty to accept or recognize;

(d) By passive acquiescence.

6. Under each of the methods of classification outlined in paragraphs 3-5 of the present article, heads (a) and (b) involve effects of a predominantly active or positive character; heads (c) and (d) of a predominantly passive or negative character.

7. Where method (iv) in paragraph 2 of the present article is employed (nature of the treaty in relation to which the effects for third States are produced), the main sub-divisions are as follows:

(a) Ordinary bilateral or group treaties;

(b) So-called law-making or norm-enunciating treaties;

(c) Treaties establishing international user régimes;

(d) Treaties embodying international political or territorial settlements, or treaties of a dispositive character.

8. The present text, on ground of convenience, comprehensiveness and tradition, adopts a mixed, *ad hoc* classification, compounded of all of these methods, but based principally on method (iii).¹⁰

¹⁰ This method of classification also preserves the traditional complete separation of *in detrimentum* and *in favorem* effects. An alternative set of articles embodying a more highly integrated concept, and based on method (i), will be furnished at a later stage.

SUB-DIVISION II. EFFECTS OF TREATIES IN DETRIMENTUM AND IN FAVOREM TERTIIS

SECTION 1. EFFECTS *in detrimentum tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN, THE TREATY

Rubric (a). In detrimentum effects brought about by the volition of the third State

Sub-rubric (a) 1. Effects directly brought about by the third State

ARTICLE 10. POSITION OF A THIRD STATE SIGNATORY OF BUT NOT YET A PARTY TO A TREATY, IN REGARD TO THE FORMAL CLAUSES OF THE TREATY, AND, IN PARTICULAR, TO PARTICIPATION BY OTHER STATES HAVING A FACULTY OF PARTICIPATION UNDER THE TREATY

1. States which have signed a treaty, even though they have not yet ratified it, are deemed to have given a final and definitive assent to the formal clauses of the treaty dealing with the mechanics of bringing it into force, the right of other States to participate in it, the method of participation and related matters.

2. In particular, a State in this position is, by reason of such assent, under an obligation not to object to or obstruct, and to accept the legal consequences of, signature, ratification, accession, or the equivalent, by any other State having by the terms of the treaty a faculty to become a party to it.

ARTICLE 11. CASE OF SPECIFIC AGREEMENT BY THE THIRD STATE WITH THE PARTIES TO THE TREATY, OR WITH ONE OR SOME OF THEM, OR WITH ANOTHER INTERESTED THIRD STATE

1. A third State becomes bound by the same obligations as those involved by the provisions of a treaty to which it is not a party, or suffers the same *in detrimentum* effects, if it agrees to accept or carry out such provisions by a separate treaty entered into with either:

- (a) The parties to the treaty concerned;
- (b) One or more of such parties;
- (c) Another interested third State.

2. In any such case, the obligations or liabilities of, or other *in detrimentum* effects for, the third State arise and exist, not under or by reason of the original treaty, which is and remains *res inter alios acta*, but solely by reason of, and under, the separate treaty into which the third State has itself entered.

ARTICLE 12. CASE WHERE THE THIRD STATE ASSUMES OBLIGATIONS OR LIABILITIES, OR ACCEPTS OTHER EFFECTS *in detrimentum*, BY MEANS OF A UNILATERAL DECLARATION

1. A third State becomes bound in the same way as under article 11 if it assumes obligations, or accepts other *in detrimentum* effects, under or by reason of a treaty to which it is not a party, if it makes a unilateral

declaration to that effect, of such a kind, or in such circumstances, as, according to the general rules of international law, will result for it in legally binding obligations.

2. In any such case, the provisions of paragraph 2 of article 11 are, *mutatis mutandis*, applicable—substituting unilateral declaration for separate agreement.

3. Whereas, in cases coming under article 11, the question of the termination or modification of the separate treaty is governed by the ordinary provisions of treaty law, in the case of a unilateral declaration, as contemplated by paragraph 1 of the present article, such declaration—unless stated to be irrevocable—may be terminated at the will of the declarant third State; subject however to an obligation to pay compensation, or make other appropriate reparation, to any other State which, acting on the faith of the declaration, has changed its position in such a way that it suffers detriment going beyond the natural consequences of the termination or modification of the declaration, and is placed in a worse position than if the declaration had never been made.

Sub-rubric (a) 2. *In detrimentum* effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty

ARTICLE 13. RULE APPLICABLE IN RESPECT OF ALL TREATIES

1. Where a third State is in a position to, and does, take benefits or exercise rights under, or by virtue of, a treaty (or otherwise avails itself of it) in circumstances necessarily implying and involving the recognition of a duty to perform corresponding obligations, or of conformity with its provisions, or acceptance of its terms—such performance, conformity or acceptance becomes incumbent on the third State.

2. There exists a natural presumption, *prima facie*, that the circumstances referred to in paragraph 1 of the present article do involve such an entailment.

ARTICLE 14. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

1. Where use is made of the maritime or land territory of another State, and the conditions of user of that territory for that purpose are the subject of a treaty to which the third State concerned is not a party, the vessels and nationals of the State, or the State itself should the case arise, must conform to the conditions in question.

2. The same principle is applicable in regard to the use of territory placed by treaty under an international régime of common user for purposes, and on conditions, specified in the treaty, and in circumstances causing the treaty to have, or to come to be regarded as having, effect *erga omnes*.

Rubric (b). In detrimentum effects brought about by operation of law

Sub-rubric (b) 1. The third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 15. CASES OF STATE SUCCESSION, AGENCY, AND PROTECTION

A third State not originally a party to the treaty concerned becomes bound by it:

(a) If it succeeds to treaty obligations or liabilities, by the operation of the rules of international law governing the topic of State succession;

(b) If treaty obligations are extended to it through the agency of another State to which it has delegated the right to enter as an agent into treaties on its behalf;

(c) If the third State is a protected State, and a treaty to which the protecting State is a party is applied to it.

Sub-rubric (b) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law.

ARTICLE 16. CASE OF CUSTOMARY INTERNATIONAL LAW OBLIGATIONS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

1. Law-making or norm-enunciating treaties, in the nature of general multilateral conventions, codifying branches of existing customary international law, or establishing new rules by way of the progressive development of international law, and in so far as they evidence, declare or embody legal rules or legal régimes which are, or eventually become, recognized as being of universal validity and application, constitute vehicles whereby such rules or régimes are or become generally mediated so as also to bind States not actually parties to the treaty as such.

2. In any such case however, it is the rule of customary international law thus evidenced, declared or embodied that binds the third State, not the treaty as such.

SUB-SECTION (ii). PASSIVE OR NEGATIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS INCUMBENT ON THE THIRD STATE, NOT UNDER, BUT IN RELATION TO, THE TREATY

Rubric (a). In detrimentum effects resulting from the application of the principle of respect for lawful and valid international acts

Sub-rubric (a) 1. In the case of all lawful and valid treaties.

ARTICLE 17. GENERAL DUTY OF ALL STATES TO RESPECT AND NOT IMPEDE OR INTERFERE WITH THE OPERATION OF LAWFUL AND VALID TREATIES ENTERED INTO BETWEEN OTHER STATES

1. All States are under a general legal duty in relation to treaties to which they are not parties:

(a) Not to interfere with, or impede, the due performance and execution of the treaty on the part of the parties to it; provided always that the objects of

the treaty are lawful and that it does not purport to deprive, or have the effect of depriving, the third State concerned of its legal rights, or of impairing such rights, or of creating legal liabilities or disabilities for such State without its consent;

(b) Subject to the same conditions, to respect, and if necessary recognize, any legal rights or interests created or established by the treaty in favour of one or more of the parties, or of another third State;

(c) In relation to a treaty which the third State concerned has signed, but not yet ratified, not to take any action which might impair the value of the treaty or frustrate the objects which it is intended to achieve; subject however to a right to resume freedom of action if, and when, a decision not to ratify is taken.

2. Provided the conditions specified in paragraph 1 (a) above are satisfied, the mere fact that a treaty operates to the disadvantage or detriment of a third State is not a ground on which its validity can be impugned, or on which the third State can refuse to recognize it.

Sub-rubric (a) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character

ARTICLE 18. GENERAL DUTY OF ALL STATES TO RECOGNIZE AND RESPECT SITUATIONS OF LAW OR OF FACT ESTABLISHED UNDER LAWFUL AND VALID TREATIES

1. Subject to the conditions specified in article 17, paragraph 1 (a) of the present text, to the provisions of paragraph 3 of the present article, and to the terms of the treaties themselves, or of any other relevant treaties, all States are under a duty to recognize and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effects *erga omnes*. The following are amongst the more important types of treaties producing effects of this kind.¹¹

(a) Peace treaties, and other treaties containing political or territorial settlements;

(b) Treaties creating a general régime or status of neutralization, or demilitarization, for particular territories or localities;

(c) Treaties of a dispositive character, such as treaties of cession, frontier demarcation, or treaties creating a servitude.

2. *Mutatis mutandis*, the provisions of 1 above are, in relation to treaties having a regional or group character, equally applicable for (but only for) the States of the particular geographical region or group concerned.

3. The provisions of paragraphs 1 and 2 above do not involve or imply that the treaties specified can impose any direct or positive obligations on States not parties to them, but only that, subject to the conditions

¹¹ For the case of treaties governing the common use of territory, or establishing a régime for some means of international communications such as a river or waterway, see art. 14 above.

indicated, such States cannot deny the validity of the treaty, must respect its provisions, and must also conform to them in so far as any such States avail themselves of facilities created by the treaty, or have dealings in or relative to the locality or region which is the subject matter of the treaty.

Rubric (b). Effects incidentally unfavourable to a third State resulting automatically from the simple operation of a treaty

ARTICLE 19. DUTY OF STATES TO ACCEPT AND TOLERATE THE INCIDENTALLY UNFAVOURABLE EFFECTS OF LAWFUL AND VALID TREATIES

Provided that no legal right of the third State is infringed, and that the treaty concerned is otherwise in conformity with the conditions specified in article 17, paragraph 1 (a), of the present text, the third State does not suffer any legal wrong, or possess any right of recourse against the parties, merely by reason of the fact that it is adversely affected by the operation of the treaty, or that the treaty is incidentally unfavourable to it.

SECTION 2. EFFECTS *in favorem tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in favorem tertiis*—RIGHTS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In favorem effects brought about by the act of the parties to the treaty alone, or of a single grantor

Sub-rubric (a) 1. Act of the parties to the treaty.

ARTICLE 20. THE *stipulation pour autrui* (RIGHTS OR BENEFITS EXPRESSLY CONFERRED ON A THIRD STATE BY THE TREATY ITSELF)

1. Where a treaty expressly confers rights or benefits on, or makes provision for the exercise of rights or faculties, or for the enjoyment of facilities or benefits by a third State, in such a way as to indicate that the parties meant to create legal rights for the third State, or to bind themselves to grant them, or to create a legal relationship between themselves and the third State, the third State concerned thereby acquires a legal right to claim the benefit of the provisions in question.

2. It is not a condition of the operation of paragraph 1 that the third State should be specified *eo nomine*, provided it is clear from the context or surrounding circumstances what State is intended, or that a group or class of States is intended of which the claiming State is a member.

3. In any case coming under paragraphs 1 and 2 of the present article, the claiming third State has a direct right of recourse against the parties to the treaty, acting in its own name and of its own motion, if the provisions of the treaty concerning the third State are not carried out—provided always that the third State has complied, or is willing to comply, with any conditions attached by these provisions to the grant.

4. However, the third State is not entitled by virtue of the preceding paragraphs of the present article,

to require the indefinite maintenance in force of the treaty, or to object to its termination or amendment by the parties without its consent, except in the following cases :

(a) Where the parties, either in the treaty or separately, have undertaken to maintain the treaty in force indefinitely or for a specified period, or not to terminate or amend it without the consent of the third State, or where the legal relationship the treaty creates between the parties and the third State is of such a nature as to entail this ;

(b) Where the clauses of the treaty in favour of the third State are of a dispositive character, and have been actually executed ;

(c) Where the third State, for the purpose, or in the course of, exercising its rights or faculties, or of taking the benefits or advantages resulting from the treaty, has altered its position in such a way that the termination or amendment of the treaty would affect it detrimentally over and above the natural detriment to be expected from the cessation or modification of the rights, faculties, benefits or advantages concerned, by placing the third State in a worse position than before these were enjoyed ;

(d) In the cases coming under article 21 of the present text.

ARTICLE 21. TREATY PROVISIONS REMOVING OR MODIFYING A DISABILITY OR PROHIBITION PREVIOUSLY EXISTING FOR A THIRD STATE

A treaty provision removing, cancelling or modifying a disability or prohibition previously existing for a third State, provided it is within the competence of the parties to the treaty to do so, ranks as an executed provision, in the sense that the third State (subject to any conditions stated in the treaty) is *ipso facto* freed from the disability or prohibition, which cannot thereafter be reimposed or revived merely by reason of the lapse, termination, or modification of the treaty.

Sub-rubric (a) 2. Act of a single State.

ARTICLE 22. UNILATERAL DECLARATIONS CONFERRING RIGHTS ON OTHER STATES

1. Where a State makes a unilateral declaration in favour of, or assuming obligations towards, one or more, or all, other States, in such a manner, or in such circumstances that, according to the general rules of international law, a legally binding undertaking will result for the declarant State, the other State or States concerned can claim as of right the performance of the declaration.

2. Unless the declaration specifies its own irrevocability, the State or States in whose favour it was made cannot object to its withdrawal or modification at the will of the declarant State ; provided that, if this has consequences analogous to those indicated in paragraph 4 (c) of article 20 of the present text, the declarant State shall be liable to pay compensation, or make other appropriate reparation, in respect of the loss or damage caused.

Rubric (b). In favorem effects brought about with the participation of the third State itself

Sub-rubric (b) 1. Effects directly brought about by the parties and the third State conjointly

ARTICLE 23. EXERCISE BY THE THIRD STATE OF A FACULTY OF PARTICIPATION IN THE TREATY ITSELF

1. A third State has the right to become a party to the treaty concerned by such means as the treaty or any other applicable instrument indicates, and where the third State is a member of the class specified in the treaty or other instrument as having the faculty of becoming a party, or where there is no restriction on that class.

2. In such a case the third State has a right of objection in case, pending action by it to become a party, any other State so conducts itself as to impair the value of the treaty or frustrate the objects which it was intended to achieve; provided however that this right shall cease after the lapse of a reasonable period during which the third State could have exercised the faculty of becoming a party.

3. Where no provision is made by the treaty for the participation of States other than the original parties, the fact that a treaty purports to confer rights on, or contains provisions to the advantage of, any third State, does not invest the third State with any right to become an actual party to the treaty without the express consent of the existing parties.

ARTICLE 24. CASE OF SEPARATE AGREEMENT BETWEEN ALL, OR ONE OR MORE OF, THE PARTIES, AND A THIRD STATE, PRODUCING FOR THE LATTER *in favorem* EFFECTS SIMILAR TO THOSE OF THE TREATY

1. A third State possesses a legal claim to the enjoyment of the rights or benefits specified in any treaty, if the third State has entered into a separate agreement to that effect with:

(a) All the parties to the treaty;

(b) One or more of the parties only—provided that in such case the agreement is not contrary to or inconsistent with the treaty.

2. In cases coming under paragraph 1 of the present article, any right of recourse will exist solely by virtue of the separate agreement, and against such party or parties.

3. In cases coming under paragraph 1, the right, if any, of the third State to object to the termination or modification of the separate agreement concerned, will depend on its terms, and on the ordinary rules of treaty law respecting the termination or modification of treaties.

Sub-rubric (b) 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties

ARTICLE 25. RULE APPLICABLE IN THE CASE OF ALL TREATIES

1. Where a third State, with the consent or tacit acquiescence of the parties, is permitted to perform, and

regularly performs, the obligations of a treaty, or conforms to its provisions, it is entitled to exercise such rights, or to enjoy such facilities or benefits, as, under the treaty or by any general rule of law, are normally entailed by such performance or conformity.

2. Without prejudice to the special rule provided by paragraph 2 of article 26 of the present text, the third State cannot object to any termination or modification of a treaty under, or by virtue of which, it has exercised rights or obtained benefits, in accordance with paragraph 1 of the present article; provided that, if this has consequences analogous to those specified in paragraph 4 (c) of article 20 of the present text, the third State shall be entitled to compensation or other appropriate reparation in respect of the loss or damage caused.

ARTICLE 26. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

1. Subject to the terms of the treaties concerned, and to their correct interpretation, States, their vessels and nationals, if conforming to the conditions of user specified in treaties or international régimes of the classes indicated in article 14 of the present text, and provided such user is with the consent or tacit acquiescence of the parties to the treaty or régime, are entitled to enjoy the user and other benefits of the treaty or régime, on the conditions attached to them.

2. Third States are entitled to object to any termination or modification of such treaties or régimes, unless with general international consent, whenever the rights, facilities or benefits involved have, by constant exercise and enjoyment on the part of third States, acquired an objective existence independently of the treaty or régime under which they were originally established. Even where this is not the case, third States are entitled to compensation or other appropriate reparation for the loss or damage caused by the termination or modification of the treaty or régime.

Rubric (c). In favorem effects brought about by operation of law.

Sub-rubric (c) 1. Because the third State in effect is or becomes a party to the treaty by operation of law.

ARTICLE 27. CASES OF STATE SUCCESSION, AGENCY, AND PROTECTION

Any State which becomes bound by a treaty in the circumstances specified by article 15 of the present text is entitled to the benefit of the corresponding or related *in favorem* effects of the treaty.

Sub-rubric (c) 2. *In favorem* effects consequential on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law.

ARTICLE 28. CASE OF CUSTOMARY INTERNATIONAL LAW RIGHTS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

Where, by means of the processes indicated in article 16 of the present text, third States become subject, through the agency of a treaty, to rules that are, or have come to be, accepted as rules of general customary

international law, such States automatically enjoy the related rights and benefits.

SUB-SECTION (ii). INDIRECT OR INCIDENTAL EFFECTS OR CONSEQUENCES *in favorem tertiis*—EFFECTS NOT UNDER BUT IN RELATION TO THE TREATY

ARTICLE 29. *In favorem* EFFECTS RESULTING FROM THE APPLICATION OF THE PRINCIPLE OF RESPECT FOR LAWFUL AND VALID INTERNATIONAL ACTS

1. Any third State conducting itself in conformity with the provisions of articles 17 and 18 of the present text is entitled, in so far as the case may arise, to expect similar conduct on the part of other third States.

2. In the case of treaties embodying international régimes or settlements, or of a dispositive character, to which the provisions of article 18 of the present text apply, and which are or have come to be accepted as having effects *erga omnes*, third States which are conforming to the provisions of the régime or settlement, and which have a direct interest in the situation of law or fact created by the treaty, are entitled in principle to expect the continued maintenance in being of this situation, or to be consulted before any termination or modification of it is effected.

3. The provisions of the preceding paragraphs of the present article cannot however operate in themselves to confer on third States any direct or active rights under the treaty concerned.

ARTICLE 30. EFFECTS INCIDENTALLY FAVOURABLE TO A THIRD STATE RESULTING AUTOMATICALLY FROM THE SIMPLE OPERATION OF A TREATY

In cases not covered by any of the preceding articles of the present section, a third State may nevertheless enjoy benefits or advantages of an incidental character resulting automatically from the operation of a treaty between other States; but such State does not thereby acquire any rights under the treaty itself, or any right to its continued maintenance in force or non-modification by the parties, or to compensation for its termination.

II. COMMENTARY ON THE ARTICLES

[Note: 1. 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.

2. The Special Rapporteur refers to note 2 in the corresponding place at the head of the commentary in his second report.¹²

3. For the general arrangement of the present chapter, see *Arrangement* immediately before the text of the articles.]

Second chapter. The effects of treaties

Part II. The effects of treaties in relation to third States

DIVISION A. DEFINITIONS AND BASIC PRINCIPLES

ARTICLE 1. DEFINITION OF A THIRD STATE

1. *Paragraph 1.* This article deals with the notion

of a "third State". Admittedly, this term is not in itself a very satisfactory one. It is imprecise, and strictly appropriate only for the case of a bilateral treaty; whereas, of course, the question of the position of States which are not parties to the particular treaty concerned arises not merely with reference to bilateral treaties, but also in relation to treaties which have several parties, or to which a group of States are parties; and equally in relation to treaties of the general multilateral type. However, it has been considered best to adhere to the term third State, the use of which is traditional and well understood. Deriving from the Latin expression "*tertiis*", similar expressions ("*les tiers*", "*i terzi*") figure in the contract law of many States as denoting in general persons, whether individual or corporate, who, without being parties to a given contract, may none the less be affected by it in some way. In English this expression cannot be exactly reproduced (there is no such term as "the thirds"), but the same idea is found in the corresponding expressions "third parties" or "third States".

2. A third State can be defined quite simply in relation to any given treaty, as any State which is not actually a party to that treaty. On this basis, there is, strictly speaking, evidently only one category of third State. At the same time, although all third States are in the same position in the sense that they are none of them parties to the given treaty, yet they can stand in different relationships to the treaty in other ways; and it is worth drawing attention to this, even though, with one exception to be noted in a moment, no real legal distinctions between third States result from it—not, at any rate, in the sense of placing any one category either more or any less in the position of a third State than another.

3. *Paragraphs 2-4.* These paragraphs contain a classification of third States according to how they stand in relation to the particular treaty. In a sense, each of these paragraphs covers the same ground, but it approaches that ground from a different direction. The most obvious distinction between third States (though it must again be emphasized that it is not really a legal distinction in respect of the consequences involved) is the one that can be drawn between third States that are wholly strangers to the treaty and those that are not. In the latter category would come third States that participated in the framing of the treaty, but which have not yet signed it; or States that have signed but have not yet ratified. Such States are third States in so far as they are not as yet parties to the treaty. At the same time they cannot be regarded as being wholly strangers to it, and they have certain rights in relation to the treaty—for instance, a right to sign, or a right to ratify, as the case may be. Nevertheless, so long as they do not, by performing the necessary acts, become parties to the treaty, they remain third States, and have no greater rights or obligations under the treaty, or by reason of it, than any other third State, including those which, not having participated in the negotiation of the treaty or not having signed it, are wholly and entirely strangers to it in its origins.

¹² *Yearbook of the International Law Commission* (United Nations Publication, Sales No.: 1957.V.5, vol. II), document A/CN.4/107, p. 37.

4. States which, though not having taken part in the framing of a treaty, are nevertheless by its terms entitled to become parties to it, usually by accession, are also in a sense not wholly strangers to it. But in the case of States having a right of accession, another basis of distinction operates, arising out of the provisions of the treaty itself, according as to whether it does, or does not, enable countries other than its original framers to participate in it. Some treaties make express provision for accession in one form or another by countries which did not participate in the negotiation of the treaty, and did not become parties to it by signature and ratification. In the case of this type of treaty, any third State can always become a party to it if it wishes to do so, by taking the necessary steps, provided always that such State comes within the class to which accession is open under the treaty if that class is expressly or by implication a restricted one.¹³ Other treaties contain no such provision, and in that case it is normally not possible for third States to become parties to them unless the parties to the treaty should subsequently invite them to do so or make some separate and special arrangement for the purpose. Where a treaty does make provision for the participation of third States, the latter, of course, *ipso facto*, possess the right, or rather the faculty, to become parties; but again, so long as they have not exercised it, and so long therefore as they remain third States, their legal position in relation to the treaty (i.e. as regards having any rights or obligations of a substantive character resulting from it) are exactly the same as they would be in relation to a treaty that did not provide for any faculty of participation by third States.

5. The words in paragraph 2(b), "... and by any other State entitled to participate in such invitation" are intended to cover the case where a signatory, not having yet ratified, might be held to be so entitled.

6. Paragraph 5. This has already been explained. The point dealt with in article 10 will be considered in the commentary on that article (see para. 40 below). That dealt with in article 23 is simply the right conferred by some treaties on third States, or on a class of them, to become actual parties to it (see para. 94 below).

ARTICLE 2. STATES AS SUBJECTS AND AS OBJECTS OF TREATIES

7. The contents of this article and of the immediately following article (art. 3) contain statements of the same principle seen from slightly different points of view. The direct consequence of the rule which is considered in article 3 (*res inter alios acta*) is that, as stated in paragraph 1 of the present article, the application of a treaty is in principle confined to the parties to the treaty and to their relations *inter se*. As Charles Rousseau says:

"In principle, treaties have but a relative effect. They can neither damage nor advantage third States.

Their legal effects are strictly limited to the circle of the contracting parties..."¹⁴

To put the matter in another way, treaties do not create law except for the contracting parties, and even then it is more accurate to say that what they create for the contracting parties is particular rights and obligations rather than general law. The circumstances in which a treaty may create what could properly speaking be regarded as law, even for the contracting parties, and still more (though indirectly) for non-contracting parties, involves considerations of a wider order dealt with elsewhere.¹⁵

8. Paragraph 2. The fact that the direct application of the treaty is confined to the parties to it does not, of course, mean that other States may not be (to use a French term that has no exact English equivalent in the context) *visés* by the treaty. From the point of view of personalities, it is only the parties to the treaty who can be regarded as the subjects of it, and therefore subject to it; but other States may be the objects of the treaty in one form or another as, for instance, if two States were to make a treaty agreeing upon certain action to be taken in relation to a third State, or in consequence of some action taken by that third State.

9. Paragraph 3. It is necessary to distinguish between the position of the third State itself in relation to the treaty, and the position of the parties in their relations *inter se* with reference to the third State. The fact that the latter State may have no rights or obligations, under the treaty, in no way affects the possibility that the parties may have rights and obligations, not directly towards the third State as such, but *inter se* (and enforceable *inter se*) as respects the third State.

ARTICLE 3. *Pacta tertiis nec nocent nec prosunt*

10. Paragraph 1. The general principles referred to in this paragraph, which constitute the foundation of the rules of treaty law relating to third States, are so fundamental, self-evident and well-known, that they do not really require the citation of much authority in their support. They derive, at any rate as concerns the question of obligation, from the general principle of consent as being the foundation of the treaty obligation. Rousseau¹⁶ cites Professor Scelle¹⁷ as alone protesting against

¹⁴ *Op. cit.*, vol. I, pp. 453 and 454: Special Rapporteur's translation of the passage cited.

¹⁵ See below in connexion with article 16.

¹⁶ *Op. cit.*, vol. I, p. 454.

¹⁷ *Précis de droit des gens*, vol. II, 1934, pp. 367 and 368: Special Rapporteur's translation of the passage cited. It is permissible to contend whether Professor Scelle would really deny that at any rate no bilateral treaty, for instance, can directly oblige a third State without its consent, given expressly or to be implied in some shape or form, or in the absence of some independent rule of international law creating conditions in which a treaty may oblige third States. On the other hand, it is of course possible to take either a more extended or a more restricted view, as the case may be, of the various exceptions, or rather qualifications, that may be said to exist to the strict rule. Thus, while the present Special Rapporteur does not state this as necessarily representing his own opinion, it might not be unreasonable to take the view that an instrument such as the United Nations Charter, which is subscribed to by practically all the States of the world, may be capable in certain ways of creating liabilities even for

¹³ As to this, see the Special Rapporteur's first report on the law of treaties, article 34, paragraphs 2 and 3, and commentary thereon, in the *Yearbook of the International Law Commission*, 1956, vol. II (United Nations Publication, Sales No.: 1956.V.3, vol. II), pp. 114 and 125.

"...the application to inter-statal relations of a rule instituted for the private sphere and for relations of a contractual character."

Rousseau continues:¹⁸

"Nevertheless the principle [*pacta tertiis nec nocent nec prosunt*] appears certain as a matter of positive international law. It results as well from treaty law as from decided cases—international and national—and from diplomatic practice."

11. In spite of the self-evident nature of these principles, it may be of interest to cite some of the principal judicial decisions in which they have been affirmed, or which have been based upon them. Thus, in the case of *German Interests in Polish Upper Silesia* the Permanent Court of International Justice said, in relation to various instruments terminating hostilities after the First World War:

"It is, however, just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third States. A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."¹⁹

Similarly, in the *Free Zones of Upper Savoy and District of Gex* case the Permanent Court, speaking of article 435, paragraph 2, of the Treaty of Versailles, said:

"It follows from the foregoing that Article 435, paragraph 2, as such, does not involve the abolition of the free zones, but, even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a party to that Treaty, except to the extent to which that country accepted it."²⁰

In the same way, in the case of the *Territorial Jurisdiction of the International Commission of the River Oder*,²¹ the Permanent Court had to consider the effect of article 338 of the Treaty of Versailles. This provided that the régime set out in articles 332 to 337 of the Treaty were to be superseded by such régime as might be "laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character", and that this Convention was to apply in particular, *inter alia*, to the Oder. The subsequently drawn up Barcelona Convention of April, 1921, was

non-member States. Professor Scelle's view would indeed seem to relate largely to the multilateral *traité-loi*. He says (Special Rapporteur's translation) that "The assertion according to which the effects of treaties cannot extend to third States fails to recognize that in relation to a treaty there may be neither parties nor third States, but only legislators" (*op. cit.*, vol. II, 1934, pp. 345 and 346).

¹⁸ *Loc cit.*

¹⁹ *Publications of the Permanent Court of International Justice, Judgments, Orders and Advisory Opinions*, series A, No. 7, pp. 28 and 29.

²⁰ *Ibid.*, Series A/B, No. 46, p. 141.

²¹ *Ibid.*, Series A, No. 23, p. 19.

considered to be such a Convention, and the question was whether the effect of article 338 of the Treaty of Versailles was automatically to apply the Barcelona Convention to the case of the Oder, even in relation to a country (Poland) which had not ratified the Barcelona Convention. As the Court said: "The question therefore is whether the obligation taken by Poland in virtue of Article 338 of the Treaty of Versailles is sufficient to render the Barcelona Convention applicable to the extent contemplated by that article"; and, since the parties to the Treaty of Versailles had agreed that its river provisions should be superseded by those of the future General (Barcelona) Convention "the question is therefore whether this supersession depends on ratification of the said (Barcelona) Convention by the States concerned—in this particular case on ratification by Poland". The Court concluded that the ordinary rules of international law must be applied, "amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification". It then remained to be seen "whether Article 338 intended to derogate from that rule". As to this, the Court concluded that there was nothing in Article 338 of the Treaty of Versailles which could be regarded as imposing upon the parties to it, and in particular upon Poland, an automatic liability under the future General Convention referred to, irrespective of whether the State concerned had become a party to such future Convention. The Court stated that it therefore

"concludes that, even having regard to Article 338 of the Treaty of Versailles, it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification."²²

12. On the other hand, a State not bound by a provision of Treaty A might nevertheless become bound by it through (but only through) accepting such an obligation under Treaty B. Thus, in the case of the *Treatment of Polish Nationals in Danzig*,²³ the Permanent Court considered the position of the Free City of Danzig in relation to Article 104, paragraph 5, of the Treaty of Versailles, to which it was not a party, but which it was considered to have accepted by the independent complex of instruments establishing the Free City and regulating the legal position as between it and Poland. The Court concluded:

"It is certain... that the Free City..., having accepted the convention which the Principal Allied and Associated Powers had negotiated in pursuance of the terms of Article 104 of the Treaty of Versailles, thereby... accepted that article."²⁴

13. The same principle was affirmed by the Arbitrator, Judge Huber, in the wellknown *Island of Palmas* case,²⁵ in which he said:

²² *Ibid.*, p. 21.

²³ Series A/B, No. 44.

²⁴ *Ibid.*, p. 30.

²⁵ *Reports of International Arbitral Awards*, vol. II (United Nations Publication, Sales No. 1949.V.I), pp. 842, 850 and 870.

"It is evident that whatever may be the right construction of the treaty, it cannot be interpreted as disposing of the rights of independent third Powers... It appears further to be evident that treaties concluded by Spain with third Powers recognising her sovereignty over the 'Philippines' could not be binding upon the Netherlands... On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded by third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing [this] inchoate title...".

These citations from the *Island of Palmas* case illustrate another aspect of the basic principle that a treaty cannot impose obligations on third States—namely, that it equally cannot impose liabilities or disqualifications upon them or impair, affect, or dispose of their rights; and this aspect is also illustrated by an opinion given by Lord Stowell in 1796 when he was King's Advocate, cited in Lord McNair's *Law of Treaties*:

"...And with respect to the operation of any subsisting treaties between the Crown of Denmark and the Dey (of Algiers) for the mutual protection to be afforded to each other's Property by their respective Flags, it cannot be extended beyond the Powers who are parties to that Engagement, and cannot in any manner abridge the Rights of other States founded upon the general law of Nations..."²⁶

14. A further variation, and a striking illustration of the same basic principle, is afforded by the decision of Professor Verzijl as umpire of the Franco-Mexican Claims Commission, in the *Pablo Najera* case. The question was whether Mexico, not being a member of the League of Nations, could nevertheless avail herself of Article 18 of the Covenant of the League, which provided for the registration of treaties and international agreements with the Secretariat of the League, and added that "No such Treaty or international engagement shall be binding until so registered". In giving this decision, Professor Verzijl, as umpire, said:²⁷

"The non-member State is wholly a stranger to the undertakings assumed by the members... Mexico, not being bound in any way by the provisions of Article 18, and these provisions being in consequence incapable of prejudicing it in any way, Mexico *per contra* can equally not derive from these provisions any argument in its favour in order to escape from international engagements which it has assumed by a Convention that, so far as Mexico is concerned, is entirely valid."

15. The line taken in the above-cited decisions and opinions abundantly reflects the line taken in the practice of States. In this respect it will perhaps be sufficient for present purposes to cite Roxburgh, who

discussed a considerable number of concrete cases, and in relation to them says²⁸ that

"The practice of States fully confirms the unanimous view of Publicists that a third State cannot incur legal obligations under a treaty to which it is not a party."

and he adds²⁹

"Many other cases can be found in the practice of States to show that a treaty cannot impose obligations on a third party; but it is unnecessary to labour an undisputed point".

Equally, in relation to rights, Roxburgh says:³⁰

"No Publicist has ever suggested that a third State can ever acquire rights under a treaty which benefits it merely incidentally, and the practice of nations supplies evidence to show that it cannot do so."

This last citation, however, involves a point that will be more fully considered in due course.

16. *Paragraph 2*. This is self-explanatory—and see article 2 (3) and the commentary to it in para. 9 above.

ARTICLE 4. APPARENT OR QUASI-EXCEPTIONS OR QUALIFICATIONS TO THE PRINCIPLE *pacta tertiis nec nocent nec prosunt*

17. *Paragraph 1*. Despite the more or less absolute character of the principles discussed in the preceding paragraphs—absolute at any rate in the case of obligations (the case of rights, as will be seen in due course, is not quite so absolute), these principles are nevertheless subject in practice to certain qualifications. These are specified in Division C of the text, and will be commented on in that connexion. Reference may, however, be made here to paragraphs 3 and 4 of the introduction to the present report. The phrase "exceptions or qualifications" is all the same not entirely satisfactory. Possibly "qualifications" is reasonably apt, but none of them amount strictly to an *exception*; or, if they are exceptions, it is only in the indirect or incidental sense that they can be said so to be. At the most they are quasi-exceptions. This will become clearer when the actual provisions dealing with the matter are considered, but it would be truer to say that all these exceptions or qualifications are really in the nature of glosses on the basic principles, which in themselves remain entirely unaffected. But the gloss exists, for as Rousseau³¹ says, harking back to his earlier *dictum* (see para. 7 above), "...the affirmation of principle according to which international treaties have but a relative effect must not be taken literally". What this means is that while the treaty may not, purely in and of itself, either oblige or entitle the third State, the latter may become separately obliged or entitled, in a manner similar or parallel to the treaty provisions, or may be affected by its provisions in a manner that has legal consequences, or may, under general international law, be or become

²⁶ Opinion of Lord Stowell as King's Advocate, of January 2nd, 1796, cited in A. D. McNair, *The Law of Treaties: British Practice and Opinions* (Oxford University Press, 1938), p. 309.

²⁷ Cited in Verzijl, *Jurisprudence*, p. 161: Special Rapporteur's translation of the passage cited.

²⁸ *Op. cit.*, p. 29.

²⁹ *Ibid.*, p. 31.

³⁰ *Ibid.*, p. 36.

³¹ *Op. cit.* in note 3 above, p. 462 – Special Rapporteur's translation of the passage cited.

possessed of certain obligations or rights *in relation* to the treaty.

18. *Paragraph 2.* This paragraph defines the terms “(effects) *in detrimentum*” and “*in favorem, tertiis*”, which, as indicated in paragraph 6 of the introduction, are used throughout the text as convenient portmanteau expressions whenever it is not desired to indicate any particular effect, but to cover the whole of the very considerable range of the different classes of effects that a treaty provision may have. Not every such provision simply imposes an active obligation or confers an active right. This paragraph is otherwise self-explanatory.

19. *Paragraph 3.* No particular comment is required.

ARTICLE 5. PRINCIPLES UNDERLYING THE CASES IN WHICH TREATIES MAY HAVE, OR RESULT IN, EFFECTS *in detrimentum*, OR *in favorem tertiis*

20. *Paragraph 1.* This is so largely self-explanatory that to comment on it would only result in repetition, in a more extended form, of what is already there. It is a question of trying to discern and isolate the main principles on the basis of which, despite the *pacta tertiis* principle, and without infringing it, treaties can be said to have certain effects *in detrimentum*, and *in favorem, tertiis*. The main principles are stated in this paragraph, and are four in number (or five, if the principle that where there is *damnum sine injuria* there is no legal claim in any case where no basis of absolute liability exists, be included: this might have been mentioned as a sub-division of the principle numbered (iv), since it is relevant in connexion with the position whereby a third State has no legal cause of complaint if it incidentally suffers damage or detriment from a treaty which is in itself lawful, and does not infringe any legal right of the State concerned). In a certain sense, the principle of non-intervention is also involved.

21. Some of the principles mentioned are obvious, as for instance, that a third State will incur obligations, and similarly obtain rights or benefits, if it enters into a separate treaty to that effect with the parties. It is then of course under this separate treaty that the actual effects arise, and it is under this treaty alone that the third State is obliged or can claim. Others of the principles indicated are not so self-evident. In the books, many individual instances or classes of concrete case are mentioned—such as those of treaties containing international settlements, or demilitarizing some area, or transferring territory, or creating a servitude; but this is often done without relating these classes of cases to any general principle, such, for instance, as that of a duty to respect valid international acts not infringing the legal rights of the third State. The principle of this duty covers respect for acquired rights, recognition of the “dispositive” effects of treaties under executed clauses, and much else. In the same way, it is often stated that “as a general rule” treaties establishing régimes for international waterways operate *erga omnes*, but without relating this fact to the principle that if use is made for purposes of passage of a waterway passing though the territory of another State, such use must

necessarily conform to any valid treaty provisions governing the navigation of the waterway. A more or less automatic entailment—“because rights, then obligations”—is involved here, and there is really no need to have recourse to the idea of a treaty by nature “*erga omnes*”. Whether the Special Rapporteur has indicated the right or the best principles to account for the different concrete instances is another matter. It can easily be seen that a different view could be taken on certain points. The essential thing is that some basis of principle should be sought and found.

22. A word may be added about the headings lettered (A) and (B) in paragraph 1 of article 5. It is evident that the effects of treaties for third States can be divided into two main groups. There are, on the one hand, those effects which, in a variety of ways, lead to or consist in a position in which the third State is found to be carrying out or enjoying, if not the very obligations and rights of the treaty itself as such, at any rate similar, analogous, or parallel ones. If the treaty says “Do A”, the third State will in due course be found doing A, not under the treaty as such, but for example because, through the medium of the treaty, “A” has been received into the general body of international customary law, and has in that form, for that reason, and in that way, become incumbent on all States even though they were not parties to the original treaty. On the other hand, there is the other main category of “effects”. The third State is not found carrying out the treaty provisions at all, either directly or by analogy, or for any reason or in any guise. The “effect” is simply that the third State is called upon to take up a certain attitude towards the treaty and its contents or consequences—an attitude of recognition, respect, non-interference, tolerance, sufferance, as the case may be. The principle of non-intervention could be invoked here. But the duty is really a broader one—of respect for valid international acts. The latter principle is also a far more satisfactory one than the idea that certain types of treaty have an inherent effect *erga omnes*. In any case, the distinction between the two above-mentioned types of “effects” is a well marked one, even if there are certain areas of slight overlap, and recognition of it contributes greatly to a retention of direction in this subject.

23. *Paragraph 2.* This has been inserted in order that the point should be borne in mind even at this stage. Comment on it is reserved until later.

DIVISION B. RIGHTS AND OBLIGATIONS *INTER SE* OF THE PARTIES TO A TREATY IN CONSEQUENCE OF PROVISIONS RELATING TO THIRD STATES

ARTICLES 6 AND 7. CASES OF *pacta in detrimentum* AND *in favorem tertiis*, RESPECTIVELY

24. It will be convenient to consider these two articles together. It is clear, though often not specifically referred to in this literature of the subject, that the question of third States in relation to treaties to which

they are not parties has two distinct aspects. The more usual aspect, or at any rate that which more frequently gives rise to problems, is that of the position of the third State itself—how far that position is or can be affected by the treaty, and in what circumstances, if any, the third State can be under any obligations, or derive any rights, by reason of the treaty, though not a party to it. The other aspect relates, not to the position of the third State, but to the position of the parties *inter se*, in those cases where the treaty provides, for instance, that one or more of the parties shall take certain action regarding, or afford certain treatment to, a third State.

25. The general principle of articles 6 and 7 is quite clear, and indeed self-evident, in the case of a treaty conferring rights or benefits on third States. If, under a treaty, one of the parties undertakes to confer a certain benefit on a State which is not a party to the treaty, this is presumably because the other party has a direct interest in the third State concerned receiving that treatment or benefit, and, consequently, if it is not afforded, that other party has a right of recourse.

26. *Paragraphs 1 and 2 of article 6.* In principle the position is exactly the same where a treaty purports to confer, not rights, but rather to impose liabilities or disabilities on, or to create a situation unfavourable for, a third State. Of course, such action may be illegal, which would raise another issue. For present purposes it must be assumed that no illegality is involved. It may be, for instance, that the parties, having under the treaty assumed certain obligations, undertake in addition that they will use their best endeavours to secure similar conduct on the part of third States. This indeed is precisely the principle embodied in Article 2, paragraph 6, of the United Nations Charter—and see also the somewhat similar provision embodied in the recently concluded Antarctica treaty, cited in paragraph 54 below. In such cases—and many others can be imagined—the fact that the third State is not, and cannot be under any direct obligation in the matter, not being a party to the treaty concerned, does not of itself absolve the parties to the treaty, so far as they are able, and can do so without any illegality, from endeavouring to secure that the third State conforms its conduct or action to the provisions of the treaty. Any party to the treaty failing to make this attempt in relation to the third State will, in the circumstances, commit a breach of the treaty, in respect of which the other party or parties will have a right of recourse against it. It must nevertheless be emphasized that this situation cannot create any actual obligations for the third State (and see para. 28 below).

27. It must equally be emphasized that in such a situation, the third State, though not under any legal obligation, has correspondingly no legal right of redress in case the provisions of the treaty can be and are carried out in relation to it, unless indeed those provisions are in some way unlawful, or their

performance involves illegality. This last point is discussed in the next paragraph.

28. "... and so far as they can do so without infringing any other applicable treaty or general rule of international law...". It goes without saying that provisions of the kind here under discussion can only be applied to the third State either with its consent, or else only if, or in so far as, it is possible to do so lawfully without such consent—i.e. without infringing any other applicable treaty or general rule of international law. The parties to a treaty cannot arrogate to themselves the right to apply measures to, or enforce conduct by, a third State, in contravention of applicable treaties or general rules of law. It is not considered that paragraph 6 of Article 2 of the United Nations Charter is intended to have any different effect, despite its somewhat peremptory wording; and, Article 103 *ex hypothesi* can only apply in respect of treaties between Member States. It must be assumed that the Charter, of all instruments, falls to be interpreted in such a way as not to lead to contraventions of treaties or general rules of law.

29. *Paragraph 3 of article 6.* Not only does the fact that the treaty creates disabilities or disadvantages for a third State not absolve parties from their obligations under it *inter se*, but so equally are they not absolved merely by reason of the fact that the third State itself declares its refusal to accept the treaty provision concerned. Only in two cases, it would seem, would the attitude of the third State be material to the obligation of the parties, namely where it is a condition of the treaty that the third State must accept the liability or other situation created for it by the treaty, or else where the treaty provision is of such a character that its object, and the carrying out of that object, would be unlawful without the consent of the third State concerned.

30. *Article 7* deals with the case of treaties by which the parties engage themselves to afford certain rights or benefits to a third State, such as a treaty providing for a transfer of territory to a third State, or for the exercise by it of certain rights in the territory of one of the parties, or for the restoration of certain property to the third State. Peace treaties often contain such provisions. It is possible, as will be seen later, that the effect of a treaty of this kind may be actually to confer upon the third State itself certain direct rights, in such a way as to afford to that State a right of recourse in case the treaty is not carried out in relation to it. The point is that, whether this is the case or not, and even if the third State cannot itself be said to enjoy, by reason of the treaty, any direct right which the third State itself could, to use the French term, *faire valoir*, the parties to the treaty remain under an obligation *inter se* to grant to the third State the stipulated rights or treatment. In short, if one of them fails to do so, there would be a breach of the treaty, and the other party or parties would have a right of recourse against it, even though the third State itself might have no legal right of action.

DIVISION C. POSITION OF THIRD STATES IN RELATION TO THE TREATY ³²

SUB-DIVISION I. PRESUMPTIONS AND METHODS OF CLASSIFICATION

ARTICLE 8. PRESUMPTIONS

31. *Paragraph 1.* Owing to the force of the principle *pacta tertiis nec nocent nec prosunt*, which is itself a derivative of the fundamental principle of consent as the foundation of the international obligation (though not, as has been observed elsewhere in this series of reports ³³ of the antecedent rule that consent does create obligation), there must be a natural presumption that any given treaty does not have any effects *in detrimentum*, or *in favorem*, *tertiis*; and in case of doubt this presumption will govern.

32. *Paragraph 2.* But clearly the presumption can only apply to the question whether the third State is affected by the actual provisions of the treaty, e.g. must carry out like obligations or is entitled to enjoy the benefits. It cannot relate to or affect obligations (or rights) which, under general principles of law, it may have in relation to the treaty, if lawful and infringing no legal right of the third State; e.g. not to interfere with its due execution, to respect its dispositive clauses etc. This type of obligation on the part of a third State in relation to a treaty is of an independent, objective, character, and is not affected by presumptions.

33. *Paragraph 3.* The presumption is in any case weakened, and may be entirely negated, in the case of certain treaties such as those embodying international settlements, or containing neutralization or demilitarization clauses which are frequently regarded (though perhaps with doubtful warrant (see end of para. 22 above)) as having effect *erga omnes*. This must be a matter for appreciation in the individual case.

34. *Paragraph 4.* *Per contra*, the presumption is greatly strengthened, and may become virtually absolute, in those cases where the third State has the possibility of becoming a party to the treaty in question, by ratification or accession, or by any other special procedure that may have been provided. Such cases are clearly different from those where the third State possesses no inherent faculty of participation, and could not become a party at all unless the parties to the treaty themselves made some special *ad hoc* provision to that effect, or specifically and *ad hoc* admitted it as a party. No authority on the proposition enunciated in the paragraph exists. Nevertheless, as a matter of principle, it is believed to be correct, and to furnish a substantial aid to determining the circumstances in

which an *in detrimentum* or *in favorem* effect for third States can reasonably be implied—or not implied. This is because it seems clear that when a treaty itself makes provision for the admission of third States, then the correct method of procedure, if those third States wish to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume its obligations, is for them to avail themselves of the faculty of becoming parties. In these circumstances, therefore, and in relation to this type of treaty, there would be a rather strong *prima facie* (though perhaps not always necessarily conclusive) presumption that third States were not, so long as they remained such, intended to derive any benefit from the treaty, or equally to be placed under any liability by reason of it. Where, on the other hand, a third State is in some way affected by a treaty to which it can never become a party except by some special dispensation of the existing parties, it may be easier or more natural, or more equitable, as the case may be, to regard the treaty as producing indirectly or incidentally certain effects in relation to that party. Naturally, as implied at the beginning of paragraph 1 of article 8, all must depend on the interpretation of the treaty in the context of the surrounding circumstances.

35. *Paragraph 5.* This is merely consequential. Paragraph 4 only applies to third States who could sign and ratify or accede. It is not sufficient for the treaty simply to contain accession clauses. For paragraph 4 to apply, the third State concerned must come within the scope of the provisions concerned, if those provisions are limited as to the class of State entitled to accede.

ARTICLE 9. METHODS OF CLASSIFICATION

36. *Paragraphs 1-5 and 7.* This article, like corresponding ones in previous drafts, is purely analytical. It need not figure in any eventual draft completed by the Commission, but has been included at the present stage because it affords by far the best means of seeing what the topic as a whole really involves, and also what are the different legal principles underlying the various aspects of the subject. As in the case of the topic of termination of treaties, there is a natural tendency to confuse processes and principles ³⁴—in the present case to confuse the processes by which effects for third States may be produced, with the legal principles that cause these processes to produce the effects in question. A third and interesting method of classification is that based on the nature of the effects themselves. For purposes of comparison, a separate and alternative set of articles covering the material figuring in Sub-division II of Division C of the text will be furnished at a later stage. A fourth, but less important, method of classification, is according to the character of the treaty in respect of which the effects for third States are being produced. Since the basis and effect of the various methods of classification are clearly

³² As the logical counterpart of the title of division B, this might have been called something like "Relations of the parties with third States". But this would not have been quite correct. The third State has, in certain respects, a relation to the treaty, rather than to the parties.

³³ See for instance in the fourth report (A/CN.4/120), printed in the *Yearbook of the International Law Commission, 1959*, vol. II, para. 15 of the commentary to article 3 (1) of the text.

³⁴ See the Special Rapporteur's second report, *Yearbook of the International Law Commission, 1957* (United Nations Publication, Sales No.: 57.V.5, Vol. II), p. 43, para. 39.

apparent from the text of the relevant paragraphs of article 9, it is not proposed to expound them further here. It is evident, however, that each method of classification is capable of covering broadly the same, and the whole, ground.³⁵ It is merely a matter of convenience or elegance which is selected (see further in para. 38 below).

37. *Paragraph 6.* This points out something that would otherwise perhaps be overlooked, and which in any case refers to one of the distinctions that are among the most important for the understanding of the subject as a whole. Some "effects" of treaties for third States, if appropriately brought about—e.g. by consent—are active and positive: the third State does something—it carries out an obligation or exercises a right. Other "effects" are purely passive or negative: the third State recognizes, respects, tolerates, refrains from interference, etc.

38. *Paragraph 7.* As so often, there are difficulties or drawbacks in practice in adhering rigidly to any one of the different methods of classification outlined, considered purely in themselves; and for immediate purposes at any rate, it seems best to adopt a somewhat mixed and eclectic form of arrangement. The one actually adopted is neither wholly logical nor the most elegant, but it has the merit of spreading the subject out to the utmost possible extent, so that it can be fully inspected, as it were. It is principally based on method (iii)—nature of the concrete acts or processes whereby effects are produced for third States—since this is how the matter mostly comes up in practice; but it has elements drawn from the other methods also, more particularly method (ii). As the nature of this classification will be clear from the various sub-division and section headings, etc. of the text, it need not be commented on here. But these headings should be carefully studied, for in a sense they contain in themselves a pocket exposition of the whole subject. One point may be specially mentioned. The selected method has the advantage, for study purposes, of keeping mainly to the presentation of the subject that will be found in the books, while at the same time trying to make its structure and foundation of principle clearer. For this purpose, it keeps entirely separate the *in detrimentum* and the *in favorem* situations. This is, however, somewhat artificial and a matter of convenience rather than essential. While there are one or two points peculiar to the case of obligations only, or to the case of rights only, in general it is possible to include both obligations and rights (or rather *in detrimentum* and *in favorem* effects) together, under each head and sub-head.

³⁵ For example, selecting on the basis of method (iv) the type of treaty which is producing effects for third States, it may be said that the process whereby the provisions of a so-called "law-making" treaty come to be regarded as applicable *erga omnes*, can variously be regarded purely as a process (method (iii)), based on the principle (method (ii)) that the *pratique constante* brings a general rule into being as a rule of customary international law, and that the type of effect thereby produced (method (i)) is that the third State must observe the same rule as is contained in the treaty, though it observes it as a customary, not a treaty, rule (it has merely become customary *via* the treaty).

SUB-DIVISION II. EFFECTS OF TREATIES IN DETRIMENTUM AND IN FAVOREM TERTIIS

SECTION 1. EFFECTS *in detrimentum tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES, *in detrimentum tertiis*—OBLIGATIONS WHICH THE THIRD STATE MAY ACQUIRE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In detrimentum effects brought about by the volition of the third State

Sub-rubric (a) 1. Effects directly brought about by the third State

39. The present section deals exclusively with *in detrimentum* effects, and the present sub-section deals with active or positive, as opposed to passive or negative, effects. *Rubric (a)* covers the case of *in detrimentum* effects of this kind produced by the volition of the third State itself. This volition may manifest itself in two ways—directly (the third State consents) or indirectly (the third State does something else which, by a process of entailment, involves for it *in detrimentum* effects under or arising out of the treaty). Sub rubric (a) 1 deals with the one case; sub-rubric (a) 2—see paragraphs 48-54 below—with the other.

