

Document:-  
**A/CN.4/122**

**Report of the International Law Commission covering the work of its Eleventh Session,  
20 April - 26 June 1959, Official Records of the General Assembly, Fourteenth Session,  
Supplement No. 9 (A/4169)**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1959 , vol. II**

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# Report of the Commission to the General Assembly

DOCUMENT A/4169 \*

Report of the International Law Commission covering the work of its eleventh session, 20 April - 26 June 1959

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### 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 eleventh session in Geneva, from 20 April to 26 June 1959. The meetings were, apart from the first two held at the European Office of the United Nations, held at the International Labour Office by courtesy of the Director-General of the International Labour Organisation. The work of the Commission during the present session is described in the present Report. Chapter II of the Report contains a first "section" of a Code on the Law of Treaties, comprising a definition of the scope of the Code and a number of articles which will be part of a first chapter of the Code, dealing with the validity of treaties. There is also a commentary on the articles. Chapter III contains the first

nineteen articles of a draft on Consular Intercourse and Immunities, together with a commentary on those articles. 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. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	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

\* Also issued as *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9.*

<i>Name</i>	<i>Country</i>
Mr. Thanat Khoman	Thailand
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. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

3. On 1 May 1959 the Commission elected Mr. Nihat Erim of Turkey to fill the casual vacancy caused by the resignation of Mr. Abdullah El-Erian during the previous session. Mr. Erim attended the meetings of the Commission from 1 June onwards.

## II. Officers

4. At its 479th meeting on 20 April 1959, the Commission elected the following officers:

*Chairman*: Sir Gerald Fitzmaurice;

*First Vice-Chairman*: Mr. Shuhsi Hsu;

*Second Vice-Chairman*: Mr. Ricardo J. Alfaro;

*Rapporteur*: Mr. J. P. A. François.

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 eleventh session consisting of the following items:

1. Filling of casual vacancy in the Commission (art. 11 of the statute).
2. Consular intercourse and immunities.
3. Law of treaties.
4. State responsibility.
5. General Assembly resolution 1289 (XIII) on relations between States and inter-governmental organizations (adopted in connexion with the General Assembly's consideration of the Draft Articles on Diplomatic Intercourse and Immunities).
6. Date and place of the twelfth session.
7. Planning of future work of the Commission.
8. General Assembly resolution 1272 (XIII) on control and limitation of documentation.
9. Other business.

7. In the course of the session the Commission held forty-seven meetings. It considered all the items on its agenda. With regard to item 2, it will be recalled that at its previous session the Commission had decided to place the subject of consular intercourse and immunities first on the agenda for the present session with a view to completing at this session a provisional draft for circulation to Governments together with a request for

their comments.<sup>1</sup> However, the unavoidable absence from the Commission for almost half the session of the special rapporteur for this subject, Mr. Jaroslav Zourek, resulting from his duties as *ad hoc* judge on the International Court of Justice, made it impossible to accomplish this aim during this session. The subject has been given first priority for the next session (see paras. 29-30 below). It is hoped, therefore, that a complete first draft will be included in the report covering the twelfth session and that Governments will be in a position to submit their comments prior to the thirteenth session in 1961 so as to enable the Commission to fulfil its original intention<sup>2</sup> of submitting the final draft to the General Assembly in its report covering that session. The results of the work of the Commission on this item during the present session are contained in chapter III. The results of the work of the Commission on item 3 (Law of treaties) are contained in chapter II. With regard to item 4, at its 512th and 513th meetings the Commission held a brief discussion on the subject of State responsibility. It heard a report from the representatives of the Harvard Law School of the work currently being undertaken by the School on this subject. With regard to items 5 and 8, the Commission took note of the resolutions of the General Assembly referred to in those items and, in relation to item 5, decided that this question would be taken up in due course. Certain administrative and other questions are dealt with in chapter IV.

## CHAPTER II

### LAW OF TREATIES

#### I. General Observations

##### A. HISTORICAL SUMMARY OF THE SUBJECT

8. At its first session, in 1949, the International Law Commission placed the subject of the "Law of treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year<sup>3</sup> as being suitable for codification; and also decided<sup>4</sup> to give this subject priority treatment. However, while the Commission has been able to complete the other subjects selected for priority treatment, it has hitherto been prevented from seriously taking up the subject of the law of treaties. Amongst the reasons for this may be mentioned the various special tasks assigned to the Commission by the General Assembly; the necessity for completing subjects like the law of the sea and diplomatic intercourse and immunities which were required for consideration by the Assembly; and also delays inevitably entailed by the changes which have taken place in the office of special rapporteur for the topic of the law of treaties.

9. The early dealings of the Commission with the subject of the law of treaties can best be seen from the following passages taken from previous reports of the Commission:

<sup>2</sup> *Ibid.*, para. 61.

<sup>3</sup> *Ibid.*, Fourth Session, Supplement No. 10 (A/925).

<sup>4</sup> *Ibid.*, paras. 19-20.

<sup>1</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859), para. 57.*

*Report for 1950*<sup>5</sup>

160. At its first session the International Law Commission elected as special rapporteur for the law of treaties, Mr. James L. Brierly, who prepared a report (A/CN.4/23) on the topic for the second session of the Commission. The Commission devoted its 49th to 53rd meetings to a preliminary discussion of this report with a view to assisting the special rapporteur in the continuance of his work between the second and third sessions of the Commission. The Commission also had available replies of Governments to a questionnaire addressed to them under article 19, paragraph 2, of its Statute (A/CN.4/19, part I, A).

161. The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to them by the special rapporteur. A majority of the Commission favoured the explanation of the term "treaty" as a "formal instrument" rather than as an "agreement recorded in writing". Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty.

162. A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.

*Report for 1951*<sup>6</sup>

74. At the third session of the Commission, Mr. Brierly presented a second report on the law of treaties (A/CN.4/43). In this report, the special rapporteur submitted a number of draft articles which he had proposed in the draft convention contained in his report to the previous session.

75. In the course of eight meetings (namely the 84th to 88th, and 98th to 100th meetings), the Commission considered these draft articles as well as some others contained in the first report of the special rapporteur. Various amendments were adopted and tentative texts were provisionally agreed upon (A/CN.4/L.28). These texts were referred to the special rapporteur, who was requested to present to the Commission, at its fourth session, a final draft, together with a commentary thereon. The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.