ARTICLE 10. POSITION OF A THIRD STATE SIGNATORY OF, BUT NOT YET A PARTY TO, A TREATY, IN REGARD TO THE FORMAL CLAUSES OF THE TREATY AND, IN PARTICULAR, TO PARTICIPATION BY OTHER STATES HAVING A FACULTY OF PARTICIPATION UNDER THE TREATY

40. *Paragraph 1.* This is a relatively minor matter. Yet it does constitute a case where a State which is technically a third State (in that it is not yet a party, though not wholly a stranger to the treaty concerned), has obligations under the treaty. This can, of course, be explained on the basis that signature of a treaty, while only involving a provisional consent to the substantive provisions of the treaty, involves what is really a final and definitive consent to its formal clauses, or those of them which deal with such matters as ratification, accession and coming into force. Thus the third State might be said to be a party to that part of the treaty that contains the formal clauses and therefore not a third State in respect of that part of the treaty. That may be so, but the case seems worth inclusion here.

41. *Paragraph 2.* This seems worth separate mention as an important application of the rule.

ARTICLE 11. CASE OF SPECIFIC AGREEMENT BY THE THIRD STATE WITH THE PARTIES TO THE TREATY, OR WITH ONE OR SOME OF THEM, OR WITH ANOTHER INTERESTED THIRD STATE

42. A third State can, of course, as already stated, never incur an obligation or become subject to a direct liability by reason of a treaty to which it is not a party—that is to say, it can never be placed in this position simply by reason of the treaty itself. It may, however, be placed in that position by its own acts, in which case it becomes a consenting party and there is no violation of the rule that States can only be bound by their consent. (Though irrelevant in the immediate

context, it may be added that it is also possible that in certain circumstances a general rule of international law will operate to place a third State in the same position—of having to conform to provisions contained in a treaty to which it is not itself a party; but then, of course, States are held to be *ipso facto* and *a priori* consenting parties to the accepted general rules of international law. In general, Rousseau says³⁶ that “Without even mentioning the case where certain treaty provisions are applicable in the guise of customary law to States which did not participate in the framing of them... there are fairly frequent situations in which one sees treaties ... imposing themselves on such States”).

43. *Paragraph 1.* A third State may agree by a separate instrument to be bound, or may, by virtue of a separate instrument, become bound, by a provision of a treaty to which it is not a party. This type of case has already been illustrated by the references to and citations from the decisions of the Permanent Court of International Justice in the cases of the *International Commission of the River Oder* and *Treatment of Polish Nationals in Danzig* (see paragraphs 11 and 12 above). It is strictly immaterial whether (see cases (a), (b) and (c) of this para.) the agreement is with the parties to the treaty, or one or some only, or with another interested third State. The third State is in any event bound.

44. *Paragraph 2.* Clearly, the obligation of the third State arises and continues solely under the separate agreement and not under the original treaty. But this position is sometimes obscured because the third State agrees (though separately) in the form that it undertakes to carry out the provisions of (or observe) “Article X of treaty Y”—which may seem to make it a sort of party to treaty Y. Of course, it is not: it merely subscribes to a similar or analogous undertaking, as would be clear if the undertaking took the form (as it always could do) of reciting the *ipsissima verba* of article X of treaty Y, without referring to it.

ARTICLE 12. CASE WHERE THE THIRD STATE ASSUMES OBLIGATIONS OR LIABILITIES, OR ACCEPTS OTHER EFFECTS *in detrimentum*, BY MEANS OF A UNILATERAL DECLARATION

45. *Paragraph 1.* It is no doubt a question whether binding obligations can be assumed by means of a purely unilateral declaration. That, however, is a separate issue. This paragraph is intended to be so worded as not to prejudice the question of the circumstances in which a purely unilateral declaration can, under international law, create binding obligations for the declarant State. This question, as has already been mentioned elsewhere,³⁷ is not really a part of the pre-

sent subject, because a unilateral declaration, although it may be one of the means by which obligations are created for States, is not a treaty, and there are, of course, various ways (and the unilateral declaration may be one of them) in which obligations can arise for States otherwise than through an actual international agreement such as a treaty. The point involved in the present sub-head is simply that in so far as a State can assume obligations by a unilateral declaration in a manner which will be legally binding upon it, then it must necessarily, by that means, be able to bind itself to carry out the provisions of some already existing treaty, or to assume obligations or responsibilities under it. Indeed, declarations of this kind have not been uncommon. It will not be overlooked, however, that in this case, as in those coming under article 11 (see para. 44 above), the third State concerned still remains a third State. It still does not become a party to the treaty in relation to which it assumes obligations. Its obligation still does not derive from that treaty as such, but from the unilateral declaration it makes. Consequently, there is still no exception to the basic principle that treaties cannot directly create obligations for third States.

46. *Paragraph 2.* This needs no further comment than is contained in paragraph 44 above, in relation to the parallel situation arising under article 11.

47. *Paragraph 3.* This raises a point of some importance. However, it arises even more definitely in the case of treaty provisions having effects *in favorem tertiis*, and as the principle involved is exactly the same, comment may be reserved until later (see paras. 90, 93, 101, 103 and 105 below).

Sub-rubric (c) 2. Effects indirectly brought about by the third State, as the automatic consequence of acts in the nature of an exercise of rights under the treaty, or of a user of maritime or land territory, the conditions of which are governed by the treaty

ARTICLE 13. RULES APPLICABLE IN RESPECT OF ALL TREATIES

48. *Paragraph 1.* Apart from the fact that the consequences indicated in this paragraph would seem to follow as a matter of principle, there is some authority for the view that a State which conducts itself in this manner—i.e., by availing itself of the benefits of a treaty, or exercising rights under it—thereby also incurs the corresponding obligations, even if no more than the general obligation to conform to it and not infringe its terms. This seems to be the opinion of Roxburgh, who cites Despagnet, who would apparently regard the case as one of a sort of tacit accession to the treaty by conduct.³⁸ If this is correct, then it is again a case of consent (that is to say, implied consent) by the third State in respect of the obligations concerned. Equally, the third State does not thereby become a party to the treaty, or directly incur any obligations under it. The case is in a sense akin to that dealt with in article 12. It is a sort of unilateral taking up of position by conduct on the part of the third State.

³⁶ *Op. cit.* in note 3 above, p. 462: Special Rapporteur's translation of the passage cited.

³⁷ See the Special Rapporteur's first report, *loc. cit.*, p. 117, para. 8; and see article 1, para. 4, of the articles on treaties adopted by the International Law Commission in 1959: *Report of the International Law Commission covering the work of its eleventh session* (A/4169), p. 6; and para. 10 of the commentary thereon (*ibid.*, p. 9).

³⁸ Roxburgh, *op. cit.*, pp. 25 and 26.

49. *Paragraph 2.* The rule indicated in the first paragraph of the article is conditioned by the words "... in circumstances necessarily implying and involving ..." etc. This condition seems requisite. Nevertheless, there would seem to be a *prima facie* presumption in any given case that it is fulfilled.

ARTICLE 14. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

50. *Paragraph 1.* This case is usually classed with those coming under article 18 of the text, and of course it does have certain features in common with those cases or with the class they represent. There is, in particular, the superficial resemblance involved by the type of instrument under which the user régime is established. Nevertheless, to the Special Rapporteur, these cases—i.e. those coming under the present article 14—appear to belong to a distinct category. In the article 18 type of case, the third State is not, in general, called upon to do more than recognize, accept, not intervene or obstruct the functioning of the régime (e.g. of demilitarization) or status (e.g. of neutrality) set up by the treaty, or the treaty's dispositive clauses (e.g. a transfer of territory), and so on. In the article 14 type of case, on the other hand, something more active is involved. The third State, or its nationals or vessels, wishes to make use of the land or maritime territory concerned, and to make use of the provisions of the treaty for that purpose. It is basically the same case as that of article 13, and really a special instance of it. Again, therefore, an automatic entailment must be involved. The third State, its nationals or vessels, wishes to avail itself of the treaty: it must consequently conform to its provisions and the conditions laid down.

51. The classic case is, of course, that of treaties regulating the use of a means of international communications, in particular a waterway, running through the territory of one or more States. This is frequently treated by writers as an independent and objective case of a class of treaty producing effects *erga omnes*. It is, of course, really only one particular instance of the general type of treaty with which article 14 is concerned. But it tends to receive special mention because it is a frequent and important instance of the class, and one in relation to which the principle of article 14 comes almost daily into play. However, as indicated, most authorities (mistakenly in the Special Rapporteur's view) tend to treat the case as an example of treaties which in their nature have effects *erga omnes*. Thus, Rousseau says:³⁹

"It has happened on a number of occasions that treaties relating to communications, fluvial as well as railroad, have been regarded as binding equally all riparian or interested States, which are deemed to constitute a special group and on that basis, to be subject to a common ordinance valid even without express consent."

To the Special Rapporteur it seems very doubtful whether any treaty can be regarded as having automatic

effects *erga omnes*, unless the system it establishes is one that third States can simply recognize and respect without having to engage in the carrying out of specific obligations that would require their active consent. Treaties about international waterways would seem to belong rather to the latter than to the former category. But the point is that the necessary consent can be implied automatically from the exercise of the rights or facilities provided by the treaty. Alternatively, these rights or facilities may be regarded as being in the nature of what the common lawyer calls an "easement", and therefore, according to normal principles, subject to the conditions of the easement.

52. Nevertheless, it is certainly true that as a matter of practice and fact, the instruments governing the use of such international rivers as the Rhine, Danube, and Oder, and such seaways as the Suez and Panama Canals, the sounds and belts, and the Dardanelles and Bosphorus, to take some of the more prominent cases, have all come to be accepted or regarded as effective *erga omnes*, and this of course is still more so as regards the question whether they confer universally available rights of passage (see later in connexion with article 26 of the text, and paragraphs 104 and 105 below). It is automatic, in any case, as already indicated, that, if they give rights to third States, they should also bind, for that arises out of the actual use of these waterways which cannot in practice be effected without conforming to the conditions governing it. Furthermore, it is precisely the willingness to conform, and the fact of habitual conformity, that gives the country concerned the necessary *locus standi* for protest in case of abuses, discrimination, etc. on the part of any riparian State. Lord McNair⁴⁰ cites an interesting case considered in 1850, illustrating both the principle of rights and of obligations for third States in respect of the use of an international river—a striking illustration as regards the latter question, since the third States regarded as obliged were actually riparian States and not States merely making a passage use of the waterway concerned. This was the Po, at that time still an international river, flowing through territory that was Austrian, and territory belonging to various Italian States. Under the general Vienna settlement of 1815, the Po was placed under the same navigational régime as that provided for other international rivers by the Treaty of Vienna; but only Austria among the riparian States of the Po was an original party to that Treaty. Sardinia and Parma subsequently acceded to it, but Modena and the Papal States did not. Lewis Hertslet, the Librarian of the Foreign Office⁴¹ putting to the Queen's Advocate the question of the position of British vessels using the Po, and after referring to the fact that the territories of the Papacy and of Modena had been restored to their Rulers by the efforts of the Allies, and confirmed

⁴⁰ *Op. cit.*, pp. 319 and 320.

⁴¹ At that time the Foreign Office had no resident legal advisers. The "Librarian and Keeper of the Papers", as custodian of treaties, would frame any question of treaty interpretation for consideration by the Law Officers of the Crown and/or the Queen's Advocate. As to the office of the latter, see note 44 below.

³⁹ *Op. cit.*, vol. I, p. 481: Special Rapporteur's translation of the passage cited.

to them by the Treaty of Vienna (a fact which he seemed to suggest might be regarded as sufficient to render them subject to the provisions of that Treaty)⁴² went on as follows:⁴³

"It is declared by Article 96 of the Congress Treaty that the General Principles adopted by the Congress of Vienna, for the Navigation of Rivers, shall be applicable to the River Po.

"Among the Bases of those General Principles, it is established by Article 109, that the Navigation of Rivers along their whole course, from the point where each of them becomes navigable, to its Mouth, shall be entirely free, and (shall) not be prohibited to anyone, in respect of commerce—the Regulations with regard to the Police of the Navigation being respected.

"And by Article 110, it is further established that the System for the collection of the Duties, and for the maintenance of the Police, shall be as nearly as possible the same, along the whole course of the River, and also along that of its Branches and Junctions which separate or traverse different States.

"British Commercial Vessels are therefore, it would appear, entitled to the freedom of Navigating the Po; subject to the payment of the Duties of Customs and Police, which may be established by the several States through whose Territory the River passes—agreeably to the Regulations for that purpose, which should be, if they have not already been, concluded between their Commissioners, in pursuance of Articles 96 and 108 of the Congress Treaty."

In answer to this the Queen's Advocate⁴⁴ replied simply:⁴⁵

"I am of opinion that it is obligatory upon the Governments of Rome and Modena although not Parties to the Treaty of Vienna to permit the Navigation of the Po, as mentioned at the conclusion of the Memorandum drawn up at the Foreign Office dated the 2nd of May last."

In a later case instanced by McNair, Lord Phillimore, then Queen's Advocate, made the following statement of the principle involved, namely that certain situations are of general interest and concern to all States:⁴⁶

"It is true, indeed, that in ordinary circumstances a third State would have no right to interfere in the question of the construction of a Treaty between two other States; but this important subject of transit over the Isthmus of Panama, and generally of the communication between the Atlantic and Pacific Oceans, has of late years been recognised as affecting the interests of all civilised States, and has been the subject of various negotiations and treaties."

⁴² Hertslet was not a lawyer, and this was clearly a political rather than a valid legal argument.

⁴³ *Loc. cit.* in note 40 above, p. 320.

⁴⁴ John Dodson. The nature of the office of Queen's Advocate was explained in a footnote to paragraph 76 of the commentary in the Special Rapporteur's fourth report (footnote numbered 69 in the version in A/CN.4/120).

⁴⁵ *Loc. cit.* in note 40 above.

⁴⁶ McNair, *op. cit.*, p. 317: report of 13 February 1866.

The Special Rapporteur cannot deny that these citations lean somewhat heavily on the side of the "international status", having effects *erga omnes*, theory, although he feels that the better view in the case of the use of waterways and other communications running through State territory, and governed by treaty, is that the act of user implies consent to the conditions of use.

53. Paragraph 2 of article 14. Treaties providing for common international user of an area. It is difficult to say whether this particular type of case—to some extent novel—should be regarded (in respect of the position of third States not parties to the basic treaty of establishment, but making, or wishing to make, use of the territory concerned) as an article 18 or an article 14 type of case—as an "implied consent", or as a "status *erga omnes*" case, in regard to the obligation of the third State to conform to the treaty conditions as to user. In practice, it can no doubt be said that where all the States having, in respect of a given region or area, territorial rights or claims to such rights, or a possible basis of claim, or otherwise directly interested, have established by treaty a régime of permanent or quasi-permanent common user of the region or area, in such a way that the position of other States is not prejudiced or impaired, nor their general international law rights affected, it is extremely likely that the treaty will be regarded, or will come to be regarded, as being effective *erga omnes*.

54. Despite these considerations, cases of this type would seem to belong more properly to the article 14 type (although the concluding words of this paragraph of article 14 do—perhaps somewhat illogically—import an *erga omnes* test). Cases of this type are infrequent, and must in any event be distinguished from the more familiar cases of purely temporary special régimes for a particular area placed under an international authority for a specific purpose (e.g. the holding of a plebiscite) or pending a certain event (e.g. the conclusion of a treaty).⁴⁷ The recently concluded treaty on Antarctica, signed in Washington on 1 December 1959,⁴⁸ affords an example of the type of treaty under discussion. While specifically reserving all questions of sovereignty, neither admitting nor denying any claims, it provides for the joint use of the whole of Antarctica between latitude 60 south, and the Pole, for scientific, exploratory and other similar purposes, and sets up machinery to supervise and facilitate this process. It makes provision for accession by other countries, but at the same time does not seem to exclude non-parties from the area within the limits of the concept of use for scientific and geographical purposes. Nor does it purport specifically to impose any obligation on non-parties. Yet it is difficult to believe that any non-party which, for instance, sent a scientific expedition to Antarctica,

⁴⁷ One might instance the Saar, Upper Silesia, Trieste, etc. at different times.

⁴⁸ The treaty is actually called "The Antarctic Treaty", and, together with the Final Act of the Washington Antarctica Conference is printed as a White Paper by H. M. Stationery Office, London, as "Miscellaneous No. 21 (1959)", cited as Command Paper 913 of 1959.

would not (particularly, but not only, if it made use of facilities provided by, or arranged for with, one or more of the contracting parties, or through the joint periodical meetings of the parties provided for by the Treaty) consider itself, and be regarded, as bound to conform to the conditions of the user of Antarctica laid down by the Treaty, such as demilitarization of the area, prohibition of nuclear tests, provision for inspection of bases, etc., immunity from jurisdiction of all inspectors, etc. There is also a significant clause (see art. 6 of the present text and para. 26 above) by which the parties undertake to "exert appropriate efforts ... to the end that nobody engages in any activity in Antarctica contrary to the principles or purposes" of the Treaty.⁴⁹ At the root of such a position, as a causative element affecting the attitude of the third State, lies the existence of a simple if indirect sanction—the test of what it is practicable for it to do, except in co-operation with the parties—and this is itself but an offshoot of a principle fundamental to the "imperfect" character of international law, as law lacking fully adequate means of central enforcement—the principle of effectiveness—of what can or cannot effectively be done by States acting individually.

Rubric (b). In detrimentum effects brought about by operation of law.

Sub-rubric (b) 1. The third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 15. CASES OF STATE SUCCESSION, AGENCY AND PROTECTION

54A. Whereas articles 10-14 in rubric (a) deal with the case where a third State, necessarily having no direct obligations under the treaty, incurs such obligations, or rather similar obligations, by virtue of its own separate act or conduct, the present article attempts to specify the cases in which, by operation of law, a State will directly incur obligations in relation to a treaty to which it is not, or was not in the ordinary sense, a party.

55. *Sub-head (a).* A State may succeed to obligations under a treaty in circumstances in which the law of State Succession governs the matter. In many cases the State concerned thereby becomes an actual party to the treaty, thereby ceasing to be a third State in relation to it, so that no true exception exists. But this is not necessarily always the case. If, for instance, by a cession or other mode of transfer, a piece of territory passes to a State subject to a servitude originally created by a treaty between the State to which the territory formerly belonged and some other State, the State taking the cession may become subject to the obligation, i.e. to the servitude, without becoming a party to the treaty which created it. It can perhaps be said that in such a case that State becomes a party to the obligation though not to the treaty. But the case is more properly simply

one of a right *in rem* relating to the territory, effect to which must be given by whatever State is in possession. In any case, it seems worth while drawing attention to State succession as possibly giving rise to something in the nature of a qualification to the general principle of *pacta tertiis*.

56. *Sub-head (b).* Here again, there is not a true exception because the State in question becomes or must be deemed to be an actual party to the treaty. In form, however, it would seem to be possible, and cases would seem to have occurred, in which State A enters into a treaty on behalf of State B, by virtue of a general power conferred by B on A to act for it in the foreign sphere (B nevertheless retaining full sovereign independence), and without B itself actually signing or ratifying the treaty.⁵⁰ Roxburgh,⁵¹ though expressing some doubt whether there exists such a law, says "... it is possible that a third State may incur special rights and duties by virtue of the International Law of agency". There is certainly some warrant for this idea in the authorities, and the following passage from Alphonse Rivier⁵² is worth noting:

"... it may happen that a State contracts in the name of another, as mandatory or agent... It may happen that one Power includes [covers] another, its ally, in a treaty of peace. A State can make a *sponsio* for another, or answer for it."

57. *Sub-head (c).* This also is not a real exception, since the protected State is directly bound by the treaty, although not *eo nomine* a party to it. The case is, nevertheless, a quasi-exception, and worth mentioning.

Sub-rubric (b) 2. The third State becomes subject by operation of law to obligations similar to those contained in the treaty and functioning as customary rules of international law

ARTICLE 16. CASE OF CUSTOMARY INTERNATIONAL LAW OBLIGATIONS MEDIATED THROUGH THE OPERATION OF LAW-MAKING OR NORM-ENUNCIATING TREATIES

58. *Paragraph 1.* This article attempts to describe a process rather than to formulate a rule. Whether the treaty concerned will have the effects stated, must depend on a number of uncertain factors, such as its precise terms, the nature of its subject matter, the circumstances in which it was concluded, the number of States subscribing to it, their importance relative to the subject matter of the treaty,⁵³ the history of the treaty subsequent to its conclusion, and of the topic to which it relates—and so forth. That a number of important "law-making" or norm-enunciating

⁵⁰ The relationships between Switzerland and Liechtenstein; France and Monaco; Italy and San Marino for instance are not relationships of protecting State and protectorate.

⁵¹ *Op. cit.*, p. 96.

⁵² *Principes du droit des gens* (Paris, 1896), vol. II, p. 89: Special Rapporteur's translation of the passage cited.

⁵³ Thus a treaty to which only a relatively small number of States became parties might nevertheless have a general "law-making" effect, if those States were the States whose influence or interest was preponderant in relation to the subject-matter of the treaty. Some striking examples of this are given in para. 59 below.

⁴⁹ It is also of interest having regard to what is said in para. 28 above, that this provision expressly says that "the appropriate efforts" to be exerted by the Parties are to be "consistent with the Charter of the United Nations".

("normative") treaties have had such an effect is well known. As Roxburgh⁵⁴ says:

"In practice, this process of the extension of a conventional into a customary rule is not only possible, but of very constant occurrence."

Some of these treaties have largely codified or reflected existing customary law, some have formulated new rules regarded by the States concluding the treaty as being desirable or appropriate. Many have done both. In the former case the rules contained in the treaty, embodying, as they will do, existing customary law, will already be binding on all States as part of general international law, and what really occurs in these cases is that the particular formulation of the existing rule as enunciated in the treaty comes, whether more or less gradually, to be universally accepted as a correct statement or formulation of it. In the latter case, if the new rules prove their worth in practice, as applied by and between the parties to the treaty, and are also of a character suitable for wider application, they may come to be accepted and to pass into the general *corpus* of international law—they then acquire the status of general rules of law, instead of mere treaty rules binding only on the parties to the treaty, and as such are, or become binding on all other States, even though not parties to the treaty. Thus F. de Martens says:⁵⁵

"Sometimes indeed what is regulated by treaty with certain Powers is observed vis-à-vis others through a simple usage, in such a way that the same point can be one of treaty law for some, and of customary law for others."

Similarly, Alejandro Alvarez says⁵⁶ that in such cases

"The rules have changed their character—they can no longer be regarded as contractual, but as customary."

59. Amongst the best known treaties of this kind, or that seem likely to prove to be of it, are the following:

The Vienna *Règlement* on Diplomatic Rank and Precedence drawn up at the Congress of Vienna 1814-15 and the Congress of Aix-la-Chapelle, 1818;

The Declaration of Paris, 1856, on Privateering, Blockade, and related matters;

The Hague Conventions of 1899 and 1907 on the Laws of War, Neutrality and so forth;

The Declaration of London, 1909, on similar matters;

The Paris (1919) and Chicago (1944) Air Navigation Conventions;

The International Load Line and Safety of Life at Sea Conventions;

The Geneva Red Cross Conventions of 1929 and 1949 on Prisoners of War and related matters;

The Geneva Law of the Sea Conventions, 1958.

Included in this list are some instruments, such as the Vienna *Règlement* and the Declaration of Paris, the original parties to which, at least, were few in number; but since these included in the first case the members of the Concert of Europe and in the second the principal naval powers of the day,⁵⁷ the treaties had sufficient prestige to secure general acceptance of their provisions as received law. Similarly one instrument, the Declaration of London, was never ratified and did not come into force. Yet much of it was in fact applied during the First World War, until the circumstances of the war changed in such a way as to make this impossible. *Per contra*, there have been treaties essentially of a law-making character, which have been signed by a considerable number of countries, but which have nevertheless failed to secure universal acceptance as embodying generally received rules of law, such as the Brussels conventions on State-owned ships. These facts show that the process here under discussion is not governed by formal considerations but by elements of an imponderable character.

60. Where the process does occur, it may be likened by way of illustration to what happens when lexicographers compile a dictionary.⁵⁸ The lexicographer ascribes a certain meaning to a particular word because, in his view, that meaning represents the existing and already received signification of the term in question, as a matter of general and common usage. In short, he "codifies". Alternatively, if the existing usage is uncertain, or there is controversy as to the generally received meaning, he gives it that which, in his view, is on balance the best, most appropriate, or most useful ("legislation" or "progressive development"). But in either case, once in the dictionary, and if the latter is a work generally regarded as authoritative,⁵⁹ the word will tend to be used in its dictionary sense because it is there, and is so defined there. The dictionary which, to its compilers (the "parties"), had been an end-process, becomes for other ("third States") a point of departure and a source of authority ("law").

61. The analogy is not complete, and must not be pressed too far. Reverting to treaties, it is important to be clear as to the exact sense in which the type of treaty under discussion may be a source of law. Where it codifies existing general law, it does not make but only declares or evidences the law, and acts as a sort of catalyst through which a particular formulation of the law is mediated. Where the treaty does make new law, it does so, strictly, only for the parties to it. If what it provides comes to receive universal acceptance,

⁵⁷ The United States (perhaps not then as prominent in the naval sphere as later) was however not amongst the signatories.

⁵⁸ For this idea the Special Rapporteur is indebted to an article by C. Douglas McGee of Vassar College, New York (*A Word for Dictionaries*) in the leading philosophical journal *Mind*, vol. LXIX, No. 273 (January, 1960) at pp. 14-30.

⁵⁹ Clearly, the view taken by such a publication as the Oxford English Dictionary will tend to carry special weight; and this parallels the special weight that would be attached in the formulation of general rules of law through treaty, to the participation of those States possessing a particular experience, expertise, or interest in the field concerned.

⁵⁴ *Op. cit.*, p. 75.

⁵⁵ *Précis du droit des gens*, Introduction, para. 7 — Special Rapporteur's translation of the passage cited.

⁵⁶ Alejandro Alvarez, *La codificación del derecho internacional* (Paris, 1912), p. 148: Special Rapporteur's translation of the passage cited.

this is because other States have (voluntarily in the first instance) conformed their practice to it, thereby assisting in creating a new rule of customary law; and it is this rule rather than the treaty that binds the non-parties; and it is custom rather than treaty which is the formal source of the law—the treaty being the material source of the custom. This process has been aptly described by Roxburgh⁶⁰ as follows:

“Thus it may come about that a rule which was originally introduced by express agreement between certain parties may, in process of time, and subject to limitations to be considered, be extended by the consent of the contracting parties and of third parties into a rule of International Law, binding upon those states which have tacitly consented to it. The rights and duties so acquired by third states are not contractual rights and obligations, but rights and obligations which owe their origin to the fact that the treaty supplied the basis for the growth of a customary rule of law.”

62. *Paragraph 2.* But whether it is a case of new law, as described by Roxburgh, or of a treaty codifying and declaring existing law—in either case the treaty acts simply as a vehicle. It never as such directly binds non-parties—a position concluding words of paragraph 2 of article 16 seek to bring out. The Special Rapporteur may perhaps be permitted to close the discussion on this subject by quoting from what he has said elsewhere:⁶¹

“... the treaty may be an instrument in which the law is conveniently stated, and evidence of what it is, but it is still not itself the law—it is still formally not a source of law but only evidence of it. Where a treaty is, or rather becomes, a material source of law, because the rules it contains come to be generally regarded as representing rules of universal applicability, it will nevertheless be the case that when non-parties apply or conform to these rules, this will be because the rules are or have become rules of general law: it is in the application of this general law, not of the treaty, that non-parties will act. For them, the rules are law; but the treaty is not the law, though it may be both the material source of it, and correctly state it.”

SUB-SECTION (ii). PASSIVE OR NEGATIVE EFFECTS OR CONSEQUENCES *in detrimentum tertiis*—OBLIGATIONS INCUMBENT ON THE THIRD STATE, NOT UNDER, BUT IN RELATION TO THE TREATY

Rubric (a). In *detrimentum effects resulting from the application of the principle of respect for lawful and valid international acts*

Sub-rubric (a) 1. In the case of all lawful and valid treaties

ARTICLE 17. GENERAL DUTY OF ALL STATES TO RESPECT AND NOT IMPEDE OR INTERFERE WITH LAWFUL TREATIES ENTERED INTO BETWEEN OTHER STATES

63. *Paragraph 1.* It is probably true to say that by inference at any rate, international law does impose on States certain general duties in relation to valid treaties entered into by other States, and an attempt is made in this paragraph to list these.

64. *Sub-head (a).* Roxburgh,⁶² citing various authorities,⁶³ says of third States:

“They have a general duty not to interfere with the due execution of the treaty, so long as it does not violate international law or their vested rights. Even though they may suffer damage, they are without a legal remedy; they have incurred *damnum sine injuria*, and any attempt to interfere would be a violation of the international personality of the contracting parties.”

The second sentence of this passage is more relevant to the subject matter of article 19 of the text, namely that States must accept the fact that certain treaties may have the effect of impairing their position in some way. The first sentence is, however, apt in relation to the more general point dealt with in article 17, which involves a duty of non-intervention in the carrying out of lawful and valid treaties between other States based on the broader obligation of respect for lawful and valid international acts. But, as the sub-head indicates, this does not of course apply where a treaty impairs the actual legal rights, or purports to create legal liabilities or disabilities for the third State without its consent. The different case where a treaty places a State at a disadvantage or impairs or affects its position disadvantageously in some way without impairing its actual legal rights or purporting to create for its liabilities of a legal character, is considered in connexion with article 19.

65. *Sub-head (b).* In the same way, States would appear to be under a general duty to respect, and if necessary recognize, rights which treaties create for other States, provided again that the same conditions prevail, namely that the object of the treaty is lawful and that no impairment of legal rights or creation of legal liabilities etc. is involved. A fuller discussion of this matter will be found below (paras. 70 *et seq.*) in connexion with the related questions arising under article 18.

66. *Sub-head (c).* This is possibly controversial, but it would seem that a State which has signed a treaty, though it has not yet become an actual party by ratification, is nevertheless under a certain duty in relation to the treaty, so long as at any rate as there is still a possibility that it may ratify, and no decision not to do so has been taken. It would be anomalous for a State in such a position, and having just participated in the framing of the treaty, and having gone so far as to give the provisional acceptance of it that was involved by signature, then to proceed to take action that might impair the value of the treaty, or frustrate its objects, if and when it came into force. But once a decision not to ratify has been taken, any special duty

⁶⁰ *Op. cit.*, pp. 73 and 74.

⁶¹ See *Symbolae Verzijl* (The Hague, Nijhoff, 1958), pp. 158 and 159.

⁶² *Op. cit.*, p. 32.

⁶³ Oppenheim, Fiore, Hall, Rivier, F. de Martens.

arising out of the principle of this sub-head ceases.

67. *Paragraph 2.* This paragraph deals with a point relating to the general question of the validity of treaties, and indicates that it is not a ground of the invalidity of the treaty that it operates to the disadvantage or detriment of a third State—provided always that the treaty is otherwise valid according to the rules governing the substantive validity of treaties.⁶⁴ The point is similar, but considered from a slightly different angle, to that which forms the subject of article 19, for the commentary on which see paragraph 79 below *et seq.*

Sub-rubric (a) 2. In the case of treaties embodying international régimes or settlements, or of a dispositive character

ARTICLE 18. GENERAL DUTY OF ALL STATES TO RECOGNIZE AND RESPECT SITUATIONS OF LAW OR OF FACT ESTABLISHED UNDER LAWFUL AND VALID TREATIES

68. *Paragraph 1.* Many of the considerations which were discussed in connexion with article 16 apply *mutatis mutandis* to the type of case contemplated by the present article. In contrast with article 16, however, what is here involved is not so much that third States will come to be bound by obligations similar to those incumbent on the parties under the treaties concerned, as that they will be called upon, or will find themselves obliged, to accept, or anyhow will accept, and in that sense be bound by, the situation of law or fact, or the settlement or status, created by the treaty. Whether this is by virtue of some inherent character of these treaties as having effect *erga omnes*, or the consequence of a simple duty for all States to recognize and respect lawful and valid international acts, is a question that has already been touched upon (see para. 22 above) and will be discussed later.

69. Of course in some cases normally classed under this head, but which the Special Rapporteur has placed under article 14, an element of active, even if tacitly manifested, consent is present as was indicated earlier (see paragraph 51 above). Thus if a régime is created for a waterway by the riparian and other directly and principally interested States (e.g. the chief users of the waterway) other States using it, but not having taken part in the framing of the treaty, and not being actually parties to it, must yet abide by the conditions of user established by the treaty: an implied consent to these conditions arises out of the user itself.

70. *Sub-head (a). "International Settlements".* With regard to the view that certain types of treaties have a sort of inherently legislative effect *erga omnes*, while such a view is frequently discussed, sometimes with approval, in the literature of the subject, other authorities approach it with a good deal of caution, as,

for instance, in the following passage from the *Harvard Research* volume on treaties:⁶⁵

"According to some writers an exception to the general principle that treaties cannot impose obligations on third States is recognized in the case of collective treaties in the nature of 'international settlements'. Such treaties find their justification not upon legal principles but upon the acquiescence, of the States upon which they are imposed, or upon the ground that they are intended to serve the general interest. Examples of such treaties as those regulating the status or use of international waterways, treaties imposing a régime of neutralization or demilitarization upon a State, and others of a like character. As to treaties of permanent neutralization, there is some difference of opinion as to whether they may create obligations for third States, some authors holding that they do, while others deny it, although at the same time admitting that they may become binding upon third States through the operation of custom. Charles de Visscher (*Belgium's Case*, 1916, p. 17), speaking of the treaty for the neutralization of Belgium observes that it embodied an 'objective rule of international law', from which it would follow that it was binding upon third States as well as upon the parties.

"Professor Quincy Wright has expressed the opinion that, while the provisions of treaties in the nature of international settlements which are intended to establish a permanent condition of things may be of universal obligation, this results from the general acceptance and acquiescence in their terms by all States, not from the treaties themselves. 'Conflicts Between International Law and Treaties', 11 *American Journal of International Law* (1917), p. 573."

Roxburgh is also very non-committal and leans more to the tacit consent theory:⁶⁶

"An International Settlement is an arrangement made by treaty between the leading Powers, intended to form part of the International order of things, either defining the status or territory of particular states, or regulating the use of International waterways, or making other dispositions of general importance, and incidentally imposing certain obligations or restrictions on International conduct. Such a treaty may or may not contain an 'accession' clause; but in any case it is intended to be binding upon, and in favour of, the whole International Community. What is the position of third States under such a Settlement?... let us suppose that third states, knowing that the Settlement is to be part of the International order, abide by its terms, and in the course of time they come to believe that they are legally bound by it, and entitled to benefit under it: but that this conviction of legal obligation and

⁶⁴ See, as to this, the Special Rapporteur's third report (substantive validity of treaties), articles 16–20 and commentary thereon: *Yearbook of the International Law Commission*, 1958, vol. II (United Nations Publication, Sales No.: 58.V.I, Vol. II), pp. 26–28, 39–45.

⁶⁵ Harvard Law School, *Research in International Law*, III, *Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29, 1935, pp. 922–923.

⁶⁶ *Op. cit.*, pp. 81 and 82.

legal right does not admit of convincing or direct proof. The question then arises whether it may be presumed. The difference between tacit consent as a source of contractual obligation and tacit consent as a basis of law is here excellently illustrated. Not only is it true that the former is of immediate operation, and the latter of gradual growth; to establish the latter a conviction of legal necessity must be proved or presumed, whereas for the operation of the former no such conviction is necessary."

Rousseau, however, is more categorical and states:⁶⁷

"It happens fairly frequently that treaties establishing a political and territorial régime are regarded as being good against Powers other than the signatory States."

He cites a number of concrete instances but points out that the type of case in which one State, such as Germany under the Treaty of Versailles, undertakes to recognize territorial settlements effected by other countries under other treaties, is not a true instance of the principle now under discussion. It is rather a case coming under the head of article 11 of the present text.

71. To the Special Rapporteur, the considerable lack of enthusiasm evinced over the supposedly inherently "legislative" effect of some kinds of treaties, is evidence of a certain uneasiness at the idea. Exactly which classes have this effect, and why and how? It is easy to see that some treaties trigger off, so to speak, a law-making process (article 16 of the text). Again, some treaties are valid as against third States because the latter actively avail themselves of the treaty (articles 13 and 14). It is less easy to see why others, even if they do embody "international settlements" should be regarded as having an automatic effect *erga omnes*. The Special Rapporteur does not deny that, in the result, they do; but it seems to him preferable to reach this conclusion, not on the esoteric basis of some *mystique* attaching to certain types of treaties, but simply on that of a general duty for States—which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided)—to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense. It is not of course denied that a third State which dislikes an international act and which is not a party to it, is entitled by legitimate political means to seek to procure its modification or termination. That is what political assemblies such as that of the United Nations, are, *inter alia*, for. But that is a different thing from denying the legal validity of the act or claiming a right to disregard it.

72. *Sub-head (b). Case of treaties providing for the demilitarization of an area.* The classic type of treaty, or international act, on whichever basis it is placed, is

that providing for the demilitarization of an area; and the classic instance of it is that of the Åland Islands which, by the Treaty of Paris of 30 March 1856, were placed under a permanent régime of demilitarization, the original parties to this act being France, Great Britain and Russia followed by Austria, Prussia and Turkey. The Islands were then under Russian sovereignty, in virtue of Russian sovereignty over Finland to whom they basically belonged. After the First World War, Finland became separated from Russia, and the question of the need to continue the demilitarized status of the Islands was raised and referred to the Council of the League of Nations. Various legal questions were involved, and the Council appointed a Committee of Jurists to consider them. The chief question was one of rights not obligations—i.e. the right of Sweden, not a party to the Treaty of 1856, to insist on continued demilitarization,⁶⁸ and this will be considered under Section 2 below (*in favorem* position). But a possible question of obligations for a non-party was also involved⁶⁹ and the Committee of Jurists was led to consider and pronounce on the general juridical nature of the Åland Islands settlement under the Treaty of 1856. Adverting to the fact that although Sweden was not a party to this Treaty, it was entered into largely in the Swedish interest,⁷⁰ the Committee said:⁷¹

"An examination of the political conditions in which this agreement was entered into shows that the convention in reality has a much more extended bearing . . . the provisions settled upon in Paris between the Powers and Russia went beyond the ambit of purely Swedish interests. What was involved was a European interest deriving from the great strategic importance of the Åland group . . ."

The Committee, which also referred to the "objective nature of the settlement of the Åland Islands question by the Treaty of 1856",⁷² further declared that

"... any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarization established by these provisions."

Nor did the Committee see anything unusual in such a situation, for it said:⁷³

"The Powers have indeed, in numerous cases since 1815 . . . sought to establish a true objective law, and true political régimes the effects of which make themselves felt even outside the circle of the contracting Parties."

⁶⁸ The group is very close to the Swedish coast, and the original treaty—although Sweden was not a party, nor mentioned in it—was made largely in the Swedish interest.

⁶⁹ Finland, covered by the original treaty as part of Russia, but not, as such, a party.

⁷⁰ See note 68 above.

⁷¹ *League of Nations Official Journal*, Special Supplement No. 3 (October, 1920), pp. 17 *et seq.*

⁷² *Ibid.*, p. 18.

⁷³ *Ibid.*

⁶⁷ *Op. cit.*, p. 478: Special Rapporteur's translation of the passage cited.

It is clear that the Committee leaned very much in the direction of the theory of the inherent character of certain treaties as creating an objective situation good *erga omnes*. The Special Rapporteur has already explained in paragraph 71 above why he thinks a different theory is to be preferred, even though it may lead to much the same practical result. In any event, whether a particular treaty will have, or come to have, effects *erga omnes*, must depend on the general situation, and, as the paragraph states, the terms of the treaties themselves and of any other relevant treaties; and equally on other factors, such as the legitimacy of the objects of the treaty, how far they affect and may impair the vested rights of other States, and so on.

73. Somewhat similar to the case just discussed is that of treaties providing for the neutralization of territory. An interesting pronouncement illustrative of the "general interest" theory or principle, made by the English Law Officers of the Crown in 1859 is cited by Lord McNair. After reciting the facts and treaty provisions relating to the neutrality of Switzerland, and the simultaneous neutralization of a portion of Sardinian territory "as if it belonged to Switzerland", the Law Officers continued as follows:⁷⁴

"It results from these Premises (1) That the Neutrality of Switzerland was established and guaranteed on the ground of the general interest of Europe, quite independently of Switzerland herself, or of Sardinia; and by an Instrument to which they were not originally parties. (2) That the Territory in question (north of the line to be drawn from Ugine) whatever may be its limits geographically or in point of fact, is *quoad* such Neutrality, to be considered as if it belonged to Switzerland, although in all other respects Sardinian Territory. (3) That Sardinia and Switzerland, which were not parties to the Treaty (which first established and guaranteed the Neutrality of Switzerland in the 'general interest') cannot by agreement 'inter se' made for their separate interest, as opposed to the general interest of Europe, retain to themselves any optional or 'facultative' power of actually de-neutralizing, or of permitting the de-neutralization either of any portion of Switzerland (proper) or of any portion of the Territory in question, which is (*quoad* Neutrality) to be considered as if it belonged to Switzerland. As against the other European Powers (especially Austria) this has however been done improperly in the existing war. Switzerland and Sardinia could not rightfully, either as against the other Powers, or as against Austria, have permitted French Troops to pass (say) through the Canton of Ticino—such an act would have been a clear violation of the Neutrality of Switzerland; but the territory in question is to be considered for this purpose *as if it belonged to Switzerland*."

It is perhaps difficult to say that the mere fact that a State declares itself to be neutral, or that certain territory is neutralized and its neutrality guaranteed by

certain other States, suffices *per se* to create a status of neutrality *erga omnes*. It tends very strongly to do so, however, in all cases where the assumption of neutrality is not inconsistent with any other status or obligations of the country or territory concerned, and a general tacit acceptance of it will speedily create a legally operative situation. Employing the theory advanced by the Special Rapporteur, however, it seems reasonable to postulate an international duty for all States to recognize and respect any status of neutrality validly created and not in contravention of the rights of any other States or of any relevant existing treaty obligations.

74. Sub-head (c). *Treaties having a "dispositive" character*. It is fairly clear, and needs no argument, that treaties containing clauses that take effect immediately and become "executed", such as transfers of territory, are *ipso facto* "good" against any third State, unless such State has itself a valid and relevant claim—e.g. to territory purported to be transferred by the treaty.

75. A special case is that of treaties creating a "servitude". It is not the Special Rapporteur's intention to discuss the theory of the general range of questions subsumed under the term "international servitudes". He is well aware of its possibly invidious and displeasing connotations. But, as Dr. F. A. Váli shows in a valuable recent re-edition of his work on the subject,⁷⁵ such considerations—which are largely considerations of terminology—are irrelevant to the substance of the matter, which relates to the cases in which (usually by treaty) one State possesses or exercises rights in or relative to the territory of another—often to the mutual advantage of both States. The simple point is that, assuming the treaty in question to be valid, it tends to have effects *erga omnes*, or alternatively comes within the category of treaties which other States have a general duty to respect. An excellent illustration, discussed by Dr. Váli,⁷⁶ is that of the Costa Rican/Nicaraguan rights in the San Juan River. By the so-called Cañas-Jerez Treaty of 1858, Costa Rica in effect renounced all claims to sovereignty over any part of the San Juan River separating her from Nicaragua, and accepted that the boundary should run along the Costa Rican shore. In return for this renunciation, she was granted certain rights of free navigation on the river. By the subsequent Bryan-Chamorro Treaty, Nicaragua granted the United States what might be called an option to construct an inter-oceanic canal (Atlantic-Pacific) by way of the Great Lake of Nicaragua and the San Juan River, in such a way that if the United States had exercised this option (which in fact it never did, as the canal was constructed in the Panama zone) this would, or almost certainly must, have prejudiced or interfered with Costa Rican navigational rights. Costa Rica protested to Nicaragua and the matter

⁷⁴ Opinion of 18 May 1859: cited in McNair, *op. cit.*, p. 314.

⁷⁵ *Servitudes of International Law*, Second Edition (London, Stevens, 1958).

⁷⁶ *Ibid.*, pp. 147–152.

was referred to the Central American Court of Justice. The Court said:⁷⁷

"With respect to the legal effects of the treaty in so far as they concern Costa Rica, a third party that took no part in its negotiation, consideration must be given to the situation existing between that country and Nicaragua in the *sphere of territorial rights* prior to the date on which the canal treaty was raised to the category of a law for the high contracting parties, in order to judge the full effect and scope of the violation of rights that is the subject of Costa Rica's action before this Court."

Continuing as to the position regarding the San Juan River, the Court said:⁷⁸

"It is clear . . . that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute nor unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica—the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*; such a concession is equivalent to a *real right of use*, perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory."

Dr. Váli, commenting, says that this judgement merits attention from two points of view:⁷⁹

"First, it is clearly recognised therein that the Costa-Rican navigation rights on the San Juan River constitute a real, i.e. absolute, right. It has been given to Costa Rica as a *quid pro quo* for the abandonment of a territorial claim, that to the full sovereignty of the right half of the above river. The court compares the Costa-Rican rights in foreign territory in its nature to the Nicaraguan rights of sovereignty over the San Juan River.

"Secondly, the court ruled that the Costa-Rican rights are based upon a territorial arrangement; therefore the engagements of Nicaragua with third parties cannot effect, diminish or annihilate these rights."

In short, this case is an illustration both of the principle that a treaty between States A and B (Nicaragua and the United States) cannot impair the rights of State C (Costa Rica) not a party to it; but also of the principle that a treaty between States A and C, giving C rights equivalent to rights *in rem* relating to the territory or waters of A, is good *erga omnes*, and good therefore against B.

76. "... as respects such of their provisions as specifically establish the régime or settlement, or create the status or situation concerned"—a point of detail but an important one. A treaty usually consists of a

mixed bag of provisions. The effect of article 18 is, of course, confined to those which are of the particular kind contemplated.

77. *Paragraph 2.* Certain treaties have a specifically regional or group character. Their effects cannot go beyond the region or group. But within those limits they may produce, in relation to third States within the group, the same effects as are set out in paragraph 1.

78. *Paragraph 3.* This paragraph seems desirable as a necessary corrective to any idea that the type of treaty provision contemplated by this article could affect third States in the sense of creating active and positive obligations for them.

Rubric (b). Effects incidentally unfavourable to a third State, resulting automatically from the simple operation of a treaty

ARTICLE 19. DUTY OF STATES TO ACCEPT AND TOLERATE THE INCIDENTALLY UNFAVOURABLE EFFECTS OF LAWFUL AND VALID TREATIES

79. This is really the commonest of all the cases in which a question may arise as to the situation of a third State in relation to a treaty to which it is not a party. As Rivier says:⁸⁰ "Treaties may very closely affect third States, and . . . the more the bonds between States are multiplied, the more will this be so. Already today it can be said that hardly anything of what may be determined between one group of members of the family of nations is entirely indifferent to the others." In these cases, the treaty imposes no obligations on the third State and has no direct effect of any kind on it, but it operates to its disadvantage—or else is "aimed" at it (for instance a pact of mutual assistance between two States in the event of attack by a named third). There may be cases in which such treaties have an unlawful object and are therefore invalid, or impinge on or purport to impair or ignore the rights of one or more third States, and would therefore be—or to that extent be—invalid. But if this is not the case, the third State has no legal ground of complaint merely by reason of the adverse effect that may result for it from the treaty. A common case would be commercial privileges mutually granted to one another by two States, detrimentally affecting the trade or commercial position of a third, which, however, possesses no treaty right to similar treatment. The theory of the matter is very well stated by Roxburgh as follows under the head of *Treaties Incidentally Unfavourable to Third States*:⁸¹

"Nevertheless, although a treaty cannot impose obligations on third parties, it may be detrimental to them in various ways. Many a treaty is bound to 'affect' states which are strangers to it, on account of the many points of contact between members of the Family of Nations. But although a treaty may affect strangers, it does not follow that, because it

⁷⁷ Judgement, p. 218; cited by Váli, *op. cit.*, p. 151.

⁷⁸ Judgement, pp. 219–220; Váli, *op. cit.*, p. 152.

⁷⁹ *Op. cit.*, p. 152.

⁸⁰ *Op. cit.*, p. 89; Special Rapporteur's translation of the passage cited.

⁸¹ *Op. cit.*, pp. 31–32.

benefits them, they have a right to enforce it, nor that, because it is detrimental to them, they have any legal right to redress.

"On the contrary, they have a general duty not to interfere with the due execution of the treaty, so long as it does not violate International Law, or their vested rights. Even though they may suffer damage, they are without legal remedy; they have incurred *damnum sine injuria*, and any attempt to interfere would be a violation of the International Personality of the contracting parties.

"If, on the other hand, the treaty infringes the legal rights of a third state, that state is immediately entitled to intervene. In practice, there seem to be three classes of cases in which such rights are liable to be violated: (a) when the treaty violates an universally accepted rule of International Law, (b) when it is inconsistent with the safety of the third state, and (c) when it violates rights previously acquired by the third state."

With reference to the concluding paragraph of this quotation, the phrase "that State is immediately entitled to intervene", apt at the time when Roxburgh was writing, could today be replaced by some such phrase as "that State would at once stand possessed of a right of recourse". Nor probably would Roxburgh's three heads of exception (a), (b) and (c) now be formulated in just that way. But the principles involved remain the same.

80. *Treaties of guarantee and mutual assistance.* Rousseau points out that a number of these were entered into after the First World War, some naming a specific third State contemplated by them, others cast in general terms. "Can it not be said...", he asks, "that such treaties affected third States as assumed or potential aggressors, and thus possessed validity *erga omnes*?"⁸² He continues, however, "But here too it must be observed that these treaties only applied to the third State in so far as the latter brought their mechanism into play by its own act. The treaties of guarantee did not operate *ipso facto*, their operation being necessarily subordinated to the illicit act (aggression) of the third State."⁸³ It is in the same light that such a provision as Article 17 of the League of Nations Covenant has to be seen. This provided that in the event of a dispute between a member and a non-member State, if the non-member refused an invitation of the League Council to become a member for the purposes of the dispute, and resorted to war with the member State, the sanctions provided for by Article 16 of the Covenant should be applicable. This is not, however, properly to be regarded as an attempt to subject the non-member to the provisions of a treaty it was not a party to. Rather was it the creation of a situation potentially unfavourable to the third State in circumstances which, nevertheless, could only come about by the act

or omission of the third State itself—and doubly so, because either by accepting temporary membership, or by not resorting to war, these consequences could be averted by it. In a certain sense no doubt, such a treaty does create a liability for a third State—but not in an illegal way. The well known explanation of this matter given by Dionisio Anzilotti⁸⁴ is still the best:

"The juridical content of these provisions does not bear on relationships with third States but with the relationships [*inter se*] of the members of the League: these provisions primarily authorize the Council, in the general interests of peace, and in the special interests of one of several members, to perform acts which may heavily engage the responsibility of the League; in the second place they impose on the associated States duties connected with the action of the Council, duties amongst which figures one of the most serious character, namely to come to the aid of a member State in the circumstances contemplated by paragraph 3. [But] in the relationships between the member States and the non-member States it is customary international law which remains in force."

81. *Extradition treaties.* Lord McNair⁸⁵ cites these as constituting a case in which incidental effects are produced for a third State—or rather for its nationals—by a treaty to which that State is not a party. This is true, but as these effects arise from the presence of the individual concerned in the territory of one of the parties to the treaty, the same situation can result from many other types of treaties affecting individuals. The case of extradition treaties is cited by McNair because the English Law Officers have fairly frequently been called upon to pronounce on it. Various views were expressed, but the correct one appears undoubtedly to be that given by the Queen's Advocate, Dodson, in 1849 as follows:⁸⁶

"Mr. Clark states that he is advised 'that as a British Subject his arrest under a Treaty between Belgium and France is a Breach of International Law, a Treaty between those two Countries, although by it made applicable to Foreigners in each Country, being inoperative against a British Subject unless ratified by a Treaty with Great Britain, which in respect to the charge of Fraudulent Bankruptcy is not the case'.

"I do not think that Mr. Clark has been correctly advised in this respect; I am of opinion that a British Subject residing in France is amenable generally to all the Laws of France whether founded on Treaties between France and other Countries, or not, and that the accession of Great Britain to the Treaty is not requisite to give Validity to the Treaty between France and the other Contracting Country."

⁸² *Op. cit.*, p. 483: Special Rapporteur's translation of the passage cited.

⁸³ *Ibid.*

⁸⁴ *Corso de Diritto Internazionale*, 3rd ed. (Rome, 1928) French translation by Gidel (Paris, Sirey, 1929), pp. 415 and 416: Special Rapporteur's translation from the French of Gidel.

⁸⁵ *Op. cit.*, pp. 320–326.

⁸⁶ Report of 10 December 1849: cited in McNair, *op. cit.*, p. 322.

SECTION 2. EFFECTS *in favorem tertiis*

SUB-SECTION (i). ACTIVE OR POSITIVE EFFECTS OR CONSEQUENCES *in favorem tertiis*—RIGHTS WHICH THE THIRD STATE MAY HAVE UNDER, OR WHICH MAY BE SIMILAR OR PARALLEL TO, THOSE CONTAINED IN THE TREATY

Rubric (a). In favorem effects brought about by the act of the parties to the treaty alone, or of a single grantor

Sub-rubric (a) 1. Act of the parties to the treaty

ARTICLE 20. THE *stipulation pour autrui* (RIGHTS OR BENEFITS EXPRESSLY CONFERRED ON A THIRD STATE BY THE TREATY ITSELF)

82. *Paragraph 1.* The "*stipulation pour autrui*", giving direct rights to the third party concerned, is, in one form or another, known to most systems of law based on Roman law; and although not known as such in the Common Law systems, can be achieved *aliter* by what is known as the declaration of trust.⁸⁷ Moreover, there is in principle no reason why a trust should not be created by a contract between the settlor and the trustee, to which the beneficiary is not a party; and although the normal method is by deed of trust or under a will, some authorities⁸⁸ regard a trust, which certainly originates in agreement (requiring as it does the consent of the settlor and the trustee) as being "merely a special kind of contract ... between the settlor and the trustee"⁸⁹ for the benefit of the *cestui que trust*. There seems to be no reason why a similar position should not obtain in international law, provided the conditions specified in paragraph 1 of article 20 are satisfied, and it would seem that the principle of the *stipulation pour autrui* is in fact received in international law—see further below.

83. The point is that there must be a "*stipulation*" definitely and intentionally made "*pour autrui*". Article 20 in no way breaches the rule that, in principle, third States cannot any more claim rights under a treaty to which they are not parties, than they can be subjected to obligations under it. The parties to the treaty must intend to confer rights or benefits on the third State in such a way that it can be said that they have agreed that the third State can claim them as of right. They must in effect intend to create what amounts to a legal relationship between themselves and the third State, though it may not be of a contractual character—just as under the Common Law system there is a very definite legal relationship between the trustee and the beneficiary, though it is not a contractual one (the contractual element operating only between the trustee and the creator of the trust). Another way of looking at the matter in international law would be to regard it as an extension of the position whereby a single State may, by a purely unilateral declaration, give undertakings or assume obligations in favour of another State,

or *erga omnes*, which may in certain circumstances be legally binding on it. If one State, acting alone, can do this, there seems to be no reason why two or more acting jointly should not do so. In short, what operates as a contract between the parties *inter se*, also operates *vis-à-vis* the third States as a species of joint and binding unilateral declaration.

84. Although a contrary view has been expressed by authorities of the eminence of Anzilotti,⁹⁰ it would seem that the above conclusion, and the rule suggested in paragraph 1 of the present article 20, correspond to the view expressed by the Permanent Court in the *Free Zones* case. In the preliminary phase of the case, the Court, having come to the conclusion that it could find in favour of Switzerland's "right to the Free Zone of Gex ... simply on the basis of an examination of the situation of fact in regard to this case", considered that the Court "need not decide as to the extent to which international law takes cognizance of the principle of 'stipulations in favour of third Parties'".⁹¹ Commenting on this, however, the *Harvard Research* volume says:⁹²

"Notwithstanding the somewhat cautious manner in which the Court expressed itself regarding the place in international law of the principle of *stipulations pour autrui*, it would seem that its order in so far as concerned the Zone of Gex was, in fact, based on a recognition of the principle that in this particular case, the Powers having by treaty created for the benefit of Switzerland, a free customs zone within the territory of one of the parties to the treaty, Switzerland was entitled to enjoy that right, and could not be deprived of it without her consent."

Next, in its subsequent (final) judgement in the *Free Zones* case,⁹³ the Permanent Court, while again able to find in favour of Switzerland on independent grounds, made certain general observations on the subject of stipulations *in favorem tertiis*. After uttering a warning to the effect that "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour",⁹⁴ the Court continued:⁹⁵

"There is, however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."

Apart from the last seven words, which are clearly redundant (since if the third State claims the right at

⁸⁷ See the English case of *Dunlop Pneumatic Tyre Co. v. Selfridge and Co.*, (1915) Appeal Cases 847, at p. 853.

⁸⁸ See Roxburgh, *op. cit.*, p. 8, citing so distinguished a constellation as Maitland, Pollock, and Anson.

⁸⁹ *Ibid.*

⁹⁰ *Op. cit.*, p. 424.

⁹¹ Publications of the Permanent Court of International Justice, *Reports*, Series A, No. 22, p. 20.

⁹² *Op. cit.*, p. 932.

⁹³ Publications of the Permanent Court of International Justice, Series A/B, No. 46.

⁹⁴ *Ibid.*, p. 147.

⁹⁵ *Ibid.*

all, it *ipso facto* accepts it), this passage exactly expresses and endorses the view on which paragraph 1 of the present article is based. Article 18 (b) of the Harvard Draft⁹⁶ equally embodies this idea and in commenting on it the *Harvard Research* volume says:⁹⁷

"It is believed that the conclusions of the majority of the court are sound, and that they will be approved by the majority of jurists. It may be emphasized in this connection that the increasing practice of inserting in treaties stipulations for the benefit of third States is a fact which cannot be ignored, and that international law should be interpreted in such a way as to bring it into harmony with the actual conditions which this tendency is producing. Reference may be made here to the pertinent observation of Hoiyer (*Les Traités Internationaux*, 1926, p. 280), that, while the principle of *res inter alios neque prodesse neque nocere potest* is one of the most generally accepted principles of international law, it is necessary to avoid attributing an absolute effect to it which would be in contradiction with the increasing interdependence of nations and contrary to the realities of international life. The conclusions of the majority of the court go no further than to affirm that a treaty may stipulate for a benefit in favor of a State which is not a party to that treaty, and if it does so, such State is entitled to claim and enjoy the benefit. But it would seem that the benefit must be expressly stipulated for in the treaty; in the language of the Court it cannot be 'lightly presumed' to have been the intention of the parties to accord it."

Sir Eric Beckett equally concluded⁹⁸ that

"The [Permanent] Court must have held, therefore, that international law does—in some circumstances—take cognizance of the principle of stipulations in favour of third parties."

85. It must be admitted that Rousseau, to whose views the Special Rapporteur attaches great weight, appears to reject altogether the principle of the *stipulation pour autrui* in international law, which he characterises as "foreign to international law",⁹⁹ and concluding after a long examination of the international practice and decided cases in the matter that "... it does not seem that the institution of the *stipulation pour autrui* should be admitted in international law".¹⁰⁰ In the course of this examination he says:¹⁰¹

"It makes no difference that the benefit for the third State has been foreseen and taken into account by the Parties, even were it to the point of constituting the purpose of the stipulation: even in that case, the third State acquires no 'right' to demand the

execution of the treaty. There exists in that event an advantage for the third State, but not a right."

This view has the curious result that Rousseau almost appears to admit more readily that a treaty can impose a liability on a third State than that it can create rights in its favour, and although this would not be a fair description of his conclusions, it does seem to the Special Rapporteur that they perhaps do not give sufficient weight to the cumulative effect of the decided cases which he cites,¹⁰² and which afford at least some element of support for the notion of the *stipulation pour autrui*. The Rapporteur himself feels that the view taken in the Harvard Draft, and in the present text, is more in accordance with realities in the international sphere. When international law in so many ways contains analogies with private law, and reflects or applies private law doctrines,¹⁰³ it is difficult to see why that possibility should be regarded as wholly excluded in the case of the *stipulation pour autrui*.

86. Paragraph 2. As the *Harvard Research* volume says,¹⁰⁴ "... it hardly seems essential ... that the State in whose favour the benefit was stipulated must be specifically named in the treaty, when it is manifest from its terms or the attendant circumstances ... that the benefit was intended for a particular State and that no other State could have possibly been intended or could have availed itself of the benefit". One could go further: there are many ways in which a State can be designated without being indicated *eo nomine*, e.g. if it belongs to a clearly specified class.

87. Paragraph 3. This is of course the essential consequence of paragraph 1. If the third State had no right of recourse exercisable independently of the action of either or any of the parties, it could not be said strictly to possess any actual right. The right would then lie only in the parties to the treaty, to insist *inter se* on the performance of the treaty stipulation. If they failed so to insist, the third State would have no recourse. Hence if the principle of paragraph 1 is to constitute a reality, a direct right of recourse for the third State must exist.

88. "... provided always ... etc.". As the *Harvard Research* volume says,¹⁰⁵ "Obviously, if a treaty stipulation for the benefit of a third State lays down conditions under which the benefit is offered, compliance with those conditions by the third State is necessary before it is entitled to claim the benefit".

89. Paragraph 4. It might be maintained that, as a matter of logic, if a third State once has a right on the basis discussed above, it cannot be deprived of it without its consent, and must therefore be a party to any abrogation or modification of the treaty provision concerned. But this would be to make the third State the equivalent to an actual party to the treaty itself,

⁹⁶ *Op. cit.*, p. 661.

⁹⁷ *Ibid.*, p. 935.

⁹⁸ In the *British Year Book of International Law*, vol. 11 (1930), p. 14.

⁹⁹ *Op. cit.*, p. 477; Special Rapporteur's translation of the passage cited.

¹⁰⁰ *Ibid.*: Special Rapporteur's translation of the passage cited.

¹⁰¹ *Ibid.*, p. 469; Special Rapporteur's translation.

¹⁰² *Ibid.*, pp. 471-473.

¹⁰³ See the striking collection of instances contained in H. Lauterpacht's *Private Law Sources and Analogies of International Law* (London, Longmans, Green & Co., 1927).

¹⁰⁴ *Op. cit.*, p. 935.

¹⁰⁵ *Ibid.*, p. 936.

at any rate as respects the provisions under which it claimed; and it has never been suggested that the *stipulation pour autrui* can have this effect. In general, the possibility is categorically denied. Thus Rousseau (p. 470) says: "Il paraît impossible de reconnaître ce droit à l'Etat tiers". The Harvard Draft article 18 (b), which, as already indicated, provides:¹⁰⁶ "If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation..."; adding that "so long as the stipulation remains in force between the parties to the treaty". Commenting, the *Harvard Research* volume says:¹⁰⁷

"As to the duration of the benefit, the meaning of paragraph (b) is clear: the third State is entitled to the benefit stipulated in its behalf only so long as the stipulation remains in force between the parties. It may, therefore, be extinguished by the abrogation or termination of the treaty or the benefit stipulation therein... or its enjoyment may be suspended, or it may be impaired or otherwise modified by an alteration of the treaty—in each case without obtaining the consent of the third State."

The reasons for this view were cogently stated by Judges Altamira and Sir Cecil Hurst in their dissenting opinion in the *Free Zones*, when they said:¹⁰⁸

"In conclusion, we wish to make every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded to third Parties by international conventions, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State; such a theory would be fraught with so great peril for the future of conventions of this kind now in force, that it would be most dangerous to rely on it in support of any conclusion whatever."

Evidently basing itself on this expression of judicial opinion, the *Harvard Research* volume comments:¹⁰⁹

"To require the consent of a third State in whose favor a benefit has been stipulated for, as a condition of the abrogation or modification of a treaty by the parties who have entered into it, would be contrary to one of the basic principles underlying the whole treaty system... If it were admitted that the consent of a State, merely because it is the beneficiary of a stipulation in a treaty between other States, but which is not itself a party thereto, were necessary before the treaty could be abrogated or altered by the parties who made it, it is safe to say that few if any treaties containing such stipulations would ever be entered into in the future. It would seem to be a sound principle, therefore, that when a State not a party to a treaty is nevertheless the beneficiary of an ad-

vantage or privilege derived from such treaty, the advantage or privilege must be regarded as a precarious one, to be enjoyed only so long as the parties choose to maintain the treaty in force between themselves, and to execute its stipulations. The State which accepts and avails itself of the benefit must do so with full knowledge of the precariousness of its duration and subject to any risk which may be involved in its reliance upon the assumed continuance of the benefit."

90. *The exceptions to the principle of paragraph 4.* The correctness of the view just described is incontestable. Nevertheless it seems to the Special Rapporteur that, in the circumstances set out in sub-paragraphs (a) and (b) of paragraph 4 of the article, certain exceptions to the principle should be admitted. The third State enjoying the rights in question is (as noted above—para. 89) not a party to the treaty: yet there is a legal relationship, which might be regarded as having a quasi-contractual character, between it and the parties. If—*Case (a)*—the parties have undertaken to maintain the treaty in force indefinitely or not to terminate or modify it without the consent of the third State, then this is part of the very right which the third State enjoys objectively in consequence of the treaty. It stands on the same footing as the substantive content of the right. If—*Case (b)*—the clauses of the treaty in favour of the third State are of a "dispositive" character (e.g. provision for a transfer of territory to it), and have been executed, there can be no going back upon them except by a new international act, to which the third State would have to be a consenting party. This is the normal legal effect of dispositive clauses. If—*Case (c)*—the third State would, as a result of the cessation or modification of the substantive right, suffer detriment going beyond the simple consequences of such termination or modification—in short, if it would not merely be put back into the position it occupied before it had received and exercised the right, but into a worse position, then again, it is suggested, its consent ought to be sought before any change is effected—seeing that the right or benefit was deliberately conferred on it by the parties. If none the less it were considered to be going too far to give the third State what might amount to a veto in the matter, it should at least be provided that in a case of this kind, no change in the position would be brought about without previous consultation with the third State, and without its views being taken fully into account—and also there should be provision for the payment of compensation.

ARTICLE 21. TREATY PROVISIONS REMOVING OR MODIFYING A DISABILITY OR PROHIBITION PREVIOUSLY EXISTING FOR A THIRD STATE

91. This is clearly an important and quite frequent case, and therefore, though strictly governed by the principle of article 20, worth dealing with in a separate article. The parties to the treaty may, by the treaty, not only confer active rights or benefits on a third State, but release it from some disability or prohibition (e.g. not to cede certain territory without consent, not to enter into a customs union with another country,

¹⁰⁶ *Ibid.*, pp. 661 and 924.

¹⁰⁷ *Ibid.*, pp. 936 and 937.

¹⁰⁸ Publications of the Permanent Court of International Justice, Series A/B, No. 46, p. 185.

¹⁰⁹ *Op. cit.*, p. 937.

etc.), under which it previously lay. This disability or prohibition will itself probably have been imposed by a treaty to which the third State was a party; but the method of the original creation is immaterial. The point is that once the release has taken effect, this, according to the usual principle of executed clauses referred to in paragraph 90 above, is irreversible, except by a new international act, to which the third State would have to be a consenting party.

Sub-rubric (a) 2. Act of a single State

ARTICLE 22. UNILATERAL DECLARATIONS CONFERRING RIGHTS ON OTHER STATES

92. *Paragraph 1.* This is the counterpart in the sphere of rights of article 12, except that, of course, the third State cannot, as in the article 12 case, be the declarant State, since no State can unilaterally confer rights on itself. But the third State can be the beneficiary of a unilateral declaration made by another State, if this effectively creates legal rights. Accordingly, this article, without prejudging this last issue, provides that if and when one State does, by a unilateral declaration, assume binding legal obligations, this creates rights for third States.

93. *Paragraph 2.* This is entirely speculative. There seems to be no authority on the point. In the case of obligations assumed by means of a purely unilateral declaration, and consequently without any *quid pro quo*, it seems peculiarly difficult to deny the right of the declarant State in all circumstances to rescind or modify the declaration, unless this was itself stated to be irrevocable; but in the circumstances mentioned in the paragraph it may be reasonable to expect the payment of compensation or the making of other appropriate reparation.

Rubric (b). In favorem effects brought about with the participation of the third State itself

Sub-rubric (b) 1. Effects directly brought about by the parties and the third State conjointly

ARTICLE 23. EXERCISE BY THE THIRD STATE OF A FACULTY OF PARTICIPATION IN THE TREATY ITSELF BY THE THIRD STATE

94. *Paragraph 1.* While still technically a third State (according to the definition of that term contained in article 1 of the text) though not a stranger to the treaty, a country can become a party to it in the circumstances stated in this paragraph, though of course the effect and the purpose is to cause it to cease to be a third State. It can of course be maintained, as has been noticed in connexion with the corresponding case in article 10 of the text (see paragraph 40 above), that the third State is not truly a mere third party in respect of the formal clauses of the treaty, under which the right of substantive participation arises. The case is included here, however, because it is a case in which the third State, while still not a party to the treaty, enjoys a right in virtue of it—namely to become a party.

95. *Paragraph 2.* This paragraph is speculative and the idea involved in it has already been considered

elsewhere.¹¹⁰ The idea is not unreasonable in itself, but involves difficulties. The right cannot in any case continue indefinitely, or a sort of veto would be retained by a State which might never ratify. Hence the time limitation.

96. *Paragraph 3.* In connexion with the topic of the conclusion of treaties, it was seen that States, other than the original signatories of a treaty, have no basic right to become parties to it.¹¹¹ This must depend on the terms of the treaty and any other relevant circumstances. It is equally the case that the mere fact that a third State enjoys rights or benefits in virtue of the treaty can confer no such right.

ARTICLE 24. CASE OF SEPARATE AGREEMENT BETWEEN ALL, OR ONE OR MORE OF THE PARTIES, AND A THIRD STATE, PRODUCING FOR THE LATTER *in favorem* EFFECTS SIMILAR TO THOSE OF THE TREATY

97. *Paragraph 1.* The case mentioned in subhead (a) of this paragraph is merely the counterpart of that contained on the side of obligations in article 11. It involves no theoretical difficulties, since it is entirely by virtue of the separate agreement that any rights are enjoyed.

98. *Most-favoured-nation clauses.* Worth noticing as a common example of rights under treaty A being acquired by a third State under a separate treaty B, is the case of a most-favoured-nation clause. X contracts with Y under treaty B to give Y the benefit of any treatment it accords to another country. Subsequently by treaty A, X grants certain treatment to Z. X must then grant the same treatment to Y, although Y is a third State so far as treaty A goes, and has no direct rights under it.

99. As regards subhead (b), there would seem to be no reason, in principle, why only one or some of the parties should not agree to give the third State the treatment in question—so far as such party or parties could, without the co-operation of the other or others, do so.

100. *Paragraph 2.* It might of course be inconsistent with the terms or objects of the treaty for one or some of the parties to agree to afford rights or benefits under it to a third State. Any attempt to do so would then involve a conflict that would fall to be resolved according to the ordinary rules for resolving conflicts between different treaties or other agreements.¹¹²

101. *Paragraph 3.* It is clear that in cases coming under paragraph 1 the third State's right, if any, to object to the treaty being abrogated or modified without its consent would depend entirely on the separate

¹¹⁰ See the Special Rapporteur's first report, articles 29 and 30 and commentary thereon: *Yearbook of the International Law Commission*, 1956, vol. II (United Nations Publication, Sales No.: 56.V.3, Vol.II), pp. 112 and 113, 122.

¹¹¹ Article 34, para. 2, and commentary thereto in the Special Rapporteur's first report: *loc. cit.*, pp. 114, 125.

¹¹² See article 18 and the commentary thereon in the Special Rapporteur's third report: *Yearbook of the International Law Commission*, 1958, vol. II (United Nations Publication, Sales No.: 58.V.1, Vol.II), pp. 27, 41–44.

agreement, and such right, if any, would lie solely against the other party or parties to this separate agreement. The position might well be that in spite of the termination or modification of the main treaty, the third State would still be entitled to the same rights or benefits under the separate agreement, and as against the other party or parties to that agreement, unless it consented to forgo them.

Sub-rubric (b) 2. *In favorem* effects indirectly brought about as the automatic consequence of the discharge of obligations under, or of conformity with, the provisions of, the treaty, by the third State with the consent, express or tacit, of the parties

ARTICLE 25. RULE APPLICABLE IN THE CASE OF ALL TREATIES

102. *Paragraph 1.* There is no particular authority for this provision. But it seems reasonable and logical in the circumstances specified.

103. *Paragraph 2.* Clearly third States cannot (unless the case is an "article 26 case") insist on the indefinite maintenance of rights or benefits they have only indirectly come by under paragraph 1 of this article. But a right to receive compensation or other appropriate reparation may be reasonable in the circumstances indicated.

ARTICLE 26. CASE OF THE USE OF MARITIME OR LAND TERRITORY UNDER A TREATY OR INTERNATIONAL REGIME

104. *Paragraph 1.* This article is simply the counterpart of article 14, and needs no comment beyond what was made in connexion with that article. The provisions of this paragraph of the present article are believed to correspond to fact, i.e. to what actually happens in the case e.g. of an international waterway (river, canal) passing through national territory.

105. *Paragraph 2.* It would also seem that in a number (though not necessarily all) of these cases, long continued usage has given rise to what amounts to a right to the continued enjoyment of the facilities or benefits concerned, unless there is general international agreement to terminating or changing them. Even where this is not the case, there would seem to be occasion to provide for compensation or other appropriate reparation. Furthermore, since the essence of the loss or damage would consist in the very cessation or diminution of the right, there would seem to be no ground for limiting the right to reparation to the article 20 4 (c) type of case, where the third State has to show loss or damage over and above that caused by such cessation or diminution.

Rubric (c). *In favorem effects brought about by operation of law*

Sub-rubric (c) 1. Because the third State in effect is or becomes a party to the treaty by operation of law

ARTICLE 27. CASES OF STATE SUCCESSION, AGENCY AND PROTECTION

106. This is simply the counterpart of article 15, and requires no comment beyond what was made in connexion with that article.

Sub-rubric (c) 2. *In favorem* effects consequent on subjection by operation of law to obligations similar to those contained in the treaty, and functioning as customary rules of international law

ARTICLE 28. CASE OF CUSTOMARY INTERNATIONAL LAW RIGHTS MEDIATED THROUGH THE OPERATION OF A LAW-MAKING OR NORM-ENUNCIATING TREATY

107. It follows automatically that if, through the process described in article 16, a third State is or becomes subject to certain rules, as rules of customary international law, though they have acquired recognition as such through the mediating effects of a treaty, such State is entitled to all the benefits of the rule.

SUB-SECTION (ii). INDIRECT OR INCIDENTAL EFFECTS OF CONSEQUENCES *in favorem tertiis*—EFFECTS NOT UNDER, BUT IN RELATION TO, THE TREATY

ARTICLE 29. *In favorem* EFFECTS RESULTING FROM THE APPLICATION OF THE PRINCIPLE OF RESPECT FOR LAWFUL AND VALID INTERNATIONAL ACTS

108. *Paragraphs 1 and 2.* This again is the counterpart in the sphere of rights or benefits of articles 17 and 18. It is however very possible that in relation to these matters no question of rights or benefits will arise. For instance, in the case of many of the treaties coming within the ambit of article 18, what happens is simply that the régime, status, settlement or disposition concerned is valid and applies *erga omnes*. But in some cases there is a concomitant. For instance, in the case of a demilitarized area, the concomitant of respecting the demilitarization provisions is the right to have them respected by others. In the case of waterways, as has been seen, the concomitant of respecting and conforming to the conditions of passage and user may be, and usually is, the enjoyment of a right of passage and user. This must of course depend on the terms of the treaties concerned, the circumstances, the actual practice followed, and so on. The principle involved was well stated by the Committee of Jurists in the *Åland Islands* case¹¹³ as follows: 114

"As concerns Sweden, no doubt she has no contractual right under the provisions of 1856 as she was not a signatory Power. Neither can she make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, since—though it may, generally speaking, be possible to create a right in favour of a third party in an international convention—it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions. Nevertheless, by reason of the objective nature of the settlement of the Åland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested,

¹¹³ This case has already been discussed as regards the obligations aspects, in connexion with article 18 of the text see para. 72 above.

¹¹⁴ *Idem*.

insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it. This is all the more true owing to the fact that Sweden has always made use of it and it has never been called in question by the signatory Powers."

Rousseau also, despite the doubts referred to in paragraph 85 above, recognizes the existence of rights or benefits for third States where international communications are concerned, and, instancing a number of cases, says:¹¹⁵

"The law relating to communications tends in effect to accord free passage as a right, and not as a favour, to all the States of the world, whatever the declaring or contracting States. The right of passage is for the benefit of all, third States as well as signatory States. This is particularly so in the matter of fluvial and maritime communication (international rivers and canals)."

109. *Paragraph 2.* Here something more is involved than the mere right to expect that other States also will respect the situation of law or of fact concerned. How far can the third State purport to insist on the continuance of that situation? This is a different case from that of "law-making" or norm-enunciating treaties of the kind contemplated in articles 16 and 28 of the text. These can, of course, *quâ* treaties, be modified, or even terminated. But the rules they embody, or have come to be regarded as embodying, as general rules of customary international law, can, as such, only be modified in a manner that is valid *erga omnes* by the means recognized by international law for the modification or creation of customary rules of law.

110. As regards international settlements, it is obvious that some, e.g. territorial settlements, can be modified at will by the parties. The passage quoted in paragraph 108 above from the Report of the Com-

mittee of Jurists in the *Åland Islands* case suggests that the same would be the case with a treaty demilitarizing or neutralizing an area. It seems to the Special Rapporteur, however, doubtful whether this view is entirely correct. As has been seen (para. 105 above), it would not appear, in principle, to be correct as regards the case of international waterways that have been in common and general use over a long period. It would seem that, in principle, a somewhat similar position ought to obtain in the case of any other treaty of the international settlement type, if it is one which has come to be accepted as having an *erga omnes* character—at least to the extent suggested in paragraph 2 of the article, namely that directly interested States¹¹⁶ which are duly conforming to the provisions of the régime or settlement, are entitled to expect to see it continue, or at least to be consulted before it is terminated or modified.

111. *Paragraph 3.* The third State still does not have any rights under the treaty, though it may have certain rights respecting it.

ARTICLE 30. EFFECTS INCIDENTALLY FAVOURABLE TO A THIRD STATE RESULTING AUTOMATICALLY FROM THE SIMPLE OPERATION OF A TREATY

112. There are of course numerous, and even innumerable, ways in which a treaty may incidentally or indirectly benefit a third State. Thus a treaty between A and B which has the effect of limiting certain exports from A into B may create greater opportunities for the same line of exports from C into A. It is, however, obvious that not the remotest right is conferred on C as the result of this, and it goes without saying that C can have no right to require the continuance of the treaty or to object to its termination or modification. This article naturally only applies to cases where the third State does not, under any previous article of the text, enjoy more concrete rights, or a more favourable position.

¹¹⁵ *Op. cit.*, p. 463: Special Rapporteur's translation of the passage cited.

¹¹⁶ It would have been very different in the *Åland Islands* case, for instance, if the third State concerned had not been Sweden, but some geographically remote State that took the matter up.

AD HOC DIPLOMACY

[Agenda item 5]

DOCUMENT A/CN.4/129

Report by A. E. F. Sandström, Special Rapporteur

[Original text : English]
[11 March 1960]

CONTENTS

	Paragraphs	Page
INTRODUCTION	1-3	108
I. SPECIAL MISSIONS	4-26	108
A. General provisions of the 1958 draft (Section I)	9-22	109
B. Privileges and immunities	23-26	110
II. ITINERANT ENVOYS	27-28	110
III. CONGRESSES AND CONFERENCES	29-43	110
IV. PLACE AND FORM OF THE DRAFT ARTICLES	44-51	111
V. TEXT OF DRAFT ARTICLES		112
A. Alternative I		112
B. Alternative II		114

Introduction

1. When, at its tenth session in 1958, the International Law Commission elaborated a text of draft articles on diplomatic intercourse and immunities, the Commission dealt only with permanent diplomatic missions. As the Commission pointed out in its introductory remarks,¹ diplomatic relations between States may also "assume other forms that might be placed under the heading of 'ad hoc diplomacy', covering itinerant envoys, diplomatic conferences and special missions sent to States for limited purposes".

2. The Commission, considering that these forms of diplomacy should also be studied in order to bring out the rules of law governing them, requested the writer, as Special Rapporteur, to make such a study and to submit his report at a future session. Dealing at its eleventh session in 1959 with its future work, the Commission decided to place on the agenda of its twelfth session in 1960, among other subjects, that of *ad hoc* diplomacy. The Special Rapporteur had already declared his intention to submit his report to the Commission before the twelfth session in case the Commission should definitely decide to take up the matter.

3. In presenting his report, the Special Rapporteur, for reasons of convenience, first takes up the question of special missions, which perhaps most closely resemble the permanent missions.

I. Special missions

4. Sometimes a State entrusts the carrying out of a special diplomatic assignment in a foreign State to a

diplomatic officer who does not belong to its permanent mission accredited to the country. This may be done for ceremonial functions, such as coronations, weddings, funerals, jubilees, the announcement of an accession to the throne, and the like.² It may also be done for negotiating and concluding an agreement on some special diplomatic matter concerning the relations between the States. The reason might be to emphasize the importance of the act, or, without increasing or changing the personnel of the permanent mission, to employ in the diplomatic action personal resources (e.g., a special competence) which the permanent mission could not provide.

5. In any case, a special mission can be characterized as performing temporarily an act which ordinarily is taken care of by the permanent mission. The head of a special mission is also generally, but not always, a diplomatic officer by profession.

6. The similarity between a special mission's activities and aims and those of a permanent mission raises the questions of whether, and to what extent, the rules concerning diplomatic intercourse and immunities ought to apply in respect of the special mission.

7. Broadly speaking, it seems natural that rules relating to special features of a permanent mission which do not obtain in respect of special missions should not apply, whereas rules inspired by considerations of the similar nature and aims of the functions in question should be applied.

8. Applying this criterion, the dividing line between the applicable and non-applicable provisions of the 1958

¹ *Yearbook of the International Law Commission, 1958*, (United Nations Publication, Sales No.: 58.V.1, Vol. II), p. 89.

² See L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co, 1955) pp. 775 and 776.

draft will fall between Section I, which contains, for the most part, articles having in view the special conditions of permanent missions, and Sections II, III and IV, which refer directly or indirectly to the privileges and immunities based essentially on the requirements of the diplomatic function. Sections V and VI refer to the draft agreement as such, and ought, therefore, to have a general application.

A. GENERAL PROVISIONS OF THE 1958 DRAFT (SECTION I)

9. Examining in detail the applicability of the various rules of the 1958 draft to special missions, the definitions in article 1 might well apply also to a special mission, although its staff generally is neither so numerous nor so differentiated as that of a permanent mission. It will, however, be necessary to define a special mission.

10. Articles 2 and 3 of the 1958 draft, which deal with the establishment of a permanent mission and its functions, naturally find no application in respect of a special mission. The establishment of a permanent mission is the subject of a special agreement, distinct from the appointment of the persons which it may comprise. A special mission is also based on an agreement, but one which is *ad hoc*, and in connexion with which the person to whom the mission is entrusted is usually mentioned. To the Special Rapporteur it seems sufficient only to mention the *ad hoc* agreement in the new draft (article 2).

11. As to the functions of a special mission, it is only with one or more distinct aspects of the general diplomatic functions referred to in article 3 of the 1958 draft that a special mission is charged, and it will be enough to mention in the definition the special nature of the assignment without attempting to enumerate the possible functions involved.

12. A rule corresponding to article 4 of the 1958 draft, concerning appointment after *agrément*, is not required, since the head of the mission is no doubt mentioned in the communications preliminary to the agreement on the special mission. For the same reason, a rule like article 7 of the 1958 draft does not seem to be required. The question covered by article 5 of the 1958 draft does not arise.

13. There is no reason for the application of the rule stated in the first part of article 6 of the 1958 draft; and the second part of that article can have no application in respect of a special mission.

14. On the other hand, provisions corresponding to those of article 8 of the 1958 draft seem to be equally desirable in the case of a special mission, as the success of the mission will largely depend on the acceptability of the person or persons entrusted with the mission. In the interests of orderly administration, and with a view to enabling the receiving State to observe its duties in respect of the special mission and its members, provisions similar to those in article 9 of the 1958 draft ought to be formulated with regard to special missions.

15. The rules laid down in articles 10 and 11 of the 1958 draft do not seem to have any relevance to special missions.

16. As to the questions dealt with in articles 12 to 16 of the 1958 draft, the practice of special missions with regard to different points is not uniform.

17. To take as an example the question of the presentation of credentials, it sometimes happens that credentials are formally presented; and this practice is particularly common in the case of missions for ceremonial purposes, with regard to which the question of precedence plays a certain role. On the other hand, when negotiations are conducted by a special mission, generally only a record showing the powers to negotiate is presented.

18. With regard to the question of precedence, it is to be observed that the Regulation of Vienna of 19 March 1815, which is at the basis of article 15 of the 1958 draft, contains a provision (article 3) which reads as follows:

"Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank."³

This rule seems not always to have been followed. Genet⁴ gives the following explanation:

"D'une manière générale, la personne chargée de mission spéciale n'a pas de rang diplomatique proprement dit à raison de la mission spéciale, tout en ayant cependant le caractère diplomatique.

"Tout agent accrédité a donc en principe le pas sur elle; en pratique pourtant et comme par une faveur insigne, le pas leur est généralement cédé et on témoigne des égards tout particuliers aux envoyés de cette catégorie. 'Ils ne prennent pas la préséance, ils la reçoivent.' *Inter se*, ils se classent suivant le grade réel; à grade égal, c'est l'ordre de la remise des lettres de créances qui leur donne le rang."⁵

Whatever the value of this reasoning, article 3 of the Regulation of Vienna states only that an extraordinary mission does not give any superiority in rank. Later practice has given the heads of special ceremonial missions rank, at least among themselves, according to the order of the presentation of their credentials.⁶ Finally, it is to be observed that more and more persons who are not diplomats by profession are used for special diplomatic missions, for example, to negotiate matters of a highly technical character. They do not belong to any generally recognized diplomatic category and cannot be placed in the classification contained in article 13 of the 1958 draft.

19. In the circumstances described, the Special Rapporteur finds it justifiable to insert in the draft on

³ *Yearbook of the International Law Commission, 1958* (United Nations Publication, Sales No.: 58.V.I, Vol. II), p. 93, footnote 29.

⁴ Raoul Genet, *Traité de Diplomatie et de Droit Diplomatique*, (Paris, A. Pédonc, 1931) vol. I, p. 86.

⁵ *Ibid.*, pp. 86.

⁶ See Sir Ernest Satow, *A Guide to Diplomatic Practice* (4th edition edited by Sir Neville Bland, 1957), London, Longmans, Green & Co., 1957), pp. 41-43.

special missions a provision (article 10) reproducing the sense of article 3 of the Regulation of Vienna.

20. A second paragraph might be included in that article which would formulate, with regard to special envoys for ceremonial purposes, a rule corresponding to the rule in paragraph 1 of article 15 of the 1958 draft. Since, however, the practice does not appear to be quite certain, the Special Rapporteur is of the opinion that at this stage no proposal ought to be made.

21. Article 17 in the 1958 draft does not seem to have any bearing on the circumstances of a special mission.

22. A provision might be included, similar to that in article 18 of the 1958 draft, authorizing the use of the flag and emblem of the sending State on the automobile of the head of a ceremonial mission. However, in view of the difficulty of making such a distinction, and since the absence of a rule does not mean the prohibition of a practice, it is perhaps preferable not to have an express provision on the matter.

B. PRIVILEGES AND IMMUNITIES

23. Turning now to the applicability of the provisions of Section II of the 1958 draft, dealing with diplomatic privileges and immunities, it has been suggested above in Paragraph 8 that this part of the draft would, in the main, be applicable to special missions. The activities of a special mission are part of what are usually functions of a permanent mission, and since privileges and immunities are granted in the interest of these functions and for promoting good relations between the States, it is natural that these advantages be granted also to special missions unless they are based on circumstances which apply only to permanent missions.

24. To this latter category belong the provisions of articles 19, 21, 24 and 26 of the 1958 draft. The need of premises for a special mission is not such as to warrant a provision of the kind laid down in article 19 of the 1958 draft. If there is such a need, it seems more natural that the matter be settled in connexion with the agreement on the mission. Further, it scarcely seems necessary to include a provision of the kind appearing in article 21 of the 1958 draft. An additional reason for omitting such a provision in this instance is the generally short duration of a special mission. Article 24 of the 1958 draft is based on considerations relating to functions of a permanent mission which could hardly be entrusted to a special mission: and as to article 26 of the 1958 draft, it is not likely that fees and charges would be levied by a special mission.

25. On the other hand, there seems to be no reason to exclude the remaining articles of Section II of the 1958 draft from application to special missions. The same is true for article 35 of the 1958 draft, concerning acquisition of nationality, even if such cases as there envisaged are not very likely to occur.

26. Publicists seem to agree that diplomatic immunities apply also to special missions, although they do

not discuss the matter in detail. The Havana Convention of 1928 sanctions the same rule.⁷

II. Itinerant envoys

27. An itinerant envoy is an envoy sent by a State to several other States in succession, without being accredited to any of them, charged with a special diplomatic task which, for its performance in the different States, generally requires some special co-ordination.

28. In relation to each receiving State, the itinerant envoy's mission seems to be a special mission, and, seen as a whole, it can also be said to be a sequence of special missions to different countries. The common aim that keeps these consecutive missions together does not seem to justify any special rules apart from the rules applicable to a special mission.

III. Congresses and conferences

29. A congress or conference is a meeting between representatives of several States for discussing and settling questions concerning the relations between the States, either political questions, questions of social, economic, cultural order, or other matters.

30. The term "congress" was, in the past, usually employed for a meeting of plenipotentiaries assembled in order to settle a dispute, and especially to conclude a peace treaty. Nowadays, the terms "congress" and "conference" are used indifferently.

31. Generally, after a preliminary discussion between the States concerned, one of them—as a rule the State where the conference is to be held—invites the others to the meeting.

32. Those entitled to speak for a State are called plenipotentiaries or delegates. They can be of two kinds, those who take part in the proceedings, and those who are present only as observers. They can have at their disposal a staff of experts and technicians. The plenipotentiaries and the auxiliary staff together are described as a delegation.

33. In the relations between the State where the congress or conference takes place and any one of the participating States, the situation appears to be in the main the same as in the case of a special mission negotiating with the host State, even if the negotiations are carried on between all the participating States. The plenipotentiaries need not be diplomatists by profession, but the nature of their task gives the delegation the character of an essentially diplomatic mission.

34. A first consequence of this similarity is that what has been said above in paragraphs 7 and following about the applicability of the general provisions (Section I) of the 1958 draft to special missions is valid also in respect of congresses and conferences.

⁷ Convention on the Status of Aliens, signed at Havana on 20 February 1928 (League of Nations, *Treaty Series*, Vol. CXXXII, 1932-1933, No. 3045).

35. But there are certain other subjects which have to be dealt with in the draft.

36. One is a special question of precedence peculiar to congresses and conferences. In what order ought the delegations to be seated? Nowadays, it seems to be generally accepted that States, on account of their equality in international law, are to be seated in the alphabetical order of their English (or French) names, unless otherwise agreed. A different order may be decided if, for instance, there is a valid reason for having the participants divided into groups—a case which can occur, for example, at a peace conference.⁸ A provision to this effect ought to be inserted in the draft.

37. Apart from this question, it seems appropriate that the draft should also contain an article on how the scope and the organization of the conference or congress should be determined (e.g., election of officers, bureau and commissions, secretariat, voting order, etc.). The scope is fixed by previous agreement between the parties; and the organization, if not fixed by previous agreement or by reference to a règlement, is arranged by the congress or conference itself at the outset of the meeting.⁹

38. As to privileges and immunities, authors generally agree that the plenipotentiaries and their auxiliary staff enjoy full diplomatic privileges. Sometimes the foundation of this opinion is given as being the diplomatic character of the delegation's mission.¹⁰ Satow stated that "some doubt might perhaps be felt, in the absence of cases arising for settlement, as to the extent of the immunities to which they and the members of their suites are entitled".¹¹ In this context, he added: "Formerly international congresses and conferences were for the most part attended by personages of high ministerial rank, or by resident diplomatic agents who already possessed diplomatic privilege; now the plenipotentiaries appointed are often officials or persons chosen for their special knowledge of the subject to be discussed, who with their retinues constitute the delegations to the conference."¹²

39. To the Special Rapporteur the facts referred to do not in themselves seem sufficient to deny to the members of a delegation full diplomatic privileges, as long as one considers the basis of the privileges to be the "interest of the function". But some hesitation is prompted by the provisions of the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on 13 February 1946 by its resolution 22 A (I) and the Interim Arrangement on Privileges and Immunities of the United Nations between the Swiss Federal Council and the Secretary-General of the United Nations, signed on 11 June and 1 July 1946.¹³ Article IV of these instruments relates to the privileges and immunities to be

accorded to representatives of Members of the United Nations on its principal and subsidiary organs and at conferences convened by the United Nations; and, among these privileges and immunities, immunity from jurisdiction is limited to "words spoken or written and all acts done by them in their capacity as representatives", whereas a member of a permanent mission, according to the 1958 draft of the Commission, enjoys a more complete immunity from the jurisdiction of the receiving State.

40. The question dealt with here is so closely connected with that of the privileges and immunities of conferences convened by the United Nations and other international organizations—which is to be taken up at a later stage of the work of the Commission—that it ought to be considered whether the question of privileges and immunities in respect of congresses and conferences ought not to be postponed and undertaken in that context.

41. It is possible, however, to make a distinction between, on the one hand, a conference in general, and on the other, a conference convened by the United Nations. The latter is, in a way, a prolongation of the United Nations Organization, and it can be argued that such a conference ought to be regulated in the same way as the meeting of an organ of the United Nations and not as an ordinary congress or conference. Thus, the provisions referred to in paragraph 39 above do not necessarily express the law regulating congresses and conferences generally.

42. On the other hand, it would be rather a quaint arrangement to have different rules governing the two types of conference and to have the group which is, or may become, the more important surrounded with less protection than the other.

43. Awaiting the discussion in the Commission, the Special Rapporteur inserts in the draft a rule which, in conformity with the 1958 draft for permanent missions, gives full privileges, with reservation, however, for conferences governed by special agreements.

IV. Place and form of the draft articles

44. In the opinion of the Special Rapporteur, the draft articles on the subjects dealt with in this report have their natural place as a continuation of the draft articles of 1958, more precisely as chapters following a first chapter containing the 1958 draft articles.

45. A difficulty connected with such an arrangement is that the General Assembly of the United Nations decided on 7 December 1959 by its resolution 1450 (XIV) that an international conference should be convened to deal with the 1958 draft, and that this conference should be convoked at the latest in the spring of 1961.

46. If the report is dealt with at the Commission's session this year, fixed to begin on 25 April 1960, the Commission should normally, according to article 21

⁸ See Genet, *op. cit.*, vol. III, pp. 226 ff. And see Satow, *op. cit.*, p. 310.

⁹ See Genet, *op. cit.*, Vol. III, pp. 133, 149, 176 ff. And see Satow, *op. cit.*, pp. 305, 306 and 310.

¹⁰ See Satow, *op. cit.*, pp. 207 and 208, and references cited therein.

¹¹ *Ibid.*, p. 207.

¹² *Ibid.*, pp. 207 and 208.

¹³ *Official Records of the General Assembly, First Part of First Session*, document A/175, annex 17.

of its Statute, prepare a preliminary draft and ask Governments to submit comments on this draft, and thereafter, according to article 22, take such comments into consideration and prepare a final draft and explanatory report which it should submit with its recommendation through the Secretary-General to the General Assembly. This procedure could not be completed before the contemplated conference in the spring of 1961.

47. Whether the General Assembly will postpone the conference, or dispense with the rule of article 22 and deal with the draft that might emerge from the Commission's deliberations this year, or deal later and separately with this draft after the Commission has made a final draft, has, of course, to be left entirely to the Assembly.

48. Even the second procedure mentioned above seems possible, since the draft articles mainly concern the field of application of previously drafted articles.

49. As to the form of the articles, it does not seem necessary to repeat the wording of the articles in the 1958 draft. That wording can, to a very large extent, be incorporated by reference. Two drafts have been prepared, one in a more detailed form and the other in a more contracted form.

50. The Special Rapporteur recommends the first one, which seems to be the clearer.

51. If the present draft articles and the 1958 draft articles are to be integrated in one draft, it would be advisable to bring together all the definitions in an initial article (art. 1); to make articles 2-43 of the 1958 draft, Chapter I, under the heading "Diplomatic relations by permanent missions"; to continue with the Chapters of the present draft as Chapters II and III; and to add a fourth Chapter containing articles 44 and 45 of the 1958 draft, which would be applicable to the whole new draft.

V. Text of draft articles

A. ALTERNATIVE I

CHAPTER I. DIPLOMATIC RELATIONS BY MEANS OF ITINERANT ENVOYS AND SPECIAL MISSIONS

Definitions

Article 1

For the purpose of this chapter the following expressions shall have the meanings hereunder assigned to them:

(a) An "itinerant envoy" is a diplomatic mission headed by an envoy who represents the sending State in several other States in a certain area or at large without being accredited to any of these States;

(b) A "special mission" is a diplomatic mission sent by one State to another for a special diplomatic assignment;

(c) The "1958 draft" means the draft articles on

the diplomatic intercourse and immunities which the International Law Commission elaborated at its tenth session and recommended to the General Assembly with a view to the conclusion of a convention;

(d) The definitions in article 1 of the 1958 draft shall apply also to the members of the staff of an itinerant envoy's mission or of a special mission.

Scope of Chapter I

Article 2

If a State has agreed to receive an itinerant envoy or a special mission from another State the following rules shall apply.

Persons declared *personae non gratae*

Article 3

Even if the receiving State has given formal *agrément* for an itinerant envoy or the head of a special mission or a member of their missions, the rules laid down in article 8 of the 1958 draft shall receive application in respect of them.

Facilities and freedom of communication

Article 4

1. The receiving State shall accord full facilities for the performance of the functions of the itinerant envoy's mission or the special mission.

2. Concerning communication for official purposes on the part of the itinerant envoy or the special mission, the same rules shall apply as laid down in paragraph 1 of article 25 of the 1958 draft.

3. In respect of the official correspondence of the itinerant envoy or the special mission, and diplomatic bags and couriers used by them, the same rules as provided for in paragraphs 2-5 of article 25 of the 1958 draft shall equally apply.

Inviolability of mission premises and archives

Article 5

The official premises of an itinerant envoy or a special mission and the archives and documents pertaining thereto shall enjoy the same inviolability as provided in articles 20 and 22 of the 1958 draft.

Inviolability as to person, private residence and property

Article 6

An itinerant envoy or the head of a special mission shall enjoy the same personal inviolability and inviolability of private residence and property as provided in articles 27 and 28 of the 1958 draft in respect of a diplomatic agent.

Immunity from jurisdiction and other exemptions from legislation

Article 7

1. An itinerant envoy or the head of a special mission shall, if he is not a national of the receiving State, enjoy the same immunity from the jurisdiction of the

receiving State and the same exemptions from its other legislation as are accorded to a diplomatic agent by article 29 and articles 31-35 of the 1958 draft.

2. As to waiver of jurisdiction, the same rules as provided in article 30 of the said draft shall apply.

Persons entitled to privileges and immunities

Article 8

1. Apart from the itinerant envoy and the head of a special mission, the members of their families forming part of their households and likewise the members of the diplomatic, administrative and technical staff of the missions and the members of their families forming part of their households shall, if they are not nationals of the receiving State, enjoy the privileges and immunities referred to in articles 6 and 7.

2. Members of the service staff of a mission and private servants of members of a mission shall, if they are not nationals of the receiving State, receive the same treatment as corresponding groups in a permanent mission according to paragraphs 2 and 3 article 36 of the 1958 draft.

Persons who are nationals of the receiving State

Article 9

An itinerant envoy and the head of a special mission, the members of their staffs, and their private servants, shall be treated as corresponding groups of persons in a permanent mission according to article 37 of the 1958 draft.

Precedence

Article 10

An itinerant envoy or the head of a special mission shall not by such position only be entitled to any superiority of rank.

Duration of privileges and immunities

Article 11

As to the duration of privileges and immunities, article 38 of the 1958 draft shall have analogous application.

Notification of arrival and departure

Article 12

The arrival and departure of the members of the staff of an itinerant envoy's mission or of a special mission shall be notified to the Ministry for Foreign Affairs of the receiving State. A similar notification shall be given whenever members of the mission and private servants are locally engaged or discharged.

Duties of third States

Article 13

In respect of the members of an itinerant envoy's mission or of a special mission, their official correspondence and other official communications, and couriers used by them, the provisions of article 39 of the 1958 draft shall be applied.

Conduct towards the receiving State

Article 14

The provisions of article 40 of the 1958 draft shall apply also to an itinerant envoy's mission, a special mission, the members of the mission, and all other persons connected with such missions who enjoy diplomatic privileges and immunities.

End of the function of an itinerant envoy or the head of a special mission

Article 15

The function of an itinerant envoy or the head of a special mission comes to an end, *inter alia*:

(a) When the transactions which have been the aim of the itinerant envoy or the mission have been brought to an end, or are interrupted;

(b) On notification by the Government of the sending State to the Government of the receiving State that the function of the itinerant envoy or the head of the mission has come to an end (recall);

(c) On notification by the receiving State, given in accordance with article 3, that it considers the function of the itinerant envoy or the head of the mission to be terminated.

Facilitation of departure and protection of premises and archives

Article 16

The provisions of article 42 and paragraphs (a) and (b) of article 43 of the 1958 draft shall be applied also in respect of an itinerant envoy's mission and a special mission.

CHAPTER II. CONGRESSES AND CONFERENCES

Definitions

Article 1

In this chapter the following expression shall have the meanings hereunder assigned to them:

(a) A congress or conference is a meeting of representatives of two or more States, not forming a federative State, for negotiating and/or concluding an agreement on matters concerning the relations between the States;

(b) A State or an international organization which is represented only for observation purposes is considered as participating in the congress or conference;

(c) A "delegation" is the person or body of persons representing, at the congress or conference, a State or an organization having international status, taking part in the congress or conference, and the auxiliary staff of such person or body of persons;

(d) "Delegates" are the head of the delegation and those who, with him, represent their State at the congress or conference, and their alternates;

(e) The "auxiliary staff" of a delegation consists of the persons who are appointed to assist the delegation;

(f) "Members of delegation" are delegates and members of the auxiliary staff;

(g) The premises where the meetings of the congress or conference or its committees take place, and the premises of the Secretariat, are considered as premises of the congress or conference.

Field of application of Chapter II

Article 2

If a State has convened a congress or conference to take place on its territory the following provisions shall apply, provided that, in respect of the congress or conference, no special international agreement is in force.

Persons declared *personae non gratae*

Article 3

The provisions of article 8 of the 1958 draft shall receive application also in respect of members of a delegation to a Congress or Conference.

Scope of the congress or conference

Article 4

The programme (subject) of the congress or conference is determined by agreement between the interested parties in connexion with the discussions preliminary to the invitation.

Organization

Article 5

The details of the organization of the congress or conference, for example, the election of officers, arrangements relating to the Bureau and Commissions, Secretariat, voting order and other matters, are fixed by the congress or conference itself at the outset of the meeting, if not fixed by previous agreement.

Precedence

Article 6

At the sessions of the congress or conference the delegations are seated in the alphabetical order of the English (or French) names of the participating countries, unless there are special reasons for dividing the participants into different groups.

Premises of the congress or conference

Article 7

The premises of the congress or conference and its archives and documents shall enjoy the same inviolability as the official premises and archives of a permanent diplomatic mission according to articles 20 and 22 of the 1958 draft.

Delegation premises, residences of delegates and staff, privileges and immunities

Article 8

The provisions of articles 4-16 of chapter I of

this draft shall receive analogous application in respect of the delegation's premises, archives, documents and correspondence, the privileges and immunities of the delegates and the auxiliary staff and the members of their families, the treatment of their private servants, the duties of third States and, in general, all other matters treated in those articles.

In the application of this article the head of the delegation shall be considered to be in the same category as the head of a mission, the other delegates in the same category as diplomatic agents, and the different groups of the auxiliary staff in the same categories as the groups of staff belonging to a mission to which they most closely correspond.

B. ALTERNATIVE II

CHAPTER I. DIPLOMATIC RELATIONS BY ITINERANT ENVOYS AND SPECIAL MISSIONS

Definitions

Article 1

For the purpose of this chapter of the present draft articles the following expressions shall have the meanings hereunder assigned to them:

(a) An "itinerant envoy" is a diplomatic mission headed by an envoy who represents the sending State in several other States in a certain area or at large without being accredited to any of these States;

(b) A "special mission" is a diplomatic mission sent by one State to another for a special diplomatic assignment.

(c) The "1958 draft" means the draft articles on diplomatic intercourse and immunities which the International Law Commission elaborated at its tenth session and recommended to the General Assembly with a view to the conclusion of a convention.

(d) The definitions in article 1 of the 1958 draft shall apply also to the members of the staff of an itinerant envoy's mission or of a special mission.