*Report for 1952*<sup>7</sup>

48. The Commission gave consideration to the topic at its second (1950) and third (1951) sessions, on the basis, respectively, of the first (A/CN.4/23) and second (A/CN.4/43) reports submitted by the special rapporteur. Tentative texts of articles on certain aspects of the law of treaties were provisionally adopted and referred to the special rapporteur, who was requested to present a final draft to the Commission at its fourth session.

49. In the interval between the third and fourth sessions of the Commission, Mr. Brierly resigned from membership in the Commission, an event regretted by all the members.

50. Before his resignation, Mr. Brierly presented to the Commission a "Third Report on the Law of Treaties" (A/CN.4/54), which was laid before the Commission at its fourth session. In the absence of its author, however, the Commission did not deem it expedient to discuss this report.

<sup>5</sup> *Ibid.*, Fifth Session, Supplement No. 12 (A/1316).

<sup>6</sup> *Ibid.*, Sixth Session, Supplement No. 9 (A/1858).

<sup>7</sup> *Ibid.*, Seventh Session, Supplement No. 9 (A/2163).

51. In the course of its fourth session, the Commission, at its meeting on 4 August 1952, elected Mr. H. Lauterpacht, special rapporteur on the law of treaties, to succeed Mr. Brierly. Mr. Lauterpacht was requested to take into account the work that had been done by the Commission, as well as that by Mr. Brierly, on the subject entrusted to him, and to present, in any manner he might deem fit, a report to the Commission at its fifth session.

*Report for 1953*<sup>8</sup>

164. The Commission decided to request its special rapporteur on the law of treaties, Mr. Lauterpacht, to continue his work on the subject and to present a further report for discussion at the next session together with the report (A/CN.4/63) held over from the present session. After a brief exchange of views the Commission decided that the special rapporteur, in the final draft of his report, should take account of any observations which members of the Commission might make in the form of written statements.

10. At its third session, in 1951, the Commission had also taken a further decision with reference to the question of treaties and international organizations mentioned in paragraph 162 of the report for 1950 (see para. 9 above) and in this connexion adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modifications" (A/CN.4/SR.98, para 1).<sup>8a</sup>

11. In 1954, Professor Lauterpacht (now Sir Hersch Lauterpacht) presented a second report (A/CN.4/87) which, like his first report (see above, para. 164 of the Commission's report for 1953), could not be discussed for lack of time. Between the Commission's sessions in 1954 and 1955, Professor Lauterpacht resigned on being elected a judge of the International Court of Justice, and at the Commission's seventh session in 1955, Sir Gerald Fitzmaurice, who had been elected to fill the vacancy on the Commission caused by the resignation of Professor Lauterpacht, was appointed special rapporteur for the subject of the law of treaties (see the report of the Commission for 1955,<sup>9</sup> para. 32). At the Commission's eighth, ninth and tenth sessions (1956-1958), and also at the present session, Sir Gerald Fitzmaurice presented four reports dealing with different aspects of the subject;<sup>10</sup> but apart from a brief discussion of certain general questions of treaty law at the 368th to 370th meetings in 1956, the Commission (because of its work on the law of the sea and on diplomatic intercourse

<sup>8</sup> *Ibid.*, Eighth Session, Supplement No. 9 (A/2456).

<sup>8a</sup> *Yearbook of the International Law Commission, 1951*, vol. I (United Nations publication, Sales No.: 1957. V. 6, vol. I), p. 136.

<sup>9</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 9 (A/2934)*.

<sup>10</sup> These are respectively on the topics of the framing, conclusion and entry into force of treaties; the termination of treaties; essential or substantive validity; and effects as between the parties (operation, execution and enforcement). They are to be found in A/CN.4/101, A/CN.4/107, A/CN.4/115, and A/CN.4/120. Further reports on effects in respect of third States, and on the interpretation of treaties, are in preparation.

and immunities) has not found it possible to take up any of these reports until the present session.

12. At the present session, the Commission, not being in a position to begin its work on consular intercourse and immunities until the fifth week of the session (see para. 7 above), with a further gap during the sixth week, accordingly took the opportunity to make a start with the subject of the law of treaties, on the basis of the first report of Sir Gerald Fitzmaurice on the framing, conclusion and entry into force of treaties; but, owing to shortage of time, the difficulties of the subject and the fact that it had not been under serious consideration since 1951, the Commission has not been able to finish its study of this report, or to complete more than the fourteen articles set out in the present chapter.

13. The Commission hopes in the fairly near future to complete a first draft on the whole subject of the framing, conclusion, and entry into force of treaties, and to submit it to Governments for their comments. It is obvious that the topic of the law of treaties, considered as a whole,<sup>11</sup> is so extensive as to require a number of years for completion, particularly if the Commission is also to make adequate progress with other topics. Since, however, the topic of the law of treaties is subdivided into a number of well-defined branches (conclusion, termination, execution, interpretation, etc.), and these branches, while interrelated in certain respects, are to a large extent self-contained, there is no reason why the Commission's work on each of them, as and when accomplished, should not be submitted to Governments, and subsequently to the Assembly, without awaiting the completion of the work on the remaining branches, or on the subject as a whole. Nevertheless, because of the interrelationship of the different branches, and in order to secure uniformity of terminology and arrangement and to effect the necessary co-ordination, it will be necessary for the Commission eventually to review its work on the different branches, and to make the necessary adjustments, so as to present the work in the form of a single co-ordinated Code.

#### B. SCOPE AND CHARACTER OF THE PRESENT CHAPTER

14. The topic of the law of treaties is a very extensive one, and the question of what arrangement it is best to adopt for its presentation in the form of a Code involves a number of problems. On the subject of arrangement in general, the special rapporteur, Sir Gerald Fitzmaurice, made the following remarks in paragraph 8 of the introduction to his first report.