Conditions of the mission and its members

Article 2

If a State has agreed to receive an itinerant envoy, or a special mission, from another State the provisions of the following articles of Chapter I of the 1958 draft, namely articles 8, 9, 20, 22, 23, 25, 27-40, 42 and 43 (a) and (b), shall apply also to the conditions of such a mission, its members, the members of their households and their private servants, the duties of the privileged persons towards the receiving State, the duties of third States, and the other matters covered by the said articles.

Precedence

Article 3

An itinerant envoy or the head of a special mission shall not by such position only be entitled to any superiority of rank.

Modes of termination of the function of an itinerant envoy or the head of special mission

Article 4

The function of an itinerant envoy or the head of a special mission comes to an end in respect of a receiving country, *inter alia*:

(a) When the transactions which have been the aim of the itinerant envoy or the mission have been brought to an end or have been interrupted;

(b) On notification by the Government of the sending State to the Government of the receiving State that the function of the itinerant envoy or the head of the mission has come to an end (recall);

(c) On notification by the receiving State, given in accordance with article 8 of the 1958 draft, that it considers the functions of the itinerant envoy or the head of the special mission to be terminated.

CHAPTER II. DIPLOMATIC CONGRESSES AND CONFERENCES

Articles 1-7 the same as in alternative I.

Delegation premises, residences of delegates and staff, privileges and immunities

Article 8

The provisions referred to in article 8 of Chapter I shall receive analogous application in respect of the delegation's premises, archives, documents and correspondence, the privileges and immunities of the delegates and the auxiliary staff and the members of their families, the treatment of their private servants, the duties of third States, and in general all other matters treated in that article.

In the application of this article the head of the delegation shall be considered to be in the same category as the head of a mission, the other delegates in the same category as diplomatic agents, and the different groups of the auxiliary staff in the same categories as the groups of staff belonging to a mission to which they most closely correspond.

DOCUMENT A/CN.4/L.87

Provisions proposed by Mr. Jiménez de Aréchaga for insertion in the draft articles on diplomatic intercourse and immunities prepared by the International Law Commission at its tenth session¹

[Original text : English]
[15 June 1960]

1. In article 1, insert after sub-paragraph (e) the following :

"(e bis) A 'special mission' is a diplomatic mission sent by one State to another State or States for a specific assignment."

2. In article 41, insert after subparagraph (c) the following :

"(d) In the case of a special mission, when the functions which have been the aim of the mission have come to an end."

3. After article 43, section IV, insert the following :

"SECTION IVa. DIPLOMATIC RELATIONS BY SPECIAL MISSIONS

Article 43a

If a State has agreed to receive a special mission from another State, the provisions of this Convention shall apply to such mission."

¹ *Yearbook of the International Law Commission, Volume II* (United Nations publication, Sales No.: 58.V.1, vol.II) document A/3859, chap III.

DOCUMENT A/CN.4/L.88

Memorandum by Mr. Jiménez de Aréchaga in explanation of his proposal concerning *ad hoc* diplomacy (A/CN.4/L.87)

[Original text : English]
[15 June 1960]

1. The submission of new provisions on *ad hoc* diplomacy (A/CN.4/L.87) has been prompted by certain observations and suggestions made by the Special Rapporteur in his report on the subject (A/CN.4./129).

2. In paragraphs 46, 47 and 48 of his report, the Special Rapporteur suggested that the General Assembly might dispense with the application of article 22

of the Statute of the International Law Commission in order to deal with the draft which might emerge from the Commission's deliberations at the present session.

3. This procedure might be acceptable for the General Assembly, provided that the draft articles on *ad hoc* diplomacy approved by the International Law Commission constitute a short and uncontroversial addendum to the 1958 Draft on Diplomatic Intercourse

and Immunities, consisting of a minimum core of essential provisions which would make the 1958 draft well-rounded and complete.

4. With this aim in view, it seems preferable, as the Special Rapporteur suggests in paragraph 40 of his report, to postpone consideration of the provisions on congresses and conferences and to undertake that task in the context of the privileges and immunities of delegates to conferences convened by the United Nations and the Specialized Agencies.

5. As the Special Rapporteur states in paragraph 42 of his report, it would be a somewhat incongruous arrangement to have different rules governing the two types of conference and to have the group, which is, or may become, the more important surrounded with less protection than the other. This would certainly be the case since, under the Charter of the United Nations and the Conventions on Privileges and Immunities approved by the General Assembly, delegates to conferences organized under the auspices of the United Nations or of the Specialized Agencies do not enjoy full jurisdictional immunity, but only immunity in connection with "words spoken or written and all acts done in their capacity as representatives"; and they do not benefit from full customs privileges or tax exemptions. Furthermore, these conventions extend such immunities and privileges only to delegates, advisers and secretaries of diplomatic rank, and not to their families or private servants or the auxiliary staff of delegations.

6. It seems unnecessary to deal specifically with the category described as "itinerant envoys" since, as the Special Rapporteur points out in paragraph 28 of his report, an itinerant mission is really a series of special missions carried out in a number of different States in succession. In view of that consideration, the provisions relating to special missions could also apply to itinerant envoys.

7. The present proposals diverge from those of the Special Rapporteur only with regard to the question of special missions. In paragraph 12 of his report the Special Rapporteur suggests that a provision such as article 4 of the 1958 draft on diplomatic intercourse and immunities (Appointment of the head of the mission: *agrément*) is not required with regard to special missions, on the ground that "the head of the mission is no doubt mentioned in the communications preliminary to the agreement on the special mission". Although in general this may be the position, it is not necessarily so in all circumstances. For example, there may be cases in which the parties have agreed respectively to send and receive a special mission before the individual entrusted with the assignment has been selected. In that event, it seems both advantageous and desirable that a provision such as article 4 of the diplomatic draft should be applicable.

8. In the same paragraph of his report the Special Rapporteur suggests that the question covered by article 5 of the diplomatic draft (Appointment to more than one State) does not arise in connexion with special missions. However, the situation envisaged by

that article is by no means unusual. For example, changes of government or other ceremonial occasions may follow each other in rapid succession in a number of neighbouring States. The extension of article 5 to special missions would take adequate account of the nature of itinerant envoys.

9. In relation to article 6 of the diplomatic draft (Appointment of the staff of the mission), it may be observed that military, naval and air attachés are often appointed as members of special missions. It would seem, therefore, advisable to retain the rule laid down in article 6 of the 1958 draft. Similarly, article 7 of the 1958 draft (Appointment of nationals of the receiving State) may in some circumstances be relevant to the case of special missions.

10. The Special Rapporteur also proposes to exclude articles 10 (Size of staff) and 11 (Offices away from the seat of the mission) of the 1958 draft. It is true that in the majority of cases these provisions would have little relevance to special missions. However, it might seem undesirable to preclude the applicability of such provisions to special missions, since to do so might invite the implication that, in accordance with the principle *inclusio unius est exclusio alterius*, special missions may claim the right to have an unlimited staff or to open offices in any part of the territory of the receiving State.

11. It would also seem that article 12 (Commencement of the functions of the head of the mission), and articles 13 and 14 (Classes of heads of missions) of the diplomatic draft should apply, since these provisions are followed in practice in the case of special missions.

12. A negative rule on precedence, as proposed in article 10 of Alternative I of the Draft presented by the Special Rapporteur, might not be desirable. The relative precedence between permanent and special diplomatic missions may give rise to difficulties between the diplomatic officers concerned of the sending State, but there is no rule of international law in this respect. This is the type of question which it might be better to leave for the sending State to determine in agreement with the receiving State.

13. On the other hand, article 15 of the 1958 draft (Precedence) seems to have a definite bearing with regard to special missions. So also does article 16 (Mode of reception), particularly when special missions from various countries are received simultaneously, as is often the case. Again, the elimination of these articles would have an undesirable consequence, in that their omission might be interpreted as meaning that these rules would not apply to special missions.

14. Equally, it would seem advisable to include article 17 (*Chargé d'affaires ad interim*) of the diplomatic draft, since this provision might be invoked in case of sickness on the part of a principal negotiator during the course of a transaction. Article 18 (Use of flag and emblem) should also be included, since its omission would carry the implication that there would be no right to use those insignia on the ceremonial occasions where their use would be particularly appropriate.

15. With regard to diplomatic privileges and immunities, the Special Rapporteur proposes to exclude special missions from the application of article 19 (Accommodation), article 21 (Exemption of mission premises from tax), article 24 (Free movement), and article 26 which provides that fees and charges levied by a mission in the course of its official duties shall be exempt from all dues and taxes.

16. The normal international practice, however, is to confer on diplomats in special missions exactly the same privileges and immunities as are granted to diplomats on permanent missions. The Havana Convention of 1928 on diplomatic officers provides with respect to "extraordinary diplomatic officers", defined in article 2 thereof as "those entrusted with a special mission", that they "enjoy the same prerogatives and immunities as ordinary ones" (art. 9).

17. It seems not to be the intention of the Special Rapporteur to propose any modification of this well-established rule. However, the above-quoted articles are excluded by the Special Rapporteur on the ground that they would not be applicable to special missions, at least in the great majority of cases. Here again, the fact that those provisions might be inapplicable in many cases, or even in the majority of cases, does not mean that they ought to be omitted from the draft, since to do so would prevent their application in the cases in which they might have a bearing on the performance of a special mission. Their omission might well be interpreted as signifying that the privileges relating to free-

dom of movement or tax exemption, for instance, could never apply to any special mission.

18. In the light of the considerations outlined above, it may safely be concluded that all the provisions of the 1958 draft are relevant to special missions and should be made applicable to them, with the proviso that article 3 of the 1958 draft (Functions of a diplomatic mission) should be interpreted as applying only within the scope of the specific task assigned to the special mission.

19. The only additional provision which seems to be required in the case of special missions is one concerning termination of the mission on fulfilment of the entrusted assignment. The relevant provision has been drafted as a sub-paragraph, on the lines of article 25 paragraph 3 of the Havana Convention of 1928 on diplomatic officers, to be inserted in article 41 of the 1958 draft (Modes of termination).

20. The draft submitted in document A/CN.4/L.87 attempts, for the reasons which have been indicated, to give expression, in a more condensed form, to the various ideas and suggestions contained in the Special Rapporteur's report, particularly his suggestions as to the form of the draft. The present proposal is intended to constitute an addendum to the 1958 draft, corresponding to the suggestion made by the Special Rapporteur in paragraph 51 of his report, where he indicates that the provisions on *ad hoc* diplomacy adopted by the Commission might appropriately form an integral part of the draft convention on diplomatic intercourse and immunities.

DOCUMENT A/CN.4/L.89

New alternative proposal submitted by the Special Rapporteur

[Original text: French]
[20 June 1960]

PRIVILEGES AND IMMUNITIES GRANTED TO SPECIAL MISSIONS

ARTICLE 1

Definition

The expression "special mission" means a mission sent by one State to another to carry out a special diplomatic task, and is also applied to a mission by an itinerant envoy who carries out special diplomatic tasks for the sending State in several other States.

ARTICLE 2

Privileges and immunities granted to special missions

The provisions of sections II, III and IV shall apply also to any special mission which a State has agreed to receive from another State.

Comments

Insert the substance of paragraphs 6, 7 and 8 of the Special Rapporteur's report (A/CN.4/129) and add:

(a) With regard to the provisions of section I of the 1958 draft, it is admitted that cases may occur where some of these articles would be applicable to special

missions. In general, however, these articles are intended to apply to permanent missions, by reason of the special features of such missions, including their permanence, their function of maintaining diplomatic relations between countries and the presence in a capital of several missions of the same character. Special missions, on the other hand, may vary considerably in composition and character and would require a different set of rules. The States concerned have encountered no difficulty in settling among themselves such general questions as have arisen on this point. In the circumstances, there would seem to be no need for separate rules on this subject. Wherever similar situations arise, States can proceed along the lines of the solutions to these questions contained in the 1958 draft.

(b) In the opinion of the Commission, an examination article by article of sections II, III and IV of the draft, which deal mainly directly or indirectly with diplomatic privileges and immunities, shows that there is no reason to exclude the application of any of these articles to special missions, although the provisions of some, such as articles 19, 21, 24 and 26, would apply to such missions only in special circumstances.

GENERAL ASSEMBLY RESOLUTION 1400 (XIV) ON THE CODIFICATION OF THE PRINCIPLES AND RULES OF INTERNATIONAL LAW RELATING TO THE RIGHT OF ASYLUM

[Agenda item 6]

DOCUMENT A/CN.4/128

Note by the Secretariat

[Original text : French]
[4 March 1960]

1. During the Sixth Committee's discussion on item 55 of the agenda of the fourteenth session of the General Assembly, "Report of the International Law Commission on the work of its eleventh session",¹ the representative of El Salvador submitted a draft resolution² requesting the International Law Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum.

2. The representative of El Salvador pointed out that while this question had been included in the list of topics selected for codification by the International Law Commission at its first session,³ and while the right of asylum, with its twin aspects of territorial asylum and diplomatic asylum, was an ancient institution, accepted and applied in many parts of the world, there was not yet sufficient uniformity in its application, so that the work of the International Law Commission on the matter would have to consist of both codification and progressive development of international law.

3. The various views expressed on the Salvadorian proposal were set forth in the summary records of the 602nd to the 612th meetings of the Sixth Committee⁴ and in the Committee's report on the item to the General Assembly.⁵ During the debate the representa-

tive of Cuba submitted an amendment,⁶ which was later withdrawn, requesting the International Law Commission to give priority to the codification of this subject.

4. The majority of representatives supported the draft resolution of El Salvador, which was adopted by the Sixth Committee at its 612th meeting by 63 votes to 1, with 12 abstentions.⁷

5. At its 842nd plenary meeting, held on 21 November 1959,⁸ the General Assembly adopted without discussion, by 56 votes to none with 11 abstentions, the draft resolution of the Sixth Committee, which then became resolution 1400 (XIV), reading as follows:

"The General Assembly,

"Considering that it is desirable to standardize the application of the principles and rules relating to the right of asylum,

"Recalling that the International Law Commission at its first session included the right of asylum in the provisional list of topics of international law selected for codification,

"Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum."

¹ *Official Records of the General Assembly Fourteenth Session, Supplement No. 9.*

² *Ibid.*, Sixth Committee, document A/C.6/L.443.

³ *Ibid.*, Fourth Session, Supplement No. 10, para. 16.

⁴ *Ibid.*, Fourteenth Session, Sixth Committee, 602nd to 612th meetings.

⁵ Document A/4253, paras. 19-30.

⁶ See *Ibid.*, Sixth Committee, document A/C.6/L.447.

⁷ *Official Records of the General Assembly, Fourteenth Session, Sixth Committee, 612th meeting.*

⁸ *Ibid.*, Plenary meetings, 842nd meeting.

GENERAL ASSEMBLY RESOLUTION 1453 (XIV) ON THE STUDY OF THE JURIDICAL RÉGIME OF HISTORIC WATERS, INCLUDING HISTORIC BAYS

[Agenda item 7]

DOCUMENT A/CN.4/126

Note by the Secretariat

[Original text: French]
[26 February 1960]

1. The draft articles on the law of the sea,¹ which were prepared by the International Law Commission and were used as a basis for the work of the United Nations Conference on the Law of the Sea, do not deal with the régime of historic waters. In draft article 7 (4), however, the Commission mentions so-called historic bays, limiting itself to excluding this class of bays from the scope of its general rules concerning ordinary bays.

2. In order to provide the Conference with information concerning historic bays, the United Nations Secretariat drew up a memorandum on the subject.²

3. At its twentieth plenary meeting, held on 27 April 1958, the first United Nations Conference on the Law of the Sea adopted a Draft resolution in which, after noting that the International Law Commission had not provided for the régime of historic waters, including historic bays, and, after recognizing the importance of the juridical status of such areas, it decided to request the General Assembly of the United Nations to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations.³

4. At its 752nd plenary meeting, on 22 September 1958, the General Assembly placed on the agenda of its thirteenth session the item "Question of initiating a study of the juridical régime of historic waters, including historic bays" and referred it to the Sixth Committee, which examined it at its 597th and 598th meetings, on 5 and 8 December 1958.

5. As stated in the report of the Sixth Committee to the General Assembly,⁴ the majority of speakers on this item were of the opinion that, for want of time, it would be preferable to postpone the question until the fourteenth session of the General Assembly.

6. On 10 December 1958, at its 783rd plenary meet-

ing, the General Assembly, on the recommendation of the Sixth Committee,⁵ adopted resolution 1306 (XIII), by which it decided to place this item on the provisional agenda of its fourteenth session.

7. At its 803rd plenary meeting, on 22 September 1959, the General Assembly placed the item on the agenda of its fourteenth session and referred it to the Sixth Committee, which examined it at its 643rd to 646th meetings, held from 30 November to 4 December 1959.

8. In its report to the General Assembly⁶ the Sixth Committee noted that in the course of the debate some representatives had discussed the substance of the question and had referred, in particular, to certain problems raised by the juridical régime of historic waters and some had cited specific cases of claims in respect of historic waters and bays. It also noted that the majority of representatives had reserved their position with regard to the substantive issues and that a large number of them had declared themselves in favour of entrusting the study to the International Law Commission.

9. At its 847th plenary meeting, held on 7 December 1959, the General Assembly, on the recommendation of the Sixth Committee,⁷ adopted resolution 1453 (XIV), the complete text of which reads as follows:

STUDY OF THE JURIDICAL RÉGIME OF HISTORIC WATERS, INCLUDING HISTORIC BAYS

"The General Assembly,

"Recalling that, by a resolution adopted on 27 April 1958, the United Nations Conference on the Law of the Sea requested the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of the study to all States Members of the United Nations,

"Requests the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate."

¹ *Ibid.*, para. 9.

² *Ibid.*, Fourteenth Session, Annexes, agenda item 58, document A/4333, paras. 7-9.

³ *Ibid.*, paragraph 11.

¹ *Yearbook of the International Law Commission*, 56, Volume II (United Nations publication, Sales No.: 56.V.3, Vol. II) document A/3159, para. 33.

² United Nations Conference on the Law of the Sea, *Official Records, Volume I: Preparatory Documents* (United Nations Publication, Sales No.: 58.V.4, Vol. I) document A/CONF.13/I.

³ *Ibid.*, Volume II, *Plenary Meetings* (United Nations publication, Sales No.: 58.V.4, Vol. II) annexes, document A/CONF.13/L.56, resolution VII.

⁴ *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 58, document A/4039, para. 4.

CO-OPERATION WITH OTHER BODIES

[Agenda item 8]

DOCUMENT A/CN.4/124

Report by Mr. Yuen-li Liang, Secretary of the Commission, on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists

[Original text: Spanish]
[5 February 1960]

CONTENTS

	Page
INTRODUCTION	121
CHAPTER I. ORGANIZATION AND AGENDA OF THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS	
1. Place and date of the Meeting	122
2. States represented	122
3. Election of presiding officers and establishment of Committees	122
4. Secretariat	122
5. Representation of the Inter-American Juridical Committee	122
6. Agenda and allocation of topics to Committees	122
7. Resolutions adopted	123
8. Place of the Fifth Meeting	123
CHAPTER II. MATTERS DISCUSSED AT THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS WHICH ARE ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION.	
<i>Section one. Reservations to multilateral treaties</i>	
I. Past treatment of the topic in the Organization of American States	124
A. Proposal of the topic (1950)	124
B. Draft text of rules approved by the Council at its Third Meeting and draft text contained in the Juridical Committee's second study	126
1. General arrangement of the two draft texts	126
2. Nature and grounds of reservations	126
3. Time at which reservations are made	126
(a) Admissibility of reservations made at the time of signing	126
(b) Renewal of reservations made at the time of signing	126
(c) Admissibility of reservations made at the time of ratification	127
4. Juridical effects of reservations	127
5. Functions of the Pan American Union as depositary	127
II. Fourth Meeting of the Inter-American Council of Jurists	127
A. Consideration of the topic in Committee II	127
1. Draft resolutions and amendments	127
2. Discussion	130
3. Voting	131
B. Consideration of the topic in plenary session of the Council, and adoption of the draft resolution submitted by Committee II	131
1. Draft resolutions and amendments	131
2. Discussion	131
3. Voting	132
C. Proposal to establish a new class of reservations to multilateral treaties, to be known as "reservations of theoretical or moral adherence"	134
<i>Section two. The principles of international law that govern the responsibility of the State</i>	
I. Past treatment of the topic in the Organization of American States	134
A. Proposal of the topic (1954)	134
B. Report of the Inter-American Juridical Committee	135
II. Fourth Meeting of the Inter-American Council of Jurists	137
A. Consideration of the topic in Committee II	137
1. Draft resolutions and amendments	137
2. Discussion	138
3. Voting	138

CONTENTS (*continued*)

	<i>Page</i>
B. Discussion of the topic in plenary session of the Council, and adoption of the draft resolution submitted by Committee II	139
1. Draft resolutions and amendments	139
2. Discussion	139
3. Voting	139
CHAPTER III. RELATIONS BETWEEN THE INTER-AMERICAN COUNCIL OF JURISTS AND THE INTERNATIONAL LAW COMMISSION AT THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS	140
I. Statement by the Secretary of the International Law Commission at the Fourth Meeting of the Inter-American Council of Jurists	140
II. The topic of collaboration with the International Law Commission of the United Nations at the Fourth Meeting of the Inter-American Council of Jurists	140
A. Consideration of the topic in Committee III	140
1. Draft resolutions and amendments	140
2. Discussion	141
3. Voting	141
B. Consideration of the draft resolution submitted by Committee III in plenary session of the Council, and resolution adopted	141

Introduction

1. The statutory basis for co-operation between the International Law Commission of the United Nations and the Inter-American Council of Jurists is to be found in the provisions of article 26, paragraph 4, of the Statute of the International Law Commission,¹ in article 61 of the Charter of the Organization of American States² and in article 4 of the Statutes of the Inter-American Council of Jurists.³

2. Originally, the Inter-American Council of Jurists discussed the question of collaboration with the international Law Commission of the United Nations at its first Meeting in 1950, when it adopted a resolution designed to establish a basis for co-operation between the Council and the International Law Commission.⁴

3. The International Law Commission adopted an initial resolution on co-operation with inter-American bodies in 1954;⁵ and in 1955 it requested the Secretary-

General of the United Nations to authorize its Secretary to attend, in the capacity of an observer, the Third Meeting of the Inter-American Council of Jurists, and expressed the hope that the latter would also send its Secretary to attend the meetings of the Commission.⁶

4. This authorization having been granted, the Secretary of the International Law Commission attended the Third Meeting of the Inter-American Council of Jurists, held at Mexico City in 1956, at which he made a statement.⁷

5. Co-operation between the two bodies was also one of the topics discussed by the Inter-American Council of Jurists at its Third Meeting, at which a resolution was approved expressing the opinion that it would be desirable for the Organization of American States to study the possibility of having its juridical agencies represented as observers in the International Law Commission.⁸

6. The Secretary General of the Organization of American States sent as observer to the eight session of the International Law Commission, held in 1956, Mr. M. Canyes, Deputy Director of the Department of Legal Affairs of the Pan American Union.

7. At the same session, the Secretary of the International Law Commission submitted to the Commission his "Report on the proceedings of the Third Meeting of the Inter-American Council of Jurists"⁹ and the Commission requested the Secretary-General of the United Nations again to authorize the Secretary of the Commission to attend the Fourth Meeting of the Inter-American Council of Jurists at Santiago, Chile.¹⁰ The Commission made a similar request in 1958.¹¹

¹ "The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized."

² "The organs of the Council of the Organization shall, in agreement with the Council, establish co-operative relations with the corresponding organs of the United Nations and with the national or international agencies that function within their respective spheres of action."

³ "The Inter-American Council of Jurists shall, directly or through its Permanent Committee, seek the co-operation of national committees for the codification of international law, of institutes of international and comparative law, and of other specialized agencies."

"When this co-operation implies the establishment of permanent relations with the corresponding organs of the United Nations and with the national and international agencies that function within its sphere of action, the Council of Jurists may act only in agreement with the Council of the Organization."

⁴ *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/102, "Co-operation with Inter-American Bodies", paras. 87 and 88.

⁵ *Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693)*, para. 77.

⁶ *Ibid.*, Tenth Session, Supplement No. 9 (A/2934), para. 36.

⁷ *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/102, paras. 2, 3, 4 and 91-94.

⁸ *Ibid.*, document A/CN.4/102, paras. 95-98.

⁹ *Ibid.*, pp. 236-252.

¹⁰ *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*, paras. 46 and 47.

¹¹ *Ibid.*, Thirteenth Session, Supplement No. 9 (A/3859), para. 72.

8. The Fourth Meeting of the Inter-American Council of Jurists, planned for 1958, had to be postponed until 1959 owing to the need for further preparatory work by the Council's permanent committee, the Juridical Committee.¹²

9. At the eleventh session of the International Law Commission, held from April to June 1959, the Secretary of the Commission stated that the Fourth Meeting of the Inter-American Council of Jurists would be held in August and September 1959 at Santiago, Chile, that an invitation had been received from the Government of Chile and that the Secretary-General of the United Nations had authorized him to attend the Meeting in accordance with the request of the Commission.¹³

10. The Secretary of the International Law Commission of the United Nations attended the Fourth Meeting of the Inter-American Council of Jurists in the capacity of observer¹⁴ and made a statement which is summarized briefly in chapter III of this document.

11. The present document constitutes the "Report on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists" submitted to the International Law Commission by its Secretary in fulfilment of the task assigned to him and in the terms requested by the Commission.

12. The report comprises three chapters, in addition to this introduction. Chapter I deals with the "Organization and agenda of the Fourth Meeting of the Inter-American Council of Jurists". Chapter II, which forms the main subject of the report, deals with "Matters discussed at the Fourth Meeting of the Inter-American Council of Jurists which are on the agenda of the International Law Commission". These are "Reservations to multilateral treaties" (section 1) and "The principles of international law that govern the responsibility of the State" (section 2). Finally, chapter III deals with "Relations between the Inter-American Council of Jurists and the International Law Commission at the Fourth Meeting of the Inter-American Council of Jurists".

Chapter I. Organization and agenda of the Fourth Meeting of the Inter-American Council of Jurists

1. Place and date of the Meeting

13. The Fourth Meeting¹⁵ of the Inter-American Council of Jurists was held at Santiago, Chile, from 24 August to 9 September 1959 by virtue of the con-

vocation issued by the Council of the Organization of American States.¹⁶

2. States represented

14. Twenty of the twenty-one Member States of the Organization of American States were represented at the Meeting. These States were, in the order of precedence determined by lot at the first plenary session on 25 August 1959, in accordance with article 7 of the Regulations of the Council: Brazil, Costa Rica, Argentina, United States of America, Venezuela, Ecuador, Bolivia, Dominican Republic, Nicaragua, Cuba, Peru, Mexico, Paraguay, Haiti, Colombia, Guatemala, El Salvador, Uruguay, Panama and Chile.¹⁷ Honduras was not represented at the meeting.

3. Election of presiding officers and establishment of Committees

15. The Fourth Meeting of the Inter-American Council of Jurists elected, by acclamation, Mr. Luis David Cruz Ocampo (Chile) and Mr. Eduardo Zuleta Angel (Colombia) as Chairman and Vice-Chairman, respectively, of the Council. The Chilean Minister of Foreign Affairs, Mr. Germán Vergara Donoso, and the Chilean Minister of Justice, Mr. Julio Philippi Izquierdo, were elected honorary chairmen at the same session.¹⁸

16. Four working Committees were formed: a Special Committee, Committee I, Committee II and Committee III, whose respective Chairmen were Mr. Carlos García Bauer (Guatemala), Mr. Miguel Rafael Urquía (El Salvador), Mr. Eduardo Arroyo Lamedá (Venezuela) and Mr. Antonio Gómez Robledo (Mexico).¹⁹

4. Secretariat²⁰

17. The Deputy Director of the Department of Legal Affairs of the Pan American Union, Mr. Manuel Canyes, served as acting Executive Secretary of the Council.

18. The Government of Chile appointed Mr. Fernando Donoso Silva as Secretary General of the meeting. Mr. Luis Reque, Chief of the Codification Division of the Department of Legal Affairs of the Pan American Union, served as Assistant Secretary General.

5. Representation of the Inter-American Juridical Committee

19. In accordance with the decision taken by the Inter-American Juridical Committee at its 1958 session, Mr. José Jaquín Caicedo Castilla attended the Meeting as representative of the Committee.²¹

6. Agenda and allocation of topics to Committees

20. In accordance with the Statutes of the Inter-

¹² *Ibid.*, Twelfth Session, (A/3623), para. 22.

¹³ *Ibid.*, Fourteenth Session, Supplement No. 9 (A/4169), para. 45.

¹⁴ See *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D.C., p. 5.

¹⁵ The First Meeting of the Inter-American Council of Jurists was held at Rio de Janeiro, from 22 May to 15 June 1950; the Second Meeting at Buenos Aires, from 20 April to 9 May 1953; and the Third Meeting at Mexico City, from 17 January to 4 February 1956. *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/102, para. 12.

¹⁶ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D.C., p. I.

¹⁷ *Ibid.*, pp. 1-4.

¹⁸ *Ibid.*, p. 6.

¹⁹ *Ibid.*, pp. 7-9.

²⁰ *Ibid.*, p. 5.

²¹ *Ibid.*

American Council of Jurists, the agenda of the Fourth Meeting was prepared initially by the Council's permanent committee, the Inter-American Juridical Committee, and was approved by the Council of the Organization of American States on 28 January 1959.²²

21. However, the Inter-American Council of Jurists modified this agenda at its first plenary session, on 25 August 1959. The Council decided to add the two topics recommended by the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States, viz. "Study on the juridical relationship between respect for human rights and the effective exercise of representative democracy" and "Human rights", as well as the topics "Draft standards for inter-American specialized conferences", requested by the Council of the Organization, and "Territorial asylum" (proposal submitted by the delegation of Cuba at the second plenary session).²³

22. The final agenda was allocated to the working committees as follows:²⁴

Special Committee

Topic I (g) Study on the juridical relationship between respect for human rights and the effective exercise of representative democracy.

Topic I (h) Human rights.

Committee I

Topic I (a) Extradition.

Topic I (d) Diplomatic asylum.

Topic I (i) Territorial asylum.

Committee II

Topic I (b) Juridical effects of reservations made to multilateral treaties.

Topic I (c) Contribution of the American Continent to the development and codification of the principles of international law that govern the responsibility of the State.

Topic I (e) Possibility of revising the Bustamante Code.

Topic I (f) Rules concerning the immunity of State ships.

Committee III

Topic II (a) Amendments to resolution VII of the First Meeting of the Inter-American Council of Jurists.

Topic II (b) Amendments to the Regulations of the Juridical Committee.

Topic II (c) Collaboration with the International Law Commission of the United Nations.

Topic II (d) Determination of the matters that should be studied by the Permanent Committee during its next period of meetings.

Topic II (e) Draft standards for Inter-American specialized conferences.

7. Resolutions adopted

23. The Council adopted, at its Fourth Meeting, twenty-six resolutions,²⁵ twenty-one of which contain substantive or procedural decisions.²⁶ Chapter II examines in detail the resolutions relating to topics dealt with by the International Law Commission, and chapter III deals with the resolution on relations between the Council and the International Law Commission.

24. Of the remaining resolutions adopted by the Council at its Fourth Meeting, the following are of interest from the legal point of view: resolution I, which contains a draft additional protocol to the conventions on diplomatic asylum; resolution IV, which contains a draft convention on extradition; resolution XIII, which proposes a series of amendments to the Regulations of the Inter-American Juridical Committee; resolution XIV, which amends the resolution adopted at the First Meeting on the plan to be adopted by the Council in order to promote the development and codification of international law; resolution XIX, which contains a draft supplementary protocol to the Convention on Territorial Asylum of 1954; and, particularly, resolution XX, which contains a complete draft convention on human rights, consisting of eighty-eight articles, that is being sent to the Council of the Organization of American States for submission to the Eleventh Inter-American Conference.

8. Place of the Fifth Meeting

25. At the second plenary session, on 7 September 1959, the Council decided to accept the offer of the Government of El Salvador and designated San Salvador as the place of the Fifth Meeting of the Inter-American Council of Jurists.²⁷

²⁵ *Resolutions*: (I) Diplomatic asylum; (II) New articles on diplomatic asylum; (III) Study on political offences; (IV) Draft convention on extradition; (V) Extradition; (VI) Seat of the Fifth Meeting; (VII) Tribute to Dr. Raul Fernandes; (VIII) Possibility of revision of the Bustamante Code; (IX) Immunity of State-owned vessels; (X) Reservations to multilateral treaties; (XI) Reservations to multilateral treaties - Reservation of theoretical adherence; (XII) Contribution of the American continent to the principles that govern the responsibility of the State; (XIII) Amendments to the Regulations of the Inter-American Juridical Committee; (XIV) Amendments to resolution VII of the First Meeting of the Inter-American Council of Jurists; (XV) Draft standards for inter-American specialized conferences; (XVI) Relations with the International Law Commission of the United Nations; (XVII) Matters that should be assigned to the Permanent Committee for study at its next period of meetings; (XVIII) Special session of the Inter-American Juridical Committee; (XIX) Territorial asylum; (XX) Human rights; (XXI) Study on the juridical relationship between respect for human rights and the exercise of democracy; (XXII) Programme designed to fight illiteracy in the American continent; (XXIII) Tribute to the memory of Don Andrés Bello; (XXIV) Vote of thanks to the Inter-American Juridical Committee; (XXV) Tribute to Dr. Charles G. Fenwick; (XXVI) Vote of thanks. *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D.C., pp. 10-81.

²⁶ Resolutions VII, XXIII, XXIV, XXV and XXVI are merely tributes or votes of thanks.

²⁷ Resolution VI, *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D. C. p. 24.

²² *Ibid.*, p. 6.

²³ *Ibid.*, pp. 6-7.

²⁴ *Ibid.*, pp. 7-9.

Chapter II. Matters discussed at the Fourth Meeting of the Inter-American Council of Jurists which are on the agenda of the International Law Commission

SECTION ONE. RESERVATIONS TO MULTILATERAL TREATIES

I. PAST TREATMENT OF THE TOPIC IN THE ORGANIZATION OF AMERICAN STATES (OAS)²⁸

A. PROPOSAL OF THE TOPIC (1950)

26. The study by the Inter-American Juridical Committee of the question of reservations to multilateral treaties was originally proposed by the Inter-American Economic and Social Council in 1950 when it was considering the reservations to the Economic Agreement of Bogotá. The Inter-American Economic and Social Council requested the Council of the Organization of American States to submit the question of the juridical scope of reservations to multilateral treaties to the Inter-American Juridical Committee, in accordance with article 70 of the Charter of the OAS.²⁹

27. Responding to this request, the Council of the OAS, on 17 May 1950, recommended to the Juridical Committee that it undertake a study of the question and submit the results to the Council.³⁰ By a later resolution, the Council of the OAS decided to request that the Juridical Committee, in its study, review the rules of procedure established at the Eighth International Conference of American States (Lima, 1938).³¹

28. In conformity with this request by the Council of the OAS, the Juridical Committee prepared a first *Report on the Juridical Effect of Reservations to Multilateral Treaties* and sent it to the Council of the OAS on 27 December 1954.³² This report contained a brief analysis of the historical background of the subject and concluded with some observations which served as a basis for the later discussions of the Inter-American Council of Jurists.

29. The Committee's report was submitted to the Third Meeting of the Inter-American Council of

Jurists, held at Mexico City in 1956, as a working document, and served as a basis for its deliberations.³³

30. The Inter-American Council of Jurists, taking into account the report of the Committee as well as the dissenting opinions contained therein and the drafts presented by different delegations, drew up a draft of rules to serve as a basis for future studies, and at the same time adopted a resolution requesting:

(a) that the Council of the OAS forward that draft to the member Governments for observations; (b) that the Juridical Committee prepare a second draft text of rules on the basis of the first draft and the observations of Governments, and submit it to the Fourth Meeting of the Inter-American Council of Jurists.³⁴

31. The draft text on rules applicable to reservations to multilateral treaties, submitted by the Inter-American Council of Jurists, reads as follows:

A. RESERVATIONS MADE AT THE TIME OF SIGNING

1. A State that desires to make reservations to a multilateral treaty at the time of collective signature shall transmit the text thereof to all States that have taken part in the negotiations, at least forty-eight hours in advance, unless some other period has been agreed upon in the course of the deliberations.

2. The States to which the aforementioned communication has been made shall notify the other States and the State that is making the reservations, before the collective signing, as to whether they accept the said reservations or not.

3. Reservations that have been expressly rejected, even though in part, by the majority of the States present at the signing, shall not be admitted.

B. RESERVATIONS MADE AT THE TIME OF RATIFICATION OR ADHERENCE

1. At the time of ratification or adherence, reservations may be made in the manner and under the conditions stipulated in the treaty itself or agreed to by the signatories.

2. In the absence of any stipulation in the treaty itself or of agreement between the signatories with respect to the making of reservations at the time of ratification or adherence, such reservations may be made if within six months after the official notification thereof none of the signatory States objects to them as being incompatible with the purpose or object of the treaty. The reservations shall be considered accepted by a signatory State that does not object to them on any other ground within the six-month period.

3. If there is an allegation of incompatibility, the General Secretariat of the Organization of American States shall, on its own initiative and in accordance with its prevailing rules of procedure, consult the signatory States, and the reservations shall not be admitted if within six months they are deemed to be incompatible by at least one third of such States.

4. In the case of treaties opened for signature for a fixed or an indefinite time, the applicable rules shall be those governing reservations made at the time of ratification or adherence.

²⁸ For precedents prior to the establishment of the Organization of American States, see: *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C., pp. 13-27; and *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/102, paras. 66 and 67.

²⁹ See: *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C., p. 11 and *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/102, para. 68.

³⁰ *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/102, para. 69.

³¹ *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C. p. 11.

³² Inter-American Juridical Committee, document CIJ-23, Pan American Union, Washington, D. C.

³³ For a detailed examination of the deliberations of the Third Meeting of the Inter-American Council of Jurists on the subject of reservations see "Report by the Secretary of the International Law Commission on the proceedings of the Third Meeting of the Inter-American Council of Jurists," *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/102, paras. 71-84.

³⁴ Resolution XV of the Third Meeting of the Inter-American Council of Jurists, adopted at the fourth plenary session on 3 February 1956 (*Ibid.*, document A/CN.4/102, annex IV).

5. A reservation that is not repeated in the instrument of ratification shall be deemed to have been abandoned.

C. GENERAL RULES

1. It is advisable to include in multilateral treaties precise stipulations regarding the admissibility or inadmissibility of reservations, as well as the legal effects attributable to them, should they be accepted.

2. The legal effects of reservations are in general the following:

(a) As between countries that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

(c) As between a State that has ratified with reservations and another State that has ratified and not accepted such reservations, the treaty shall not be in force.

(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

3. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States.

4. The prevailing rules of procedure referred to in paragraph B-3 are the six rules approved in resolution XXIX of the Eighth International Conference of American States and those rules that may be approved by the competent organ in the future.

32. On 22 August 1956 the Juridical Committee approved a second work entitled *Study to Serve as the Basis for the Preparation of a Second Draft Text of Rules on Reservations to Multilateral Treaties*,³⁵ which the Pan American Union forwarded to Governments on 15 November 1956. Only four countries submitted observations. In 1958 the Juridical Committee agreed that these observations did not make necessary a revision of the study and decided to submit it without changes, as a working document, to the Fourth Meeting of the Inter-American Council of Jurists. The study contained a second draft text of rules applicable to reservations to multilateral treaties, as well as the explanation of vote of the delegate of the Dominican Republic and the dissenting opinions of the delegates of Colombia and Brazil.³⁶

33. The draft text of rules, presented in the form of a draft convention, reads as follows:³⁷

Article 1. The making of reservations to a treaty at the time of signature, ratification, or adherence, is, like the exercise of the power of concluding treaties an act inherent in national sovereignty, and as such constitutes the exercise of rights that violate no international stipulation or good form.

Article 2. The acceptance or rejection of reservations made by other States or abstaining from doing so is also an act inherent in national sovereignty.

³⁵ Inter-American Juridical Committee, document CIJ-33, Pan American Union, Washington, D. C.

³⁶ *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C., p. 12.

³⁷ Inter-American Juridical Committee, *Study to serve as the Basis for the Preparation of a Second Draft Text of Rules on Reservations to Multilateral Treaties* (CIJ-33), Pan American Union, Washington, D. C., pp. 29-31.

Article 3. Reservations made by a State in the instrument of ratification of a treaty shall never be held not to have been made; they shall always be regarded as a genuine expression of the will of the State making them and as a valid statement, in advance, that the treaty, as it enters into force with respect to that State, shall not be binding upon it with greater or different scope than is represented by the clauses and reservations as a whole.

Article 4. Reservations made by the plenipotentiaries during the negotiation of a treaty shall always be inserted in the instrument subject to ratification.

Article 5. Express stipulations agreed upon by the plenipotentiaries with respect to the admissibility or inadmissibility of reservations, as well as to the juridical effects attributable thereto, have the same force as the other clauses and, like them, may be the subject of reservations.

Article 6. If at the time of ratification of a treaty containing stipulations with respect to the admissibility of reservations as well as to the juridical effects thereof, a State, without making any reservation to these stipulations, ratifies with reservations incompatible therewith, it shall be understood that the State does not accept them insofar as they are in opposition to the reservations it is making.

Article 7. The acceptance of a reservation should be express. Consequently, the acceptance by a State of the reservations made by another may never be inferred simply because it has kept silent during a specific period, although they have been reported to it.

Article 8. In multilateral treaties and conventions that are concluded between American States, the Pan American Union shall have the following functions:

1. To assume the custody of the original instrument.
2. To furnish copies thereof to all the signatory governments.
3. To receive the instruments of ratification of the signatory States, including the reservations.
4. To communicate the deposit of ratifications to the other signatory States and, in the case of reservation, to inform them thereof.
5. To receive the replies of the other signatory States as to whether or not they accept the reservations.
6. To inform all the States signatory to the treaty whether the reservations have or have not been accepted.

Article 9. The foregoing rules of procedure, those agreed upon in the future, and the practices followed among the American States with respect to the registration and notification of multilateral treaties, their ratification and reservations thereto, and the acceptance or rejection of the latter, may in no wise affect the validity and juridical effect that ensue under law from such instruments and acts among the parties, the task of deducing the juridical consequences from the respective notifications being left to each State.

Article 10. Since the making of reservations and their acceptance or rejection by the ratifying signatory States are integral parts of treaty making, the legal effect that these acts might have may in no wise differ from that resulting from the terms of what was agreed upon in accordance with the intent of the parties. If this intent is not explicitly recorded in the treaty itself, in the instruments of ratification, or in the documents stating whether or not a reservation is accepted, the juridical effect of the aforesaid reservation will depend on what can reasonably be presumed to have been the intent of the parties with respect to the matter, in view of the nature of the obligations stipulated in the treaty, the purpose of the treaty, and the way in which the parties have already conducted themselves with respect to the treaty in question.

Article 11. Should any difference of opinion arise in the future regarding the juridical effect referred to in the preceding article, the States between which it arises shall endeavour to come to an agreement through negotiations between themselves, and should this not be possible, they shall resort to the procedures prescribed for the solution of disputes.

Article 12. None of the provisions of this convention, nor the principles of international law applicable to the subject, shall be

interpreted or applied in such a way as to limit or restrict in any way, directly or indirectly, the freedom of the States to bind themselves in the manner that they deem desirable, so that the treaty, once it is completed, will represent their freely-expressed will.

B. DRAFT TEXT OF RULES APPROVED BY THE COUNCIL AT ITS THIRD MEETING AND DRAFT TEXT CONTAINED IN THE JURIDICAL COMMITTEE'S SECOND STUDY

34. Before turning to the examination of the Juridical Committee's second study made by the Fourth Meeting of the Inter-American Council of Jurists, it may be useful briefly to compare the contents of that study with those of the draft text of rules approved by the Council itself at its Third Meeting at Mexico City in 1956.

35. For these purposes of study and comparison only, we have rearranged the contents of the Council's draft text of rules and the draft text of the Committee's second study and will deal with them under the following headings:

- (1) General arrangement of the two draft texts.
- (2) Nature and grounds of reservations.
- (3) Time at which reservations are made.
 - (a) Admissibility of reservations made at the time of signing.
 - (b) Renewal of reservations made at the time of signing.
 - (c) Admissibility of reservations made at the time of ratification.
- (4) Juridical effects of reservations.
- (5) Functions of the Pan American Union as depository.

1. General arrangement of the two draft texts

36. The Council's draft text is divided into three chapters or sections entitled: A. Reservations made at the time of signing; B. Reservations made at the time of ratification or adherence; C. General rules.

37. The Committee's draft text is divided not into chapters or sections but into articles. The draft text is preceded by a report or study on the Council's draft text, in which the latter's contents and terminology are analysed and criticized.³⁸ On the basis of the contents of the rules in the Council's draft text, the Committee's report amends the chapter or section headings, to read as follows: A. Rules Applicable to Reservations Made by Delegates or Plenipotentiaries during Negotiation of a Treaty; B. Rules Applicable to Reservations Made by a State in the Instrument of Ratification; C. Juridical Effect of Reservations.³⁹

2. Nature and grounds of reservations

38. The Council's draft text contains no provisions concerning the grounds of reservations, but, in stating that any State may withdraw its reservations at any time, either before or after they have been accepted

by the other States,⁴⁰ it recognizes their character as unilateral declarations which may be made at the discretion of States.

39. The Committee's draft text views the making of reservations and their acceptance or rejection as an act inherent in national sovereignty, like the exercise of the power of concluding treaties.⁴¹ The freedom of the States to bind themselves in the manner that they deem desirable may not be restricted in any way, directly or indirectly.⁴² Thus, pushing this affirmation to its ultimate conclusions, the Committee's draft text provides that stipulations agreed upon by the plenipotentiaries with respect to the admissibility of reservations may in their turn be the subject of reservations.⁴³

3. Time at which reservations are made

40. The Council's draft text distinguishes between reservations made "at the time of signing" and those made "at the time of ratification or adherence".⁴⁴ The Committee's draft text speaks of reservations made "by the plenipotentiaries during the negotiation of a treaty" and "by a State in the instrument of ratification".⁴⁵

(a) Admissibility of reservations made at the time of signing

41. The Council's draft text seeks to limit the admissibility of reservations made at the time of signing. To that end, it establishes a series of rules and time-limits. The text of the reservations must be transmitted to all States that have taken part in the negotiations at least forty-eight hours in advance, unless some other period has been agreed upon in the course of the deliberations.⁴⁶ Each State must notify the other States and the State that is making the reservation, before the collective signing, as to whether it accepts the said reservation or not.⁴⁷ Reservations that have been expressly rejected, even though in part, by the majority of States present at the signing, are not to be admitted.⁴⁸

(b) Renewal of reservations made at the time of signing

42. In both draft texts the reservations made "at the time of signing" or "during the negotiation of a treaty" must be renewed in the act or instrument of ratification. However, while the Committee's draft text confines itself to stating that "reservations . . . shall always be inserted in the instrument subject to ratification",⁴⁹ the Council's draft text makes a categorical statement regarding the consequences of the non-repetition of the reservation in the act of ratification: it "shall be deemed to have been abandoned".⁵⁰

⁴⁰ Council's draft text: (C-3).

⁴¹ Committee's draft text: (articles 1 and 2).

⁴² *Ibid.*: (article 12).

⁴³ *Ibid.*: (article 5).

⁴⁴ Council's draft text: (A and B).

⁴⁵ Committee's draft text: (article 4 and article 3).

⁴⁶ Council's draft text: (A-1).

⁴⁷ *Ibid.*: (A-2).

⁴⁸ *Ibid.*: (A-3).

⁴⁹ Committee's draft text: (article 4).

⁵⁰ Council's draft text: (B-5).

³⁸ *Ibid.*, pp. 6-29.

³⁹ *Ibid.*, p. 8.

(c) *Admissibility of reservations made at the time of ratification*

43. The restrictive criterion adopted in the Council's draft text for the admissibility of reservations is even more clearly visible in the provisions concerning reservations made at the time of ratification. In this respect, it differs completely from the Committee's draft text. For the latter, the reservations made by a State in the instrument of ratification of a treaty are never held not to have been made, and if a State, without making any reservation to these stipulations of a treaty with respect to the admissibility of reservations, ratifies with reservations incompatible therewith, it is to be understood that the State does not accept them in so far as they are in opposition to the reservations it is making.⁵¹

44. The Council's draft text admits reservations made in the manner and under the conditions stipulated in the treaty itself or agreed to by the signatories.⁵² In the absence of any stipulation in the treaty itself or of agreement between the signatories, reservations may be made if within six months after the official notification thereof none of the signatory States objects to them as being "incompatible with the purpose or object of the treaty". The reservations are to be considered accepted by a signatory State that does not object to them on any other ground within the six-month period.⁵³ According to the Committee's draft text, the acceptance of a reservation should be express and may never be inferred merely from silence during a specific period.⁵⁴

45. In the Council's draft text, if there is an allegation of incompatibility, the General Secretariat of the Organization of American States must, on its own initiative, consult the signatory States, and the reservations may not be admitted if within six months they are deemed to be incompatible by at least one third of such States.⁵⁵ These provisions also apply in the case of treaties opened for signature.⁵⁶

4. *Juridical effects of reservations*

46. The Council's draft text states that it is advisable to include in multilateral treaties stipulations regarding the legal effects attributable to reservations, but at the same time enumerates the legal effects of reservations "in general".⁵⁷ These effects are the three rules approved by the Governing Board of the Pan American Union in 1932 and a fourth based on its provisions concerning the admissibility of reservations. Under the last rule, reservations accepted by the majority of the States shall in no case have any effect with respect to a State that has rejected them.

47. The Committee's draft text takes the position

that the legal effect of the making of reservations, and of their acceptance or rejection, may in no way differ from that sought in the intent of the parties, and that if this intent is not explicitly recorded the juridical effect will depend on "what can reasonably be presumed to have been the intent of the parties with respect to the matter, and the way in which the parties have already conducted themselves".⁵⁸ If differences of opinion arise, the States should endeavour to come to an agreement through negotiations, and, should this not be possible, should resort to the procedures prescribed for the peaceful solution of disputes.⁵⁹

5. *Functions of the Pan American Union as depositary*

48. Both draft texts incorporate the stipulations of resolution XXIX of the Eighth International Conference of American States, which are merely procedural in nature.⁶⁰

49. The Committee's draft text is careful to specify that these rules may in no way affect the validity and juridical effect of the instruments and acts in question, leaving to each State the task of deducing "the juridical consequences from the respective notifications".⁶¹

II. FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS

50. As we have said, the topic "Juridical effects of reservations to multilateral treaties" was placed on the agenda of the Fourth Meeting of the Inter-American Council of Jurists, to which the second study undertaken by the Juridical Committee was submitted for consideration. The topic was allocated to Committee II for consideration.

A. CONSIDERATION OF THE TOPIC IN COMMITTEE II ⁶²

51. Committee II examined the topic at its fourth and fifth sessions, on 31 August and 2 September respectively.

1. *Draft resolutions and amendments*

52. (i) Draft resolution presented by the delegation of Panama.⁶³ The text of the draft resolution was as follows:

Article 1

The making of reservations to a treaty at the time of signature, ratification or adherence by the plenipotentiaries, is an act inherent in national sovereignty and as such constitutes the exercise of rights that violate no international stipulation or good form.

Article 2

Express acceptance or rejection of reservations made by other States or abstaining from doing so is also an act inherent in national sovereignty.

⁵¹ Committee's draft text: (article 3 and article 6).

⁵² Council's draft text: (B-1).

⁵³ *Ibid.*: (B-2).

⁵⁴ Committee's draft text: (article 7).

⁵⁵ Council's draft text: (B-3).

⁵⁶ *Ibid.*: (B-4).

⁵⁷ *Ibid.*: (C-1 and C-2).

⁵⁸ Committee's draft text: (article 10).

⁵⁹ *Ibid.*: (article II).

⁶⁰ Council's draft text: (C-4); and Committee's draft text (article 8).

⁶¹ Committee's draft text: (article 9).

⁶² The numbers and pages of the documents quoted in this part of chapter II, section I, correspond to those of the official Spanish documents of the Fourth Meeting of the Inter-American Council of Jurists, held at Santiago, Chile, August-September 1959.

⁶³ Document 34, 26 August 1959.

Article 3

Reservations made by the plenipotentiaries during the negotiation of a treaty shall always be inserted in the instrument subject to ratification; and if not withdrawn or modified prior to the modification or at the time of ratification, it shall be understood that they persist.

Article 4

Express stipulations agreed upon by the plenipotentiaries with respect to the admissibility or inadmissibility of reservations, as well as to the juridical effects attributable thereto, have the same force as the other clauses and like them, may be the subject of reservations.