"The law of treaties lends itself to several different methods of arrangement. How different these can be will be apparent to anyone who, for instance, compares so well-known a text as the Harvard draft convention on the law of treaties with the arrangement adopted by Professor Charles Rousseau in volume I of his *Principes généraux du droit international public*. Thus the topic of the making (conclusion) of

treaties covered by the present report can be regarded either as a process (*opération à procédure*) governed by certain legal rules, or as a substantive topic relating to the validity of treaties—i.e., so far as this is concerned, their formal validity. In the same way, termination can be regarded as a process, or equally as part of the topic of validity (validity of the treaty in point of time or duration). Chronologically, the two topics of the conclusion and termination of treaties are at opposite ends of the scale; but substantially they can be regarded as belonging (together with the topic of essential validity) to the general chapter of "validity". In between them, chronologically, are the topics of interpretation, operation, and enforcement, the effect of the treaty as regards third parties, etc., all of which may be regarded as constituting a second main chapter of treaty law—the "effect" of treaties (interpretation, for instance, is closely allied to application). It is possible, up to a point, to combine these conceptions, though not entirely. Provisionally, the present report adopts, in the main, the arrangement adumbrated in the previous ones, since it is simplest, and most in accordance with the way in which things occur, to view a treaty as a process in time. Treaties are born, they live, produce their effects, and, perhaps, eventually die. But it may be thought desirable to displace the subject of termination, and make it part III of a first chapter on "Validity", of which formal validity would constitute part I, and essential validity part II. Tentatively this is the arrangement now proposed. Most of the rest of the subject could then be grouped under a second chapter on "Effect". However, a final decision on this question is probably best deferred until a comparatively late stage of the whole work."<sup>12</sup>

In a later report (A/CN.4/120), the special rapporteur made it clear that he envisaged a code on treaty law as consisting of three main chapters—on the validity, the effects (operation, execution, etc.), and the interpretation of treaties. Without in any way committing itself as yet to this arrangement as a whole, the Commission has provisionally adopted the idea of a first chapter based on the concept of validity, and divided into three main parts—part I on formal validity, covering the topic of the framing, conclusion and entry into force of treaties; part II on essential or substantive validity (capacity of the parties, legality of the object, vitiating effect of fraud, error, duress, etc.); and part III on temporal validity, covering the topic of the termination of treaties.

15. The subject of formal validity (framing, conclusion and entry into force) itself falls into two main sections, namely, in the first place (after some introductory provisions) the topic of the drawing up and authentication of the text; and in the second place, the topic of the conclusion and entry into force of the treaty (i.e., the initial text becomes an actual international agreement by signature, ratification and entry into force). The first section would cover the treaty-making process up to the point where the text is established *ne varietur*. But up to this point the negotiating States have

<sup>11</sup> In addition to the reports at present before the Commission, and others in preparation or contemplation (see footnote 10 above), the topic of treaties forms a branch of certain other subjects—e.g., the effect of war on treaties; treaties and state succession, etc. It is by no means clear that a code on treaty law should not cover these, although they probably belong more properly to the other topics concerned.

<sup>12</sup> *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956. V. 3, vol. II), p. 106.

not given any substantive consent to it as a *treaty*, either provisionally (as for instance by signing subject to ratification), or finally (as for instance by ratifying). Even after final consent has been given to it, the treaty may not yet be operative, for some separate act, or the happening of some event, or the lapse of some period, may be necessary before it comes into force. To cause the text, as initially drawn up, to become an operative treaty therefore, further steps by way of signature,<sup>13</sup> or signature followed by ratification, and entry into force,<sup>14</sup> will be required.

16. The articles now presented, apart from certain introductory provisions relating to the scope of the Code as a whole, the meaning of a treaty or international agreement, and the concepts of validity and obligatory force, cover part of the subject of the framing, conclusion and entry into force of treaties, that is to say the drawing up and authentication of the text, and also part of the topic of signature, its function, incidents and legal effects. The remainder of the topic of signature, and the topics of ratification, accession, reservations and entry into force will be covered by future articles (see also para. 17 below). The articles now presented, numbering 1-10 and 14-17 inclusive, cover articles 1-25 in the special rapporteur's first report; the difference in numbering being due to the omission or amalgamation of some of the special rapporteur's articles, and the relegation of certain others to later stages of the work. This applies in particular to the definitions article (art. 13 in the Special Rapporteur's text), which some members of the Commission wished to retain, but which others opposed—or preferred to consider after the substantive articles had been completed; and to the articles 4-9 in the special rapporteur's text which embodied certain important general principles of the law of treaties. It was made clear that this relegation was effected on the basis that these matters were in fact more fully and comprehensively considered in later reports of the special rapporteur. As regards the articles which have been re-drafted, these are themselves based largely on further drafts supplied by the special rapporteur in the light of the Commission's discussions.

17. The gap between 10 and 14 in the numbering of the present articles is due to the fact that the Commission decided to transpose paragraph 3 of article 20, and articles 22, 24 and 25, in the special rapporteur's text, and to place them after his article 28. The Commission has not, however, been able to deal with the special rapporteur's articles 26-28 inclusive, and hence has left a corresponding gap between articles 10 and 14 in the present text. The Commission was equally unable to deal with articles 29 and 30 of the special rapporteur's text, which would have completed the topic of signature. These various provisions will have to be taken up later.

18. It should be mentioned that, on the recommendation of the special rapporteur, and of course without

<sup>13</sup> There will be signature alone in the case of agreements expressed to take effect on signature, or in the case of certain classes of instruments, such as exchanges of notes, agreed minutes, memoranda of understanding, etc., which are normally subject to ratification unless this is expressly provided for.

<sup>14</sup> Depending on the character and terms of the treaty, entry into force may coincide with ratification or may take place later.

prejudice to any eventual decision to be taken by the Commission or by the General Assembly, the Commission has not at present envisaged its work on the law of treaties as taking the form of one or more international conventions or as taking the form of a treaty, but rather as a code of a general character. The reasons for and advantages of this conception, as they appeared to the special rapporteur, are stated in the following passage from paragraph 9 of the introduction to his first report:

“Secondly, the Rapporteur believes that any codification of the law of treaties, such as the Commission is called upon to carry out, should take the form of a *code* and not of a draft convention. There are two reasons for this. First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.”<sup>15</sup>

In short, the *law* of treaties is not itself dependent on treaty, but is part of general customary international law. Queries might arise if the law of treaties were embodied in a multilateral convention, but some States did not become parties to the convention, or became parties to it and then subsequently denounced it; for they would in fact be or remain bound by the provisions of the treaty in so far as these embodied customary international law *de lege lata*. No doubt this difficulty arises whenever a convention embodies rules of customary international law. In practice, this often does not matter. In the case of the law of treaties it might matter—for the law of treaties is itself the basis of the force and effect of all treaties. It follows from all this that if it were ever decided to cast the Code, or any part of it, in the form of an international convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required.

19. With regard to the commentary, the Commission has not thought it necessary at this stage to provide more than is essential for understanding the significance of the texts adopted and the considerations that have been taken into account. The articles now presented are in themselves provisional, and may require some reconsideration in the light of the completed draft on the subject of the framing, conclusion and entry into force of treaties, when this is finished. At that stage, therefore, further commentary will, if necessary, be provided.