Article 5

In multilateral treaties and conventions that are concluded between American States, the Pan American Union shall have the following functions:

1. To assume the custody of the original document.
2. To furnish copies thereof to all the signatory Governments.
3. To receive the instruments of ratification or adhesion of the Parties, including the reservations.
4. To communicate the deposit of ratifications and adhesions to the other signatory States and, in the case of reservations, to inform them thereof.
5. To receive the replies of the other signatory States as to whether or not they accept the reservations.
6. To inform all the signatory States to the treaty as to whether the reservations have or have not been accepted, with the reasons that might be cited by the States for not accepting them.

Article 6

The following rules shall be applied with respect to the juridical effects of reservations:

1. As between States that have ratified without reservations the treaty shall be in force.
2. As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.
3. As between a State that has ratified with reservations and another State that has ratified and not accepted such reservations, the treaty shall not be in force. However, the State that rejects the reservations may agree with the State making the reservations that the treaty enter into force between both States with respect to all of its provisions not affected by the reservations.
4. In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

Article 7

In the event a State, that within a period of six months counting from the date it received the communication referred to in article 5 (4), does not expressly indicate its disagreement with the reservations made to the treaty, it shall be understood that it has no objection with respect to the reservations.

Article 8

Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States.

Article 9

Any State that may have rejected the reservations made by another may, at any time, change its position and agree to accept them.

In this case, as well as that referred to in article 8, the States that withdraw their reservations, and those that agree to accept reservations previously rejected, shall transmit their decision to the Pan American Union for communication to the other States."

53. (ii) Draft resolution presented by the delegation of Colombia.⁶⁴ The text of the draft resolution was as follows:

"RESOLVES:

"To recommend to the Eleventh Inter-American Conference the approval of the following rules governing the reservations to multilateral treaties:

"In the performance of its functions under article 83 (e) of the Charter of the Organization of American States, the Pan American Union shall be governed by the following rules, unless the respective treaty contains special provisions on the subject:

"1. It shall receive the instruments of ratification of the treaties, conventions and other diplomatic instruments of which the Pan American Union is made the depositary.

"2. It shall prepare a *procès-verbal* of deposit of the respective instrument of ratification, which shall be signed by the representative on the Council of the Organization of American States of the country making the deposit or such other representative as that country may designate, by the Secretary General of the Organization of American States, and by the Secretary of the Council of the Organization of American States.

"3. It shall notify the deposit to all signatory Governments, through their representatives on the Council of the Organization of American States.

"4. When a State ratifies a treaty with reservations not made at the time of signature at the conference at which it was negotiated, or subsequently adheres thereto with reservations, such State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the said reservations, so that the Pan American Union may send them to the other signatory States for the purpose of ascertaining whether they accept them or not. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States.

"5. When a State makes reservations at the time of signing a treaty that is open for signature, the Pan American Union, upon communicating the text of such reservations to the other States Members of the Organization of American States, shall inquire whether they consider them acceptable or not. The answers received shall be transmitted to the State that has made the reservations, so that, on the basis thereof, it may determine whether it is advisable or not to maintain such reservations at the time of ratifying the treaty.

"6. If notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

⁶⁴ Document 35, 26 August 1959.

"(a) The treaty shall be in force, as between the States that have ratified it without reservations, in the terms in which it was originally drafted and signed.

"(b) As between the States that have ratified it with reservations and the contracting States that have accepted them, the treaty shall be in force in the form in which it is modified by such reservations.

"(c) When a State ratifies with reservations and another State does not accept them, the latter, taking into account the character thereof, shall determine the effect of its non-acceptance, that is, whether the entire treaty shall be of no effect between the two parties or whether only the part affected by the reservations shall be of no effect. In the latter case the ratifying State shall indicate explicitly or implicitly whether such limitation is acceptable.

"7. When a State does not reply within a reasonable period, which in no case shall be more than one year, to the notes sent to it by the Pan American Union to ascertain its opinion with respect to reservations that are the subject of consultation, it shall be understood that that State has no objection to make thereto."

54. (iii) Oral amendment by the delegation of Uruguay⁶⁵ to the draft resolution submitted by the delegation of Panama (document 34), proposing the deletion of the last two lines of article 1 of that draft resolution.

55. (iv) Amendment by the delegation of Paraguay,⁶⁶ to the effect that the following recommendation should be incorporated into the Pan American rules on reservations to multilateral treaties:

"Reservations made to multilateral treaties, at the time of signing, ratification or adherence to them, shall be precise and shall indicate exactly the clause or rule to which the reservation is made."

56. (v) Draft resolution submitted by the Working Group (Argentina, Brazil, Chile, Colombia, Dominican Republic, Panama, United States and Uruguay).⁶⁷ The text of the draft was as follows:

"RESOLVES:

"To recommend to the Eleventh Inter-American Conference that it consider the following rules on reservations to multilateral treaties:

"In the performance of its functions under article 83 (e) of the Charter of the Organization of American States, the Pan American Union shall be governed by the following rules, subject to contrary stipulations, with respect to reservations on multilateral treaties, including those open for signature for a fixed or indefinite period of time.

"I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the said reservations, so that the Pan American Union may send them to the other signatory States

for the purpose of ascertaining whether they accept them or not.

"The Secretary General shall advise the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States.

"If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations.

"If notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"(a) As between States that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

"(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

"(c) As between a State that has ratified with reservations and another State that has ratified and not accepted such reservations, the treaty shall not be in force.

"(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not affirmed before depositing the ratification instrument.

"In the event the reservations are affirmed, consultations will be made in accordance with rule I.

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States.

"The making of reservations to a treaty at the time of signature, ratification or adherence by the plenipotentiaries, is an act inherent in national sovereignty.

"Acceptance or rejection of reservations made by other States or abstention from doing so is also an act inherent in national sovereignty. It is recommended that reservations made to multilateral treaties, at the time of signing, ratification or adherence to them, shall be precise and shall indicate exactly the clause or rule to which the reservation is made."

2. Discussion⁶⁸

57. There were two stages in the debate on the topic of reservations to multilateral treaties: before

⁶⁵ Document 71, 31 August 1959, p. 4, lines 1 and 2.

⁶⁶ Document 70, 31 August 1959.

⁶⁷ Document 84, 4 September 1959.

⁶⁸ Summary records of the fourth and fifth sessions of Committee II. Document 71, 31 August 1959, and document 94, 3 September 1959, respectively.

and after the establishment of the Working Group. Those stages correspond to the fourth and fifth sessions respectively.

58. The general debate began with a statement by the representative of Colombia in support of the draft resolution submitted by his delegation.⁶⁹ He pointed out that the Colombian draft resolution was based on the rules established by the Governing Board of the Pan American Union, on resolution XXIX of the Eighth International Conference of American States and on the regular practice of the Pan American Union in recent years. Its aim was to give breadth and flexibility to the formulae relating to reservations, in order to facilitate the ratification of conventions by as large a number of States as possible, and at the same time to indicate the juridical effect of reservations. While respecting the principle of national sovereignty and freedom to contract treaties, the draft resolution would eliminate where possible the adverse effects of reservations when they were not accepted by some signatory States and would establish the principle of tacit acquiescence as practised hitherto by the American States.

59. The representative of Uruguay said that he was in agreement with the views of the representative of Colombia and with many points of the draft resolution submitted by the delegation of Panama.⁷⁰ The important thing was to reaffirm the two fundamental principles which in his opinion constituted the basis of Pan American policy in the matter: namely, the recognition of the inherent right of reservation in all its aspects, and the principle that in no circumstances should solutions adopted by the majority of States compromise directly or indirectly the State formulating the reservation. He concluded by stating that article 1 and article 6, paragraph 4, of the draft resolution of Panama reflected the position of his own Government and he proposed the deletion of the last two lines of article 1 of that draft resolution.⁷¹

60. The representative of Chile said that he, on the other hand, saw no need for the inclusion of article 1 in the draft resolution, since it would only be a repetition of a basic principle already embodied in an Inter-American convention, in article 6 of the Convention on Treaties, signed at Havana in 1928.

61. The representative of Brazil directed the attention of the Committee to the study prepared by the Juridical Committee⁷² and the resolution on reservations which the Council itself had adopted at its Third Meeting⁷³ and expressed the view that the Committee should bear them in mind in considering the topic.

62. The representative of Paraguay said that the fundamental purpose of the codification of international law was to provide certainty regarding the rule to be

applied. The draft resolution submitted by his delegation⁷⁴ proposed the incorporation into the Pan American rules on reservations to multilateral treaties of the recommendation that all reservations should be precise and that the clause or rule in question should be specifically indicated.

63. The representative of Panama outlined the treatment the subject had been given in the Organization of American States and explained to the Committee the purpose and scope of the draft resolution submitted by his delegation.⁷⁵ The draft resolution was designed to solve the problem of reservations by reconciling the different points of view expressed in the report of the Juridical Committee and in the dissenting opinions, while at the same preserving the "Pan American rules". It was based on the assumption that the formulation of reserves and their acceptance or rejection was an act inherent in national sovereignty. It also defined the functions of the Pan American Union as a depositary and stated the principle, established also by the United Nations International Law Commission, that if, within a period of six months counting from the date it received from the Pan American Union information of a reservation formulated to a treaty, a State did not expressly indicate its disagreement it would be understood that it had no objection with respect to that reservation. He pointed out, in conclusion, that the draft resolution of his delegation stipulated that a State could withdraw reservations it had formulated or change its position with regard to reservations previously rejected.

64. Having heard these statements, the Committee agreed to set up a Working Group to examine the topic and submit its conclusions to the Committee. The Working Group consisted of the representatives of Argentina, Brazil, Chile, Colombia, the Dominican Republic, Panama, the United States of America and Uruguay.

65. In the second part of the debate the Committee examined the draft resolution submitted by the Working Group.⁷⁶

66. After a general statement on the question from the representative of Chile tracing the evolution of treaties from the multilateral contractual to the law-making or "normative" form, and expressing the hope that the American States would establish some sort of classification which would facilitate the regulation of the process of making reservations and of their juridical effects, the Rapporteur of the Working Group, the representative of Uruguay, read out the draft resolution of the Working Group part by part.

67. There followed an exchange of views on part I between the representatives of Brazil, Uruguay, Chile, the Dominican Republic, Panama, Mexico, Colombia, Guatemala and the Acting Executive Secretary of the Inter-American Council of Jurists, from which it be-

⁶⁹ Colombian draft resolution, document 35. See *supra*, para. 53.

⁷⁰ Draft resolution of Panama, document 34. See *supra*, para. 52.

⁷¹ Oral amendment by Uruguay, document 71, p. 4, lines 1 and 2. See *supra*, para. 54.

⁷² See *supra*, paras. 32 and 33.

⁷³ See *supra*, paras. 30 and 31.

⁷⁴ Paraguayan draft resolution, document 70. See *supra*, para. 55.

⁷⁵ Panamanian draft resolution, document 34. See *supra*, para. 52.

⁷⁶ Document 84. See *supra*, para. 56.

came clear that the draft resolution of the Working Group was based on resolution XXIX of the Eighth International Conference of American States.

3. Voting

68. The draft resolutions submitted by Panama⁷⁷ and Colombia⁷⁸ and the amendments submitted by the representatives of Uruguay⁷⁹ and Paraguay⁸⁰ were not put to the vote.

69. Committee II voted only on the draft resolution submitted by the Working Group,⁸¹ which was unanimously adopted with certain reservations. The Committee took separate votes on part I, part II and part III and finally on the draft resolution as a whole. The representative of Chile made his vote on part I of the draft resolution subject to a reservation with regard to the third paragraph, which might in certain cases conflict with tenets of Chilean constitutional law, but at the same time he recognized that the provision was warranted as part of the consultation machinery for reservations. The representative of the United States reserved his position for the time being with regard to part II of the draft resolution and the time limit imposed in the third paragraph of part I.

B. CONSIDERATION OF THE TOPIC IN PLENARY SESSION OF THE COUNCIL, AND ADOPTION OF THE DRAFT RESOLUTION SUBMITTED BY COMMITTEE II

70. The records of the Committee's debates on the legal effects of reservations to multilateral treaties and the draft resolution that the Committee had approved on that item of the agenda were submitted to the plenary session of the Council by Mr. Julio Escudero Guzmán (Chile), Rapporteur of Committee II, after revision by the Drafting Committee.⁸²

1. Draft resolutions and amendments

71. (i) Oral amendment by the representative of Cuba⁸³ proposing that the antepenultimate and penultimate paragraphs of the draft resolution approved by Committee II (document 84) should be deleted.

72. (ii) Oral proposal by the representative of Cuba⁸⁴ that the Council should consider whether there was any justification for including in the draft resolution approved by Committee II (document 84) the subject referred to in the antepenultimate and penultimate paragraphs of the resolution.

73. (iii) Oral amendments by the representative of Cuba to the antepenultimate paragraph of the draft

resolution approved by Committee II (document 84). As first amended the paragraph would have read as follows:⁸⁵

"The making of reservations to a treaty at the time of its signature by the plenipotentiaries, of its ratification or of adherence, is an act inherent in national sovereignty, *but reservations cannot be made to an instrument when this is expressly prohibited by the said instrument or when such reservations would be incompatible with the nature and purpose of the instrument in question.*"

74. In a revised version of the amendment⁸⁶ the representative of Cuba withdrew the last phrase: "or when such reservations would be incompatible with the nature and purpose of the instrument in question".

2. Discussion⁸⁷

75. The draft resolution adopted by Committee II on reservations to multilateral treaties gave rise to a new discussion at the third plenary session of the Council.

76. The representative of Peru said that he would not support Committee II's draft resolution,⁸⁸ on the grounds that in the absence of a prior definition of the term "reservation" it was not possible to discuss the legal consequences or effects of reservations. Furthermore, he added, the rules of procedure to be followed by the Secretary General of the Organization of American States in registering treaties had already been established and there was no difficulty in applying them.

77. With the exception of that view on Committee II's draft resolution as a whole, the discussion was concentrated on the questions raised by the representative of Cuba in relation to his proposals and amendments to the antepenultimate and penultimate paragraphs of the draft resolution.⁸⁹ The discussion on that point consisted, on the one hand, of a general debate on the legal principles on which the concept of reservations in international law was based and on the advisability of including one or more of those principles in the draft resolution under consideration, and, on the other hand, of a debate on the amendment to the antepenultimate paragraph of the draft resolution. The former debate concerned whether the whole of the text of Committee II's draft resolution should be maintained, or whether the antepenultimate and penultimate paragraphs should be deleted; the latter debate centred on the amendment of the antepenultimate paragraph of the draft resolution by the addition of a restrictive phrase at the end.

78. The representative of Cuba opened the general debate by criticizing the principle affirmed in Committee II's draft resolution⁹⁰ that the making, acceptance

⁷⁷ Document 34. See *supra*, para. 52.

⁷⁸ Document 35. See *supra*, para. 53.

⁷⁹ Document 71, p. 4, lines 1 and 2. See *supra*, para. 54.

⁸⁰ Document 70. See *supra*, para. 55.

⁸¹ Document 84. See *supra*, para. 56.

⁸² Document 117, 5 September 1959. Report by the Rapporteur of Committee II.

⁸³ Document 151, 9 September 1959, p. 5, para. 1.

⁸⁴ *Ibid.*, p. 14, para. 3.

⁸⁵ *Ibid.*, p. 14, last paragraph.

⁸⁶ *Ibid.*, p. 16, last paragraph.

⁸⁷ Record of the third plenary session, document 151, 9 September 1959, pp. 2-19.

⁸⁸ Document 84. See *supra*, paras. 56 and 69.

⁸⁹ Document 151, p. 5, first paragraph; p. 14, third and last paragraphs, and p. 16, last paragraph. See *supra*, paras. 71-74.

⁹⁰ Document 84. See *supra*, paras. 56 and 69.

or rejection of reservations was an act inherent in national sovereignty. The Cuban representative considered that that concept of reservations was incompatible with the present state of positive international law with respect to reservations, which was in turn the result of the increasing tendency for international agreements to give way to international legislation. Such a concept of reservations was also contrary to the progressive development of international law. There was no need for the Latin American countries, in order to defend their legitimate interests, to cling to a concept of national sovereignty that had already fulfilled its purpose and no longer had a useful function at the present stage of development of international relations. Nowadays, when the principle of national sovereignty could no longer constitute a real safeguard of national interests, it must be replaced by the new principle of international organization. The idea of national sovereignty was a two-edged sword which could often be turned against the small countries that defended it. Reservations must now be compatible with the purposes of the treaty.

79. In addition to those criticisms of substance, the Cuban representative opposed the inclusion of such principles in the draft resolution on the grounds that there was no justification for doing so. According to its own agenda the Council was concerned solely with regulating the effects of the acceptance or non-acceptance by one State of the reservations made by another. It was a mere matter of logic to delete the restatement of a principle from a text where it was out of place; to do so in no way implied a judgement regarding the substance of the said principle.

80. The representative of the United States endorsed the views expressed by the Cuban representative regarding the inappropriateness of the paragraphs concerned in the text of the resolution under discussion.

81. The representative of Chile also agreed that the matter was one of formulating a minor provision on reservations; he did not think that it would be appropriate at the present stage to include a restatement of general principles.

82. The majority of the representatives, however, opposed the views expressed by the representative of Cuba.

83. The representative of Colombia gave an account of the drafting of Committee II's draft resolution and expressed the view that for a State to legislate on international questions was an act of sovereignty at the international level. The doctrine of the incompatibility of reservations was gaining ground but it had not yet developed sufficiently to be regarded as an established rule of international law of general application.

84. The representative of Mexico expressed the same view on the doctrine of incompatibility; he considered that, quite apart from whether or not the making of reservations was a necessary attribute of sovereignty, it was an act inherent in sovereignty and as such was established in international law on the American Continent.

85. The representative of Venezuela agreed with those who supported the full text of the Committee's draft resolution, but said that he understood national sovereignty in the modern sense of that concept, namely as a principle that must be viewed not in isolation, but in relation to other principles of international law.

86. The representatives of Uruguay, Panama and the Dominican Republic also favoured the maintenance of the full text of Committee II's draft resolution.

87. In the subsequent debate on the amendment of the antepenultimate paragraph of Committee II's draft resolution,⁹¹ the views of the representative of Cuba received greater, though qualified, support.

88. None of the representatives supported the last part of the amendment, to the effect that reservations could not be made when they would be incompatible with the nature and purpose of the treaty. The representatives of Colombia, Mexico and Brazil, however, were favourably disposed to the first part of the amendment, which provided that reservations could not be made to a treaty when they were expressly prohibited by the treaty.

89. In view of the opinions that had been expressed, the representative of Cuba revised his amendment by deleting the reference to reservations incompatible with the nature and purpose of the treaty; as will be seen below, however, the Council rejected also the second version of the amendment.

3. Voting

90. At its third plenary session, on 8 September 1959, the Inter-American Council of Jurists approved the draft resolution submitted by Committee II, which became resolution X of the Fourth Meeting.

91. The Council voted first on the procedural proposal by the representative of Cuba, which was rejected by 11 votes to 3, with 6 abstentions.⁹²

92. The first version of the amendment by the representative of Cuba⁹³ to the antepenultimate paragraph of Committee II's draft resolution was not put to the vote. The Council voted on the second version of the Cuban amendment,⁹⁴ which was rejected, not having obtained the required majority of 11 votes. There were 10 votes in favour of the amendment, and 5 against it, with 5 abstentions.⁹⁵

93. The Council voted next on the draft resolution submitted by Committee II.⁹⁶ It voted first, by roll-call, on the antepenultimate and penultimate paragraphs, whose deletion had been requested by the representative of Cuba.⁹⁷ The two paragraphs were approved by 14 votes to 2, with 4 abstentions. Cuba and El Salvador voted

⁹¹ Document 151, p. 5, first paragraph; p. 14, third and last paragraphs, and p. 16, last paragraph. See *supra*, paras. 71, 73 and 74.

⁹² *Ibid.*, p. 14, third paragraph. See *supra*, para. 72.

⁹³ *Ibid.*, p. 14, last paragraph. See *supra*, para. 73.

⁹⁴ *Ibid.*, p. 16, last paragraph. See *supra*, para. 74.

⁹⁵ *Ibid.*, p. 17, first paragraph.

⁹⁶ Document 84. See above, paras. 56 and 69.

⁹⁷ Document 151, p. 5, first paragraph. See *supra*, para. 71.

against the two paragraphs, and Chile, Nicaragua, Peru and the United States abstained.⁹⁸ Lastly, the Council approved, by 15 votes to 1, with 3 abstentions,⁹⁹ Committee II's draft resolution as a whole, which became resolution X of the Fourth Meeting.

94. By virtue of that resolution:

"The Inter-American Council of Jurists

"RESOLVES:

"To recommend to the Eleventh Inter-American Conference the consideration of the following rules on reservations to multilateral treaties:

"In the performance of its functions under article 83 (e) of the Charter of the Organization of American States, the Pan American Union shall be governed by the following rules, subject to contrary stipulations, with respect to reservations to multilateral treaties, including those open for signature for a fixed or indefinite period.

"I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the reservations it proposes to make, so that the Pan American Union may transmit them to the other signatory States for the purpose of ascertaining whether they accept them or not.

"The Secretary General shall inform the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States.

"If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations.

"If, notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"(a) As between States that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

"(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

"(c) As between the States that have ratified with reservations and those that have ratified but have not accepted the reservations, the treaty shall not be in force. In any event the State that rejects the reservations and the one that has made them may expressly

agree that the treaty shall be in force between them with the exception of the provisions affected by the reservations.

"(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification.

"In the event the reservations are affirmed, consultations will be made in accordance with rule I.

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other states. A State that has rejected a reservation may later accept it.

"The making of reservations to a treaty at the time of signature by the plenipotentiaries, of ratification, or of adherence is an act inherent in national sovereignty.

"Acceptance or rejection of reservations made by other States or abstention from doing so is also an act inherent in national sovereignty. It is recommended that reservations made to multilateral treaties, at the time of signing, ratification, or adherence to them, shall be precise and shall indicate exactly the clause or rule to which the reservation is made."¹⁰⁰

95. When the vote on resolution X took place at the plenary session of the Council, the following reservations and statements¹⁰¹ were made by the delegations of Bolivia, Brazil, Chile and the United States:

"*Reservation of Brazil:*

"The Delegation of Brazil abstains from voting on rule I, paragraphs (b), (c), and (d), with respect to reservations to multilateral treaties, in view of the opinion maintained by the Government of Brazil regarding the principle of the compatibility of reservations with the objective or purpose of the treaties to which they refer.

"*Statement of the United States of America:*

"The United States Delegation makes the following Statement with respect to two of the provisions in the Draft Resolution on the Juridical Effects of Reservations to Multilateral Pacts:

"(a) The provision in Paragraph I of the Resolution that the failure of a party to the Convention to reply within a year to a notice of a reservation filed by a ratifying or adhering party shall be construed as acceptance of the reservation, is undesirable.

"(b) The requirement of Paragraph II of the Resolution under which reservations filed at the time of signature must also be reiterated prior to the deposit of the ratification, is unacceptable to the

⁹⁸ *Ibid.*, pp. 17 and 18.

⁹⁹ *Ibid.*, p. 18.

¹⁰⁰ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D.C., pp. 29 and 30.

¹⁰¹ *Ibid.*, p. 86.

United States Delegation in the form in which it has been drafted.

The United States Delegation therefore reserves its position on both these provisions.

"Reservation of Bolivia:

"The Delegation of Bolivia abstains from voting on the draft resolution dealing with Reservations on Multilateral Treaties, because it regards as inappropriate any statement "in the abstract" on the acceptance or rejection of reservations on multilateral treaties, without a prior definition of the subject matter of these reservations and the significance thereof.

"Statement of Chile:

The Delegation of Chile makes a reservation with respect to the third paragraph of rule I of the Draft Resolution on Reservations to Multilateral Treaties, the justification of which, within the machinery of consultation on reservations, it recognizes only to the extent that it could be in disagreement, in certain cases, with provisions of Chilean constitutional law."

96. Some representatives explained their votes. The representative of the Dominican Republic said that his country did not accept rule c of the draft resolution. The representative of Ecuador said that if there had been separate votes on the various parts of the draft resolution he would have abstained from voting on sub-paragraph c. The representative of Paraguay said that he had voted in favour of the draft resolution as a whole, but that he would have abstained on paragraph 3 of article I.¹⁰²

C. PROPOSAL TO ESTABLISH A NEW CLASS OF RESERVATIONS TO MULTILATERAL TREATIES, TO BE KNOWN AS "RESERVATIONS OF THEORETICAL OR MORAL ADHERENCE"

97. During Committee II's discussion of the item on reservations to multilateral treaties, the representative of Paraguay submitted a number of observations suggesting that there should be introduced into the practice of reservations to multilateral treaties a class of reservation that he referred to as "reservations of theoretical or moral adherence".¹⁰³

98. That type of reservation sought to overcome the difficulties caused by internal legislation when the latter was in conflict with a given rule of international treaty law that States found appropriate and acceptable. It was suggested that that problem could be solved by means of the reservation of theoretical or moral adherence, whereby a State could express its agreement with the international rule in question in exchange for an undertaking to promote the amendment of whatever provision or provisions of its internal legislation might be in conflict with the said international rule and thus

make possible the ratification and operation of that rule. Thus the purpose of the "reservation of theoretical adherence" was the abolition of reservations based on the provisions of the internal legislation of States.

99. As the representative of Paraguay pointed out, the "reservation of theoretical adherence" would have the advantage of making it clear whether a clause opposed by a number of States had been rejected because it was unsatisfactory or whether, on the other hand, it had won general approval and consent, of enabling the Organization of American States to promote and encourage in the various States the changes necessary for the smooth and unopposed ratification of clauses to which the reservation of theoretical adherence had been made, and of encouraging every State to work towards bringing its legislation into line with that of the other States.

100. Committee II took up this question at its fifth and seventh sessions, on 2 and 4 September respectively.¹⁰⁴ During the discussion the view was expressed that the observations of the Paraguayan representative should be forwarded to Committee III, which was considering questions for reference to the Juridical Committee at its next session. Committee II concluded by unanimously approving a draft resolution submitted by Uruguay,¹⁰⁵ which was adopted at a plenary session of the Council¹⁰⁶ by 17 votes to none, with no abstentions. Three delegations were absent. That resolution, which was resolution XI of its Fourth Meeting, read as follows:

"The Inter-American Council of Jurists

"RESOLVES:

To transmit the proposal of the Delegation of Paraguay on Reservation of Theoretical Adherence, to the Inter-American Juridical Committee so that it may study the possibilities of its application."¹⁰⁷

SECTION TWO. THE PRINCIPLES OF INTERNATIONAL LAW THAT GOVERN THE RESPONSIBILITY OF THE STATE

I. PAST TREATMENT OF THE TOPIC IN THE ORGANIZATION OF AMERICAN STATES (OAS)¹⁰⁸

A. PROPOSAL OF THE TOPIC (1954)

101. The Organization of American States first

¹⁰⁴ Summary records of the fifth and seventh sessions of Committee II, document 94, 3 September 1959, and document 109, 4 September 1959, respectively.

¹⁰⁵ Document 108, 4 September 1959.

¹⁰⁶ Record of the third plenary session, document 151, pp. 18 and 19.

¹⁰⁷ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D. C. p. 31.

¹⁰⁸ For precedents prior to the establishment of the Organization of American States, see *Yearbook of the International Law Commission*, 1956, vol. II (United Nations publication, Sales No.: 56.V.3, Vol. II), document A/CN.4/96, "State Responsibility", report prepared by F. V. García Amador, paras. 24-29 and annexes 4, 5 and 6.

¹⁰² Record of the third plenary session, document 151, pp. 18 and 19.

¹⁰³ Document 69, 31 August 1959.

discussed the "principles of international law governing State responsibility" at the Tenth Inter-American Conference held at Caracas in 1954. Resolution CIV of that conference, after mentioning (a) resolution 799 (VIII) of the United Nations General Assembly, which requested the International Law Commission to undertake the codification of the principles of international law governing State responsibility, (b) the need for encouraging closer co-operation between the International Law Commission and the inter-American organs responsible for the development and codification of international law and (c) the fact that the American Continent had made a notable contribution to the development and codification of the principles of international law that govern the responsibility of the State, recommended to the Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, "the preparation of a study or report on the contribution the American Continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State".¹⁰⁹

102. While introducing for the first time the question of "the principles of international law governing State responsibility" for study by the organs of the Organization of American States, resolution CIV of the Tenth Inter-American Conference at the same time specified the form, content and purpose of that study. As regards the form, the Inter-American Council of Jurists and the Inter-American Juridical Committee were recommended to prepare a study or report. As regards the content, the study or report was to deal with "the contribution the American Continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State". As the resolution's preamble infers, the purpose was to transmit to the International Law Commission, for its use, material describing the contribution made by the American Continent to that field of international law.

103. At the request of the Government of Cuba, the Council of the Organization of American States included the item concerning the "principles of international law governing the responsibility of the State" in the agenda of the Third Meeting of the Inter-American Council of Jurists, even though the Juridical Committee had not yet prepared the study or report envisaged in the Caracas resolution. It was felt that the Council might usefully discuss the item in order to decide the best procedure for securing the aims of the resolution.¹¹⁰

104. At the Third Meeting of the Inter-American Council of Jurists, held at Mexico City in 1956, the item "Principles of international law governing the responsibility of the State" was dealt with by Committee III.

In its resolution VI, which was purely procedural, the Council requested its permanent committee, the Inter-American Juridical Committee, to complete as soon as possible the study or report recommended by the Caracas Conference so that it might be considered by the Inter-American Council of Jurists at its Fourth Meeting. It also asked the Department of International Law of the Pan American Union to make a preliminary study of the subject for the purpose of facilitating the Committee's work.¹¹¹

B. REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE

105. In 1958, the Inter-American Juridical Committee adopted a report entitled *Contribution of the American Continent to the Principles of International Law that govern the Responsibility of the State*.¹¹² The report began by analysing the terms of reference laid down for the Juridical Committee by the Inter-American Conference and the Inter-American Council of Jurists. After taking the view that the study was to be limited strictly to the past and to the most faithful interpretation of that past, i.e. to the contribution which the American Continent "has made" to the development and codification of the legal principles governing State responsibility, the Committee reviewed the subject-matter involved. Bearing in mind the terms of the resolutions and the fact that the report on the contribution of the American Continent was to be transmitted to the International Law Commission, the Committee felt it necessary to take into account "all" that had been decided or proposed, thought or written, throughout the vast American Continent, on the problems of every kind grouped under the general classification of the international responsibility of the State. The study would include "current law and expired law, the jurisprudence of international and also of national courts, other court records furnished by the parties that are frequently of unusual interest, foreign-office documents and statements by legislatures, and doctrine of writers on the subjects".¹¹³

106. Of course, the task was so gigantic that the Committee could not possibly tackle it all at once. Turning from the statement of the problem to the matter of finding practical solutions, it therefore confined itself to: (1) pointing out some of the measures which the Inter-American Conference and the Inter-American Council of Jurists might take to meet the situation; and (2) enunciating a series of principles which were accepted by the majority of American countries and which, in the Committee's opinion, formed part of Latin American international law as well as, in some aspects, of American international law.

107. With regard to point (1), the Committee felt that, if the Inter-American Conference or the Inter-American Council of Jurists approved in all its scope the task entrusted to the Committee, they should con-

¹⁰⁹ *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C., pp. 35 and 36.

¹¹⁰ *Handbook, Third Meeting of the Inter-American Council of Jurists*, Mexico City, 17 January 1956 (CIJ-24), Pan American Union, Washington, D. C., pp. 84 and 85.

¹¹¹ *Handbook, Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August 1959 (CIJ-41), Pan American Union, Washington, D. C., p. 37.

¹¹² Inter-American Juridical Committee, document CIJ-39, Pan American Union, Washington, D. C.

¹¹³ *Ibid.*, p. 3.

sider the time factor. The selection of a certain number of important subjects in the field of State responsibility would obviously expedite matters. The Committee listed certain of those subjects, most of which related to the Law of Claims, because it felt that it was in that very specialized field that the contribution of the American Continent could best be evaluated and its principles best incorporated in a codification instrument. Finally, the Committee considered that the American Governments might wish to give a new impetus to the present system by embodying in a convention or declaration the principles which *should govern* international State responsibility.¹¹⁴

108. With regard to point (2), the Committee enumerated a number of principles which, in its view, as already pointed out, formed part of Latin American international law as well as, in certain aspects, of American international law.¹¹⁵ Those principles were as follows:

"I. Intervention in the internal or external affairs of a state as a sanction of the responsibility of this state is not admissible.

"II. The responsibility of a state for contractual debts claimed by the government of another state as owing to it or to its nationals cannot be enforced through recourse to armed force. This principle is applicable even where the debtor state fails to reply to a proposal of arbitration or to comply with an arbitral award.

"III. The state is not responsible for acts or omissions with respect to aliens except in those cases where it has, under its own laws, the same responsibility toward its nationals.

"IV. The responsibility of the state for a crime committed within its territory is not derived from the deed itself or from the injury resulting from it but from the inexcusable negligence or unwillingness of this state to prevent, prosecute, or punish such crime under its laws and within the jurisdiction of its courts.

"V. The state is not responsible for damages suffered by aliens through acts of God, among which are included acts of insurrection and civil war.

"VI. The responsibility of the state, insofar as judicial protection is concerned, should be considered fulfilled when it places the necessary national courts and resources at the disposal of aliens every time they exercise their rights. A state cannot make diplomatic representations in order to protect its nationals or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before the competent courts of the respective state.

"Therefore:

"(a) There is no denial of justice when aliens have had available the means to place their cases

before the competent domestic courts of the respective state.

"(b) The state has fulfilled its international responsibility when the judicial authority passes down its decision, even though it declares the claim, action, or recourse brought by the alien to be inadmissible.

"(c) The state has no international responsibility with regard to the judicial decision, whatever it may be, even if it is not satisfactory to the claimant.

"(d) The state is responsible for damages suffered by aliens when it is guilty of a denial of justice."

109. The Committee's report also included the following conclusions illustrative of the various measures that could be taken:¹¹⁶

"1. Under the resolutions that have been in effect up to now, the study on the contribution that the American Continent has made to the principles of international law that govern the responsibility of the state is to be regarded as a full and objective report of everything that can be found on this subject in the work of the governments, jurists, and thinking men, that is, in present or historical law, in national or international jurisprudence, in foreign-office policy, and in the doctrine of writers on the subject.

"2. Through a new decision of the American governments that report could, although preserving the same qualities of impartiality and objectivity, be reduced to those topics that are considered, under such conditions, to be of the greatest interest.

"3. With the same prior requisite, that is, a decision of the governments, preparatory studies leading to the codification in an appropriate instrument of the principles whose general approval is considered most necessary in this Hemisphere may be undertaken, with a view to finding the best solution to any problems that may arise with regard to the international responsibility of the state."

110. The Committee therefore pronounced itself, subject to a decision by Governments, in favour of "the codification in an appropriate instrument" of the principles, governing the international responsibility of the State, whose general approval was considered most necessary in the American Continent.

111. The report of the Inter-American Juridical Committee was accompanied by an annex containing the separate opinion of the United States representative¹¹⁷ on the "principles" which the report considered to have been accepted by a majority of the American States as forming part of Latin American international law and, in certain aspects, of American international law.

112. The United States representative expressed his agreement with the principles incorporated in paragraph I regarding intervention and in paragraph II regarding the use of armed force. Paragraph III would be acceptable with the addition of some such words as:

¹¹⁴ *Ibid.*, pp. 6 and 7.

¹¹⁵ *Ibid.*, p. 8.

¹¹⁶ *Ibid.*, p. 9.

¹¹⁷ *Ibid.*, pp. 11-15.

"... except where the treatment of the alien is in contravention of generally accepted principles of international law". He rejected paragraph V because it seemed to exclude losses which resulted from the requisitioning of property by the constituted authorities or by successful revolutionary forces and for which the State was regarded as responsible under generally accepted principles of international law. However, the United States representative was mainly opposed to paragraph VI. After recalling the reservation made by the United States to article VII of the Bogotá Pact, he quoted in support of his objection articles 5 and 7 of the Charter of the Organization of American States and article third of the Convention Relative to the Rights of Aliens signed at Mexico City in 1902, and concluded as follows: "While it is stated in sub-paragraph (d) that the State is responsible for damages suffered by aliens when it is guilty of a denial of justice, that statement is, for practical purposes, nullified by the three sub-paragraphs (a), (b) and (c) in so far as they relate to judicial proceedings in which an alien may be a plaintiff or a defendant".¹¹⁸

II. FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS

113. The topic "Contribution of the American Continent to the development and codification of the principles of international law that govern the responsibility of the State" was included, as already pointed out, in section I of the agenda of the Fourth Meeting of the Inter-American Council of Jurists for whose consideration the report prepared by the Juridical Committee was submitted. The topic was referred to Committee II.

A. CONSIDERATION OF THE TOPIC IN COMMITTEE II¹¹⁹

114. Committee II considered the topic at its sixth and seventh sessions held on 3 and 4 September 1959, respectively.

1. Draft resolutions and amendments

115. (i) Draft resolution submitted by the United States delegation.¹²⁰ The operative part of the draft resolution read as follows:

"RESOLVES:

"To request the Department of Legal Affairs of the Pan American Union to prepare a compilation of the formal texts as gleaned from official records, of the contribution of the Americas to the development and codification of international law on the subject of State Responsibility; and to transmit such compilation to the International Law Commission through the United Nations Secretariat."

116. (ii) Draft resolution submitted by the dele-

gation of Panama.¹²¹ The operative part read as follows:

"RESOLVES:

"To request that the Inter-American Juridical Committee prepare a draft treaty in which, duly outlined article by article, the principles whose common acceptance is regarded as most needed in the American Continent may be compiled, for a proper solution to the questions that may arise with regard to the international responsibility of the State."

117. (iii) Draft resolution submitted by the Working Group (United States, Mexico, Panama, Cuba and Chile)¹²² to Committee II. The operative part read as follows:

"RESOLVES:

"1. To request the Inter-American Juridical Committee to proceed with the study or report entrusted to it by Resolution CIV of the Tenth Inter-American Conference, and later by Resolution VI of the Third Meeting of the Inter-American Council of Jurists.

"2. To instruct the Juridical Committee that, in pursuance to the request contained in the preceding paragraph, it continue its tasks on the following basis:

"(a) The Department of Legal Affairs of the Pan American Union shall send additional background material on this topic to the Inter-American Juridical Committee.

"(b) The Juridical Committee shall prepare an objective and documented presentation of all that which may demonstrate the contribution of the American Continent. To this end it will utilize all the appropriate sources.

"(c) The Juridical Committee shall indicate at the same time the differences that may exist between the several American republics on the principles referred to in the present resolution.

"3. To recommend earnestly to the Committee that during its regular period of meetings in 1960, it complete the study or report and submit it for the consideration of the Fifth Meeting of the Inter-American Council of Jurists."

118. (iv) Oral amendment submitted by the representative of the Dominican Republic¹²³ to replace the words "the contribution of the American Continent" by the words "the contribution of the American countries", in paragraph 2 (b) of the draft resolution submitted by the Working Group (document 102).

119. (v) Oral amendment submitted by the representative of Mexico¹²⁴ to replace the words "a report" by the words "a document entitled", in the last preambular paragraph of the draft resolution submitted by the Working Group (document 102).

120. (vi) Oral amendment submitted by the re-

¹¹⁸ *Ibid.*, p. 14

¹¹⁹ The numbers and pages of the documents quoted in this part of chapter II, section II, correspond to those of the official Spanish documents of the Fourth Meeting of the Inter-American Council of Jurists, held at Santiago, Chile, August-September 1959.

¹²⁰ Document 50, 28 August 1959.

¹²¹ Document 79, 1 September 1959.

¹²² Document 102, 3 September 1959.

¹²³ Document 109, 4 September 1959, p. 2, paras. 3 and 4.

¹²⁴ *Ibid.*, p. 2, para. 5.

presentative of Uruguay¹²⁵ to replace the words "on the principles" by the words "on the subject" in paragraph 2 (c) of the draft resolution submitted by the Working Group (document 102).

2. Discussion¹²⁶

121. In its report, the Inter-American Juridical Committee had requested the Inter-American Council of Jurists to outline the procedure to be followed in the task of assessing the contribution of the American Continent to the principles of international law governing State responsibility, and at the same time had drawn up a series of principles which, in its opinion, were commonly accepted by the majority of American States and formed part of Latin American international law and, in certain aspects, of American international law.

122. The discussion fell into two well-defined stages, the first preceding and the second following the establishment of the Working Group which drew up the draft resolution finally adopted.

123. During the first stage of the discussion, many differences of opinion emerged regarding the usefulness of the Juridical Committee's report as well as the best procedure to be followed in the future.

124. The United States representative said there was an obvious contradiction between the first and second parts of the Committee's report: after defining the basic concept of its terms of reference, the Committee proceeded to destroy that concept in the remainder of the document. The Committee's report did not constitute a suitably objective basis for constructive action by the Council. The general observations made by the Committee without the support of official documentation could not be transmitted to the International Law Commission of the United Nations. The purpose of the Committee's task was to assemble material on the contribution made by the American Continent to the development and codification of the principles governing State responsibility. Consequently, the Council's best plan, in the United States delegation's opinion,¹²⁷ was to request the Department of Legal Affairs of the Pan American Union to prepare a compilation of official texts approved at inter-American meetings, and to transmit that compilation to the International Law Commission of the United Nations.

125. The representative of Mexico, after stating that, in his delegation's opinion, the six principles listed in the Committee's report and its conclusions did indeed form part of Latin American international law and, in some aspects, of American international law, pointed out that the Committee did not intend that its report, in its present form, should be transmitted to the International Law Commission, but was merely asking the Council for further instructions in order to pursue its task. He opposed the draft submitted by the United

States, for three main reasons: firstly, because he did not agree that the Committee had failed to comply with the terms of the Caracas resolution; secondly, because the United States draft mentioned only "a compilation of the formal texts as gleaned from official records"; and, thirdly, because it was the responsibility of the Juridical Committee, and not of the Department of Legal Affairs of the Pan American Union, to carry out the necessary studies for the purpose of defining the principles which governed State responsibility within the American Continent. Accordingly, the Mexican delegation would support any draft resolution on the lines of that submitted by Panama.¹²⁸

126. The representative of Uruguay agreed with the United States representative that the Juridical Committee had been requested merely to collate material, and was also unable to accept the series of principles enumerated. However, the development of law was not limited to its codification and, for that reason, he intended to submit a proposal seeking to determine the scope of the task entrusted to the Juridical Committee.

127. The representative of Cuba said that the Committee had merely been asked for a study or report, not for a codification or a formulation of principles. The Committee had not yet complied with that request and in its present report had omitted some of the most important of the relevant American principles. He also stressed the need for completing the task within one year.

128. Other representatives also expressed their views on the terms of the Caracas resolution and on the instructions which should be given to the Committee for continuing its study on the international responsibility of the State.

129. On the suggestion of the representative of Colombia, the Chairman of the Committee, and notwithstanding some objections, a Working Group was set up, composed of the United States, Mexico, Panama, Cuba and Chile, to study the question and attempt to reconcile the different views expressed.

130. The Working Group submitted to the Committee a draft resolution which served as a basis for the second part of the debate.¹²⁹ Slight oral amendments to it were introduced, some of which were approved by the Committee. The text drafted by the Working Group, with the amendments approved by the Committee, was acceptable to all representatives.

3. Voting

131. The draft resolutions submitted by the United States and Panama¹³⁰ were not put to the vote.

132. The oral amendment to the Working Group's draft resolution proposed by the Dominican Republic¹³¹ was rejected by the Committee.

133. Committee II unanimously approved the draft

¹²⁵ *Ibid.*, p. 3, paras. 2-5.

¹²⁶ Summary records of the sixth and seventh sessions of Committee II, documents 106 and 109 respectively, both dated 4 September 1959.

¹²⁷ United States draft resolution. See *supra*, para. 115.

¹²⁸ Panamanian draft resolution. See *supra*, para. 116.

¹²⁹ Draft resolution submitted by the Working Group. See *supra*, para. 117.

¹³⁰ Document 50 and document 79. See *supra*, paras. 115 and 116.

¹³¹ Document 109, p. 2, paras. 3 and 4. See *supra*, para. 118.

resolution submitted by the Working Group¹³² as orally amended by Mexico¹³³ and Uruguay.¹³⁴

B. DISCUSSION OF THE TOPIC IN PLENARY SESSION OF THE COUNCIL, AND ADOPTION OF THE DRAFT RESOLUTION SUBMITTED BY COMMITTEE II¹³⁵

134. An account of the Committee's deliberations on the responsibility of the State and its draft resolution on the subject were placed before the Council in plenary session by Mr. Julio Escudero Guzmán (Chile), the Rapporteur of Committee II, after revision by the Drafting Committee.¹³⁶

1. *Draft resolutions and amendments*

135. No new proposals or substantive amendments to the draft resolution approved by Committee II were put before the Council in plenary session. There was only an oral amendment by the representative of the United States to improve the wording of sub-paragraph (b) of operative paragraph 2 of the Committee's draft resolution by replacing the words "... of all that which may demonstrate ..." by the word "... demonstrating ...".¹³⁷

2. *Discussion*

136. There was no further debate in plenary session on the draft resolution submitted by Committee II.¹³⁸ The only speakers were the representatives of the United States and Mexico, each of whom made an explanatory statement which did not lead to any discussion.

137. The United States representative said that the Juridical Committee should consider sub-paragraphs (b) and (c) of operative paragraph 2 of the draft resolution approved by Committee II as a single unit. The Committee must make an objective study based on authoritative sources, which should not pass over the contribution of any country of the American Continent. The Committee should not disregard the contribution made by the United States to the development and codification of the principles of international law that govern the responsibility of the State.

138. The representative of Mexico said that he would have no objection to the amalgamation of sub-paragraphs (b) and (c) of operative paragraph 2 of the draft resolution approved by Committee II, as proposed by the United States representative. In its report, the Juridical Committee had not intended to disregard the United States contribution; it had merely enumerated the principles relating to State responsibility which appeared to be accepted by the majority of the American countries, and the adjective "Latin American" had

been added in order to make it clear that the United States had not accepted all the principles enunciated. In conclusion, the Mexican representative supported Committee II's draft resolution because it clarified the task entrusted to the Juridical Committee, which was exactly what the latter wished.

3. *Voting*

139. At its third plenary session on 8 September 1959, the Inter-American Council of Jurists adopted the draft resolution submitted by Committee II¹³⁹ — which became resolution XII of the Fourth Meeting¹⁴⁰ — after approving, with no objections, the change of wording in operative paragraph 2 (b) proposed by the United States representative.¹⁴¹ The draft resolution submitted by Committee II (document 102) was adopted by 18 votes to none, with no abstentions. Two delegations were absent when the vote was taken.¹⁴²

140. The resolution approved by the Inter-American Council of Jurists reads as follows:

"WHEREAS:

"The Tenth Inter-American Conference, held at Caracas in 1954, in Resolution CIV entrusted to the Inter-American Council of Jurists and to the Inter-American Juridical Committee, the preparation of a study or report on the contribution the American Continent has made to the development and to the codification of the principles of international law that govern the responsibility of the State;

"The aforementioned resolution was adopted in view of the request made by the General Assembly of the United Nations to its International Law Commission to proceed to the codification of the principles of international law that govern the responsibility of the State;

"In accordance with the aforementioned resolution, the Third Meeting of the Inter-American Council of Jurists, held in Mexico City in 1956, requested the Inter-American Juridical Committee (Resolution VI) to complete as soon as possible this study or report, declaring that it was advisable to gather the necessary background material for this purpose;

"The Inter-American Council of Jurists has received from the Inter-American Juridical Committee a document entitled "Contribution of the American Continent to the Principles of International Law that Govern the Responsibility of the State" (CIJ-39), in which additional instructions are requested for the purpose of continuing the study or report referred to in this resolution;

"The Inter-American Council of Jurists

"RESOLVES:

"1. To request the Inter-American Juridical Com-

¹³² Document 102. See *supra*, para. 117.

¹³³ Document 109, p. 2, para. 5. See *supra*, para. 119.

¹³⁴ *Ibid.*, p. 3, paras. 2 to 5. See *supra*, para. 120.

¹³⁵ Document 102. See *supra*, paras. 117 and 133.

¹³⁶ Document 117, 5 September 1959. Report by the Rapporteur of Committee II.

¹³⁷ Document 151, 9 September 1959, p. 19, para. 4.

¹³⁸ Record of the third plenary session, document 151, 9 September 1959, pp. 19-21.

¹³⁹ Draft resolution of Committee II. See *supra*, paras. 117 and 133.

¹⁴⁰ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D. C., pp. 32 and 33.

¹⁴¹ Document 151, p. 19, para. 5. See *supra*, para. 135.

¹⁴² Document 151, p. 21, para. 4.

mittee to proceed with the study or report entrusted to it by Resolution CIV of the Tenth Inter-American Conference, and later by Resolution VI of the Third Meeting of the Inter-American Council of Jurists.

"2. To instruct the Juridical Committee that, in pursuance to the request contained in the preceding paragraph, it continue its tasks on the following basis:

"(a) The Department of Legal Affairs of the Pan American Union shall send additional background material on this topic to the Inter-American Juridical Committee.

"(b) The Juridical Committee shall prepare an objective and documented presentation demonstrating the contribution of the American Continent. To this end it will utilize all the appropriate sources.

"(c) The Juridical Committee shall indicate at the same time the differences that may exist between the several American republics on the subject referred to in the present resolution.

"3. To recommend earnestly to the Committee that during its regular period of meetings in 1960, it complete the study or report and submit it for the consideration of the Fifth Meeting of the Inter-American Council of Jurists."

Chapter III. Relations between the Inter-American Council of Jurists and the International Law Commission at the Fourth Meeting of the Inter-American Council of Jurists

141. This chapter will begin with the statement made by the Secretary of the International Law Commission and will then give an account of the debate at the Fourth Meeting of the Inter-American Council of Jurists on the question of collaboration with the International Law Commission of the United Nations.¹⁴³

I. STATEMENT BY THE SECRETARY OF THE INTERNATIONAL LAW COMMISSION AT THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS¹⁴⁴

142. As indicated in the Introduction, the Secretary of the International Law Commission attended the Fourth Meeting of the Inter-American Council of Jurists as an observer and made a statement at the first plenary session, held on 25 August 1959.¹⁴⁵

143. The Secretary of the International Law Commission, after noting that his attendance at the Fourth Meeting of the Inter-American Council of Jurists was in accordance with what, over the past few years, had become the practice of both organizations, outlined to the Council the principal developments with regard

¹⁴³ The numbers and pages of the documents quoted in this chapter correspond to those of the official Spanish documents of the Fourth Meeting of the Inter-American Council of Jurists, held at Santiago, Chile, August-September 1959.

¹⁴⁴ Document 22, 25 August 1959.

¹⁴⁵ Record of the first plenary session, document 31, 26 August 1959, p. 9.

to the International Law Commission and its work since 1956.

144. He noted the long history of codification efforts in America, which had achieved their ultimate expression in the Bogotá Charter and the Statute of the Organization of American States with the establishment of bodies having special responsibility for the task of codification. The value and importance of the work done by those bodies had been recognized by the United Nations General Assembly itself when it had adopted the Statute of the International Law Commission (General Assembly resolution 174 (II)).

145. Speaking of the similarities and dissimilarities between the Inter-American Council of Jurists and the International Law Commission, he pointed out that the difference in the scope of their work, due to the fact that one body was regional and the other world-wide, must not obscure the fact that their objectives were fundamentally the same because they proposed to develop and codify the same branch of law.

146. He then outlined the International Law Commission's debate on reservations and the international responsibility of the State. In conclusion, he said that the collaboration already initiated between the Inter-American Council of Jurists and the International Law Commission must be developed and strengthened so as to achieve the common objective, which was to promote and contribute to the development and codification of international law.

II. THE TOPIC OF COLLABORATION WITH THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS AT THE FOURTH MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS

147. The topic of "Collaboration with the International Law Commission of the United Nations" was placed on the agenda of the Fourth Meeting of the Inter-American Council of Jurists and was referred to Committee III, as indicated in chapter I.¹⁴⁶

A. CONSIDERATION OF THE TOPIC IN COMMITTEE III

148. Committee III considered this topic at its second, third and fourth sessions, on 31 August and 2 and 4 September respectively.

1. Draft resolutions and amendments

149. (i) Draft resolution submitted to Committee III by the delegations of Argentina and Colombia.¹⁴⁷ The operative part of this draft resolution read as follows:

"RESOLVES:

"To state that, in addition to continuing the existing relations, established through the Department of Legal Affairs of the Organization of American States, it is desirable that the Inter-American Juridical Committee, the permanent committee of the Council,

¹⁴⁶ See para. 22.

¹⁴⁷ Document 42, 27 August 1959.

should designate an observer to attend the sessions of the International Law Commission."

150. (ii) Draft resolution submitted to Committee III by the Working Group (Argentina, Colombia and the United States).¹⁴⁸ The operative part of the draft resolution read as follows :

"RESOLVES :

"To request the Council of the Organization of American States to study the means by which the juridical agencies of the Organization may be represented through an observer, at the sessions of the International Law Commission where matters of common interest are discussed, and to study the possibility of having the Inter-American Juridical Committee designate an observer from among its members, to attend the sessions, in order to report thereon and in this way facilitate the work of the Committee."

2. Discussion¹⁴⁹

151. The Committee began by considering the draft resolution submitted by Argentina and Colombia, which stated that, in addition to continuing the existing relations established by the Department of Legal Affairs of the Pan American Union, the Juridical Committee should designate an observer to attend the sessions of the International Law Commission.

152. The representative of the United States said that he was in favour of designating observers only for those meetings which were of common interest to the parties, and that the observer should be an official of the Department of Legal Affairs of the Secretariat of the Organization of American States, who could also represent the Inter-American Juridical Committee.

153. Supporting the draft resolution,¹⁵⁰ the representative of Colombia said that it would be better to send a member of the Juridical Committee to attend the sessions of the International Law Commission as an observer than to follow the present practice, whereby an official of the Department of Legal Affairs of the Pan American Union acted in that capacity. That would make it easier for the Committee to become acquainted with the documents and reports of the International Law Commission in time for them to be really useful. Furthermore, the Committee itself would bear the costs involved. Although direct contact between the Department of Legal Affairs of the Pan American Union and the International Law Commission was certainly useful, direct contact between the Committee and the Commission also had its advantages.

154. On the proposal of the United States representative, the Chairman appointed a Working Group, composed of the representatives of Argentina, Colombia and the United States, which drew up a new draft resolution on which the Committee ultimately voted.

3. Voting

155. The draft resolution submitted by Argentina and Colombia¹⁵¹ was not put to the vote.

156. The Committee approved the Working Group's draft resolution unanimously at its fourth session.¹⁵²

B. CONSIDERATION OF THE DRAFT RESOLUTION SUBMITTED BY COMMITTEE III IN PLENARY SESSION OF THE COUNCIL, AND RESOLUTION ADOPTED¹⁵³

157. The discussion in Committee III on the topic of collaboration with the International Law Commission of the United Nations and the draft resolution approved by the Committee and revised by the Drafting Committee were introduced in the Council in plenary session by Mr. Robert J. Redington (United States), Rapporteur of Committee III.¹⁵⁴

158. At its third plenary session, on 8 September 1959,¹⁵⁵ the Council adopted, without discussion, the draft resolution submitted by Committee III, which became resolution XVI¹⁵⁶ of its Fourth Meeting.

159. The text of the resolution adopted by the Inter-American Council of Jurists was as follows :

"WHEREAS :

"The Charter of the Organization of American States establishes that the organs of the Council of the Organization, in agreement with the Council, shall establish cooperative relations with the corresponding organs of the United Nations ;

"At its First Meeting, the Inter-American Council of Jurists requested its Executive Secretary to establish and maintain cooperative relations with the International Law Commission of the United Nations, in consultation with the Permanent Committee and the Council of the Organization of American States ;

"The Secretary of the International Law Commission attended the Third Meeting of the Council in order to establish a direct channel of information between the two bodies ;

"By a resolution of its Third Meeting, the Council expressed its opinion 'that it would be desirable for the Organization of American States to study the possibility of having its juridical agencies represented as observers at the sessions of the International Law Commission of the United Nations' ;

"The Deputy Director of the Department of Legal Affairs of the Pan American Union attended as an observer during part of the Eighth Session of the International Law Commission ;

¹⁵¹ Document 42. See *supra*, para. 149.

¹⁵² Document 98. Summary records of the fourth session of Committee III, document 110, 4 September 1959, p. 2, para. 2. See *supra*, para. 150.

¹⁵³ *Ibid.* See *supra*, paras. 150 and 156.

¹⁵⁴ Document 124, 7 September 1959. Report by the Rapporteur of Committee III.

¹⁵⁵ Record of the third plenary session, document 151, 9 September 1959, p. 23, para. 1.

¹⁵⁶ *Final Act of the Fourth Meeting of the Inter-American Council of Jurists*, Santiago, Chile, 24 August-9 September 1959 (CIJ-43), Pan American Union, Washington, D. C., pp. 42 and 43.

¹⁴⁸ Document 98. 3 September 1959.

¹⁴⁹ Summary records of the second, third and fourth sessions of Committee III, document 73, 31 August 1959; document 92, 2 September 1959; and document 110, 4 September 1959.

¹⁵⁰ Document 42, See *supra*, para. 149.

"The Secretary of the International Law Commission has attended the present Meeting of the Council in the capacity of observer, and his presence, which has been considered useful, has been the source of great satisfaction ;

"At its First Meeting the Council resolved to include the Permanent Committee in all arrangements entered into with the International Law Commission ;

"The International Law Commission of the United Nations studies matters at some of its sessions which at the same time appear in the program of the Inter-American Juridical Committee ;

"The presence of an observer of the Committee at such sessions would be advantageous for the pur-

pose of obtaining direct information on their deliberations.

"The Inter-American Council of Jurists

"RESOLVES :

"To request the Council of the Organization of American States to study the manner in which the juridical agencies of the Organization may be represented by an observer at the meetings of the International Law Commission in which matters of common interest are discussed, including the possibility of the Inter-American Juridical Committee designating an observer from among its members, to attend such meetings, in order to report thereon and in this way facilitate the work of the Committee."

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/4425 *

Report of the International Law Commission covering the work of its twelfth session, 25 April-1 July 1960

CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
I. ORGANIZATION OF THE SESSION	1-7	143
I. Membership and attendance	2-3	143
II. Officers	4-5	144
III. Agenda	6-7	144
II. CONSULAR INTERCOURSE AND IMMUNITIES	8-28	144
I. Introduction	8-18	144
II. General considerations	19-28	145
III. Draft articles on consular intercourse and immunities, and commentary		
III. <i>Ad hoc</i> DIPLOMACY	29-38	179
I. General observations	29-38	179
II. Draft articles on special missions, and commentary		179
IV. OTHER DECISIONS OF THE COMMISSION	39-47	180
I. Codification of the principles and rules of international law relating to the right of asylum	39	180
II. Study of the juridical régime of historic waters, including historic bays	40	180
III. Planning of future work of the Commission	41	180
IV. Co-operation with other bodies	42-45	180
V. Date and place of the next session	46	181
VI. Representation at the fifteenth session of the General Assembly	47	181

* Also issued as *Official Records of the General Assembly, Fifteenth 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, as subsequently amended, held its twelfth session at the European Office of the United Nations in Geneva from 25 April to 1 July 1960. The work of the Commission during the present session is described in the present Report. Chapter II of the Report contains draft articles on Consular Intercourse and Immunities, with a commentary. Chapter III contains draft articles on Special Missions, with a commentary. Chapter IV deals with certain administrative and other matters.

I. Membership and attendance

2. The Commission consists of the following members:

<i>Name</i>	<i>Country</i>
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Nihat Erim	Turkey
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. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Faris El-Khoury	United Arab Republic
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. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Mustafa Kamil Yasseen	Iraq
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czecho- slovakia

3. On 16 May 1960 the Commission elected Mr. Eduardo Jiménez de Aréchaga (Uruguay) to fill the casual vacancy caused by the election of Mr. Ricardo J. Alfaro to the International Court of Justice and also elected Mr. Mustafa Kamil Yasseen (Iraq) to fill the casual vacancy caused by the resignation of Mr. Thanat Khoman. Mr. Yasseen attended the meetings of the Commission from 23 May and Mr. Jiménez de Aréchaga from 1 June onwards.

II. Officers

4. At its 526th meeting on 25 April 1960, the Commission elected the following officers:

Chairman: Mr. Luis Padilla Nervo;
First Vice-Chairman: Mr. Kisaburo Yokota;
Second Vice-Chairman: Mr. Milan Bartos;
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 twelfth session consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. Consular intercourse and immunities.
3. State responsibility.
4. Law of treaties.
5. *Ad hoc* diplomacy.
6. General Assembly resolution 1400 (XIV) on the codification of the principles and rules of international law relating to the right of asylum.
7. General Assembly resolution 1453 (XIV) on the study of the juridical régime of historic waters, including historic bays.
8. Co-operation with other bodies.
9. Date and place of the thirteenth session.
10. Planning of future work of the Commission.
11. Other business.

7. In the course of the session the Commission held fifty-four meetings. It took up all the items on its agenda except item 4 (Law of treaties). At its 566th and 568th meetings the Commission held a discussion on item 3 (State responsibility), in the course of which it heard a statement by Mr. Antonio Gómez Robledo, observer of the Inter-American Juridical Committee, and also a statement by Professor Louis B. Sohn on

the work currently being undertaken in this field as part of the programme of International Legal Studies of the Harvard Law School. For the decisions taken with regard to items 6, 7, 8, 9 and 10, see chapter IV below.

CHAPTER II

CONSULAR INTERCOURSE AND IMMUNITIES

I. Introduction

8. At its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered necessary or desirable. On this list was the subject of "Consular intercourse and immunities", but the Commission did not include this subject among those to which it accorded priority.¹

9. At its seventh session, in 1955, the Commission decided to begin the study of this topic and appointed Mr. Jaroslav Zourek as Special Rapporteur.²

10. In the autumn of 1955 the Special Rapporteur, wishing to ascertain the views of the members of the Commission on certain points, sent them a questionnaire on the matter.

11. The subject of "Consular intercourse and immunities" was placed on the agenda for the eighth session of the Commission, which devoted two meetings to a brief exchange of views on certain points made in a paper submitted by the Special Rapporteur. The Special Rapporteur was requested to continue his work in the light of the debate.³

12. The topic was retained on the agenda for the Commission's ninth session. The Special Rapporteur submitted a report (A/CN.4/108), but in view of its work on other topics, the Commission was unable to examine this report.⁴

13. The Commission began discussion of the report towards the end of its tenth session, in 1958. After an introductory exposé by the Special Rapporteur, followed by an exchange of views on the subject as a whole and also on the first article, the Commission was obliged, for want of time, to defer further consideration of the report until the eleventh session.⁵

14. At the same session the Commission decided to make the draft on consular intercourse and immunities the first item on the agenda for its eleventh session (1959) with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft on which governments would be invited to comment.⁶ It further decided that if, at the eleventh session, it could complete a first draft on consular intercourse and immunities to be sent to governments for comments, it would not take up the subject again for the purpose of preparing a final draft in the light of

¹ *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20.

² *Ibid.*, Tenth Session, Supplement No. 9 (A/2934), para. 34.

³ *Ibid.*, Eleventh Session, Supplement No. 9 (A/3159), para. 36.

⁴ *Ibid.*, Twelfth Session, Supplement No. 9 (A/3623), para. 20.

⁵ *Ibid.*, Thirteenth Session, Supplement No. 9 (A/3859), para. 56.

⁶ *Ibid.*, para. 57.

those comments until its thirteenth session (1961), and would proceed with other subjects at its twelfth session (1960).

15. The Commission also decided, because of the similarity of this topic to that of diplomatic intercourse and immunities which had been debated at two previous sessions, to adopt an accelerated procedure for its work on this topic. Lastly, it decided to ask all the members who might wish to propose amendments to the existing draft presented by the Special Rapporteur to come to the session prepared to put in their principal amendments in writing within a week, or at most ten days, of its opening.⁷

16. The Special Rapporteur for this topic, Mr. Jaroslav Zourek, having been prevented by his duties as *ad hoc* judge on the International Court of Justice from attending the meetings of the Commission during the first few weeks of the eleventh session, the Commission was not able to take up the consideration of the draft articles on consular intercourse and immunities until after his arrival in Geneva at the beginning of the fifth week. At its 496th to 499th, 505th to 511th, 513th, 514th, 516th to 518th and 523rd to 525th meetings, the Commission considered articles 1 to 17 of the draft and three additional articles submitted by the Special Rapporteur. It decided that at its 1960 session it would give top priority to "consular intercourse and immunities" in order to be able to complete the first draft of this topic and submit it to governments for comments.

17. At the present session the Special Rapporteur submitted his second report on consular intercourse and immunities (A/CN.4/131), dealing with the personal inviolability of consuls and the most-favoured-nation clause as applied to consular intercourse and immunities, and containing thirteen additional articles. For the convenience of members of the Commission and to simplify their work, he also prepared a document reproducing the text of the articles adopted at the eleventh session, a partially revised version of the articles included in his first report, and the additional articles submitted at the present session (A/CN.4/L.86).

18. At the present session, the Commission devoted to this topic its 528th to 543rd, 545th to 564th, 570th to 576th, 578th and 579th meetings, taking as a basis for discussion the two reports and the sixty draft articles submitted by the Special Rapporteur. In view of the Commission's decisions concerning the extent to which the articles concerning career consuls should be applicable to honorary consuls, it proved necessary to insert more detailed provisions in the chapter dealing with honorary consuls, and consequentially, to add a number of new articles. The Commission provisionally adopted sixty-five articles together with a commentary. In accordance with articles 16 to 21 of its Statute, the Commission decided to transmit the draft to governments, through the Secretary-General, for their comments.

II. General considerations

19. Consular intercourse and immunities are governed partly by municipal law and partly by international law. Very often regulations of municipal law deal with matters governed by international law. Equally, consular conventions sometimes regulate questions which are within the province of municipal law, e.g. the form of the consular commission. In drafting a code on consular intercourse and immunities, it is necessary, as the Special Rapporteur has pointed out,⁸ to bear in mind the distinction between those aspects of the status of consuls which are principally regulated by municipal law and those which are regulated by international law.

20. The codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law, and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason the Commission agreed, in accordance with the Special Rapporteur's proposal, to base the articles which it is now drafting not only on customary international law, but also on the material furnished by international conventions, especially consular conventions.

21. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which, if incorporated in a codification, may be expected to obtain the support of many States.

22. If it should not prove possible on the basis of the two sources mentioned—conventions and customary law—to settle all controversial and obscure points, or if there remain gaps, it will be necessary to have recourse to the practice of States as evidenced by internal regulations concerning the organization of the consular service and the status of foreign consuls, in so far, of course, as these are in conformity with the fundamental principles of international law.

23. It follows from what has been said that the Commission's work on this subject is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's Statute. The draft which the Commission is to prepare is described by the Special Rapporteur in his report in these words:

"A draft set of articles prepared by that method will therefore entail codification of general customary

⁷ *Ibid.*, para. 64.

⁸ *Yearbook of the International Law Commission, 1957, Vol. II* (United Nations publication, Sales No.: 57.V.5, Vol. II), para. 80.

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."⁹

24. The choice of the form of any codification of consular intercourse and immunities is determined by the purpose and nature of the codification. The Commission had this fact in mind when (bearing in mind also its decision on the form of the Draft Articles on Diplomatic Intercourse and Immunities) it approved the Special Rapporteur's proposal that his draft should be prepared on the assumption that it would form the basis of a convention. A final decision on this point cannot be taken until the Commission has considered the comments of governments on the provisional draft.

25. The Commission, wishing to bring the provisional draft articles on consular intercourse and immunities into line, as far as it considered desirable, with the Draft Articles on Diplomatic Intercourse and Immunities adopted at its tenth session in 1958, decided to insert in the draft a number of articles which the Special Rapporteur had not included in his original draft.

26. The draft is now divided into four chapters. The first chapter is devoted to consular intercourse and immunities in general (articles 1 to 28); and it is subdivided into two sections dealing with consular intercourse in general and with the end of consular functions. The second chapter, entitled "Consular privileges and immunities", contains the articles specifying the privileges and immunities of consulates and of members of the consulate who are career officials or staff (articles 29 to 53) and is subdivided into four sections concerning consular premises and archives (section I); the facilities accorded to the consulate for its activities and freedom of movement and of communication (section II); personal privileges and immunities (section III) and the duties of the consulate and of its members towards the receiving State (section IV). The third chapter contains the provisions concerning the legal status of honorary consuls and their privileges and immunities (articles 54 to 63). The fourth chapter contains the general provisions (articles 64 and 65). A fifth chapter containing the final clauses may be added later.

27. As the articles were adopted during the last two weeks of the present session, the commentary has had to be limited to the material required for an understanding of the texts. The Commission intends to submit a more detailed commentary when the draft has been put into final form at the next session in 1961, at which it will be reviewed in the light of the comments of governments.

28. The text of draft articles 1 to 65 and the commentary, as adopted by the Commission, are reproduced below.

III. Draft articles on consular intercourse and immunities, and commentary

CHAPTER I

Article 1

Definitions

For the purposes of this draft:

(a) The term "consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(b) The expression "consular premises" means any building or part of a building used for the purposes of a consulate;

(c) The expression "consular district" means the area within which the competence of the consulate is exercised in relation to the receiving State;

(d) The term "exequatur" means the final authorization granted by the receiving State to a foreign consul to exercise consular functions on the territory of the receiving State, whatever the form of such authorization;

(e) The expression "consular archives" means all the chancery papers, as well as any article of furniture intended for their protection or safe keeping;

(f) The term "consul", except in article 8, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise those functions in conformity with articles 13 or 14 of this draft. A consul may be a career consul or an honorary consul;

(g) The expression "head of consular post" means any person appointed by the sending State to take charge of a consulate;

(h) The expression "members of the consulate" means the head of consular post and the members of the consular staff;

(i) The expression "consular official" means any person, including the head of post, who exercises consular functions in the receiving State and who is not a member of a diplomatic mission;

(j) The expression "employee of the consulate" means any person who performs administrative or technical work in a consulate, or belongs to the service staff.

(k) The expression "members of the consular staff" means the consular officials (other than the head of post) and the employees of the consulate;

(l) The expression "private staff" means the persons employed in the private service of members of the consulate.

Commentary

This article was adopted in order to establish a consistent terminology for the articles prepared by the Commission. Certain members of the Commission expressed doubts concerning certain of these definitions, especially as to the appropriateness of using the term "consul" in a generic sense, and on the definition of "consular official".

SECTION I: CONSULAR INTERCOURSE IN GENERAL

Article 2

Establishment of consular relations

The establishment of consular relations takes place by mutual consent of the States concerned.

Commentary

(1) The expression "consular relations" means the relations which come into existence between two States

⁹ *Ibid.*, para. 84.

by reason of the fact that consular functions are exercised by authorities of the one State on the territory of the other. In the most cases these relations are mutual, consular functions being exercised in each of the States concerned, by the authorities of the other. The establishment of these relations presupposes agreement between the States in question, and such relations are governed by international law, conventional or customary. In addition, the legal position of consuls is governed by international law, so that by reason of this fact also a legal relationship arises between the sending State and the receiving State. Finally, the expression in question has become hallowed by long use, and this is why the Commission has retained it, although some members would have preferred another.

(2) Consular relations may be established between States which do not maintain diplomatic relations.

(3) In a number of cases where diplomatic relations exist between States, their diplomatic missions also exercise certain consular functions, usually maintaining consular sections for that purpose. The Special Rapporteur had accordingly submitted the following second paragraph for article 1:

"2. The establishment of diplomatic relations includes the establishment of consular relations."

The Commission, after studying this provision, reserved its decision on this matter.

(4) No State is bound to establish consular relations with any other State unless it has previously concluded an international agreement to do so. None the less, the interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, makes it desirable that consular relations should be established.

Article 3

Establishment of a consulate

1. No consulate may be established on the territory of the receiving State without that State's consent.

2. The seat of the consulate and the consular district shall be determined by mutual agreement between the receiving and sending States.

3. Subsequent changes in the seat of the consulate or in the consular district may not be made by the sending State except with the consent of the receiving State.

4. Save as otherwise agreed, a consul may exercise his functions outside his district only with the consent of the receiving State.

5. The consent of the receiving State is also required if the consul is at the same time to exercise consular functions in another State.

Commentary

(1) The first paragraph of this article lays down that the consent of the receiving State is essential for the establishment of any consulate (consulate-general, consulate, vice-consulate or consular agency) on its territory. This principle derives from the sovereign authority which every State exercises over its territory, and applies both in those cases where the consulate is established at the same time as the consular relations

are established, and in those cases where the consulate is to be established later. In the former case, the consent of the receiving State to the establishment of a consulate will usually already have been given in the agreement for the establishment of consular relations; but it may also happen that this agreement is confined to the establishment of consular relations, and that the establishment of the consulate is reserved for a later agreement.

(2) An agreement on the establishment of a consulate presupposes that the States concluding it agree on the boundaries of the consular district and on the seat of the consulate. It sometimes happens in practice that the agreement on the seat of the consulate is concluded before the two States have agreed on the boundaries of the consular district.

(3) The consent of the receiving State is also necessary if the consulate desires to open a vice-consulate, an agency or an office in a town other than that in which it is itself established.

(4) Since the agreement for the establishment of a consulate is in a broad sense an international treaty, it is governed by the rules of international law relating to the revision and termination of treaties. The Commission has therefore not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving State, that the sending State may not change the seat of the consulate, or the consular district, without the consent of the receiving State. The silence of the article as to the powers of the receiving State must not be taken to mean that this State would always be entitled to change the consular district or the seat of the consulate unilaterally. The Commission thought, however, that in exceptional circumstances the receiving State had the right to request the sending State to change the seat of the consulate or the consular district. If the sending State refused its consent the receiving State could denounce the agreement for the establishment of the consulate and order the consulate to be closed.

(5) Since the powers of the consul in relation to the receiving State are limited to the consular district, the consul may exercise his functions outside his district only with the consent of the receiving State. There may, however, be exceptions to this rule. Some of the articles in the draft deal with situations in which the consul may be obliged to act outside his consular district. This is the case, for instance, as regards article 18, which deals with the occasional performance of diplomatic acts by a consul, and article 19, which governs the exercise by a consul of diplomatic functions. Both situations are covered by the words "Save as otherwise agreed" at the beginning of paragraph 4.

(6) Paragraph 5 applies both where the district of a consulate established in the receiving State is to include all or part of the territory of a third State, and where the consul is to act as head of a consulate established in the third State. A similar rule relating to the accrediting of the head of a mission to several States

is contained in article 5 of the Draft Articles on Diplomatic Intercourse and Immunities.

(7) The term "sending State" means the State which the consulate represents.

(8) The term "receiving State" means the State on the territory of which the activities of the consulate are exercised. In the exceptional case where the consular district embraces the whole or part of the territory of a third State, that State should for the purposes of these articles also be regarded as a receiving State.

Article 4

Consular functions

1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are:

(a) To protect the interests of the nationals of the sending State, and the interests of the sending State itself;

(b) To help and assist nationals of the sending State;

(c) To act as notary and civil registrar, and to exercise other functions of an administrative nature;

(d) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State;

(e) To further trade and promote the development of commercial and cultural relations between the sending State and the receiving State;

(f) To acquaint himself with the economic, commercial and cultural life of his district, to report to the Government of the sending State, and to give information to any interested persons.

2. Subject to the exceptions specially provided for by the present articles or by the relevant agreements in force, a consul in the exercise of his functions may deal only with the local authorities.

Commentary

(1) The Special Rapporteur had prepared two variants. The first, following certain precedents, especially the Havana Convention (article 10), merely referred the matter to the law of the sending State, and provided that the functions and powers of consuls should be determined, in accordance with international law, by the States which appoint them.¹⁰ The second variant, after stating the essential functions of a consul in a general clause, contained an enumeration of most of the functions of a consul. This enumeration was not, however, exhaustive.

(2) During the discussion two tendencies were manifested in the Commission. Some members expressed their preference for a general definition of the kind which had been adopted by the Commission for the case of diplomatic agents, in article 3 of its Draft Articles on Diplomatic Intercourse and Immunities. They pointed to the inconveniences of too detailed an enumeration, and suggested that a general definition would be more acceptable to governments. Other members, *per contra*, preferred the Special Rapporteur's second variant with its detailed list of examples, but requested that it should be shortened and contain only the heads of the different functions as set out in numerals

1 to 15 in the Special Rapporteur's draft. They maintained that too general a definition, merely repeating the paragraph headings, would have very little practical value. They also pointed out that the functions of consuls are much more varied than those of diplomatic agents, and that it was therefore impossible to follow in this respect the Draft Articles on Diplomatic Intercourse and Immunities. Finally they suggested that governments would be far more inclined to accept in a convention a detailed and precise definition than a general formula which might give rise to all kinds of divergencies in practice. In support of this opinion they pointed to the fact that recent consular conventions all defined consular functions in considerable detail.

(3) The Commission, in order to be able to take a decision on this question, requested the Special Rapporteur to draft two texts defining consular functions: one containing a general and the other a detailed and enumerative definition. After studying the two types of definitions together, the Commission, by a majority, took a number of decisions:

(a) It rejected a proposal to postpone a decision on the article to the next session;

(b) It decided to submit the two types of definitions to governments for comment when the Commission had completed the entire draft;

(c) It decided not to include the two definitions in the text of the articles on consular relations and immunities;

(d) It decided to include the general definition in the draft, on the understanding that the more detailed definition should appear in the commentary.

(4) The draft general definition prepared by the Special Rapporteur was referred, with the amendments presented by Mr. Verdross,¹¹ Mr. Pal¹² and Mr. Padilla Nervo,¹³ to the Drafting Committee, which, on the basis of a revised proposal prepared by the Special Rapporteur, drafted a definition¹⁴ which was discussed and, with some amendments, adopted at the 523rd meeting of the Commission.

(5) The text of the article first states in a general clause that the functions of consuls are determined

(a) by the articles which the Commission is drafting;

(b) by any relevant agreements in force;

(c) by the sending State, subject to the law of the receiving State.

(6) Some members objected to the word "protect", although it appears in the Draft Articles on Diplomatic Intercourse and Immunities, and would have preferred the word "defend".

(7) Some members found the word "interests" inadequate and would have preferred the term "rights and

¹⁰ *Ibid.*, p. 91.

¹¹ *Yearbook of the International Law Commission, 1959*, vol. I (United Nations publication, Sales No.: 59.V.1, Vol. 1), pp. 156 and 159.

¹² *Ibid.*, p. 157.

¹³ *Ibid.*, p. 170.

¹⁴ See A/CN.4/L.84, art. 13.

interests". The word "interests" must, however, be taken to include rights.

(8) The word "nationals" applies also to bodies corporate having the nationality of the sending State.

(9) The provision headed (a) is distinct from that headed (b) in that the former relates to the protection which the consul exercises vis-à-vis the authorities of the receiving State, while the latter covers any kind of help and assistance which the consul may extend to nationals of his State. This assistance may take many forms: e.g. information, provision of an interpreter, assistance in case of distress, repatriation, monetary help, introduction of commercial agents to commercial concerns, and assistance to nationals working in the receiving State.

(10) Paragraph 2 provides that a consul in the exercise of his functions may deal only with the local authorities. It makes an exception where the present draft or the relevant agreements in force contain a provision allowing consuls also to deal with the central authorities or with authorities outside the consular district.

(11) The text of the more detailed, or enumerative, definition as prepared and revised by the Special Rapporteur (but not discussed in detail by the Commission), together with a commentary which he has since added but which had likewise not been considered by the Commission, is reproduced below :

CONSULAR FUNCTIONS

1. *The task of consuls is to defend, within the limits of their consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant international agreements in force or entrusted to them by the sending State, the exercise of which is compatible with the laws of the receiving State.*

2. *Without prejudice to the consular functions deriving from the preceding paragraph, consuls may perform the under-mentioned functions:*

I. Functions concerning trade and shipping

1. *To protect and promote trade between the sending State and the receiving State and to foster the development of economic relations between them;*

Commentary

This function has always been recognized by international law. In States where the sending State is represented by a diplomatic mission, the latter performs most of these functions.

2. *To render all necessary assistance to ships and merchant vessels flying the flag of the sending State;*

Commentary

In the exercise of this function the consul is competent or entitled:

- (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 in 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 inspection by the health authorities), 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 the receiving State;

(k) To settle, in accordance with the laws of the sending State, disputes concerning general average between nationals of the State which he represents.

3. *To render all necessary assistance to aircraft registered in the sending State;*

Commentary

This function consists of the following:

- (a) Checking log-books;
- (b) Rendering assistance to the crew;
- (c) Giving help in the event of accident or damage to aircraft;
- (d) Supervising compliance with the international air transport conventions to which the sending State is a party.

4. *To render all necessary assistance to vessels owned by the sending State, and particularly its warships, which visit the receiving State;*

Commentary

This function is recognized in a large number of consular conventions.

II. Functions concerning the protection of nationals of the sending State

5. *To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the receiving State and under the international customs and conventions in force and to take appropriate steps to obtain redress if these rights have been infringed;*

Commentary

This right in no way means that the consul is authorized to interfere in the domestic affairs of the receiving State or to intercede continually with the local authorities on behalf of nationals of his State. This provision clearly limits the cases in which he may intervene to those where the rights of the sending State or of its nationals under the municipal law of the receiving State or under international law are infringed. The term "nationals" in this context means both individuals and bodies corporate possessing the nationality of the sending State.

6. *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 trusteeships for insane and other persons lacking full capacity who are nationals of the sending State;*

Commentary

There are consular conventions which even confer upon the consul the right to appoint guardians or trustees in the case of minors or persons lacking full capacity who are nationals of the sending State. As, however, the laws of certain countries reserve this function to the courts, the proposed provision limits the consul's powers in this matter to those of:

- (a) Proposing the appointment of guardians or trustees;

(b) Submitting nominations to courts for the office of guardian or trustee;

(c) Supervising the guardianship or trusteeship.

7. *To represent in all cases connected with succession, without producing a power of attorney, the heirs and legatees, or their successors in title, who are nationals of the sending State and who are not represented by a special agent; to approach the competent authorities of the receiving State in order to arrange for an inventory of assets or for the winding up of the estate; and, if necessary, to apply the competent courts to settle disputes and claims concerning the estates of deceased nationals of the sending State;*

Commentary

The scope of the functions vested in consuls by consular conventions and other international agreements for the purpose of dealing with succession questions is very varied. In order that this provision should be acceptable to as many governments as possible, the proposed clause refers to those functions only which may be regarded as essential to the protection of the rights of heirs and legatees and their successors in title. Under this provision, in all cases in which nationals of the sending State beneficiaries in an estate as heirs or legatees, or because they have acquired rights in the estate through heirs or legatees, and are not represented by a special agent the consul has the right to:

(a) Represent the heirs and legatees, or their successors in title, without having to produce a power of attorney from the persons concerned;

(b) Approach the appropriate authorities of the receiving State with a view to arranging for an inventory of assets or the distribution of the estate;

(c) Apply to the competent courts to settle any disputes and claims concerning the estate of a deceased national.

The consul is competent to perform this function for so long as the heirs or legatees (or their successors in title) have not appointed special agents to represent them in proceedings connected with the estate.

III. Administrative functions

8. *To perform and record acts of civil registration (births, marriages, deaths), without prejudice to the obligation of declarants to make whatever declarations are necessary in pursuance of the laws of the receiving State;*

Commentary

These functions are determined by the laws and regulations of the sending State. They are extremely varied and include, *inter alia*, the following:

(a) The keeping of a register of nationals of the sending State residing in the consular district;

(b) The issuing of passports and other personal documents to nationals of the sending State;

(c) The issue of visas on the passports and other documents of persons travelling to the sending State;

(d) Dealing with matters relating to the nationality of the sending State;

(e) Supplying to interested persons in the receiving State information concerning the trade, industry, and all aspects of the national life of the sending State;

(f) Certifying documents indicating the origin or source of goods, invoices, and the like;

(g) Transmitting to the persons entitled 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) Receiving payment of pensions or allowances due to nationals of the sending State absent from the receiving State;

(i) Performing all acts relating to service in the armed forces of the

sending State, to the keeping of muster-rolls for those services and to the medical inspection of conscripts who are nationals of the sending State.

9. *To solemnize marriages in accordance with the laws of the sending State, where this is not contrary to the laws of the receiving State;*

Commentary

The consul, if so empowered by the laws of the sending State, may solemnize marriages between nationals of his State or under the laws of certain States, also between nationals of his State and those of another State. This function cannot, however, be exercised if it is contrary to the laws of the receiving State.

10. *To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by the conventions in force or in any other manner compatible with the laws of the receiving State;*

Commentary

This function, which is very often exercised nowadays, is recognized by customary international law.

IV. Notarial functions

11. *To receive any statements which nationals of the sending State may have to make, and to draw up, attest and receive for safe custody wills and deed-polls executed by nationals of the sending State and indentures the parties to which are nationals of the sending State or nationals of the sending State and nationals of other States, provided that they do not relate to immovable property situated in the receiving State or to rights in rem attaching to such property;*

Commentary

Consuls have many functions of this nature, e.g.:

(a) Receiving in their offices or on board vessels flying the flag of the sending State or on board aircraft of the nationality of the sending State, any statements which nationals of that State may have to make;

(b) Drawing up, attesting and receiving for safe custody, wills and all deed-polls executed by nationals of the sending State;

(c) Drawing up, attesting and receiving for safe custody deeds, the parties to which are nationals of the sending State or nationals of the sending State and nationals of the receiving State, provided that they do not relate to immovable property situated in the receiving State or to rights in rem attaching to such property.

12. *To attest or certify signatures, and to stamp, certify or translate documents, in any case in which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consul;*

Commentary

Consuls have the right to charge for these services fees determined by the laws and regulations of the sending State. This right is the subject of a subsequent article proposed by the Special Rapporteur (art. 26).¹⁵

13. *To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to the consuls by nationals of the sending State;*

Commentary

Transfers of sums of money or other valuables, especially works of art, are governed (in the absence of an international agreement) by the laws and regulations of the receiving State.

¹⁵ *Yearbook of the International Law Commission, 1957, vol. II* (United Nations publication, Sales No.: 57.V.5, Vol. II), p. 99.

V. Other functions

14. *To further the cultural interests of the sending State, particularly in science, the arts, the professions and education;*

Commentary

This function has recently become prevalent and is confirmed in a considerable number of consular conventions.

15. *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 receiving State;*

Commentary

This function, which enables nationals of the sending State to settle their disputes rapidly, has undeniable practical value but does not seem to be much used nowadays.

16. *To gather information concerning aspects of economic, commercial and cultural life in the consular district and other aspects of national life in the receiving State and to report thereon to the Government of the sending State or to supply information to interested parties in that State;*

Commentary

This function is related to the consul's economic, commercial and cultural functions.

17. *A consul may perform additional functions as specified by State, provided that their performance is not prohibited by the laws of the receiving State.*

Commentary

This is a residual clause comprising all other functions which the sending State may entrust to its consul. Their performance must never conflict with the law of the receiving State.

(12) The Special Rapporteur proposed an additional article in the following terms:

The consul shall have the right to appear, without producing a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals and bodies corporate of the sending State that owing to their absence or for any other reason are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the persons or bodies in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

This provision, which occurs in many consular conventions, grants to consuls the right to represent *ex officio* before the courts and other authorities of the receiving State such nationals of the sending State as cannot defend their rights and interests themselves. This prerogative of the consul is necessary for the exercise of the consular functions which consist (among others) of the protection of the interests of nationals of the sending State and of the interests of that State (Article 4, paragraph 1 (a)). The consul would not be able to discharge this function if he had not the power to approach the courts and administrative authorities regarding the progress of the affairs of absent nationals of his country, to transmit to the courts and other competent authorities information and proposals which may help to protect the rights of absent nationals, to draw the attention of local courts to the provisions of inter-

national treaties applicable to specific cases before them, and to arrange for the representation of absent nationals in court and before other competent authorities until the persons concerned can themselves take charge of the defence of their rights and interests. It is precisely for this purpose that the additional article allows the consuls a power of representation limited both in time and in scope. The provision does not, of course, give the consul the powers of an attorney.

After thorough debate, the Commission concluded that it did not possess sufficient information on the point, and it decided to await the comments of governments without making any recommendation for the time being.

Article 5

Obligations of the receiving State in certain special cases

The receiving State shall have the duty

(a) in the case of the death in its territory of a national of the sending State, to send a copy of the death certificate to the consulate in whose district the death occurred;

(b) to inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity, and who is a national of the sending State;

(c) if a vessel flying the flag of the sending State is wrecked or runs aground on the coast or in the territorial sea of the receiving State, to inform the consulate nearest to the scene of the occurrence, without delay.

Commentary

(1) This article is designed to ensure co-operation between the authorities of the receiving State and consulates in three types of cases coming within the scope of the consular functions. The duty to report to the consulate the events referred to in this article is often included in consular conventions. If this duty could be made general by means of a multilateral convention, the work of all consulates would be greatly facilitated.

(2) The obligation to transmit death certificates to the consulate of the sending State exists, of course, only in those cases in which the authorities of the receiving State are aware that the deceased was a national of a foreign State. If this fact is not established until later (e.g. during the administration of the estate) the obligation to transmit the death certificate arises only as from that moment.

Article 6

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of the consular functions relating to the protection of the nationals of the sending State who are present in the consular district:

(a) Nationals of the sending State shall be free to communicate with and to have access to the competent consul, and the consul shall be free to communicate with and, where appropriate, to have access to the said nationals;

(b) The competent authorities shall inform the competent consul of the sending State without undue delay if, within his district, a national of that State is committed to custody pending trial or to prison. Any communications addressed by the person in custody or

in prison to the consul shall be forwarded by the said authorities, also without undue delay;

(c) The consul shall be permitted to visit a national of the sending State who is in custody or imprisoned, to converse with him and to arrange for his legal representation. He may also visit any national of the sending State who is imprisoned within his district in pursuance of a judgement.

2. The freedoms referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these freedoms.

Commentary

(1) Like the preceding article, this article defines the freedoms granted to consuls in order to facilitate the exercise of the consular function in connexion with the protection of nationals of the sending State.

(2) First, in paragraph 1 (a), the article establishes the freedom of nationals of the sending State to communicate with and have access to the competent consul. The expression "competent consul" means the consul in the consular district in which the national of the sending State is physically present.

(3) The same provision also establishes the freedom of the consul to communicate with and, if the exercise of his consular functions so requires, to visit nationals of the sending State.

(4) In addition, this article establishes the consular freedoms that are applicable in those cases where a national of the sending State is in custody pending trial, or imprisoned in the execution of a judicial decision. In any such case, the receiving State would assume three obligations under the article proposed:

(a) First, the receiving State must, without undue delay, inform the consul of the sending State in whose district the event occurs, that a national of that State is committed to custody pending trial or to prison. The consul competent to receive the communication regarding the detention or imprisonment of a national of the sending State may, therefore, in some cases, be different from the one who would normally be competent to exercise the function of providing consular protection for the national in question on the basis of his normal residence;

(b) Secondly, the receiving State must forward to the consul without undue delay any communications addressed to him by the person in custody or in prison;

(c) Lastly, the receiving State must permit the consul to visit a national of the sending State who is in custody or in prison in his consular district, to converse with him, and to arrange for his legal representation. This provision is designed to cover cases where a national of the sending State has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgement is still open to appeal or cassation; and also cases where the judgement convicting the national has become final.

(5) All the above-mentioned freedoms are exercisable in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or

imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody, against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consul must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consul may wish to make to a prisoner who is a national of the sending State.

(6) Although the freedoms provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the freedoms in question.

(7) The expression "without undue delay" used in paragraph 1 (b) allows for cases where it is necessary to hold a person *incomunicado* for a certain period for the purposes of the criminal investigation.

Article 7

Carrying out of consular functions on behalf of a third State

No consul may carry out consular functions on behalf of a third State without the consent of the receiving State.

Commentary

(1) Whereas article 3, paragraph 5, of the draft deals with the case where the jurisdiction of a consulate, or the exercise of the functions of a consul is to extend to the whole or part of the territory of a third State, the purpose of the present article is to regulate the case where the consul desires to exercise in his district consular functions on behalf of a third State. In the first place, such a situation may arise when a third State, not maintaining consular relations with the receiving State, nevertheless desires to afford consular protection there to its nationals. For example, the Caracas Agreement, signed on 18 July 1911, between Bolivia, Colombia, Ecuador, Peru and Venezuela, relating to the functions of the consuls of each contracting Republic in the others, provided that the consuls of each of the contracting Republics residing in any other of them, could exercise their functions on behalf of persons belonging to any other contracting Republic not having a consul in the particular place concerned (art. 6).

(2) Another case in which the exercise of consular functions on behalf of a third State meets a practical need is that of a rupture of consular relations.

(3) The law of a considerable number of countries provides for the exercise of consular functions on behalf of a third State, but subjects it to consent by the Head of State, by the Government, or by the Foreign Minister.

(4) It is obvious that in the cases covered by the article the consul will rarely be able to exercise all consular functions on behalf of the third State. In some cases he may confine himself to the exercise of

only a few. The article contemplates both the occasional exercise of certain consular functions and the continuous exercise of such functions. In both cases the consent of the receiving State is essential.

Article 8

Classes of heads of consular posts

Heads of consular posts are divided into four classes, viz:

- (1) Consuls-general;
- (2) Consuls;
- (3) Vice-consuls;
- (4) Consular agents.

Commentary

(1) Whereas the classes of diplomatic agents were determined by the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818, the classes of consuls have not yet been codified. Since the institution of consuls first appeared in relations between peoples, a large variety of titles has been used. At present the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 8 to enable the classes of heads of consular posts to be codified, thus doing for consular law what the Congress of Vienna did more than 140 years ago for diplomatic law.

(2) This enumeration of four classes in no way means that States accepting it are bound to have all four classes in practice. They will be obliged only to give their heads of consular posts one of the four titles in article 8. Consequently, those States whose domestic law does not provide for all four classes will not find themselves under any necessity to amend it.

(3) It should be emphasized that the term "consular agent" is used in this article in a technical sense differing essentially from the generic meaning given to it in some international instruments, as denoting all classes of consular officials.

(4) Under some domestic laws, consular agents are invested only with functions that are more limited than those of consuls-general and consuls and relate merely to the protection of commerce and navigation; and such consular agents are appointed, with the consent of the receiving State, not by the government of the sending State, but locally by the consuls and they remain under the orders of the appointing consuls. The Commission desires to draw the especial attention of governments to this class of consular official, and to ask governments for detailed information enabling the Commission to decide what is the function and method of appointment of consular agents according to the domestic law of different States, and to ascertain the extent to which the institution of the consular agent is in practice made use of today. This information will constitute the basis for a final decision as to this class of consular official when the Commission reverts to the subject.

(5) The domestic law of some (but not very many) States allows the exercise by vice-consuls and consular

agents of gainful activities in the receiving State. Some consular conventions sanction this practice by way of exception (see, as regards consular agents, art. 2, para. 7 of the Consular Convention of 31 December 1951 between France and the United Kingdom). The Special Rapporteur's draft treats vice-consuls and consular agents exercising a gainful activity on the same footing as honorary consuls, whose legal position will be dealt with by chapter III of the draft.

(6) The proposed classification is in no way affected by the fact that certain domestic legal systems include heads of consular sections of diplomatic missions in their consular classifications for the term "head of consular section of a diplomatic mission" refers only to a function, not to a new class of consular officials.

(7) It should be emphasized that the article deals only with heads of posts as such, and in no way purports to restrict the power of States to determine the titles of the consular officials and employees who work under the direction and responsibility of the head of post.

Article 9

Acquisition of consular status

A consul within the meaning of these articles is an official who is appointed by the sending State to one of the four classes enumerated in article 8, and who is recognized in that capacity by the State in whose territory he is to carry out his functions.

Commentary

(1) This article states a fundamental principle which is developed in the succeeding articles. It lays down two requirements which must be satisfied in order that a person may be considered a consul in international law:

(a) He must be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent;

(b) He must be recognized in that capacity by the government of the State in whose territory he is to carry out his functions.

(2) This provision is necessary in order to bring out the fact that the articles drafted by the Commission relate only to consuls who have international status, and to members of their staffs, and that they do not apply to persons who may have the title of consul, but whose activities are confined to the internal services of their State.

Article 10

Competence to appoint and recognize consuls

1. Competence to appoint consuls, and the manner of its exercise, is governed by the internal law of the sending State.

2. Competence to grant recognition to consuls, and the form of such recognition, is governed by the internal law of the receiving State.

Commentary

(1) There is no rule of international law determining which in particular is the authority in a State competent to appoint consuls. This matter is governed by the internal law of each State. Consuls—at any rate

those in the first two classes—are appointed either by the Head of State on a recommendation of the government, or by the government, or by the Foreign Minister. Even within a single State there may be different competent authorities according to whether the appointment involves consuls-general and consuls, or vice-consuls and consular agents; or again, for the appointment of career consuls on the one hand and of honorary consuls on the other.

(2) The same applies to the manner of the appointment of consuls. This matter also is governed by the internal law of each State, which determines the qualifications required for the appointment of a consul, the procedure of appointment, and the form of the documents furnished to consuls. Thus it is, for example, that in some States, although consular agents may be appointed by a central authority, this is done on the recommendation of the consul under whose orders and responsibility they are to work. Since in the past the mistaken opinion has sometimes been voiced that only Heads of State are competent to appoint consuls, and since it is even the case that concrete attitudes have been taken up on the basis of these opinions, it has seemed timely to state in this article that the competence to appoint consuls, and the method of exercising this competence, is governed by the internal law of each State. Such a rule would put an end to all these differences of view, and would for the future prevent frictions calculated to injure good relations between States.

(3) Nor does international law determine which particular authority shall have competence to grant recognition to a consul appointed by the sending State, or the form of such recognition. The present draft provides only that, in the absence of the final recognition given by means of an *exequatur* (art. 13), there shall be a provisional recognition (art. 14). Internal law therefore governs the other relevant matters dealt with by the present article.

(4) Subject to article 8, which classifies heads of consular posts, every State is also free to determine the seniority of its consuls, and whether and to what extent it will make use of honorary consuls. However, as regards the appointment of a consul abroad, the views of the receiving State must also be considered. The receiving State has in fact a corresponding freedom to refuse to recognize honorary consuls, or to require in return for recognition that such a consul be appointed in a particular class, unless indeed the matter was settled when the consulate was established. It is therefore recommended that the matter should be regulated beforehand by negotiation between the States concerned. However, the point is not important enough to call for a special provision such as that contained in article 14 of the Draft Articles on Diplomatic Intercourse and Immunities.

(5) The principle underlying paragraph 1 of the present article has been codified in a different form in the 1928 Havana Convention on consuls, article 6 of which provides as follows:

“The manner of appointment of consuls, their qualifications for appointment and their classes and

categories, shall be governed by the internal law of the State concerned.”

The Commission, having regard to the development of international law reflected in international conventions and in the present draft, article 12 of which relates to the consular commission, submits in the first paragraph of the present article a provision having a more limited object, and supplements this in paragraph 2 of the article by providing that the competence to grant recognition to consuls and the form of such recognition, is governed by the internal law of the receiving State.

Article 11

Appointment of nationals of the receiving State

Consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

Commentary

In those cases where the sending State wishes to appoint as the head of a consular post or as consular official a person who is a national of the receiving State, or who is a national both of the sending State and of the receiving State, it can do so only with the express consent of the receiving State. This is a case in which a conflict could arise between the consular official's duties towards the sending State and his duties as a citizen of the receiving State. It should be noted that according to the terms of this article, the express consent of the receiving State is not required if the consular official is a national of a third State. The article corresponds to article 7 of the Draft Articles on Diplomatic Intercourse and Immunities.

Article 12

The consular commission

1. Heads of consular posts shall be furnished by the State appointing them with full powers in the form of a commission or similar instrument, made out for each appointment, and showing, as a general rule, the full name of the consul, the consular category and class, the consular district, and the seat of the consulate.

2. The State appointing a consul shall communicate the commission through the diplomatic or other appropriate channel to the government of the State on whose territory the consul is to exercise his functions.

3. If the receiving State so accepts, the commission may be replaced by a notice of the appointment of the consul, addressed by the sending State to the receiving State. In such case the provisions of paragraphs 1 and 2 of this article shall apply *mutatis mutandis*.

Commentary

(1) As a general rule, the consul is furnished with an official document known as a “consular commission” (variously known in French as *lettre de provision*, *lettre patente* or *commission consulaire*). The instrument issued to vice-consuls and consular agents sometimes bears a different name—*brevet*, *décret*, *patente* or *licence*.

(2) For purposes of simplification article 12 uses the expression “consular commission” to describe the official documents of heads of consular offices of all

classes. While it may be proper to describe differently the full powers given to consular officials not appointed by the central authorities of the State, the legal significance of these documents from the point of view of international law is the same. This *modus operandi* is all the more necessary in that the manner of appointment of consuls pertains to the domestic jurisdiction of the sending State.

(3) While the form of the consular commission remains none the less governed by municipal law, paragraph 1 of the article states the particulars which should be shown in any consular commission in order that the receiving State may be able to determine clearly the competence and legal status of the consul. The expression "as a general rule" indicates clearly that this is a provision the non-observance of which does not have the effect of nullifying the consular commission. The same paragraph specifies, in keeping with practice, that a consular commission must be made out in respect of each appointment. Accordingly, if a consul is appointed to another post, a consular commission must be made out for that case, even if the post is in the territory of the same State. On this point, too, the Commission would like to receive further information concerning prevailing practice.

(4) Some bilateral conventions specify the content or form of the consular commission (see, for example, article 3 of the Convention of 31 December 1913 between Cuba and the Netherlands; and the Convention of 20 May 1948 between the Philippines and Spain, article IV of which stipulates that regular letters of appointment shall be duly signed and sealed by the Head of State). Obviously in such cases the content or form of the consular commission must conform to the provisions of the convention in force.

(5) The consular commission, together with the *exequatur*, is retained by the consul. It constitutes an important document which he can make use of at any time with the authorities of his district as evidence of his official position.

(6) While the consular commission as above described constitutes the regular mode of appointment, the recent practice of States seems to an ever-increasing extent to permit less formal methods, such as a notification of the consul's posting. It was therefore thought necessary to allow for this practice in article 12, paragraph 3.

(7) For the presentation of the consular commission, the diplomatic channel is prescribed by a large number of national laws and international conventions, for example the Havana Convention of 20 February 1928 (art. 4). This seems to be the normal method of obtaining the *exequatur*. Nevertheless, to take account also of the circumstances and cases in which the diplomatic channel cannot be used, and where another procedure would be appropriate, the text of paragraph 2 expressly states that, as well as the diplomatic channel, some "other appropriate channel" may be used.

Article 13

The *exequatur*

Without prejudice to the provisions of articles 14 and 16, heads of consular posts may not enter upon their duties until they have obtained the final recognition of the government of the State in which they are to exercise them. This recognition is given by means of an *exequatur*.

Commentary

(1) The *exequatur* is the act whereby the receiving State grants to the foreign consul final recognition, and thereby confers upon him the right to exercise his consular functions. Accordingly, the *exequatur* invests the consul with competence vis-à-vis the receiving State. The same term also serves for describing the document containing the recognition in question.

(2) As is stipulated in article 10, competence to grant the *exequatur* is governed by the municipal law of the receiving State. In many States, the *exequatur* is granted by the Head of the State if the consular commission is signed by the Head of the sending State, and by the Minister of Foreign Affairs in other cases. In many States the *exequatur* is always granted by the Minister of Foreign Affairs. In certain countries, competence to grant the *exequatur* is reserved to the government.

(3) As is evident from article 10, the form of the *exequatur* is likewise governed by the municipal law of the receiving State. As a consequence, it varies considerably. According to the information at the Commission's disposal, the types of *exequatur* most frequently found in practice are granted in the form of:

(a) A decree by the Head of the State, signed by him and countersigned by the Minister of Foreign Affairs, the original being issued to the consul;

(b) A decree signed as above, but only a copy of which, certified by the Minister of Foreign Affairs, is issued to the consul;

(c) A transcription endorsed on the consular commission, a method which may itself have several variants;

(d) A notification to the sending State through the diplomatic channel.

(4) In certain conventions the term "*exequatur*" is used in its formal sense as referring only to the forms mentioned under (a) to (c) above. As allowance must also be made for cases in which the *exequatur* is granted to the consul in a simplified form, these conventions mention, besides the *exequatur*, other forms of final authorization for the exercise of consular functions (e.g. the Consular Convention of 12 January 1948, between Costa Rica and the United States, article I), or else do not use the term "*exequatur*".

(5) As stated in the article on definitions, the term "*exequatur*" is used in this article, at least for the time being, to denote any final authorization granted by the receiving State to a foreign consul to exercise consular functions in the territory of that State, whatever the form of such authorization. The reason is that the form is not *per se* a sufficient criterion for differentiating

between acts which have the same purpose and the same legal significance.

(6) Inasmuch as subsequent articles provide that the consul may obtain a provisional recognition before obtaining the *exequatur* (article 14), or may be allowed to act as temporary head of post in the cases referred to in article 16, the scope of the article is limited by an express reference to these two articles of the draft.

(7) The grant of the *exequatur* to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility. It is therefore not necessary for consuls who are not heads of posts to present consular commissions and obtain *exequaturs*. Notification by the head of a consular post to the competent authorities of the receiving State suffices to admit them to the benefits of the present articles and of the relevant agreements in force. However, if the sending State wishes in addition to obtain an *exequatur* for one or more consular officials with the rank of consul, there is nothing to prevent it making a request accordingly.

(8) It is universally recognized that the receiving State may refuse the *exequatur* to a foreign consul. This right is recognized implicitly in the article and the Commission did not consider it necessary to state it explicitly.