20. The text of the draft articles together with a commentary, as adopted by the Commission at its present session, is reproduced below.

<sup>15</sup> *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956. V. 3, vol. II), pp. 106-107.

## II. Text of draft articles 1-10 and 14-17 with commentary

### INTRODUCTORY ARTICLES

#### Article 1

##### Scope of the Code

1. The present Code relates to all forms of international agreements comprised by the definition given in article 2, irrespective of their particular form or designation or of whether they are embodied in a single instrument or in two or more related instruments.

2. Unless the context otherwise requires, the term "treaty", for the purposes of the present Code, covers all forms of international agreements to which the Code relates. This does not, however, affect the characterization or classification of particular instruments under the internal law of any State, for the purposes of its domestic constitutional processes.

3. The present Code does not relate to international agreements not in written form; nor does it relate to unilateral declarations or other instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement.

4. The mere fact that, by reason of the provisions of the preceding paragraph, the present Code does not relate to agreements not in written form, or to certain kinds of unilateral acts, does not in any way prejudice such obligatory force as these may possess according to international law.

#### Commentary

##### Paragraph 1

(1) Paragraph 1 of this article reflects in essence a decision originally taken by the Commission during its second and third sessions in 1950 and 1951.<sup>16</sup> The term "treaty" usually connotes a particular type of international agreement—namely, the single formal instrument which is normally subject to ratification. It is, however, abundantly clear that, whether or not the use of the term "treaty" in connexion with them is always appropriate, there are indubitably international agreements—such as exchanges of notes—which, though not consisting of a single formal instrument, and often (indeed usually) not being subject to ratification, are agreements to which the international law of treaties applies. Similarly, in the field of single instruments, very many in common and daily use—such as an "agreed minute", or a "memorandum of understanding", etc.—could not appropriately be called "single formal instruments"; yet they embody what are undoubtedly international agreements, subject to the rules of the law of treaties. A general code on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal". The question whether, in order to describe in general terms all such instruments and the law

relating to them, the expressions "treaties" and "the law of treaties", or else "international agreements" and "the law of international agreements" should be employed, is a question of terminology rather than of substance. This aspect of the matter is discussed in paragraphs (6) and (7) below.

(2) The view expressed in the preceding paragraph is in conformity with the pronouncement of the Permanent Court of International Justice in the *Austro-German Customs Régime* case,<sup>17</sup> when the Court stated that:

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken<sup>18</sup> in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes."

With more or less of qualification, the same view is generally taken in legal literature, and was expressed as long ago as 1869 by the eminent jurist Louis Renault,<sup>19</sup> when he spoke of a treaty as being:

"...every agreement arrived at between...States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)." (translation)

(3) Two further factors militate strongly in favour of this view:

(a) In the first place, the "*accord en forme simplifiée*"—to use the apt French term—so far from being at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large—much larger than that of the treaty or convention *stricto sensu*, i.e., the single formal instrument. Its use is moreover steadily increasing. On this whole aspect of the matter, it is unnecessary to do more than refer to the comprehensive statement of it given in the first report<sup>20</sup> of Sir Hersch Lauterpacht.

(b) The juridical differences, in so far as they really exist at all, between treaties *stricto sensu* and "*accords en forme simplifiée*" lie almost exclusively in the field of form, and of the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.<sup>21</sup> But these differences spring neither from the form, the appellation, nor any other outward characteristic of the *instrument* in which they

<sup>17</sup> Series A/B, No. 41, p. 47.

<sup>18</sup> The English text of the judgment is probably a translation from an original French text. A better English rendering would be "such engagements may be assumed in the form of", or better still, simply "may take the form of treaties, etc."

<sup>19</sup> *Introduction à l'étude du droit international*, pp. 33-34.

<sup>20</sup> A/CN.4/63, note to article 2, p. 39.

<sup>21</sup> See on this subject the commentaries to Sir Gerald Fitzmaurice's second report (A/CN.4/107), paras. 115, 120, 125-128 and 165-168; his third report (A/CN.4/115), paras. 90-93; and fourth report (A/CN.4/120), paras. 81 and 101.

<sup>16</sup> See, in addition to the material in paragraphs 9 and 10 of the present report, Sir Hersch Lauterpacht's first report (A/CN.4/63), paragraph 3 of the "Note" to his article 2.

are embodied: they spring exclusively from the content of the agreement, whatever its form, and from the particular character, not of that form but of that content. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a code on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and treaties *stricto sensu*. At the most, such a situation might make it desirable, in that particular field and in the section of the code dealing with it, to institute certain differences of treatment between different forms of international agreements. But the question arises whether it is necessary to do even that.

(4) The question posed at the end of the preceding paragraph is in effect whether, in the draft articles on the framing, conclusion and entry into force of treaties (on which the Commission is at present engaged), it is necessary to devote certain articles or paragraphs exclusively or mainly to the case of treaties *stricto sensu*, and others (exclusively or mainly) to that of less formal types of agreements, and in particular exchanges of notes. All three of the special rapporteurs who have worked on this subject have taken the view that this is not necessary, and that no overt distinction of this kind is required. Their view has been based on the following considerations:

(a) In so far as certain distinctions arise, they do so because certain parts of the law of treaties distinguish themselves, as it were, and so do not need to be characterized expressly as being applicable only to certain forms of international agreements. For instance, it is obvious that articles on the legal incidents and effects of ratification can have no application to agreements or classes of agreements that do not require ratification. Provided that provisions are included indicating what these agreements are—or in what circumstances ratification is unnecessary<sup>22</sup>—it then becomes self-evident that the provisions about ratification only apply to those agreements in connexion with which the requirement of ratification exists. No express distinctions between different forms of instruments are necessary for this purpose.