(9) The only question in dispute is whether a State refusing the *exequatur* ought to communicate the reasons for the refusal to the government concerned. The Commission preferred, for the time being at least, not to deal with this question. The draft's silence on the point should be interpreted to mean that the question is left to the discretion of the receiving State, since, in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decision in such a case.

Article 14

Provisional recognition

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefits of the present articles and of the relevant agreements in force.

Commentary

(1) The purpose of provisional recognition is to enable the consul to take up his duties before the *exequatur* is granted. The procedure for obtaining the *exequatur* takes some time, but the business handled by a consul will not normally wait. In these circumstances the institution of provisional recognition is a very useful expedient. This also explains why provisional recognition has become so prevalent, as can be seen from many consular conventions, including the Havana Convention of 1928 (art. 6, para. 2).

(2) It should be noted that the article does not prescribe a written form for provisional recognition. It may equally be granted in the form of an oral communication to the authorities of the sending State, including the consul himself.

(3) Certain bilateral conventions go even further and permit a kind of automatic recognition, stipulating that consuls appointed as heads of posts shall be provisionally admitted as of right to the exercise of their functions and to the benefit of the provisions of the convention unless the receiving State objects. These conventions provide for the grant of provisional recognition by means of a special act only in cases where this is necessary. The majority of the Commission considered that the formula used in the article was more suitable for a multilateral convention such as is contemplated by the present draft.

(4) By virtue of this article the receiving State will be under a duty to afford assistance and protection to a consul who is recognized provisionally and to accord him the privileges and immunities conferred on heads of consular posts by the present articles and by the relevant agreements in force.

Article 15

Obligation to notify the authorities of the consular district

The government of the receiving State shall immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions. It shall also ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to admit him to the benefits of the present articles and of the relevant agreements in force.

Commentary

(1) The grant of recognition, whether provisional or definitive, involves a twofold obligation for the government of the receiving State:

(a) It must immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions;

(b) It must ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to enjoy the benefits of the present articles and of the relevant agreements in force.

(2) Nevertheless, the commencement of the consul's function does not depend on the fulfilment of these obligations. Should the government of the receiving State omit to fulfil these obligations, the consul could himself present his consular commission and his *exequatur* to the higher authorities of his district.

Article 16

Acting head of post

1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, the direction of the consulate shall be temporarily assumed by an acting head of post whose name shall be notified to the competent authorities of the receiving State.

2. The competent authorities shall afford assistance and protection to such acting head of post, and admit him, while in charge of the consular post, to the benefits of the present articles and of the relevant agreements in force on the same basis as the head of the consular post concerned.

Commentary

(1) The institution of acting head of a consular post has long since become part of current practice, as

witness many national regulations concerning consuls and a very large number of consular conventions. The text proposed therefore merely codifies the existing practice.

(2) The function of acting head of post in the consular service corresponds to that of *chargé d'affaires ad interim* in the diplomatic service. In view of the similarity of the institutions, the text of paragraph 1 follows very closely that of article 17 of the Draft Articles on Diplomatic Intercourse and Immunities.

(3) It should be noted that the text leaves States quite free to decide the method of appointing the acting head of post, who may be chosen from any of the consular officials attached to either the particular consulate or another consulate of the sending State, or from the officials of a diplomatic mission of that State. Where no consular official is available to assume the direction of the consulate, one of the consular employees may be chosen as acting head of post (see the Havana Convention, art. 9). The text also makes it possible, if the sending State considers this advisable, for the acting head of post to be designated prior to the occurrence preventing the head of post from carrying out his functions.

(4) The word "temporarily" reflects the fact that the functions of acting head may not, except by agreement between the States concerned, be prolonged for so long a period that the acting head would in fact become permanent head.

(5) The question whether the consul should be regarded as unable to carry out his functions is a question of fact to be decided by the sending State. Unduly rigid regulations on this point are not desirable.

(6) The expression "competent authorities" means the authorities designated by the law or by the government of the receiving State as responsible for the government's relations with foreign consuls.

(7) While in charge of the consular post, the acting head has the same functions and enjoys the same privileges and immunities as the head of the consular post. The question of the precedence of acting heads of post is dealt with in article 17, paragraph 5, of this draft.

Article 17

Precedence

1. Consuls shall rank in each class according to the date of the grant of the *exequatur*,

2. If the consul, before obtaining the *exequatur*, was recognized provisionally, his precedence shall be determined according to the date of the grant of the provisional recognition; this precedence shall be maintained even after the granting of the *exequatur*.

3. If two or more consuls obtained the *exequatur* or provisional recognition on the same date, the order of precedence as between them shall be determined according to the dates on which their commissions were presented.

4. Heads of posts have precedence over consular officials not holding such rank.

5. Consular officials in charge of a consulate *ad interim* rank after all heads of posts in the class to which the heads of posts whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of posts.

Commentary

(1) The question of the precedence of consuls, though undoubtedly of practical importance, has not as yet been regulated by international law. In many towns, consuls are members of a consular corps, and the question of precedence arises quite naturally within the consular corps itself, as well as in connexion with official functions and ceremonies. In the absence of international regulations, States have been free to settle the order of precedence of consuls themselves. There would appear to be, as far as the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify.

(2) It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls. This question is dealt with in chapter III of the present draft.

(3) Paragraph 5 establishes the precedence of acting heads of posts according to the order of precedence of the heads of posts whom they replace. This is justified by the nature of the *ad interim* function. It has undoubted practical advantages, in that the order of precedence can be established easily.

Article 18

Occasional performance of diplomatic acts

In a State where the sending State has no diplomatic mission, a consul may, on an occasional basis, perform such diplomatic acts as the government of the receiving State permits in the particular circumstances.

Commentary

(1) This article deals with the special position of the consul in a country in which the sending State has no diplomatic mission and in which the consul is the sole official representative of his State. It has been found in practice that the consul in such circumstances will occasionally have to perform acts which normally come within the competence of diplomatic missions and which are consequently outside the scope of consular functions. Under this article, the consent, express or tacit, of the receiving State is essential for the performance of such diplomatic acts.

(2) Unlike article 19, this article is concerned only with the occasional performance of diplomatic acts. Such performance, even if repeated, does not affect the legal status of the consul or confer any right to diplomatic privileges and immunities.

Article 19

Grant of diplomatic status to consuls

In a State where the sending State has no diplomatic mission, a consul may, with the consent of the receiving State, 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.

Commentary

(1) This article provides for the case where the sending State wishes to entrust its consul with the per-

formance not merely of occasional diplomatic acts, as provided for in article 18, but with diplomatic functions generally. In several countries the law makes provision for this possibility. It would seem that States are at the present day less prone than in the past to entrust consuls with diplomatic functions. But even if the practice is not now very common, the Commission considers that it should be mentioned in a general codification of consular intercourse and immunities.

(2) Consuls entrusted with diplomatic functions have in the past borne a variety of titles: commissioner and consul-general, diplomatic agent and consul-general, *chargé d'affaires*-consul-general, or consul-general-*chargé d'affaires*. The Commission has adopted the last-named title as being the most in keeping with the function exercised by the consul in such cases.

(3) The consul-general-*chargé d'affaires* must, in addition to having the *exequatur*, at the same time be accredited by means of letters of credence. He enjoys diplomatic privileges and immunities.

(4) The question was raised in the Commission whether the proper place for article 19, and article 18 too, would not be in the Draft Articles on Diplomatic Intercourse and Immunities. Since in both cases the consular function is predominant and gives the post its basic character, the Commission took the view that both articles ought to remain in the draft on consular intercourse and immunities.

Article 20

Withdrawal of exequatur

1. Where the conduct of a consul gives serious grounds for complaint, the receiving State may request the sending State to recall him or to terminate his functions, as the case may be.

2. If the sending State refuses, or fails within a reasonable time, to comply with a request made in accordance with paragraph 1 of this article, the receiving State may withdraw the *exequatur* from the consul.

3. A consul from whom the *exequatur* has been withdrawn may no longer exercise consular functions.

Commentary

(1) It is customary to signify the revocation of the receiving State's recognition of a consul by the withdrawal of his *exequatur*, though the destruction or return of the document evidencing the grant of the *exequatur* is not required.

(2) It should be noted that, according to the terms of the article, the withdrawal of the *exequatur* must always be preceded by a request to the sending State for the recall of the consul or for the termination of his functions. This latter expression refers mainly to the case where the consul is a national of the receiving State, as honorary consuls often are.

(3) The right of the receiving State to make the request referred to in paragraph 1 is restricted to cases where the conduct of the consul has given serious grounds for complaint. Consequently, the withdrawal of the *exequatur* is an individual measure which may only be taken in consequence of such conduct. The obligation to request the recall of the consul or the termination of his functions before proceeding to withdraw the

exequatur constitutes some safeguard against an arbitrary withdrawal which might cause serious prejudice to the sending State by abruptly or unjustifiably interrupting the performance of consular functions in matters where more or less daily action by the consul is absolutely essential (e.g. various trade and shipping matters, the issue of visas, attestation of signatures, translation of documents, etc.).

(4) In the event of the withdrawal of the *exequatur*, the consul concerned ceases to be entitled to exercise consular functions. In addition, he loses the benefits of the present articles and of the relevant agreements in force. The question whether the consul continues in such circumstances to enjoy consular immunities until he leaves the country or until the lapse of a reasonable period within which to wind up his affairs will be dealt with in a separate article.

Article 21

Appointment of the consular staff

Subject to the provisions of articles 11, 22 and 23 the sending State may freely appoint the members of the consular staff.

Commentary

(1) The receiving State's obligation to accept the necessary number of consular officials and employees of the consulate flows from the agreement by which that State gave its consent to the establishment of consular intercourse, and in particular its consent to the establishment of the consulate. The issue of the *exequatur* to the head of consular post is not enough to ensure the smooth operation of the consulate, for the consul cannot discharge the many tasks involved in the performance of the consular function without the help of colleagues, whose qualifications, rank and number will depend on the importance of the consulate.

(2) This article is concerned only with the subordinate staff who assist the head of post in the performance of the consular functions. The procedure relating to the appointment of the head of consular post, to his recognition by the receiving State, and to the withdrawal of such recognition, has been dealt with in previous articles of the draft.

(3) The staff of a consulate is divided into two categories:

(a) *The consular officials*, i.e. persons who belong to the consular service and exercise a consular function;

(b) *The employees of the consulate*, i.e. persons who perform administrative or technical work, or belong to the service staff.

(4) The sending State is free to choose the members of the consular staff. But there are exceptions to this rule, as appears from the proviso in article 21.

(a) As stipulated in article 11, consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

(b) Article 22, which gives the receiving State the right to limit the size of the consular staff in certain circumstances, is another exception.

(c) A third exception to the rule laid down in article 21 consists in the faculty of the receiving State, under article 23, at any time to declare a member of the consular staff not acceptable, or if necessary to refuse to recognize him as such.

(5) The right to appoint to the consulate the necessary number of consular officials and consulate employees is expressly provided for in certain recent consular conventions, in particular the Conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 6), with France on 31 December 1951 (article 3, paragraph 6), with Sweden on 14 March 1952 (article 6), with Greece on 17 April 1953 (article 6), with Mexico on 20 March 1954 (article 4, paragraph 1), with Italy on 1 June 1954 (article 4), and with the Federal Republic of Germany on 30 July 1956 (article 4, paragraph 1).

(6) The free choice of consular staff provided for in article 21 naturally does not in any way imply exemption from visa formalities in the receiving State in cases where a visa is necessary for admission to that State's territory.

Article 22

Size of the staff

In the absence of a specific agreement as to the size of the consular staff, the receiving State may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the consular district, and to the needs of the particular consulate.

Commentary

(1) The Special Rapporteur did not include this provision in his original draft (A/CN.4/L.86), because he was of the opinion that the question dealt with in article 10, paragraph 1, of the Draft Articles on Diplomatic Intercourse and Immunities did not arise in the case of consulates, the staff of which is usually much smaller.

(2) Nevertheless, the majority of the members of the Commission, although recognizing that on this question there were differences of a practical nature between diplomatic missions and consulates, considered that it was advisable for the time being to recognize the receiving State's competence to settle the question of the size of staff, and that it was therefore desirable to follow in this respect the text of article 10 of the Draft Articles on Diplomatic Intercourse and Immunities.

(3) This article relates to the case in which the receiving State considers that the size of the consular staff has been unduly increased. If the receiving State considers that the consular staff is too large, it should first try to reach an agreement with the sending State. If these efforts fail, then, in the opinion of most members of the Commission, it should have the right to limit the size of the sending State's consular staff.

(4) This right of the receiving State is not, however, absolute, for such State is obliged to take into account not only the conditions prevailing in the consular district, but also the needs of the consulate concerned, i.e. it must apply objective criteria, one of the

most decisive being the consulate's needs. Any decision by the receiving State tending to limit the size of the consular staff should, in the light of the two criteria mentioned in the present article, remain within the limits of what is reasonable and normal.

Article 23

Persons deemed unacceptable

1. The receiving State may at any time notify the sending State that a member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, recall the person concerned or terminate his functions with the consulate.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the consular staff.

Commentary

(1) This article, which is concerned only with the consular staff, gives the receiving State the right at any time to declare any member of the consular staff unacceptable. The sending State is then obliged to recall the person concerned or to terminate his functions, as the case may be.

(2) Paragraph 1 takes into account two different situations which may arise. First of all, in the case of a newly-appointed consular official or employee of the consulate, the receiving State, if it has objections to the appointment, may, at the time when it learns of the appointment, and in particular when it is notified thereof, inform the sending State that the person in question is not acceptable. In some circumstances, it may do this even before the person concerned has arrived in the country to take up his duties at the consulate. On the other hand, in the case of a member of the consular staff who is already exercising his functions in the receiving State, the latter may, in the circumstances under consideration, ask the sending State to recall the person in question or to terminate his functions. This last phrase relates particularly to the cases in which the person concerned is a national of the receiving State or to cases in which, although a national of the sending State, he was in permanent residence in the territory of the receiving State before being appointed to the sending State's consulate.

(3) The expression "not acceptable" used in this article corresponds to the phrase *persona non grata* which is customarily used where diplomatic personnel are concerned.

(4) Paragraph 2 provides that, if the sending State refuses to carry out the obligation specified in paragraph 1, or fails to carry it out within a reasonable time, the receiving State may refuse to recognize the person concerned as a member of the consular staff. This means that the person concerned will cease to enjoy any consular privileges and immunities except in respect of acts performed in the exercise of official functions and, should the case arise, may even be expelled from the territory of the receiving State.

(5) Like the Draft Articles on Diplomatic Intercourse and Immunities (article 8), the article is silent on the question whether, in declaring a member of the consular staff not acceptable, the receiving State must

give reasons for its decision. The absence of any express provision on this point can only be interpreted as meaning that it is left entirely to the discretion of the receiving State whether or not to disclose the reasons for its action.

(6) However, even though the text contains no provision on this point, the receiving State should not declare a member of the consular staff unacceptable without having sufficient reason for doing so. It would be inconsistent with the obligations assumed by the receiving State in consenting to the establishment of the consulate in its territory, if it arbitrarily declared a member of the consular staff, or perhaps even all the members of the staff, unacceptable.

(7) In the wording originally proposed by the Special Rapporteur, this article stated that the right provided for in paragraph 1 might be exercised in cases where the behaviour of a member of the consular staff gave serious grounds for complaint. A similar stipulation appears in some consular conventions and may be justified by the fact that the staff of a consulate is usually much smaller than that of a diplomatic mission. That being so, the enforced withdrawal of any member of the consular staff may interfere much more seriously with the discharge of the consular function than the withdrawal of a member of a diplomatic mission would interfere with the functioning of the mission.

(8) Nevertheless many members of the Commission raised objections against the insertion of the afore-said condition, which they thought went too far. Some of these members considered in particular that the obligation contained in the proposed text, obliging the receiving State to indicate the reasons for which the conduct of a member of the consulate gives serious grounds for complaint, was neither in the interests of the two States in question, nor in the interests of the officials or employees envisaged by such a provision. For the members of the consulate, it was thought preferable to follow the same procedure as that provided by article 8 of the Draft Articles on Diplomatic Intercourse and Immunities. In order to facilitate agreement on this point, the Special Rapporteur withdrew the words "whose conduct gives serious grounds for complaint".

Article 24

Notification of the arrival and departure of members of the consulate, members of their families and members of the private staff

1. The Ministry of Foreign Affairs of the receiving State, or the authority designated by that Ministry, shall be notified of:

(a) The arrival of members of the consulate after their appointment to the consulate, and their final departure or the termination of their functions with the consulate;

(b) The arrival and final departure of a person belonging to the family of a member of the consulate and, where appropriate, the fact that a person joins the family or leaves the household of a member of the consulate;

(c) The arrival and final departure of members of the private staff in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons.

2. A similar notification shall be given whenever members of the consular staff are locally engaged or discharged.

Commentary

(1) This article imposes on the sending State the obligation to notify the receiving State of:

(a) The arrival of members of the consulate after being appointed to the consulate;

(b) Their departure or the termination of their functions with the consulate;

(c) The arrival of members of the families of members of the consulate;

(d) The arrival of members of the private staff of members of the consulate;

(e) Cases in which persons referred to in sub-paragraph (c) cease to belong to the household of members of the consulate;

(f) Cases in which members of the private staff cease to be employed by members of the consulate;

(g) Cases of the local appointment or dismissal of members of the consular staff.

(2) The receiving State has, in effect, an interest in knowing at all times what persons belong to the consulate of the sending State, since these persons, though in varying degrees, may claim the benefit of consular privileges and immunities.

(3) It should be noted that the enjoyment of consular privileges and immunities is not conditional on notification, except in the case of persons who were in the territory of the receiving State at the time of their appointment or at the time when they entered the household of a member of the consulate (article 51 of this draft).

(4) Save as otherwise provided by the legislation of the receiving State, the notification is addressed to the Ministry of Foreign Affairs, which may however designate some other authority to which the notifications referred to in article 24 are to be addressed.

(5) The obligation stipulated in the present article has a counterpart in article 43, at least as far as concerns members of the consulate, members of their families and their private staff who are not nationals of the receiving State. It consists in the exemption from obligations in the matter of the registration of aliens and residence and work permits.

(6) This article corresponds to article 9 of the Draft Articles on Diplomatic Intercourse and Immunities.

SECTION II: END OF CONSULAR FUNCTIONS

Article 25

Modes of termination

1. The functions of the head of post shall be terminated in the following events, amongst others:

(a) His recall or discharge by the sending State;

(b) The withdrawal of his *exequatur*;

(c) The severance of consular relations.

2. Except in the case referred to in paragraph 1(b) of this article, the functions of consular officials other than the head of post shall be terminated on the same grounds. In addition, their functions shall cease if the receiving State gives notice under article 23 that it considers them to be terminated.

Commentary

(1) This article deals with the modes of termination of the functions of the members of the consulate. The enumeration in paragraph 1 is not exhaustive, and it contains only the most common causes. The functions may also be terminated by other events, e.g. the death of the consular official or employee, the extinction of the sending State, or the incorporation of the consular district into another State. The events terminating the functions of a member of the consulate are sometimes set out in international consular conventions.

(2) The distinction between the termination of the functions of the head of post and the termination of the functions of other consular officials is justified by the differences in the manner of their appointment and in the manner in which their functions may be terminated.

*Article 26**Maintenance of consular relations in the event of the severance of diplomatic relations*

The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Commentary

This article sets forth a generally accepted rule of international law. It is understood that this article may later be combined with the provision of article 2, paragraph 2, if the Commission approves the latter.

*Article 27**Right to leave the territory of the receiving State and facilitation of departure*

1. Subject to the application of the provisions of article 40, the receiving State shall allow the members of the consulate whose functions have terminated, the members of their families and the private staff in their sole employ, to leave its territory even in case of armed conflict.

2. The receiving State shall grant to all the persons referred to in paragraph 1 of this article the necessary facilities for their departure as soon as they are ready to leave. It shall protect them up to the amount when they leave its territory. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects.

3. The provisions of paragraph 2 of this article shall not apply where a member of the consulate is discharged locally by the sending State.

Commentary

(1) In the past, consuls whose functions had terminated have often been prevented from leaving the territory, particularly in the case of armed conflict. Their right to leave the territory after the termination of their functions in the case of armed conflict has even been questioned as a matter of doctrine. Accordingly, the Commission considered it indispensable to provide in paragraph 1 of this article that the sending State has a right for the members of its consulate, the members of their families, and the private staff in their sole employ, to depart from the territory of the receiving State.

(2) The expression "as soon as they are ready to leave" used in paragraph 2 of the article, should be interpreted to mean that the receiving State should

accord to the persons referred to in this article the time necessary to prepare for their departure and to arrange for the transport of their personal property and effects.

(3) This article corresponds to article 42 of the Draft Articles on Diplomatic Intercourse and Immunities. In view of the differences between the legal status of the members of diplomatic missions and that of consular officials and employees, more explicit and detailed provisions have had to be included in the present article.

(4) By virtue of article 50 of this draft, the article does not apply to persons who are nationals of the receiving State.

*Article 28**Protection of consular premise and archives and of the interests of the sending State*

1. In the event of the severance of consular relations between the sending State and the receiving State,

(a) The receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the consular property and archives;

(b) The sending State may entrust the custody of the consular premises and of the consular property and archives to the consulates or diplomatic mission of a third State acceptable to the receiving State;

(c) The sending State may entrust the protection of its interests to the consulates or diplomatic mission of a third State acceptable to the receiving State.

2. The provisions of paragraph 1 of the present article shall apply also if a consulate of the sending State is closed temporarily or permanently, and the sending State has no diplomatic mission and no other consulate in the receiving State.

3. If the sending State is not represented in the receiving State by a diplomatic mission, but has another consulate in that State, that consulate may be entrusted with the custody of the archives of the consulate which has been closed and, with the consent of the receiving State, with the exercise of consular functions in the district of that consulate.

Commentary

(1) In the case referred to in paragraph 2 of this article, the sending State may entrust the custody of the consular archives to the consulate or diplomatic mission of a third State acceptable to the receiving State, unless it decides to evacuate the archives.

(2) If a consulate has been temporarily or permanently closed in the receiving State, a fresh agreement between the receiving State and the sending State is necessary for the purpose of the provisional or permanent transfer of the consular functions of the closed consulate to another consulate of the sending State in the receiving State.

(3) This article corresponds to article 43 of the Draft Articles on Diplomatic Intercourse and Immunities.

CHAPTER II. CONSULAR PRIVILEGES AND IMMUNITIES

*Article 29**Use of the national flag and of the State coat-of-arms*

1. The consulate shall have the right to fly the national flag and to display the State coat-of-arms, with an inscription identifying the

consulate, on the building occupied by the consulate, and at or near the entrance door.

2. The head of post shall have the right to fly the national flag on his means of transport.

Commentary

(1) This provision predicates in the first place the right to fly the national flag on the building in which the consulate is housed, and to display the State coat-of-arms with an inscription identifying the consulate, on the same building, and at or near the entrance door. This right, which is vested in the sending State, is confirmed by numerous consular conventions and must be regarded as being based on a rule of customary international law. It is commonly admitted that the inscription appearing on the coat-of-arms of the sending State may also be in the official language, or one of the official languages, of that State.

(2) In the case where the whole of the building is used for the purposes of the consulate, the national flag may be flown not only on the building but also within its precincts. The right to use the national flag is embodied in many national regulations.

(3) A study of the consular conventions shows that the right of the head of consular post to fly the national flag on his means of transport is recognized by a large number of States. This practice may therefore be regarded as establishing a rule of general international law. As the actual text of the article shows, the means of transport in question must be individual ones, such as motor vehicles, vessels of all kinds used exclusively by the head of consular post, aircraft belonging to the consulate, etc. Accordingly, this right is not exercisable when the head of consular post uses *public* means of transport (trains, ships and boats, commercial aircraft).

(4) Besides the head of post who has received the *exequatur* (article 13) or provisional recognition (article 14), an acting head of post (article 16) may also exercise the privilege referred to in paragraph 3 of this commentary.

(5) The consular regulations applied by some States provide for the use of a consular flag (*fanion*) by their consuls. Article 29 should be interpreted as applying to these cases also.

(6) The duty of the receiving State to permit the use of the national flag of the sending State implies the duty to provide for the protection of that flag. Some conventions stipulate that consular flags are inviolable (e.g. the Convention of Caracas of 1911, article III, paragraph 1).

(7) In connexion with this article, the question was raised of what would be the relations between its provisions, once they have been adopted and incorporated in a multilateral convention, and municipal law. Some members of the Commission considered that the article should not be drafted in terms capable of being interpreted as placing upon the receiving State the obligation to enforce even as against the owner of the building in which the consulate is housed the right of the sending State under article 29. In their opinion, the receiving State's obligation should not be so far-reaching as to

require that State to ensure the exercise of the right in question in every particular case. This view was opposed by those who maintained that any State which has accepted an international undertaking is bound to put into effect rules of domestic law for the purpose of ensuring the implementation of that undertaking. Other members of the Commission, without expressing any definite opinion on this point, considered that the question raised no difficulty in practice since it could be settled in connexion with the lease. For these reasons, the Commission did not think it necessary to examine the problem of the relationship between an international treaty and municipal law, as that problem will be discussed and resolved within the framework of the law of treaties.

(8) This article corresponds to article 18 of the Draft Articles on Diplomatic Intercourse and Immunities.

SECTION I: CONSULAR PREMISES AND ARCHIVES

Article 30

Accommodation

The sending State has the right to procure on the territory of the receiving State, in accordance with the internal law of the latter, the premises necessary for its consulates. The receiving State is bound to facilitate, as far as possible, the procuring of suitable premises for such consulates.

Commentary

(1) The right to procure on the territory of the receiving State the premises necessary for a consulate derives from the agreement by which that State gives its consent to the establishment of the consulate. The reference in the text of the article to the internal law of the receiving State signifies that the sending State may procure premises only in the manner laid down by the internal law of the receiving State. That internal law may however contain provisions prohibiting the acquisition of the ownership of premises by aliens or by foreign States, so that the sending State may be obliged to rent premises. Even in this case, the sending State may encounter legal or practical difficulties. Hence, the Commission decided to include in the draft an article making it obligatory for the receiving State to facilitate, as far as possible, the procuring of suitable premises for the consulate of the sending State. This obligation does not extend to the residence of members of the consular staff, for such a duty would be too onerous for the receiving State.

(2) As compared with article 19 of the Draft Articles on Diplomatic Intercourse and Immunities, the wording of this article was modified so as not to impose an unduly heavy burden on receiving States which have a large number of consulates in their territory, and also to make allowance for the fact that States tend to lease rather than purchase premises when seeking accommodation for their consulates in the receiving State.

Article 31

Inviolability of the consular premises

1. The consular premises shall be inviolable. The agents of the

receiving State may not enter them, save with the consent of the head of post.

2. The receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage, and to prevent any disturbance of the peace of the consulate or impairment of its dignity.

3. The consular premises and their furnishings shall be immune from any search, requisition, attachment or execution.

Commentary

(1) The consular premises comprise any building or any part of a building which is used for the purposes of a consulate, whether the building is owned by the sending State or by a third party acting on its account, or whether the premises are occupied under a lease. If the consulate uses an entire building for its purposes, the consular premises also comprise the surrounding land and the appurtenances, including the garden, if any; for the appurtenances are an integral part of the building and are governed by the same rules. It is hardly conceivable that the appurtenances should be governed by rules different from those applicable to the building to which they are attached.

(2) The inviolability of the consular premises is a prerogative granted to the sending State by reason of the fact that the premises in question are used as the seat of its consulate.

(3) The article places two obligations on the receiving State. In the first place, that State must prevent its agents from entering the consular premises unless they have previously obtained the consent of the head of post (paragraph 1). Secondly, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage, and to prevent any disturbance of the peace of the consulate or impairment of its dignity (paragraph 2). The expression "special duty" is used to emphasize that the receiving State is required to take steps going beyond those normally taken in the discharge of its general duty to maintain public order.

(4) Paragraph 3 of the article provides that the consular premises must not be entered even in pursuance of an order made by a judicial or administrative authority. The paragraph states that the consular premises, including their furnishings and fittings, are immune from any search, requisition, attachment or execution. This immunity naturally includes immunity from military requisitioning and billeting.

(5) If the consulate uses rented premises, measures of execution against the private owner are permissible, but only in so far as they do not necessitate entry upon the premises of the consulate.

(6) By reason of article 28 of the present draft, the inviolability of the consular premises will subsist even in the event of the severance of consular relations or of the permanent or temporary closure of the consulate.

(7) The present article follows *mutatis mutandis* the terms of article 20 of the Draft Articles on Diplomatic Intercourse and Immunities.

(8) The principle of the inviolability of the consular

premises is recognized in numerous consular conventions, including the following: Cuba-Netherlands, 31 December 1913 (article 5); Albania-France, 5 February 1920 (article 6); Czechoslovakia-Italy, 1 March 1924 (article 9); Greece-Spain, 23 September 1926 (article 9); Poland-Yugoslavia, 6 March 1927 (article VIII); Germany-Turkey, 28 May 1929 (article 6); Costa Rica-United States of America, 12 January 1948 (article VI); Philippines-Spain, 20 May 1948 (article IX, paragraph 2); the consular conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 10, paragraph 4), with France on 31 December 1951 (article 11, paragraph 1), with Sweden on 14 March 1952 (article 10, paragraph 4), with Greece on 17 April 1953 (article 10, paragraph 3), with Mexico on 20 March 1954 (article 10, paragraph 3) and with the Federal Republic of Germany on 30 July 1956 (article 8, paragraph 3); the conventions concluded by the Union of Soviet Socialist Republics with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 2), with the Mongolian People's Republic on 28 August 1957 (article 13, paragraph 2), with the Romanian People's Republic on 4 September 1957 (article 9, paragraph 2), with the People's Republic of Albania on 18 September 1957 (article 3, paragraph 2), with the People's Republic of Bulgaria on 16 December 1957 (article 13, paragraph 2), with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 3), with Austria on 28 February 1959 (article 13, paragraph 2), with the Democratic Republic of Viet-Nam on 5 June 1959 (article 13, paragraph 2) and with the People's Republic of China on 23 June 1959 (article 13, paragraph 2); the Consular Convention of 23 May 1957 between Czechoslovakia and the German Democratic Republic (article 5, paragraph 2); and the Havana Convention of 1928 regarding consular agents (article 18).

(9) Some bilateral consular conventions even recognize the inviolability of the consul's residence. The municipal laws of some (though of very few) countries also recognize the inviolability of the consul's residence.

Article 32

Exemption from taxation in respect of the consular premises

The sending State and the head of post shall be exempt from all taxes and dues levied by the receiving State or by any territorial or local authority in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

Commentary

(1) The exemption provided for in article 32 relates to the taxes and dues which, but for the exemption, would, under the legislation of the receiving State be leviable on the consular premises owned or leased by the sending State or by the head of consular post. The exemption covers the taxes and dues charged on the contract of sale, or on the lease, and also those charged on the building and rents.

(2) The exemption to which this article relates is an exemption *in rem* affecting the actual building acquired or leased by the sending State, even if the entity

entitled to claim the exemption is the sending State or the head of consular post. In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated.

(3) The expression "any territorial or local authority" means any one of the territorial or political subdivisions of the State: state (in a federal State), autonomous republic, canton, province, county, region, department, district, commune, municipality, etc.

(4) This exemption is subject to an exception indicated in the final phrase of the article in respect of taxes and dues which represent payment for specific services, e.g. the tax on radio and television sets, taxes on water, electricity, gas consumption, etc.

(5) The article repeats *mutatis mutandis* the text of article 21 of the Draft Articles on Diplomatic Intercourse and Immunities.

Article 33

Inviolability of the consular archives, and documents and official correspondence of the consulate

The consular archives, the documents and the official correspondence of the consulate shall be inviolable.

Commentary

(1) This article lays down one of the essential rules relating to consular privileges and immunities, recognized by customary international law. While it is true that the inviolability of the consular archives and of the documents and the official correspondence of the consulate (hereinafter designated as the papers of the consulate) is to some extent guaranteed by the inviolability of the consular premises (article 31), the papers of the consulate must as such be inviolable wherever they are, even, for example, if a member of the consulate is carrying them on his person, or if they have to be taken away from the consulate owing to its closure or on the occasion of a removal. For the reasons given, and because of the importance of this rule for the exercise of the consular function, the Commission considered it necessary that it should form the subject of a separate article.

(2) The expression "archives... of the consulate" means the chancery documents and other papers, together with any furniture intended for their custody (article 1, paragraph (e)).

(3) The term "documents" means any papers which do not come under the heading of "official correspondence", e.g. memoranda drawn up by the consulate. It is clear that "civil status" documents, such as certificates of birth, marriage or death issued by the consul, and documents such as manifests drawn up by the consul in the exercise of his functions, cannot be described for the purposes of this article as documents entitled to inviolability, for these certificates, manifests, etc., are issued to the persons concerned or to

their representatives as evidence of certain legal acts or events.

(4) The expression "official correspondence" means all correspondence sent by the consulate, or addressed to it by the authorities of the sending State, the receiving State or a third State.

(5) This article corresponds to article 22 and article 25, paragraph 2, of the Draft Articles on Diplomatic Intercourse and Immunities. The Commission considered it necessary to combine the provisions relating to the consular archives, the documents and the official correspondence of the consulate in a single article, not only because of the similarity of what is protected, but also because of the legal status of consular officials, who, unlike diplomatic agents, enjoy only a limited personal inviolability and are subject to the jurisdiction of the receiving State in respect of all acts other than those performed in the exercise of their official duties.

(6) The papers of the consulate enjoy inviolability even before the *exequatur* or special authorization is issued to the consul, for the inviolability is an immunity granted to the sending State and not to the consular official personally.

SECTION II: FACILITATION OF THE WORK OF THE CONSULATE, FREEDOM OF MOVEMENT AND COMMUNICATION

Article 34

Facilitation of the work of the consulate

The receiving State shall accord full facilities for the performance of the consular functions.

Commentary

(1) This article, which follows the terms of article 23 of the Draft Articles on Diplomatic Intercourse and Immunities, was inserted because the consulate needs the assistance of the government and authorities of the receiving State, both during its installation and in the exercise of its functions. Consuls could not successfully carry out any of the functions enumerated by way of example in article 4 without the assistance of the authorities of the receiving State. The obligation which this article imposes on the receiving State is moreover in its own interest, for the smooth functioning of the consulate helps to develop consular intercourse between the two States concerned.

(2) It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.

Article 35

Freedom of movement

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 consulate freedom of movement and travel in its territory.

Commentary

The Special Rapporteur did not propose any article relating to freedom of movement, because he considered that, since the consular district is usually rather small and only in very exceptional cases comprises the whole territory of the State, such a provision was unnecessary. He based his view on an analysis of the bilateral conventions, which contain no provisions of this kind. Some of the members of the Commission shared the Special Rapporteur's view, but the majority took the view that the consulate could not properly discharge its duties unless its members were assured of the same freedom of movement as the members of diplomatic missions. The majority was therefore in favour of including in the present draft a rule similar to that contained in article 24 of the Draft Articles on Diplomatic Inter-course and Immunities.

*Article 36**Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or other special couriers, the diplomatic or consular bag and messages in cipher.

2. The bags containing the consular correspondence shall not be opened or detained.

3. These bags, which must bear visible external marks of their character, may only contain documents or articles intended for official use.

Commentary

(1) This article predicates a freedom essential for the discharge of consular functions; and, together with the inviolability of consular premises and that of the consulate's official archives, documents and correspondence, it forms the foundation of all consular law.

(2) By the terms of paragraph 1, freedom of communication is to be accorded "for all official purposes". This expression relates to communication with the government of the sending State; with the authorities of that State, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of other States; and, lastly, with international organizations.

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or other special couriers, the diplomatic or consular bag, and messages in cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, i. e. of the couriers dispatched by the Ministry of Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates

in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(4) However, by reason of its geographical position, a consulate may have to send a special courier to the seat of the diplomatic mission or even to the sending State, particularly if the latter has no diplomatic mission in the receiving State. The text proposed by the Commission provides for this contingency. The special courier must enjoy the same protection in the receiving State as the diplomatic courier. He enjoys inviolability of person and is not liable to any form of arrest or detention. He must be provided with a document certifying his status as a special courier.

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing documents or articles, or both, intended for official purposes. The consular bag must not be opened or detained. This rule, set forth in paragraph 2, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of article 33 of the draft. As is specified in paragraph 3, consular bags must bear visible external marks of their character, i.e. they must bear an inscription or other external mark so that they can be identified as consular bags.

(6) Freedom of communication also covers messages in cipher, i.e. messages in secret language, and, of course, also messages in code, i.e. messages in a conventional language which is not secret and is employed for reasons of practical utility and, more particularly, in order to save time and money. Some consular conventions add that the messages of consulates shall enjoy transmission at the same rates as the messages of diplomatic missions. In the absence of sufficient information on the practice of States in this matter, the Commission preferred not to enter upon it for the time being.

(7) The question whether the article authorizes the consulate to instal and use a wireless transmitter must be answered in the negative. Under the international conventions on telecommunications, the consulate has to apply to the receiving State for a special licence if it wishes to instal a telecommunication post.¹⁶

(8) Correspondence and other communications in transit, including messages in cipher, enjoy protection in third States also, in conformity with the provisions of article 52, paragraph 4, of the present draft. The same protection is enjoyed by special couriers in third States.

¹⁶ Sir Gerald Fitzmaurice said that in voting in favour of the Report he must reserve his position in regard to paragraph 7 of the Commentary to article 36 since in his view the provisions of the various telecommunications conventions have no relation to the use of what is known as the diplomatic wireless.

Article 37

Communication with the authorities of the receiving State

1. In the exercise of the functions specified in article 4, consuls may address the authorities which are competent under the law of the receiving State.

2. Nevertheless, consuls may not address the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.

3. The procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the laws and usages of the receiving State.

Commentary

(1) It is a well-established principle of international law that consuls, in the exercise of their functions as set out in article 4, may address only the local authorities. The Commission was divided on the question of what these authorities are.

(2) Some members of the Commission, pointing out that the exercise of the competence of the consulate with respect to the receiving State is restricted to the consular district—as is apparent, also, from article 1 (c) and article 4 of the present draft—considered that the only cases in which consuls could address authorities outside the consular district were those where a particular service constituted the central service for the entire territory of the State, or for one of the State's territorial or political sub-divisions (e.g. the emigration or immigration services, or the chambers of commerce in many States). They held that if the consul's applications to the local authorities or to the centralized services were not given due consideration, he could address the government through the diplomatic mission of the sending State, direct communication with a ministry of the receiving State being permissible only if the sending State had no diplomatic mission in the receiving State.

(3) Other members of the Commission took the view that consuls might, in the case of matters within their consular district, address any authority of the receiving State direct, including the central authorities, with the exception of the Ministry of Foreign Affairs. In their opinion, any restrictions in this sense imposed upon consuls by the regulations of the sending State are internal measures without relevance for international law.

(4) The text of the article represents a compromise between the two points of view. It leaves it for each receiving State to determine what are the competent authorities which may be addressed by consuls in the exercise of their functions, and yet it does not exclude recourse to central authorities. The text gives consuls the right themselves to address the Ministry of Foreign Affairs of the receiving State in the special case where the sending State has no diplomatic mission in the receiving State.

(5) Paragraph 3 of the article provides, in conformity with the practice of States, that the procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined

by the relevant international agreements and by the laws and usages of the receiving State. For example, the laws of some countries require consuls who wish to address the government of the receiving State to communicate through their diplomatic mission; or they provide that consuls of countries which have no diplomatic representation in the receiving State may address only certain officials of the Ministry of Foreign Affairs in well-defined cases. The receiving State may also prescribe other procedures to be observed by foreign consuls.

(6) It should be noted that the communications of consuls with the authorities of the receiving State are often governed by consular conventions. For example, the Consular Convention of 1913 between Cuba and the Netherlands (article 6) and the Consular Convention of 1924 between Czechoslovakia and Italy (article 11, paragraph 4) provide that consuls may not address the central authorities except through the diplomatic channel. The Consular Convention of 1923 between Germany and the United States of America (article 21) gives only the consul-general or consular official stationed in the capital the right to address the government. Other conventions authorize the consul to communicate not only with the competent authorities of his district but also with the competent departments of the central government; however, he may do so only in cases where there is no diplomatic mission of the sending State in the receiving State. (See in particular the Consular Conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 19, paragraph 2) and with France on 31 December 1951 (article 24, paragraph 2). Other conventions authorize the consul to correspond with the ministries of the central government, but stipulate that the consul may not communicate directly with the Ministry of Foreign Affairs except in the absence of a diplomatic mission of the sending State. (See the Consular Convention of 17 April 1953 between Greece and the United Kingdom (article 18, paragraph 1 (d)).

Article 38

Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues

1. The consulate is entitled to levy in the territory of the receiving State the fees and charges provided by the law of the sending State for consular acts.

2. Neither the receiving State nor any territorial or local authority shall levy any tax or due on the consular fees and charges referred to in paragraph 1 of this article, or in respect of the issuance of receipts for such fees or charges.

Commentary

(1) This article states a rule of customary international law. Since the earliest times consuls have levied fees for services rendered to their nationals, originally fixed as a percentage of the quantity or of the value of goods imported through the ports by the nationals concerned. At the present time, every State levies fees provided by law for official acts performed by its consulates. It must be borne in mind that since the levying of consular fees and charges is bound up with the exer-

cise of consular functions it is subject to the general limitation laid down in the introductory sentence of paragraph 1 of article 4. For this reason, a consulate would not be entitled to levy charges on consular acts which are not recognized by the present articles or by other relevant international agreements in force, and which would be a breach of the law of the receiving State.

(2) Paragraph 2 of this article affirms another rule of customary international law in this particular sphere, namely that no sovereign State can be subjected to the jurisdiction of another State. This provision stipulates that the revenue obtained from the fees and charges levied by a consulate for consular acts shall be exempt from all taxes and dues levied either by the receiving State or by any of its territorial or local authorities. In addition, this paragraph recognizes that the receipts issued by a consulate for the payment of consular fees or charges are likewise exempt from taxes or dues levied by the receiving State. These dues include, amongst others, the stamp duty charged in many countries on the issuance of receipts.

(3) The expression "any territorial or local authority" comprises all territorial or political sub-divisions of the State: state (in a federal State), autonomous republic, canton, province, county, region, department, commune, district, municipality, etc.

(4) This article leaves aside for the time being the question of the extent to which acts performed at a consulate between private persons are exempt from the taxes and dues levied by the law of the receiving State. The opinion was expressed that such acts should be subject to the said taxes or dues only if intended to produce effects in the receiving State. It was contended that it would be unjustifiable for the receiving State to levy taxes and dues on acts performed, for example, between the nationals of two foreign States and intended to produce legal effects in one or more foreign States. However, as the Commission had not sufficient information at its disposal about the practice of States in this matter, it contented itself with bringing the problem to the attention of governments and requesting them for information about the way in which it is handled under their law or practice.

(5) The exemption of the members of the consulate and members of their families from taxation is dealt with in article 45.

SECTION III : PERSONAL PRIVILEGES AND IMMUNITIES

Article 39

Special protection and respect due to consuls

The receiving State is bound to accord special protection to consuls by reason of their official position, and to treat them with due respect. It shall take all reasonable steps to prevent any attack on their persons, freedom or dignity.

Commentary

(1) The rule that the receiving State is under a legal obligation to accord special protection to consuls and to treat them with respect must be regarded as

forming part of customary international law. Its basis lies in the fact that, according to the view generally accepted today, the consul represents the sending State in the consular district, and by reason of his position is entitled to greater protection than is enjoyed in the territory of the receiving State by resident aliens. He is also entitled to be treated with the respect due to agents of foreign States.

(2) The rule laid down tends in the direction of assuring to the consul a protection that may go beyond the benefits provided by the various articles of the present draft relative to consular intercourse and immunities. It applies in particular to all situations not actually provided for, and even assures to the consul a right of special protection where he is subjected to annoyances not constituting attacks on his person, freedom or dignity as mentioned in the second sentence of this article.

(3) The fact of receiving the consul places the receiving State under an obligation to ensure his personal safety, particularly in the event of tension between that State and the sending State. The receiving State must therefore take all reasonable steps to prevent attacks on the consul's person, freedom, or dignity. It must, for example, protect him against slanderous press campaigns.

(4) Under the provisions of article 51, a consul starts to enjoy the special protection provided for in article 39 as soon as he enters the territory of the receiving State on proceeding to take up his post, or, if already in that territory, as soon as his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

(5) The protection of the consul after the termination of his functions is dealt with in article 27 of the draft.

(6) The expression "reasonable steps" must be interpreted in the light of the circumstances of the case. It includes all steps which the receiving State is in a position to take, having regard to the actual state of affairs at the place where the consul's residence or the consulate is situated, and to the physical means at its disposal.

(7) The rule codified in this article is embodied in many consular conventions, including, amongst recent ones, the Conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 5, para. 2), with Greece on 17 April 1953 (article 5, para. 2), with Mexico on 20 March 1954 (article 5, para. 2) and with Italy on 1 June 1954 (article 5, para. 2); and the Convention concluded by the Soviet Union with the Federal Republic of Germany on 25 April 1958 (article 7), and with the People's Republic of China on 23 June 1959 (article 5).

Article 40

Personal inviolability

1. Consular officials who are not nationals of the receiving State and do not carry on any gainful private activity shall not be liable to arrest or detention pending trial, except in the case of an offence punishable by a maximum sentence of not less than

five years' imprisonment [*Alternatively: "except in the case of a grave crime"*].

2. Except in the case specified in paragraph 1 of this article, the officials referred to in that paragraph shall not be committed to prison or subjected to any other restriction upon their personal freedom save in execution of a final sentence of at least two years' imprisonment.

3. In the event of criminal proceedings being instituted against a consular official of the sending State, he must appear before the competent authorities. Nevertheless the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case referred to in paragraph 1 of this article, in a manner which will hamper the exercise of the consular function as little as possible.

4. In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall notify the head of the consular post accordingly. Should the latter be himself the object of the said measures, the receiving State shall notify the diplomatic representative of the sending State.

Commentary

(1) The purpose of this article is to settle the question of the personal inviolability of consuls, which has been controversial both as a matter of doctrine, and in the practice of States, since the time when consuls, having ceased to be public ministers, became subject to the jurisdiction of the State in which they discharge their functions. Since the *Barbuit* case in 1737, when an English court refused to recognize the immunity from jurisdiction of a consul (agent for commerce) of the King of Prussia, the personal inviolability of consuls has not been recognized by the case law of the national courts of many countries of Europe and America.

(2) Reacting against this practice, States have attempted to provide for the personal inviolability of their consuls through conventions, by including personal immunity clauses in consular conventions. The practice of including a personal immunity clause has become very widespread since the Convention of Pardo, signed on 13 March 1769 between France and Spain, which provided that the consuls of the two Contracting Parties should enjoy personal immunity so as not to be liable to arrest or imprisonment except for crimes of an atrocious character, or in cases where the consuls were merchants (article II).

(3) The personal immunity clause was for a long time interpreted in fundamentally different ways. Some writers claimed that it conferred virtual exemption from civil and criminal jurisdiction, except in cases where the consul was accused of a felony. Others have interpreted the immunity as conferring exemption from arrest and from detention pending trial, except in case of felony, and exemption from attachment of the person in a civil matter. Courts, which were at first divided as to the meaning to be given to the expression "personal immunity", have interpreted the expression as meaning personal inviolability and not immunity from jurisdiction.

(4) From an analysis of recent consular conventions, it is evident that States, while asserting the subjection of consuls to the jurisdiction of the receiving

State, recognize their personal inviolability except in cases where they have committed a grave crime. While some conventions exempt consuls not only from arrest, but also from prosecution save in cases of felony (e.g. the Convention of 12 January 1948 between Costa Rica and the United States of America, article II), the vast majority of recent conventions do no more than exempt consuls simply from arrest or detention or, in general, from any restriction on their personal freedom, except in cases where they have committed an offence the degree of seriousness of which is usually defined in the convention.

(5) Some conventions provide simply for exemption from arrest and detention pending trial, while others are general in scope and cover all forms of detention and imprisonment.

(6) Apart from this difference in scope, the conventions differ only in the manner in which they determine the nature of the offences in respect of which personal inviolability is not admitted. Some conventions which recognize personal inviolability make an exception in the case of "serious criminal offences", while others (much more numerous) permit the arrest of consuls only when they are charged with penal offences defined and punished as felonies by the criminal law of the receiving State. Sometimes the offences in respect of which inviolability is not recognized are defined by reference to the type of penalty applicable (death penalty or penal servitude). In other cases the crimes in respect of which inviolability does not apply are enumerated. Lastly, a large group of bilateral conventions uses as the criterion for determining the cases in which the arrest of consuls is permitted the length of the sentence which is imposed by the law of the receiving State for the offence committed. Some conventions even contain two different definitions of the offence, or specify two different lengths of sentence, one being applicable in one of the contracting States and the other in the other State.

(7) Some consular conventions allow arrest and detention pending trial only on the double condition that the offence is particularly serious (according to the definition given in the convention concerned) and that the consular official is taken *in flagrante delicto*.

(8) Where conventions do no more than exempt consuls from arrest pending trial except in the case of felonies, they sometimes contain clauses which provide that consuls or career consular officials may not be placed under personal arrest, either pending trial, or as a measure of execution in a civil or commercial case; and equally neither in the case of an alleged offence nor as punishment for an offence subject to prosecution by way of administrative proceedings. Other conventions expressly exclude arrest in civil and commercial cases.

(9) The scope of the provisions designed to ensure personal immunity is restricted *ratione personae* in that

(a) Conventions generally exclude consular officials who are nationals of the receiving State from the benefit of clauses granting personal inviolability; and

(b) They exclude consular officials engaged in commercial activities from exemption from personal constraint in connexion with such activities.

(10) Conventions determine in various ways what persons shall enjoy inviolability. Some grant personal inviolability to consuls only (consular officers); others grant it also to other consular officials, and some even to certain categories of consulate employees.

(11) The Commission considered that, despite the divergent views on the technical question of the definition of offences for which personal inviolability could not be admitted, there was enough common ground in the practice of States on the substance of the question of the personal inviolability of consular officials to warrant the hope that States may accept the principle of the present article.

(12) Paragraphs 1 to 3 of the article refer solely to consular officials, i.e. heads of post and other members of the consulate who exercise a consular function in the receiving State (article 1 (h)). Hence, personal inviolability does not extend to consulate employees. Moreover, only consular officials who are not nationals of the receiving State, and who are not engaged in gainful private activity, enjoy the personal inviolability provided for in this article.

(13) Under the terms of paragraph 1 of this article, the consular officials referred to in this article enjoy general immunity from arrest and detention pending trial in the case of all minor offences. The difficulty is to determine the offences in respect of which inviolability should not be granted. The Commission realized that none of the methods which it might adopt to define such offences would be entirely satisfactory. It therefore proposes two variants for paragraph 1. Under the terms of the first variant, exemption from arrest and detention pending trial is not granted in respect of offences which, under the law of the receiving State, are punishable by a maximum sentence of not less than five years' imprisonment. The second variant permits arrest and detention pending trial for all serious offences. The term "imprisonment" covers, of course, all forms of the penalty, which vary from country to country (imprisonment, solitary confinement, forced labour, etc.).

(14) Paragraph 2 of the article provides that consular officials, save in cases where, under paragraph 1 of the article, they are liable to arrest or detention pending trial, enjoy personal inviolability except in execution of a final sentence of at least two years' imprisonment. According to this provision, consular officials

(a) May not be committed to prison in execution of a judgement if the sentence imposed is of less than two years;

(b) May not be committed to prison in execution of a court decision other than a judgement such as, for example, an ordinary procedural ruling given in the course of the proceedings; and, *a fortiori*, not in execution of a mere administrative order;

(c) Are not liable to any other restriction upon their

personal freedom, such as, for instance, methods of execution involving restrictions on personal freedom (imprisonment for debt, imprisonment for the purpose of compelling the debtor to perform an act which he must perform in person, etc.).

(15) Accordingly, this article excludes the arrest or imprisonment of consular officials for minor offences. The imprisonment of a consul or other consular official hampers considerably the functioning of the consulate, and makes the discharge of its daily tasks difficult—which is particularly serious inasmuch as many of the matters calling for consular action will not bear delay (e.g. the issue of visas, passports and other travel documents; the legalization of signatures on commercial documents and invoices; various activities in connexion with shipping, etc.). Any such step would harm the interests, not only of the sending State, but also of the receiving State, and would seriously affect consular relations between the two States. It would be difficult to admit the possibility that the functioning of a consulate could at any time be interrupted, or at least seriously jeopardized, by action taken by local authorities in connexion with some trivial offence.

(16) The Commission could not accept the argument that a sentence pronounced by a court of the receiving State would be meaningless if, under this article, it could not be executed. It must be noted, first, that the same argument applies to the exceptional cases in which diplomatic agents are liable to the jurisdiction of the receiving State (see article 29, paragraph 1 (a), (b), and (c) and paragraph 3 of the Draft Articles on Diplomatic Intercourse and Immunities), and to cases where the sending State has waived the immunity (article 30 of the same draft). Nevertheless, the exercise of judicial authority by the receiving State may be regarded as desirable and even indispensable. A further point to be taken into consideration is that under the laws of many countries, courts may—for example, in the case of a first offence—award a suspended sentence. Lastly, a court sentence may always be made a ground by the receiving State for requesting the recall of the convicted consular official.