(b) Moreover—to continue, by way of example, with the subject of ratification—there are (according to one view) *no* international agreements, or classes of international agreements, that are inherently *incapable* of requiring ratification. In illustration of this view the following passage from Sir Hersch Lauterpacht's first report may be cited:

“The designation of an instrument is irrelevant not only in so far as its character as a treaty is concerned, but also in respect of the rules governing its conclusion, the conditions of its validity, its operation and interpretation, and its termination. Thus, as already stated, it does not follow from the mere fact that an instrument is described as an exchange of notes that it does not require ratification. The normal absence of the requirement of ratification in instruments of this

description follows from the circumstance that as a rule they expressly dispense with ratification by providing that they shall enter into force on a specified date or on the completion of the exchange of notes, i.e., on the acceptance and confirmation by one contracting party of the document submitted and drafted—usually as the result of a joint effort—by the other party.”<sup>23</sup>

(5) These then are the main reasons why the Commission has not thought it necessary—and has on the whole thought it undesirable—to draw distinctions between different kinds of international agreements on the basis merely of their form or designation. On the other hand, important distinctions do in some respects exist on another basis, namely according to whether the agreement is bilateral, plurilateral (i.e. made between a restricted number or group of States), or multilateral (c.g. a general multilateral convention concluded at a conference convened under the auspices of an international organization). Where distinctions exist on this basis, the Commission has not hesitated to draw them. This applies, for instance, in respect of articles 6 and 17, and the commentary to articles 4 and 9.

#### Paragraph 2

(6) The first sentence of this paragraph, based on the view that, for the reasons explained above, a code on the law of treaties must cover all international agreements, reflects the fact that in the field of such agreements a peculiarly rich and varied terminology exists as regards the designations, descriptions and appellations given to the various instruments in which the agreements are embodied. Some of the chief amongst these designations are mentioned in paragraphs (1) and (2) above, and others are listed in the footnote hereto.<sup>24</sup> In these circumstances, it is clearly necessary to employ some *generic* term to indicate and cover all such instruments; and while some members of the Commission would have preferred to confine the use of the term “treaty” to the case of treaties *stricto sensu*, the general feeling was that the use of the term “treaty” for this purpose was appropriate. The tradition of using a single term to denote all instruments embodying international agreements is reflected in two of the most important provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed “a. the interpretation of a treaty”. But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Courts for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments

<sup>23</sup> A/CN.4/63, p. 38, para. 3.

<sup>24</sup> In his article “The Names and Scope of Treaties” (*American Journal of International Law*, 51 (1957), No. 3, p. 574), Mr. Denys P. Myers considers no less than thirty-eight different appellations. See also the list given in Sir Hersch Lauterpacht's first report (A/CN.4/63), paragraph 1 of the commentary to his article 2. In addition to those mentioned in paragraphs (1) and (2) of the commentary to the present article, the following may be mentioned: “charter”, “covenant”, “pact”, “general act”, “statute”, “concordat”, “*modus vivendi*”, “agreed minute”, “articles”, “arrangement”, “exchange of letters”, etc.

<sup>22</sup> See footnote 13. This matter will be more fully considered in connexion with the articles on ratification.

having another designation. Again, in Article 38, paragraph 1, amongst the elements which the Court is directed to apply in reaching its decisions, there is listed "a. international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. Furthermore, the fact that the term "conventions" is used in one of these provisions, whereas in the other "treaty" is employed, only serves to show, and reinforces the view, that no particular significance attaches to the use of one term rather than another, provided that the term employed is reasonably general in its connotation and in the context (or else by definition) conveys the idea of the totality of the types of instruments embodying international agreements.

(7) Further points that were made in the Commission were that the expression "law of treaties" is traditional in connexion with the subject, *qua* juridical topic, although this topic has never been regarded as confined to treaties *stricto sensu*; that such a term as "the law of international agreements" would sound strangely; and that to substitute the expression "international agreement" for "treaty" throughout the articles of the Code, or to employ such a phrase as "treaty or other international agreement", would be cumbersome and would tend to complicate the drafting.

(8) Paragraph 2 of the articles does, however, contain certain saving provisions. The opening phrase "Unless the context otherwise requires" is intended to preserve the possibility that, occasionally, it may be necessary to use the term "treaty" in its strict technical, instead of in its general, sense. The phrase "for the purposes of the present Code" indicates that there is no intention to affect such uses of the term "treaty" as may be made elsewhere. Finally, there is the second sentence of paragraph 2, which is intended to preserve the constitutional usages of the different States. In many countries, it is a requirement that international agreements which take the form of a "treaty" proper must be ratified (or must have their ratification authorized) by the legislature—perhaps by a specific majority; whereas in the case of other forms of international agreements this requirement may not exist. Accordingly there may be rules of internal law for determining which instruments (for these domestic constitutional purposes) are to be regarded as treaties, and which are not. The second sentence of the paragraph therefore makes it clear that the first sentence is not intended to affect or prejudice in any way these rules of domestic law, or local usages.<sup>25</sup>

### Paragraph 3

(9) The Code applies to all *instruments* embodying international agreements, but it does not apply either to

<sup>25</sup> An unqualified rule that all instruments embodying international agreements are treaties might suggest that all such agreements without exception require ratification effected or authorized by the legislature, which is not the case (or alternatively it is a matter to be determined by the internal law of each individual State).

all international agreements, or to all instruments. There are two possibilities:

(a) There may be an international agreement, but there may be no instrument embodying it—i.e., it is an oral agreement, made for example, between heads of States or Governments. In the Eastern Greenland case,<sup>26</sup> the Permanent Court held that a valid international agreement resulted from an official conversation between a Foreign Minister and the diplomatic representative of another State—or rather that an undertaking given by a Foreign Minister in such circumstances, and when he was acting within the scope of his normal authority, was binding on his State. The Commission did not therefore intend, in paragraph 3 of this article, to imply that international agreements entered into orally cannot be valid (as to this, see further para. (10) below). It simply felt, as all the special rapporteurs had done, that oral agreements were too remote from the concept of a "treaty" to make it possible to deal with them in a code on the law of treaties, every provision of which almost necessarily has to be worded in such a way as to contemplate directly only the written instrument, or else assumes the existence of an instrument in written form.<sup>27</sup>

(b) The other possibility is that there is an instrument in writing, but that it does not embody an international agreement, because it is both purely unilateral and entirely self-contained—e.g., not part of any complex of similar instruments constituting as a whole an agreement. Again, as is made clear in paragraph 4 of this article, the Commission did not wish to imply that an instrument such as a unilateral declaration, however one-sided, could not create international obligations for the State making it. But the question whether it does so or not depends on general principles of international law. The Commission simply felt that such declarations or other similar instruments could not, for the purposes of the present Code, be treated as international agreements, except in the particular cases mentioned in paragraph 3 of the article, namely: (i) where the act or declaration is part of an interlocking group of similar acts or declarations which, taken together, constitute or evidence an agreement;<sup>28</sup> (ii) where, although there is only one declaration, it contains an offer which is subsequently accepted or acted on by the States to which it is, either actually or potentially, addressed. While many of the incidents of the law of treaties would be inapplicable to these cases, the Commission felt, on the whole, that an international agreement (depending for its effects and interpretation on the terms of the declaration or declarations, or other acts or instruments con-

<sup>26</sup> Series A/B, No. 53, pages 69 *et seq.*

<sup>27</sup> For instance, there cannot be any signature of an oral agreement—or else, *ipso facto*, it becomes a written one.

<sup>28</sup> An exchange of notes may in a sense be said to constitute an example of this, but usually the notes expressly refer to one another. Such an express reference is not, however, essential to constitute an agreement. For instance, any two declarations under the "Optional Clause", accepting the compulsory jurisdiction of the International Court of Justice, in so far as they both cover the same disputes or class of disputes, may be regarded as constituting jointly an agreement to have recourse to the Court in regard to the disputes specified, or if a dispute of that class arises between the parties.

cerned) would result, and that the case could therefore properly be regarded as a "treaty case".

#### Paragraph 4

(10) A sufficient explanation of paragraph 4 results from what has been said above in connexion with paragraph 3. The Commission did not, in the existing context, wish to express any view as to the legal effect of agreements not in written form or declarations not constituting agreements. It merely wished to bring out the fact that, without prejudice to any such question (which must depend on general principles of international law), the Code does not purport to cover these cases. At the same time, the mere fact that the Code does not do so in no way implies that no legal force or effect attaches in these cases to the acts concerned. The Code simply leaves that question entirely open.

#### Article 2

##### Meaning of an international agreement

For the purposes of the present Code, an international agreement (irrespective of its form or designation) means an agreement in written form governed by international law and concluded between two or more States, or other subjects of international law, possessed of treaty-making capacity. This agreement may be embodied either:

- (a) In a single formal instrument; or
- (b) In two or more related instruments constituting an integral whole.

#### Commentary

##### Title of the article

(1) Since the Code is to cover all international agreements in writing, while retaining the title of "Law of Treaties", and since it is accordingly stated in paragraph 2 of article 1 that the term "treaty" is, for the purposes of the Code, used as covering all forms of instruments embodying international agreements, it seems necessary in article 2 to state the meaning of the term "international agreement". Thereafter, however, (i.e., in later articles), the term "international agreement" is not employed, and "treaty" is used.

##### Text of the article

(2) Down to and including the words "an agreement in written form", the text is covered by the comments already made on article 1. Nor is it necessary to give any further explanation of the significance of the two sub-heads (a) and (b) of the article. Examples of instruments belonging to one class or the other have also already been given (see paras. (1), (2) and (6), and footnote 24 of the commentary to article 1). Certain other expressions in this article, however, call for comment.

(3) "... governed by international law..." Sir Hersch Lauterpacht had not included this phrase in his corresponding article defining a treaty because, in his view, all treaties were necessarily governed by international law unless the contrary was stated; and he accordingly inserted a separate article to that effect. The

present special rapporteur had, however, reintroduced the phrase, for the reasons stated in paragraph 7, and the related footnotes, of the commentary to the articles of his first report.<sup>29</sup> Both approaches are valid, but the Commission felt that the element of subjection to international law was so essential an aspect of a treaty—that is, of an international agreement—that this should be expressly mentioned in any definition or description of these terms. Is an agreement between States always or necessarily governed by international law? In one sense, yes: the agreement, once arrived at, must be carried out; and this results from the rule of customary international law, "*pacta sunt servanda*".<sup>30</sup> Subject to that, however, there may be agreements between States, such as agreements for the acquisition by one Government from another of premises for its diplomatic mission in the territory of that Government; or else some other purely commercial transactions between Governments—the incidents of which may be regulated entirely by the appropriate system of private (i.e., national, not international) law.<sup>31</sup> In such a case, while the one Government might be internationally *accountable* to the other for any breach of the undertaking, it would not follow that the basis of the accountability was a breach of an international *treaty* obligation. The matter is clearly not free from doubt, but this was the view to which the Commission on the whole inclined, namely that, while a failure to carry out such an undertaking might involve a breach of international law, this did not entail the consequence that the undertaking itself, or rather the instrument embodying it, was (in the normal sense of the term) a treaty or international agreement. While the obligation to carry out the undertaking might be an international law obligation, the incidents of its execution would not be governed by international law. Without prejudice to the existence of the obligation, the Commission felt it preferable to confine the notion of an international agreement proper to agreements the actual execution of which (as well as the obligation to execute) is governed by international law.

(4) "... concluded between *two or more* States, or other subjects of international law, *possessed of treaty-making capacity*". If, on the one hand, for the reasons given in the preceding paragraph, an agreement between States is not necessarily or always an agreement governed by international law, on the other hand, an agreement to which only *one*<sup>32</sup> of the parties is a State (or other subject of international law, *possessed of treaty-making capacity*)—the other being a private individual or entity—is necessarily and always *not* an agreement governed by the law of treaties; because, whether or not private individuals and entities are *sub-*

<sup>29</sup> *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956, V. 3, vol. II), p. 117.

<sup>30</sup> Even here, however, a *petitio principii* may be involved, for the *pactum* in only *servandum* if it is a *pactum*—i.e., already an international agreement.

<sup>31</sup> However, it could perhaps be said (according to one school of thought) that this is a case where international law does govern, but does so by an express reference of the matter to some system of private law.

<sup>32</sup> If *several* States were involved, together with one or more private entities, the instrument might operate as a treaty purely in the relations between the *States* parties to it.

jects, as opposed (or in addition) to being objects of international law (a question on which opinion in the Commission was divided, but which is irrelevant in the context), by common consent they do not possess treaty-making capacity. Consequently, an agreement between a State and a foreign individual or corporation is not a treaty or international agreement, however much it may resemble one superficially. That this is the case was implicit in the whole attitude of the International Court of Justice in the *Anglo-Iranian Oil Company* case, with reference to the agreement reached between the Company and the Iranian Government. The breach of such an agreement may indeed in certain circumstances involve a breach of international law, but that is another matter. The agreement itself is not a treaty.