(17) Paragraph 3 of this article, which deals with the conduct of criminal proceedings against a consular official, prescribes that an official against whom such proceedings are instituted must appear before the competent authorities. The latter expression means other tribunals as well as ordinary courts. The consular official is not required to appear in person and may be represented by his attorney. The rule set out in the first sentence of paragraph 3 is to be read in the light of the second sentence of that paragraph, which specifies that the proceedings must be conducted with the respect due to the consular official by reason of his official position and, except where he is arrested or detained pending trial in conformity with paragraph 1, in such manner as to hamper the exercise of consular functions as little as possible. This requirement must be taken as meaning that, save where arrest pending trial is admissible under paragraph 1, no coercive measure may be applied against a consular official who refuses

to appear before the court. The authority concerned can of course always take the consular official's deposition at his residence or office, if this is permissible under the law of the receiving State and possible in practice.

(18) Paragraph 4 of this article, unlike the other paragraphs, refers not only to consular officials but also to all other members of the consulate. It establishes the obligation of the receiving State to notify the head of the consular post if a member of the consular staff is arrested or placed in custody pending trial, or if criminal proceedings are instituted against him. The duty to notify the diplomatic representative of the sending State if the head of the consular post is himself the object of the said measures is to be accounted for both by the gravity of the measures that affect the person in charge of a consulate and by practical considerations.

(19) The inviolability which this article confers is enjoyed from the moment the consular official to whom it applies enters the territory of the receiving State to take up his post. He must, of course, establish his identity and claim status as a consular official. If he is already in the territory of the receiving State at the time of his appointment, inviolability is enjoyed as from the moment when the appointment is notified to the Ministry of Foreign Affairs, or to the authority designated by that Ministry (see article 51 of this draft). A consular official enjoys a like inviolability in third States if he passes through or is in their territory when proceeding to take up or return to his post, or when returning to his own country (article 52, paragraph 1).

(20) If a member of the diplomatic staff of the sending State's diplomatic mission is assigned to a consulate, he continues to enjoy the full measure of inviolability accorded to diplomatic agents.

Article 41

Immunity from jurisdiction

Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions.

Commentary

(1) Unlike members of the diplomatic staff, all the members of the consulate are in principle subject to the jurisdiction of the receiving State, unless exempted by one of the present rules or by a provision of some other applicable international agreement. In particular, they are, like any private person, subject to the jurisdiction of the receiving State in respect of all their private acts, more especially as regards any private gainful activity carried on by them. The exceptions to this rule are stated in article 41 *et seq.*

(2) The rule that, in respect of acts performed by them in the exercise of their functions (official acts), members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State, is part of customary interna-

tional law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative. Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them. Consequently, consular officials enjoy complete inviolability in respect of their official acts.

(3) In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular powers enjoy immunity from jurisdiction. The Commission was unable to accept this view. It is in fact often very difficult to draw an exact line between what is still the consular official's official act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions. If any qualifying phrase had been added to the provision in question, the exemption from jurisdiction could always be contested, and the phrase might be used at any time to weaken the position of a member of the consulate.

(4) This article does not apply to members of the consulate who are nationals of the receiving State. Their legal status is governed by article 50 of these draft articles.

Article 42

Liability to give evidence

1. Members of the consulate are liable to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if they should decline to do so, no coercive measure may be applied with respect to them.

2. The authority requiring the evidence of a consular official shall take all reasonable steps to avoid interference with the performance of his official duties and shall, where possible and permissible, arrange for the taking of such testimony at his residence or office.

3. Members of the consulate may decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto. In this case also, the authority requiring the evidence shall refrain from taking any coercive measures with respect to them.

Commentary

(1) In contrast to members of a diplomatic mission, consuls and other members of the consulate are not exempted by international law from liability to attend as witnesses in courts of law or in the course of administrative proceedings. However, the Commission agreed that if they should decline to attend, no coercive measure may be applied with respect to them. This privilege is confirmed by a large number of consular conventions. For this reason, the letter of the judicial or administrative authority inviting consular officials to attend should not contain any threat of a penalty for non-appearance.

(2) The Commission noted that consular conventions apply different methods so far as concerns the procedure to be followed in taking the testimony of

consular officials. In view of the provisions contained in numerous conventions, the Commission merely inserted two fundamental rules on the subject in paragraph 2 of this article:

(a) The authority requiring the evidence shall take all reasonable steps to avoid interference with the performance by the consular official of his official duties;

(b) The authority requiring the evidence shall, where possible and permissible, arrange for the taking of such testimony at the consular official's residence or office.

As can be seen from this last condition, the testimony of a consular official cannot be taken at his residence or office unless this is permitted by the legislation of the receiving State. But even in cases where the legislation of that State allows testimony to be taken at the consular official's residence or office, e.g. through a judge deputed to act for the president of the court (*juge délégué*), there may be exceptional cases in which the consular official's appearance in court is, in the opinion of the court, indispensable. The Commission wished to make allowance for this case by inserting the word "possible". If the testimony of the consular official is to be taken at his residence or office, the date and hour of the deposition should of course be fixed by agreement between the court and the consulate to which the official in question belongs. The date of the deposition should be fixed in such a way as not to delay the proceedings unnecessarily. While the second rule may be regarded as an application of the first, the first rule nevertheless expresses a general principle which should be applied both in cases which are covered by the second rule and in cases in which the consular official is to appear before the court.

(3) The right of members of the consulate to decline to give evidence concerning matters connected with the exercise of their functions, and to decline to produce any official correspondence or documents relating thereto, is confirmed by a large number of consular conventions. The right to decline to produce official correspondence and papers in court is a logical corollary of the inviolability of the correspondence and documents of the consulate. However, the consul or any other member of the consulate should not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths; and he should not decline to produce the documents relating thereto.

(4) This article applies to career consuls only, since the similar liability of honorary consuls is governed by articles 54 and 60 of this draft.

(5) By virtue of article 50 of this draft, this article does not apply to members of the consulate who are nationals of the receiving State.

Article 43

Exemption from obligations in the matter of registration of aliens and residence and work permits

Members of the consulate, members of their families, and their private staff, shall be exempt from all obligations under local

legislation in the matter of the registration of aliens, residence permits and work permits.

Commentary

(1) Under article 24 of this draft, the arrival of members of the consulate, and of members of their families, and of their private staff, must be notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry. In accordance with the practice of numerous countries, it seemed necessary to exempt these persons from the obligation which the law of the receiving State imposes on them to register as aliens and to apply for a residence permit.

(2) In a great many States, the Ministry of Foreign Affairs issues to members of the consulate and to members of their families special cards to be used as documents of identity certifying their status as members of the consulate or of the family of a member of the consulate. An obligation to issue such documents of identity is imposed by several consular conventions. Although the Commission considers that this practice should become general and should be accepted by all States, it did not think it necessary to include a provision to that effect in the draft in view of the purely technical character of the point involved.

(3) The extension of the said exemption to private staff is justified on practical grounds. It would in fact be difficult to require a member of the consulate who brings a member of his private staff with him from abroad to comply with the obligations in question in respect of a person belonging to his household, if he and the members of his family are themselves exempt from those obligations.

(4) Since the appointment of consular staff is governed by article 21 of the draft, the exemption from the obligations imposed by local legislation in the matter of work permits can apply only to members of a consulate who wish to employ in their service, in a country in which the employment of foreign workers is subject to a work permit, persons who have the nationality of the sending State or of a third State.

(5) By its very nature the exemption can apply to aliens only, since only they could be contemplated by legislation of the receiving State concerning the registration of aliens, and residence and work permits. The exemption in question can accordingly have no application to members of the consulate or to members of their family who are nationals of the receiving State.

(6) There is no article corresponding to this provision in the Draft Articles on Diplomatic Intercourse and Immunities. The Commission considered that because of the existence of diplomatic privileges and immunities and, more particularly, of the very broad immunity from jurisdiction which the diplomatic draft accords, not only to diplomatic agents and to members of their family who form part of their households but also to members of the administrative and technical staff of the diplomatic mission and to members of their family who form part of their households, such a provision could not have the same importance in the sphere of diplomatic intercourse and immunities as it has for consular intercourse and immunities.

*Article 44**Social security exemption*

1. Subject to the provisions of paragraph 3 of this article, the members of the consulate and the members of their families belonging to their household, shall be exempt from the social security system in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall also apply to members of the private staff who are in the sole employ of members of the consulate, on condition

(a) That they are not nationals of or permanently resident in the receiving State; and

(b) That they are covered by the social security system of the sending State or of a third State.

3. Members of the consulate who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall be subject to the obligations which the social security laws of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system, provided that such participation is allowed by the laws of the receiving State.

Commentary

(1) This exemption from social security regulations is justified on practical grounds. If whenever in the course of his career a member of the consulate is posted to consulates in different countries he and the members of his family ceased to be subject to the social security legislation of the sending State (health insurance, old age insurance, disability insurance, etc.), and if on each such occasion he were expected to comply with the provisions of legislation different from that of the sending State, considerable difficulties would result for the official or employee concerned. It is thus in the interests of all States to grant the exemption specified in this article, in order that the members of the consulate may continue to be subject to their national social security laws without any break in continuity.

(2) The exemption provided for in paragraph 1 of the article does not apply to members of the consulate and members of their families who are nationals of the receiving State (article 50 of the draft).

(3) While members of the consulate in their capacity as persons employed in the service of the sending State are exempt from the local social security system, this exemption does not apply to them as employers of any persons who are subject to the social security system of the receiving State. In the latter case they are subject to the obligations imposed by the social security laws on employers and must pay their contributions to the social insurance system.

(4) The reasons which justify exemption from the social security system in the case of members of the consulate and members of their families, also justify the exemption of members of the private staff who are in the employment of members of the consular staff. But since those persons may be recruited from among the nationals of the sending State permanently resident in the receiving State, or from among foreign nationals who may not be covered by any social security laws, provision has had to be made for these contingencies in paragraph 2 of the article.

(5) Different rules from the above can obviously be laid down in bilateral conventions. Since, however, the draft provides in article 65 for the maintenance in force of previous conventions relating to consular intercourse and immunities, and of the right to conclude such conventions in the future, there is no need for a special provision to this effect in article 44.

*Article 45**Exemption from taxation*

1. Members of the consulate and members of their families, provided they do not carry on any gainful private activity, shall be exempt from all taxes and dues, personal or real, levied by the State or by any territorial or local authority, save

(a) Indirect taxes incorporated in the price of goods or services;

(b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consulate on behalf of his government for the purposes of the consulate;

(c) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 47 concerning the succession of a member of the consulate or of a member of his family;

(d) Taxes and dues on private income having its source in the receiving State;

(e) Charges levied for specific services furnished by the receiving State or by the public services;

(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 32.

2. Members of the private staff who are in the sole employ of members of the consulate shall be exempt from taxes and dues on the wages they receive for their services.

Commentary

(1) Exemption from taxation is often accorded to consular officials by consular conventions or other bilateral agreements concluded between the receiving State and the sending State. In the absence of treaty provisions, this matter is governed by the law of the receiving State, which always makes exemption from taxation conditional upon the grant of reciprocal treatment to the consular officials of the receiving State in the sending State. The extent of the exemption from taxation varies greatly from one legal system to another. The Commission considered that members of the consulate should enjoy the same exemption from taxation as is enjoyed by the members of diplomatic missions (Draft Articles on Diplomatic Intercourse and Immunities, article 32 in conjunction with article 36). For that reason, article 45 repeats, with some drafting changes, article 32 of the Draft Articles on Diplomatic Intercourse and Immunities.

(2) The following persons are excluded from the benefit of this article:

(a) By virtue of an express provision in the article itself, members of the consulate and members of their families who carry on a gainful private activity;

(b) By virtue of article 50 of the present draft, members of the consulate and members of their families who are nationals of the receiving State.

(3) Bilateral consular conventions usually make the grant of exemption from taxation conditional on re-

ciprocity. If there is to be a condition of this kind, enabling a party to grant limited exemption from taxation where the other party acts likewise, any provision for exemption from taxation becomes a matter for individual settlement between countries. The Commission did not think it necessary to include such a reciprocity clause in a draft multilateral convention, for it considers that reciprocity will be achieved by reason of the fact that the provision in question will be binding on all the contracting parties. It was of the opinion that the purpose which a multilateral convention should seek to achieve, i.e., the unification of the practice of States in this matter, will be more rapidly attained if no reservation regarding reciprocity is included.

(4) Since the consular premises enjoy exemption from taxation under article 32 of this draft, it was necessary to include in paragraph 1 (f) a reservation referring back to that article, in order to cover cases in which it is the consul or a member of the consulate who owns or leases the consular premises for the purposes of the consulate, and who, by reason of article 32, would in such case not be liable to pay the fees or duties specified in sub-paragraph (f).

(5) The provision of paragraph 2 of this article which corresponds to the first sentence of paragraph 3 of article 36 of the Draft Articles on Diplomatic Intercourse and Immunities, does not apply to persons who are nationals of the receiving State.

Article 46

Exemption from customs duties

The receiving State shall, in accordance with the provisions of its legislation, grant to members of the consulate who do not carry on any gainful private activity exemption from customs duties and from all other charges and taxes chargeable at the time of customs clearance on articles intended

(a) For the use of a consulate of the sending State;

(b) For the personal use of members of the consulate and of members of their families belonging to their households, including articles intended for their establishments.

Commentary

(1) According to a very widespread practice, articles intended for the use of a consulate are exempt from customs duties, and this practice may be regarded as evidence of an international custom in this particular sphere. By "articles intended for the use of a consulate" is meant coats-of-arms, flags, signboards, seals and stamps, books, official printed matter for the service of the consulate, and also furniture, office equipment and supplies (files, typewriters, calculating machines, stationery, etc.), and all other articles for the use of the consulate.

(2) While the members of the consulate do not enjoy exemption from customs duties under general international law, they are being given an increasingly wide measure of exemption from customs duties under numerous individual agreements, and there is a tendency to extend to members of the consulate advantages similar to those enjoyed by members of diplomatic missions. The Commission therefore decided to include in article 46, sub-paragraph (b), a provision identical to that of

article 34, paragraph 1 (b), of the Draft Articles on Diplomatic Intercourse and Immunities, although it realizes that this exemption is not yet granted by all States.

(3) Since States determine by domestic regulations the conditions and procedures under which exemption from customs duties is granted, and in particular the period within which articles intended for the establishment must be imported, the period during which the imported articles must not be sold, and the annual quotas for consumer goods, it was necessary to include in the article the expression "in accordance with the provisions of its legislation". Such regulations are not incompatible with the obligation to grant exemption from customs duties, provided that they are general in character. They must not be directed only to an individual case.

(4) The present article does not apply

(a) To members of the consulate who carry on a gainful private activity;

(b) To members of the consulate who are nationals of the receiving State (article 50).

(5) Only articles intended for the personal use of the members of the consulate and members of their families enjoy exemption from customs duties. Articles imported by a member of the consulate in order to be sold clearly do not qualify for exemption.

Article 47

Estate of a member of the consulate or of a member of his family

In the event of the death of a member of the consulate or of a member of his family who was not a national of the receiving State and did not carry on any gainful private activity there, the receiving State

(a) Shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the country the export of which was prohibited at the time of his death;

(b) Shall levy estate, succession or inheritance duties only on immovable property situated in its territory.

Commentary

As in the case of a member of a diplomatic mission, the exemption of the movable property of a member of the consulate or a member of his family from estate, succession or inheritance duties is fully justified, because the persons in question came to the receiving State to discharge a public function in the interests of the sending State. For the same reason, the free export of the movable property of the deceased, with the exception of any such property which was acquired in the country and the export of which was prohibited at the time of his death, is justified. The article corresponds to article 38, paragraph 3, of the Draft Articles on Diplomatic Intercourse and Immunities.

Article 48

Exemption from personal services and contributions

The receiving State shall

(a) Exempt members of the consulate, members of their families, and members of the private staff who are in the sole employ of

members of the consulate, from all personal services, and from all public service of any kind whatever;

(b) Exempt the persons referred to in sub-paragraph (a) of this article from such military obligations as those connected with requisitioning, military contributions and billeting.

Commentary

(1) The exemption afforded by sub-paragraph (a) covers military service, service in the militia, the functions of juryman or lay judge, and personal labour ordered by a local authority on highways or in connexion with a public disaster, etc.

(2) The exemptions provided for in this article should be regarded, at least in so far as they concern the members of the consulate and members of their families, as constituting a part of customary international law. The Commission was of the opinion that these exemptions should be extended to members of the private staff who are in the sole employ of members of the consulate, for, if such persons were subject to the obligations mentioned in the article, the exercise of the functions of the consulate might suffer considerably.

(3) By virtue of article 50 of this draft, the present article applies to members of the consulate, members of their families and members of the private staff, only in so far as they are not nationals of the receiving State.

(4) This article corresponds to article 33 of the Draft Articles on Diplomatic Intercourse and Immunities, but, in contrast with the latter, it also applies to members of the private staff for the reasons given above.

Article 49

Question of the acquisition of the nationality of the receiving State

Members of the consulate and members of their families belonging to their households shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Commentary

(1) The primary purpose of this article, which reproduces, *mutatis mutandis*, the text of article 35 of the Draft Articles on Diplomatic Intercourse and Immunities, is to prevent the automatic acquisition of the nationality of the receiving State, more particularly

(a) By the child of parents who are members of the consulate and who are not nationals of the receiving State, if the child is born in the territory of a State whose nationality law is based on the *jus soli*;

(b) By a woman who is a member of the consulate at the time when she marries a national of the receiving State.

(2) The present article does not apply if the daughter of a member of the consulate who is not a national of the receiving State marries a national of that State, for by the act of marrying she ceases to be part of the household of the member of the consulate.

(3) In view of the Convention of 20 February 1957 on the Nationality of Married Women, concluded under the auspices of the United Nations, the rule expressed in this article loses a good deal of its importance so far as concerns the acquisition of the nationality of the receiving State by a woman member of the consulate

of the sending State through her marriage with a national of the receiving State.

Article 50

Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

1. Consular officials who are nationals of the receiving State shall enjoy immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. They may in addition enjoy any privileges and immunities granted to them by the receiving State.

2. Other members of the consulate, members of their families, and members of the private staff, who are nationals of the receiving State, shall enjoy only the privileges and immunities granted to them by the receiving State.

Commentary

(1) The present draft recognizes that the sending State may appoint consular officials and employees of the consulate from among the nationals of the receiving State. In the case of consular officials, it may do so only with the consent of the receiving State (article 11). The Commission had therefore to define the legal status of the members of the consulate who are nationals of the receiving State.

(2) In addition, as the present draft accords certain immunities also to members of the private staff in the employ of members of the consulate, it was necessary to specify whether members of the private staff who are nationals of the receiving State enjoy these immunities.

(3) As regards consular officials who are nationals of the receiving State, the present article, following the solution adopted for a similar problem which arose during the discussion of article 37 of the Draft Articles on Diplomatic Intercourse and Immunities, grants them immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. As these persons are nationals of the receiving State, the present article, unlike article 41, uses the expression "official acts", the scope of which is more restricted than that of the expression used in article 41.

(4) The grant of this immunity from jurisdiction to consular officials who are nationals of the receiving State can be justified on two grounds. First, the official acts performed by officials in the exercise of their functions are acts of the sending State. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular official, but rather an immunity attaching to the foreign State as such. Secondly, as the consent of the receiving State is required for the appointment of a national of that State as a consular official (article 11), it can be argued that the receiving State's consent implies consent to the official in question having the minimum immunity he needs in order to be able to exercise his functions. That minimum is the immunity from jurisdiction granted in respect of official acts. The receiving State may, of course, of its own accord grant the consular officials in question any other privileges and immunities.

(5) As regards the other members of the consulate, members of the private staff and members of families,

these persons enjoy only such privileges and immunities as may be granted to them by the receiving State, which is therefore under no obligation by virtue of the present articles to grant them any privileges or immunities at all.

Article 51

Beginning and end of consular privileges and immunities

1. Each member of the consulate shall enjoy the privileges and immunities provided by the present articles as soon as he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory, as soon as his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

2. The privileges and immunities of persons belonging to the household of a member of the consulate shall be enjoyed as soon as such persons enter the territory of the receiving State, whether they are accompanying the member of the consulate or proceeding independently. If such a person is in the territory of the receiving State at the moment of joining the household of the member of the consulate, privileges and immunities shall be enjoyed as soon as the name of the person concerned is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

3. When the functions of a member of the consulate have come to an end, his privileges and immunities, and those of the members of his household, shall normally cease at the moment when the persons in question leave 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. The privileges and immunities of a member of the consulate who is discharged by the sending State shall come to an end on the date on which the discharge takes effect. However, in respect of acts performed by members of the consulate in the exercise of their functions, immunity from jurisdiction shall continue to subsist without limitation of time.

Commentary

(1) This article is modelled on the provisions applicable to persons entitled to diplomatic privileges and immunities, by virtue of article 38 of the Draft Articles on Diplomatic Intercourse and Immunities. In the opinion of the Commission, it is important that the date when consular privileges and immunities begin, and the date on which they come to an end, should be fixed.

(2) The Commission considered that consular privileges and immunities should be accorded to members of the consulate even after their functions have come to an end. Privileges and immunities do not cease until the beneficiaries leave the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

(3) The vexatious measures to which consular officials and employees have often been subjected when an armed conflict had broken out between the sending State and the receiving State justify the inclusion of the words "even in case of armed conflict" in the text of the article.

(4) Where a member of the consulate is discharged by the sending State, and accordingly loses his status as a consular official or employee, his privileges and immunities come to an end on the date on which the discharge takes effect. Although this is an exceptional case, the Commission wanted on this point to amplify

the original text of the Draft Articles on Diplomatic Intercourse and Immunities.

Article 52

Obligations of third States

1. If a consular official 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 to him the personal inviolability provided for by article 40, and such other immunities as may be required to ensure his transit or return.

2. The third State shall accord the necessary facilities to the members of the family of such consular official who accompany him or who travel separately to join him or to return to their own country.

3. In the circumstances specified in paragraph 1 of this article, third States shall not hinder the transit through their territories of other members of the consulate or of members of their families.

4. Third States shall accord to correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving State.

Commentary

(1) This article does not settle the question whether a third State should grant passage through its territory to consular officials, employees and their families. It merely specifies the obligations of third States during the actual course of the passage of such persons through their territory.

(2) The obligations of the third State under the terms of this article relate only to consular officials

(a) Who pass through its territory, or

(b) Who are in its territory in order to

(i) Proceed to take up their posts, or

(ii) Return to their posts, or

(iii) Return to their own country.

(3) The Commission proposes that consular officials should be accorded the personal inviolability which they enjoy by virtue of article 40 of this draft, and such of the immunities as are necessary for their passage or return. The Commission considers that these prerogatives should not in any case exceed those accorded to the officials in question in the receiving State.

(4) With regard to the members of the families of the consular officials referred to in the preceding paragraph, the article imposes on third States the duty to accord the facilities necessary for their transit. As regards the employees of the consulate and the members of their families, third States have a duty not to hinder their passage.

(5) The provisions of paragraph 4 of the article, which guarantee to correspondence and to official communications in transit the same freedom and protection in third States as in the receiving State, are in keeping with the interest that all States have in the smooth and unimpeded development of consular relations.

(6) The article corresponds to article 39 of the Draft Articles on Diplomatic Intercourse and Immunities, and it largely follows the structure of that article.

SECTION IV: DUTIES OF THE CONSULATE AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

Article 53

Respect for the laws and regulations of the receiving State

1. Without prejudice to the privileges and immunities recognized by the present articles or by other relevant international agreements, it is the duty of all persons enjoying consular 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. The consular premises shall not be used in any manner incompatible with the consular functions as specified in the present articles or in other rules of international law.

3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in the consular premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of the present articles, be deemed to form part of the consular premises.

Commentary

(1) Paragraph 1 of this article lays down the fundamental rule that it is the duty of any person who enjoys consular privileges and immunities to respect the laws and regulations of the receiving State, save in so far as he is exempted from their application by an express provision of this draft or of some other relevant international agreement. Thus it is, for example, that laws imposing a personal contribution, and the social security laws, are not applicable to members of the consulate who are not nationals of the receiving State.

(2) The clause in the second sentence of paragraph 1 which prohibits interference in the internal affairs of the receiving State should not be interpreted as preventing members of the consulate from making representations, within the scope of their functions, for the purpose of protecting and defending the interests of their country or of its nationals, in conformity with international law.

(3) Paragraph 2 reproduces the rule contained in article 40, paragraph 3, of the Draft on Diplomatic Intercourse and Immunities. This provision means that consular premises may be used only for the exercise of consular functions. A breach of this obligation does not render inoperative the provisions of article 31 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities.

(4) Paragraph 3 refers to cases, which occur with some frequency in practice, where the offices of other institutions or agencies are installed in the building of the consulate or on the consular premises.

CHAPTER III. HONORARY CONSULS INTRODUCTION

(1) The term "honorary consul" is not used in the same sense in the laws of all countries. In some, the

decisive criterion is considered to be the fact that the official in question is not paid for his consular work. Other laws expressly recognize that career consuls may be either paid or unpaid, and base the distinction between career and honorary consuls on the fact that the former are sent abroad and the latter recruited locally. Under the terms of certain other consular regulations, the term "honorary consul" means an agent who is not a national of the sending State and who, in addition to his official functions, is authorized to carry on a gainful occupation in the receiving State, whether he does in fact carry on such an occupation or not. For the purpose of granting consular immunities, some States regard as honorary consuls any representatives, of whatever nationality, who, in addition to their official functions, carry on a gainful occupation or profession in the receiving State. Lastly, many States regard as honorary consuls all consuls who are not career consuls.

(2) At its eleventh session, the Commission provisionally adopted the following decisions:

"A consul may be:

"(i) A 'career consul', if he is a government official of the sending State, receiving a salary and not exercising in the receiving State any professional activity other than that arising from his consular functions;

"(ii) An 'honorary consul', if he does not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State."

(3) However, in view of the practice of States in this sphere and the considerable differences in national laws with regard to the definition of honorary consul, the Commission decided, at its present session, to omit any definition of honorary consul from the present draft, and merely to provide in article 1, sub-section (f), that consuls may be either career consuls or honorary consuls, leaving States free to define the latter category.

Article 54

Legal status of honorary consuls

1. The provisions of chapter I of the present articles shall apply to honorary consuls.

2. In chapters II and IV, articles 29, 30, 32, 34, 35, 36, 37, 38, 40 (paras. 3 and 4), 41, 42 (para 2), 46 (except sub-para. (b)), 50, 51, 52 and 64 shall likewise be applicable to honorary consuls.

3. As regards the matters dealt with in articles 33, 39, 42 paras. 1 and 3, 43, 45, 48 and 53, articles 55 to 62 shall apply to honorary consuls.

Commentary

(1) The Commission reviewed all the articles concerning the privileges and immunities of career consuls and decided that certain of these articles are also applicable to honorary consuls. These articles are listed in paragraph 2 of the present article.

(2) Special attention should be drawn to article 50 of the draft, which is also applicable to honorary consuls. Consequently, honorary consuls who are nationals of the receiving State do not, under the terms of this draft, enjoy any consular immunities other than im-

munity from jurisdiction in respect of official acts performed in the exercise of their functions.

(3) As regards the articles listed in paragraph 3 of this article, the Commission was of the opinion that they cannot apply in full to honorary consuls. However, it acknowledged that some of the rights accorded in these articles to career consuls should also be granted to honorary consuls. The immunities which should be granted to honorary consuls with respect to the points covered by the articles referred to in paragraph 3 are defined in the succeeding articles.

(4) The Special Rapporteur and several members of the Commission are of the opinion that the privileges and immunities granted to honorary consuls in Chapter III far exceed those which are granted to them in the practice of States.

(5) The Commission decided to defer any decision as to whether article 31 concerning the inviolability of consular premises was applicable to honorary consuls until governments had furnished their observations on the matter, since the Commission had no information as to whether States grant the privilege of inviolability to the premises used by an honorary consul for the purposes of exercising consular functions, and, if they do, the extent to which they grant that privilege.

Article 55

Inviolability of the consular archives, the documents and the official archives of the consulate

The consular archives, the documents and the official correspondence of a consulate headed by an honorary consul shall be inviolable and may not be the subject of any search or seizure, provided that they are kept separate from the private correspondence of the honorary consul, and from the books and documents relating to any gainful private activity which he carries on.

Commentary

The official correspondence, archives and documents of an honorary consul enjoy inviolability only if they are kept separate from his private correspondence, and from the books and documents relating to any business or occupation which he carries on. This condition is explained by the fact that in most cases honorary consuls carry on some gainful private activity in the receiving State.

Article 56

Special protection

The receiving State is bound to accord to an honorary consul special protection in keeping with his official position.

Commentary

The protection referred to in this article would have to be accorded chiefly in cases where the life or dignity of an honorary consul was jeopardized by reason of his exercising an official function on behalf of the sending State.

Article 57

Exemption from obligations in the matter of registration of aliens and residence and work permits

An honorary consul and the members of his family, with the

exception of those who carry on a gainful private activity outside the consulate, shall be exempt from all obligations under local legislation in the matter of registration of aliens, residence permits and work permits.

Commentary

This article does not apply to honorary consuls and members of their families who carry on a gainful private activity outside the consulate. In so far as it is concerned with registration of aliens and with residence permits, this exemption cannot by its very nature apply to nationals of the receiving State. So far as concerns exemption from obligations in the matter of work permits, the application of this article to nationals of the receiving State is excluded by article 50 of the present draft, which is also applicable to honorary consuls (article 54, paragraph 2).

Article 58

Exemption from taxation

An honorary consul shall be exempt from taxes and dues on the remuneration and emoluments which he receives from the sending State in his capacity as honorary consul.

Commentary

The majority of the members of the Commission considered that the provision contained in this article, though not in accordance with the general practice of States, should be included so as to avoid the difficulties which would be raised by the taxation of income derived from a foreign State, and because the remuneration and emoluments in question are paid by a foreign State. Nevertheless, the Commission considered that this provision does not apply to honorary consuls who are nationals of the receiving State (article 50 of the present draft, in conjunction with article 54, paragraph 2).

Article 59

Exemption from personal services and contributions

The receiving State shall

(a) Exempt honorary consuls, other honorary consular officials, and the members of their families, from all personal services, and from all public service of any kind whatever;

(b) Exempt the persons referred to in sub-paragraph (a) of this article from such military obligations as those connected with requisitioning, military contributions and billeting.

Commentary

(1) It should be noted that this article relates only to honorary consuls, other honorary consular officials, and the members of their families.

(2) This article is not applicable to nationals of the receiving State.

Article 60

Liability to give evidence

In any case in which he is requested to do so in connexion with matters relating to the exercise of his consular functions, an honorary consul may decline to give evidence in the course of judicial or administrative proceedings or to produce official correspondence and documents in his possession. In such event, the authority requiring the evidence shall refrain from taking any coercive measures with respect to him.

Commentary

Unlike the privilege of career consuls, against whom no coercive measures may be taken even if they decline to give evidence concerning a matter not connected with the exercise of their functions (article 42 (1) of this draft), the privilege of an honorary consul is more limited. He may decline to give evidence or to produce official documents in his possession without incurring a penalty only in those cases in which the testimony or the official correspondence is connected with the exercise of his functions.

However, the honorary consul like the career consul (see paragraph 3 of the commentary on article 42 of this draft) should not decline to give evidence concerning events which come to his notice in his capacity as registrar of births, marriages and deaths, nor should he decline to produce the documents relating thereto.

*Article 61**Respect for the laws and regulations of the receiving State*

In addition to the duty specified in the first sentence of paragraph 1 of article 53, an honorary consul has the duty not to use his official position in the receiving State for purposes of internal politics or for the purpose of securing advantages in any gainful private activity which he carries on.

Commentary

Inasmuch as most honorary consuls are nationals, or at least permanent residents, of the receiving State, the obligation laid down in article 53 of this draft had to be modified, particularly as regards the second sentence of paragraph 1 of the article, in order to take the special position of honorary consuls into account.

*Article 62**Precedence*

Honorary consuls shall rank in each class after career consuls in the order and according to the rules laid down in article 17.

Commentary

According to the information available to the Commission, this rule is in keeping with the practice followed in many States. The Commission would be grateful if Governments would communicate particulars of the practice followed in this respect.

*Article 63**Optional character of the institution of honorary consuls*

Each State is free to decide whether it will appoint or receive honorary consuls.

Commentary

This article, taking into consideration the practice of those States, which neither appoint nor accept honorary consuls, confirms the rule that each State is free to decide whether it will make use of the institution of honorary consuls.

CHAPTER IV. GENERAL PROVISIONS

*Article 64**Non-discrimination*

1. In the application of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place where the action of the receiving State consists in the grant, on a basis of reciprocity, of privileges and immunities more extensive than those provided for in the present articles.

Commentary

(1) Paragraph 1 sets forth a general rule inherent in the sovereign equality of States.

(2) Paragraph 2 relates to the case where the receiving State grants privileges and immunities more extensive than those provided for in the present articles. The receiving State is of course free to grant such greater advantages on the basis of reciprocity.

(3) This article reproduces the text of article 44 of the Draft Articles on Diplomatic Intercourse and Immunities, except for paragraph 2 (a) of that article. Having had an opportunity to reconsider this provision at the present session, the Commission doubted whether it should be retained even in the Draft Articles on Diplomatic Intercourse and Immunities. While it could not reverse its decision so far as the latter draft articles were concerned, it decided not to include the provision in the present draft.

*Article 65**Relationship between the present articles and bilateral conventions*
[First text]

Acceptance of the present articles shall not rule out the possibility of the maintenance in force by the Parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or the conclusion of such conventions in the future.

[Second text]
The provisions of the present articles shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the Contracting Parties, and shall not prevent the conclusion of such conventions in the future.

Commentary

(1) The Commission decided to submit two texts for governments to choose from.

(a) The first variant is based on the idea that the bilateral conventions will be automatically abrogated by the entry into force of the multilateral consular convention in the reciprocal relations between the contracting Parties unless the Parties decide to maintain them in force. In this case, therefore, a special agreement of the two contracting Parties would be needed to keep a particular bilateral convention in force.

(b) The second text, proposed by the Special Rapporteur, would automatically maintain in effect the bilateral conventions on consular intercourse and immunities previously concluded between contracting Parties. In this case the multilateral convention would apply only to questions not covered by the bilateral conventions. At the same time, this text does not prevent the conclusion of bilateral conventions on this subject in future, even if these conventions should depart from the multilateral convention which the Commission is now preparing.

(2) During the discussion of article 59 of the draft submitted by the Special Rapporteur, some members of the Commission held that this article should state

that the draft convention contains fundamental principles of consular law which should prevail over pre-existing bilateral agreements and from which no subsequent bilateral agreement may derogate.

CHAPTER III

AD HOC DIPLOMACY

I. General observations

29. At its tenth session, in 1958, the Commission considered the topic of "Diplomatic intercourse and immunities" and prepared draft articles on the subject, together with a commentary,¹⁷ hereinafter referred to as "the 1958 draft".

30. In its report, the Commission pointed out in this connexion that while the draft it was submitting dealt only with permanent diplomatic missions, diplomatic relations also assumed other forms that could be given the name of "*ad hoc* diplomacy", namely itinerant envoys, diplomatic conferences and special missions sent to a State for restricted purposes. The Commission considered that these forms of diplomacy should also be studied, in order to determine the rules of law governing them. It requested Mr. A. E. F. Sandström, Special Rapporteur for the topic "Diplomatic intercourse and immunities", to make this study and to submit his report at a future session.¹⁸

31. The Commission took up this question at its present session, adopting as a basis for discussion the report prepared by the Special Rapporteur (A/CN.4/129). Mr. Jiménez de Aréchaga also submitted for consideration by the Commission a set of proposals (A/CN.4/L.87) and a memorandum explaining these proposals (A/CN.4/L.88). In the course of the discussions on the subject, the Special Rapporteur presented an alternative proposal regarding privileges and immunities of special mission (A/CN.4/L.89).

32. In the course of a preliminary examination of the various forms of "*ad hoc* diplomacy" which it was to study, the Commission noted that the question of "diplomatic conferences" was linked not only to that of "special missions", but also to that of "relations between States and international organizations". These relations are at present governed largely by special conventions.

33. This link with the subject of "relations between States and international organizations" makes it difficult to undertake the subject of "diplomatic conferences" in isolation, and the Commission has accordingly decided not to deal with it for the moment.

34. In addition, since "itinerant envoy" is, according to the Commission's definition, an envoy who carries out special tasks in the States to which he proceeds (and to which he is not accredited as head of a permanent mission), it must follow that the mission of an itinerant envoy is a special mission vis-à-vis

each of the States visited. Indeed, it might be said that, considered as a whole, the mission of an itinerant envoy represents a series of special missions. The mere fact that these missions are often linked together by a common objective was not thought sufficient to justify the adoption for itinerant envoys of rules differing from those which apply to special missions.

35. In the Commission's opinion, the draft articles on special missions should follow immediately after the 1958 draft, which would form the first chapter, the present draft becoming the second chapter followed in turn by a third chapter, containing articles 44 and 45 of the 1958 draft, which would apply to the whole text.

36. The General Assembly having decided at its last session that an international conference should be convened in Vienna not later than the spring of 1961 to examine the 1958 draft, the Commission recommends the Assembly to refer the present draft to the conference in order to enable the conference to examine this text. This procedure seems necessary in order that the articles of the present draft may be embodied in whatever convention the conference might prepare. It appears all the more justified in that the articles of the new draft do no more than enlarge the scope of the 1958 draft.

37. At the same time, the Commission wishes to emphasize that because of the time it has had to devote to preparing its first draft on consular intercourse and immunities at the present session, it has not been able to give the topic of *ad hoc* diplomacy the thorough study it would normally have done. These articles, together with their commentary, should therefore be regarded as constituting only a preliminary survey which the Commission has carried out at this stage mainly in order to put forward certain ideas and suggestions which could be taken into account at the Vienna Conference.

38. The text of the draft articles on special missions and the commentary, as adopted by the Commission, are reproduced below.

II. Draft articles on special missions, and commentary

Article 1

Definitions

1. The expression "special mission" means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.

2. The expression "1958 draft" denotes the Draft Articles on Diplomatic Intercourse and Immunities prepared by the International Law Commission in 1958.

Article 2

Applicability of section 1 of the 1958 draft

Of the provisions of section 1 of the 1958 draft, only articles 8, 9 and 18 apply to special missions.

¹⁷ Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859), chapter III.

¹⁸ *Ibid.*, para. 51.

Commentary

(1) In view of the similarity between the activities of the two kinds of mission, it is natural that the rules governing permanent missions should to a large extent be applicable to special missions.

(2) While this is true more especially of the provisions concerning the privileges and immunities made necessary by the inherent exigencies of the functions concerned, it is no less true that in certain respects, by virtue of the similarity referred to, some of the rules which in accordance with section I of the 1958 draft apply to permanent missions should also, by analogy, apply to special missions.

(3) It must however be borne in mind that these rules were devised and drafted for application to permanent missions, which have their own special characteristics, such as their permanency, their function of ensuring the maintenance of continuous diplomatic relations between countries, and the presence in capital cities of numerous missions of the same kind. Special missions, on the other hand, may be of very varied composition and character, and it is therefore difficult to make them subject to such rigid uniform regulations as those governing permanent missions.

(4) After analysing the various articles contained in section I of the 1958 draft, the conclusion was reached that only articles 8, 9 and 18 are generally applicable to special missions as well as to permanent missions.

(5) It should not however be inferred from what is proposed above that, apart from the cases covered by the rules mentioned in article 2, there may not be cases in which certain of the principles embodied in the articles of section I of the 1958 draft could sometimes be applied. However, because of the diversity of special missions, the Commission did not think it right to subject them to too rigid a regulation. It will be quite a simple matter for States, when discussing the sending of a special mission, or when any question arises, to make use, if necessary, of the rules relating to permanent missions.

(6) So far as questions of precedence and protocol are concerned, there should be no difficulty in settling them on the same lines if the case arises.

Article 3

Applicability of sections II, III and IV of the 1958 draft

1. The provisions of sections II, III and IV apply to special missions also.

2. In addition to the modes of termination referred to in article 41 of the 1958 draft, the functions of a special mission will come to an end when the tasks entrusted to it have been carried out.

Commentary

(1) An analysis, article by article, of sections II, III and IV of the draft, despite the fact that directly or indirectly they contemplate first and foremost diplomatic privileges and immunities, nevertheless shows,

in the opinion of the Commission, that there is no occasion to exclude the application of any of these articles to special missions, even if it would be only in exceptional circumstances that the provisions of some of these articles could apply to special missions.

(2) The only adjustment required is to make it clear that, in addition to being terminable in the manner described in article 41, the functions of a special mission come to an end when its assignment is accomplished.

CHAPTER IV

OTHER DECISIONS OF THE COMMISSION

I. Codification of the principles and rules of international law relating to the right of asylum

39. Resolution 1400 (XIV) of the General Assembly, dated 21 November 1959, concerning the question of the codification of the principles and rules of international law relating to the right of asylum had been placed on the agenda of the Commission for the present session. The Commission took note of the resolution and decided to defer further consideration of this question to a future session.

II. Study of the juridical régime of historic waters, including historic bays

40. Resolution 1453 (XIV) of the General Assembly, dated 7 December 1959, concerning a study of the juridical régime of historic waters, including historic bays, had been placed on the agenda of the Commission for the present session and was discussed by the Commission. The Commission requested the Secretariat to undertake a study of the juridical régime of historic waters, including historic bays, and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays prepared by the Secretariat¹⁹ in connexion with the first United Nations Conference on the Law of the Sea. Apart from this, the Commission deferred further consideration of the subject to a future session.

III. Planning of future work of the Commission

41. The Commission decided to complete its work on consular intercourse and immunities at its thirteenth session, and thereafter to take up at the same session, the subject of State responsibility.

IV. Co-operation with other bodies

42. The Commission took note of the report by the Secretary (A/CN.4/124) on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists held at Santiago, Chile, from 24 August to 9 September 1959, which the Secretary of the Commission had attended in the capacity of observer.

¹⁹ See *United Nations Conference on the Law of the Sea, Official Records*, vol. I (United Nations publication, Sales No.: 58.V.4, Vol. I), document A/CONF.13/1.

43. The Commission also had before it a letter from the Secretary of the Asian-African Legal Consultative Committee, inviting the Commission to send an observer to the fourth session of that Committee, to be held in Tokyo in March 1961. The Commission noted that among the topics on the agenda for that session of the Asian-African Legal Consultative Committee was that of State responsibility, a subject which the Commission itself would be discussing at its next session. The Commission decided to designate its Special Rapporteur on the subject of State responsibility, Mr. F. V. García Amador, as its observer at the fourth session of the Asian-African Legal Consultative Committee.

44. The Commission also desires to refer in the present connexion to the account given in chapter I of the present Report (see paragraph 7 above) of the statements made to the Commission at the present session by Mr. Antonio Gómez Robledo, the observer for the Inter-American Juridical Committee, and Professor Louis B. Sohn of the Harvard Law School.

45. The Commission agreed that the Secretariat should be asked to ensure, as far as possible, that members were supplied with the documents of those inter-governmental organizations with which it was in consultative relationship.

V. Date and place of the next session

46. The Commission was informed by the Secretary that the next session of the Commission was scheduled to take place from 24 April to 30 June 1961. However, it was noted by the Commission that as a consequence of the decision to call a Plenipotentiary Conference on Diplomatic Intercourse and Immunities in Vienna from 2 March to 14 April 1961, there might be practical difficulties in holding the opening session of the Commission as soon as 24 April. In order therefore to ensure that there should be a reasonable interval between the end of the Vienna Conference and the beginning of the Commission's next session, it was decided, after consultation with the Secretary-General, that the normal opening and closing dates originally proposed should be postponed for one week, and that the thirteenth session of the Commission should be held in Geneva from 1 May until 7 July 1961.

VI. Representation at the fifteenth session of the General Assembly

47. The Commission decided that it should be represented at the next (fifteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. L. Padilla Nervo.

CHECK LIST OF COMMISSION DOCUMENTS REFERRED TO IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	See <i>Yearbook of the International Law Commission</i> , 1956, vol. II
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1957, vol. II
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Žourek, Special Rapporteur	<i>Ibid.</i>
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1958, vol. II
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1959, vol. II
A/CN.4/120	The law of treaties: The effects of treaties: fourth report by G. G. Fitzmaurice, Special Rapporteur	Mimeographed

DISTRIBUTORS FOR UNITED NATIONS PUBLICATIONS

- ARGENTINA**
Editorial Sudamericana, S.A., Alsina 500, Buenos Aires.
- AUSTRALIA**
Melbourne University Press, 369 Lonsdale Street, Melbourne C. 1
- AUSTRIA**
Gerald & Co., Graben 31, Wien, 1.
B. Willerstorff, Markus Sittikusstrasse 10, Salzburg.
- BELGIUM**
Agence et Messageries de la Presse, S.A., 14-22, rue du Persil, Bruxelles.
- BOLIVIA**
Libreria Selecciones, Casilla 972, La Paz.
- BRAZIL**
Livreria Agir, Rua Mexico 98-B, Caixa Postal 3291, Rio de Janeiro
- BURMA**
Curator, Govt. Book Depot, Rangoon.
- CAMBODIA**
Entreprise khmère de librairie, Imprimerie & Papeterie Sarl, Phnom-Penh.
- CANADA**
The Queen's Printer, Ottawa, Ontario
- CEYLON**
Lake House Bookshop, Assoc. Newspapers of Ceylon, P.O. Box 244, Colombo.
- CHILE**
Editorial del Pacífico, Ahumada 57 Santiago.
Libreria Ivens, Casilla 205, Santiago
- CHINA**
The World Book Co., Ltd., 99 Chung King Road, 1st Section, Taipei, Taiwan.
The Commercial Press, Ltd., 211 Honan Rd., Shanghai.
- COLOMBIA**
Libreria Buchholz, Av. Jiménez de Quesada 8-40, Bogotá.
- COSTA RICA**
Imprenta y Libreria Trejos, Apartado 1313, San José.
- CUBA**
La Casa Belga, O'Reilly 455, La Habana.
- CZECHOSLOVAKIA**
Československý Spisovatel, Národní Třída 9, Praha 1
- DENMARK**
Ejnar Munksgaard, Ltd., Nørregade 6, København, K.
- DOMINICAN REPUBLIC**
Libreria Dominicana, Mercedes 49, Ciudad Trujillo
- ECUADOR**
Libreria Científica, Casilla 362, Guayaquil.
- EL SALVADOR**
Manuel Navas y Cia., 1a. Avenida sur 37, San Salvador
- ETHIOPIA**
International Press Agency, P.O. Box 120, Addis Ababa.
- FINLAND**
Akateeminen Kirjakauppa, 2 Keskuskatu, Helsinki.
- FRANCE**
Editions A. Pédone, 13, rue Soufflot, Paris (Ve).
GERMANY
R. Eisenschmidt, Schwanthaler Str. 59, Frankfurt/Main.
Elwert und Meurer, Hauptstrasse 101, Berlin-Schöneberg.
Alexander Horn, Spiegelgasse 9, Wiesbaden.
W. E. Saabach, Gertrudenstrasse 30, Köln (1).
- GHANA**
University Bookshop, University College of Ghana, Legon, Accra.
- GREECE**
Kauffmann Bookshop, 28 Stadion Street, Athènes.
- GUATEMALA**
Sociedad Económico-Financiera, 6a Av. 14-33, Guatemala City.
- HAITI**
Librairie "A la Caravelle", Port-au-Prince.
- HONDURAS**
Libreria Panamericana, Tegucigalpa.
- HONG KONG**
The Swindon Book Co., 25 Nathan Road, Kowloon.
- ICELAND**
Bokaverzlun Sigfusar Eymundssonar H. F., Austurstraeti 18, Reykjavik.
- INDIA**
Orient Longmans, Calcutta, Bombay, Madras, New Delhi and Hyderabad.
Oxford Book & Stationery Co., New Delhi and Calcutta.
P. Varadachary & Co., Madras.
- INDONESIA**
Pembangunan, Ltd., Gunung Sahari 84, Djakarta.
- IRAN**
Guity, 482 Ferdowsi Avenue, Teheran.
- IRAQ**
Mackenzie's Bookshop, Baghdad
- IRELAND**
Stationery Office, Dublin
- ISRAEL**
Blumstein's Bookstores, 35 Allenby Rd. and 48 Nachlat Benjamin St., Tel Aviv
- ITALY**
Libreria Commissionaria Sansoni, Via Gino Capponi 26, Firenze, and Via D. A. Azuni 15/A, Roma.
- JAPAN**
Maruzen Company, Ltd., 6 Tori-Nichome, Nihonbashi, Tokyo.
- JORDAN**
Joseph I. Bahous & Co., Dar-ul-Kutub, Box 66, Amman.
- KOREA**
Eul-Yoo Publishing Co., Ltd., 5, 2-KA, Chongno, Seoul.
- LEBANON**
Khayat's College Book Cooperative, 92-94, rue Bliss, Beirut.
- LUXEMBOURG**
Librairie J. Trausch-Schummer, place du Théâtre, Luxembourg.
- MEXICO**
Editorial Hermes, S.A., Ignacio Mariscal 41, México, D.F.
- MOROCCO**
Centre de diffusion documentaire du B.E.P.I., 8, rue Michaux-Bellaire, Rabat.
- NETHERLANDS**
N.V. Martinus Nijhoff, Lange Voorhout 9, 's-Gravenhage.
- NEW ZEALAND**
United Nations Association of New Zealand, C.P.O. 1011, Wellington.
- NORWAY**
Johan Grundt Tanum Forlag, Kr. Augustsgt 7A, Oslo.
- PAKISTAN**
The Pakistan Co-operative Book Society, Dacca, East Pakistan.
Publishers United, Ltd., Lahore.
Thomas & Thomas, Karachi.
- PANAMA**
José Menéndez, Agencia Internacional de Publicaciones, Apartado 2052, Av. 8A, sur 21-58, Panamá.
- PARAGUAY**
Agencia de Librerías de Salvador Nizza, Calle Pte. Franco No. 39-43, Asunción.
- PERU**
Libreria Internacional del Perú, S.A., Casilla 1417, Lima.
- PHILIPPINES**
Alema's Book Store, 769 Rizal Avenue, Manila.
- PORTUGAL**
Livreria Rodrigues y Cia, 186 Rua Aurea, Lisboa.
- SINGAPORE**
The City Book Store, Ltd., Collyer Quay.
- SPAIN**
Libreria Bosch, 11 Ronda Universidad, Barcelona.
Libreria Mundi-Prensa, Castello 37, Madrid.
- SWEDEN**
C. E. Fritze's Kungl. Hovbokhandel A-B, Fredsgatan 2, Stockholm.
- SWITZERLAND**
Librairie Payot, S.A., Lausanne, Genève.
Hans Raunhardt, Kirchgasse 17, Zürich 1.
- THAILAND**
Pramuan Mit, Ltd., 55 Chakrawat Road, Wat Tuk, Bangkok.
- TURKEY**
Librairie Hachette, 469 Istiklal Caddesi, Beyoglu, Istanbul.
- UNION OF SOUTH AFRICA**
Van Schaik's Bookstore (Pty) Ltd., Church Street, Box 724, Pretoria.
- UNION OF SOVIET SOCIALIST REPUBLICS**
Mezhdunarodnaya Knizhka, Smolenskaya Ploshchad, Moskva.
- UNITED ARAB REPUBLIC**
Librairie "La Renaissance d'Egypte", 9 Sh. Adly Pasha, Cairo.
- UNITED KINGDOM**
H.M. Stationery Office, P.O. Box 569, London, S.E. 1 (and HMSO branches in Belfast, Birmingham, Bristol, Cardiff, Edinburgh, Manchester).
- UNITED STATES OF AMERICA**
Sales Section, Publishing Service, United Nations, New York.
- URUGUAY**
Representación de Editoriales, Prof. H. D'Elia, Plaza Cagancha 1342, 1° piso, Montevideo.
- VENEZUELA**
Libreria del Este, Av. Miranda, No. 52, Edif. Galipán, Caracas.
- VIET-NAM**
Librairie-Papeterie Xuân Thu, 185, rue Tu-do, B.P. 283, Saigon.
- YUGOSLAVIA**
Cankarjeva Založba, Ljubljana, Slovenia.
Državno Preduzeće, Jugoslovenska Knjižnica, Terazije 27/11, Beograd.
Prosvjeta, 5, Trg Bratstva i Jedinstva, Zagreb.

[61E1]

Orders and inquiries from countries not listed above may be sent to: Sales Section, Publishing Service, United Nations, New York, U.S.A.; or Sales Section, United Nations, Palais des Nations, Geneva, Switzerland.