(5) "...States... possessed of treaty-making capacity". The expression "treaty-making capacity" qualifies the term "States" as well as the phrase "other subjects of international law". The question of the capacity of States to conclude treaties was not, however, one which was fully discussed in the Commission during the present session; it will be discussed in due course, in connexion with the special rapporteur's report dealing with the essential validity of treaties.<sup>33</sup>

(6) "...between States, or other subjects of international law, possessed of treaty-making capacity". Who are these other subjects of international law? The obvious case is that of international organizations, such as the United Nations, whose international personality and treaty-making capacity was affirmed by the International Court of Justice in the case of "Reparations for injuries suffered in the service of the United Nations". It will be recollected however, that, as stated in the introduction to the present chapter (see para. 10 above), the Commission had decided in 1951 to "leave aside, for the moment, the question of...international organizations"; to "draft the articles with reference to States only"; and to "examine later whether they could be applied to international organizations as they stood or whether they required modification". It was implied by this decision that the case of treaties concluded with or between international organizations must be covered by a code on the law of treaties, but that this should be done at a later stage of the work. At its present session, the Commission again considered this matter. It had no hesitation in confirming the view that the case of treaties concluded with or between international organizations was of the first importance and must be covered. At the same time it reaffirmed the view that it would be preferable to defer the matter to a later stage. The topic of the law of treaties is a difficult and complex one. The Commission feels that its main principles and rules can most effectively and certainly be established on the basis of the traditional case of treaties between States. The case of international organizations will in any event require a separate study. Thereafter, either the existing articles of the Code must be modified to cover it, or a separate chapter to deal with that case can be added.

(7) It follows that, in the immediate context, the phrase "or other subjects of international law, possessed

of treaty-making capacity" was not included for the express purpose of covering international organizations, though it would in fact do so. It was inserted because, in the opinion of the Commission, it always has been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the case of the Papacy, particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State which is under the territorial sovereignty of the Holy See, treaties entered into by the Papacy are, in general, entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State.

(8) Certain other phrases suggested by one or more of the special rapporteurs, but not adopted by the Commission, call for notice:

(a) "...possessed of *international personality* and treaty-making capacity" (Fitzmaurice report). The Commission felt that the essential consideration was possession of treaty-making capacity. This involved international personality in the sense that all entities having treaty-making capacity necessarily had international personality. On the other hand it did not follow that all international persons had treaty-making capacity.

(b) "A treaty is an agreement...which establishes a relationship under international law between the parties thereto" (Brierly); "Treaties are agreements between States...intended to create legal rights and obligations of the parties" (Lauterpacht); "...a treaty is an international agreement...intended to create rights and obligations, or to establish relationships, governed by international law" (Fitzmaurice). According to the Lauterpacht concept, the key word was "intended to create..." However informal or unusual in character an instrument might be, and even if not expressed in normal treaty language, it would nevertheless rank as a treaty or international agreement if it was intended to create international rights and obligations. On the other hand, instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties.<sup>34</sup> The Commission was inclined, for the time being, to feel that this particular matter was probably now adequately covered by paragraph 3 of article 1, as adopted by the Commission, and that these particular phrases were not necessary. The Commission further felt that, as they stood, and even with the inclusion of the words "or to establish relationships, governed by international law", they were not satisfactory, because they by no means covered every possible case. For instance, some treaties did not create rights and obligations but terminated them, or modified existing ones, or contained merely interpretative provisions. Yet few would deny that such instruments were treaties. The Commission thought that

<sup>33</sup> A/CN.4/115, article 8 and the commentary thereto.

<sup>34</sup> See the first Lauterpacht report (A/CN.4/63), paragraph 4 of the commentary to article 1.

there were so many possible cases that it would in fact be difficult to find any convenient general phrase to cover them all, and that it would be better to omit any reference to the *objects* of the agreement. The Commission also thought that the matter was largely subsumed in the phrase adopted by it in article 2 "...an international agreement... means an agreement... governed by international law and..."<sup>35</sup>

## FIRST CHAPTER. THE VALIDITY OF TREATIES

### GENERAL ARTICLES

#### Article 3

##### *Concept of validity*

1. Validity has three aspects—a formal aspect, a substantial aspect and a temporal aspect—all of which must be present, both in respect of the treaty itself, and in respect of each contracting party.

2. A treaty is said to have validity in its formal aspect if it fulfils the conditions regarding negotiation, conclusion and entry into force, set out in part I of the present chapter (articles... of the Code).<sup>36</sup>

3. Validity in its substantial aspect denotes those intrinsic qualities relating to the treaty-making capacity of the parties, to the reality of the consent given by them, and to the nature of the object of the treaty, which are set out in part II of the present chapter (articles... of the Code).

4. Validity in its temporal aspect denotes the situation in which the treaty, having entered into force, has not been lawfully terminated in one of the ways set out in part III of the present chapter (articles... of the Code).

#### Article 4

##### *General conditions of obligatory force*

1. A treaty has obligatory force only if, at the material time, it combines all the conditions of validity referred to in the preceding article.

2. In the case of multilateral treaties, obligatory force for any particular State exists only if, in addition to the treaty being valid in itself, the State concerned has become and still remains a party to it.

##### *Commentary*

(1) These two articles cover in a simplified form the material contained in articles 10-12 of the first Fitz-

<sup>35</sup> It should be noticed that the Commission was not attempting to provide a strict logical *definition* of a treaty or international agreement, but (as the title to article 2 implies) aimed merely at describing its general meaning. In this field, definitions are apt to run into difficulties from the standpoint of strict logic. For instance, as regards the phrase to which the present footnote relates, it might be objected that it really avoids the issue, or only leads to circularity, for it necessitates an inquiry as to (or definition of) what agreements are in fact governed by international law. The meaning is nevertheless reasonably clear.

<sup>36</sup> In this and the two succeeding paragraphs the numbering of the articles is not given, as it is liable to change, or else has not been determined because the Commission has not yet considered the articles concerned.

maurice report. It was felt in the Commission (and equally be the special rapporteur) that the latter articles did not distinguish quite sufficiently clearly between the concepts of validity and obligatory force, which are of course distinct. For instance, a treaty may be valid in every respect but may, for the time being, not be obligatory because, although in force, it is subject to a suspensive condition. A further refinement would be possible, for a treaty may be both valid and in force, yet not actually be operative. Thus a treaty might provide that it enters into force on the exchange of ratifications, but if its provisions related wholly to the existence of a state of hostilities, they would not become *operative* until hostilities occurred.

(2) In the case of bilateral treaties, the validity and obligatory force of the treaty itself necessarily entails its validity and obligatory force for both the parties to it. But in the case of multilateral treaties, this is not necessarily so. The treaty itself may be valid, but the participation in it of one of the parties may not be (e.g., because not effected in the manner prescribed by the treaty). Again, the treaty itself may be in force, but may not be in force for an intending party which, for example, has signed, but not yet ratified it.

(3) With regard to the concept of validity in its three different aspects, reference may be made to paragraph 14 of the present report. In his original articles, the special rapporteur had attempted to furnish a more or less precise definition or description of the various aspects of validity. The discussion in the Commission, however, indicated that an entirely satisfactory phraseology would be difficult to find, and that it would be preferable simply to refer to the different parts of the Code in which each separate element of validity is dealt with in full detail. Hence the drafting of paragraphs 2-4 of article 3. Part I of the topic of validity is not fully covered by the articles now presented (see paras. 16 and 17 above). The rest of part I, and parts II and III, will be taken up later by the Commission.

#### Article 5

##### *The treaty considered as a text and as an international agreement*

1. Subject to the definitions contained in article 2 of the present Code, the term "treaty" is used to denote both the text of the provisions drawn up by the negotiating States and the treaty itself as finally accepted and in force.

2. In order that the treaty may exist simply as a text, it is sufficient if it has been duly drawn up and authenticated, in the manner provided in part I, section A, below.

3. In order to be or become an international agreement, the text, so drawn up and authenticated, must be accepted as an international agreement and enter into force in the manner provided for in part I, section B, below.

4. The treaty-making process may consequently be envisaged as involving four stages (some of which may, however, in certain cases, take place concurrently), namely:

- (a) The drawing up and authentication of the text;
- (b) Provisional acceptance of the text;
- (c) Final acceptance of the text as an international agreement;
- (d) Entry into force of the treaty.

*Commentary*

*Paragraphs 1-3*

(1) Certain explanations relevant to this article have already been given in paragraph 15 of the present report. The article led to prolonged discussion in the Commission. While most of the members recognized the distinction involved in the first three paragraphs, some members considered that misunderstandings might arise if the distinction was formulated as it had been in the special rapporteur's text, which (to quote the principal paragraph) read:

"1. A treaty is both a legal transaction (agreement) and a document embodying that transaction. In the latter sense, the treaty evidences but does not constitute the agreement."

At the same time, there can be little doubt that the term "treaty" is constantly—even if, strictly speaking, incorrectly—used to refer to the "treaty" at a stage when it is a mere *text*, having perhaps not even been signed—(e.g., in the case of bilateral negotiations, the delegates establish the text and then refer it to their Governments: in the case of an international conference, the text as "adopted"—but only as a *text*—is incorporated in the final act of the conference, or in a resolution of an international organization recommending that Member States agree to it as a *treaty*). Furthermore, although some members of the Commission felt unable to dissociate the notion of an international agreement from the instrument embodying it ("the treaty *is* the agreement"), others considered that the treaty evidenced the agreement, but that the agreement itself lay outside the treaty ("the treaty shows the agreement the parties have arrived at"). Other difficulties of wording arose from the possibility that the parties might agree first, and then reduce their agreement to writing; or they might draw up a text first and only give their final agreement to it later. Accordingly, the first three paragraphs of this article, as finally adopted by the Commission, are based on the fairly clear distinction between the *text* of the treaty, considered purely as a text, and the *treaty* itself considered as an instrument to which the parties have given some substantive agreement, either provisionally (e.g., by mere signature), or finally (e.g., by signature followed by ratification). The question of "authentication" is commented on below in connexion with article 9.

*Paragraph 4*

(2) The Commission feels no doubt that, as a matter of classification, the four stages mentioned in this paragraph all exist, although in practice two or more of them may be merged. Thus, in case of agreements signed on the spot, and containing a clause bringing them into force *on signature*, all *four* stages take place in one. Similarly, ratification may bring about both stages (c) and (d). In order to show, however, that the four stages are, in the abstract, distinct, the following case, a frequent one, may be noted. At an international conference: (a) the delegates draw up the text of a convention, which they do not sign or initial but authenticate simply by incorporating it into the final act of the conference; (b) the convention being subject to

ratification, and also left open for signature until a certain date, some States subsequently sign it, thereby giving a *provisional assent* to it as a potential treaty (the mere act of drawing up the text did not imply even that); (c) they subsequently ratify, thereby giving a *final assent*, but this does not necessarily bring the convention into force, because it may be expressly provided that it will come into force only when, say, twenty ratifications have been deposited; (d) on the deposit of the twentieth ratification, the treaty comes into force.

PART I. FORMAL VALIDITY

(Framing, conclusion and entry into force of treaties)

SECTION A. NEGOTIATION, DRAWING UP AND AUTHENTICATION  
OF THE TEXT

*Article 6*

*Drawing up and method of adoption of the text*

1. A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other convenient official channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference convened by the organization, or in some organ of the organization itself.

2. Representatives must be duly authorized to carry out the negotiation, and, except in the cases mentioned in paragraph 3 below, must furnish or exhibit credentials to that effect. They need not, however, for the purposes of negotiation, be in possession of full powers to sign the treaty.

3. Heads of States and Governments and Foreign Ministers have *ex officio* capacity to negotiate on behalf of their States, and need not produce any specific authority to that effect. The same applies to the head of a diplomatic mission for the purpose of negotiating a bilateral treaty between his State and the State to which he is accredited.

4. The adoption of the text takes place as follows:

(a) In the case of bilateral treaties by mutual consent of the parties;

(b) In the case of treaties negotiated between a restricted group of States, by unanimity, unless the negotiating States decide by common consent to proceed in some other way;

(c) In the case of multilateral treaties negotiated at an international conference, and subject to sub-paragraph (d) below, by such voting rule as the Conference may, by a simple majority, decide to adopt;

(d) In the case of treaties drawn up in an international organization or at an international conference convened by an international organization, according to the voting rule, if any, specifically provided for the framing of such treaties either by the constitution of the organization or by a decision of an organ competent to give it.

*Commentary*

*Paragraph 1*

(1) The first sentence relates to treaties of all kinds, bilateral and multilateral, between States, and requires no explanation. The second sentence also relates to treaties between States, but contemplates only the case of multilateral treaties drawn up under the auspices of an international organization. It does not, however, fol-

low that (as for instance was done in the case of the Genocide Convention<sup>37</sup>) the treaty must be drawn up by or in an actual organ of the organization. Indeed, except in the case of certain international organizations whose work consists rather especially in the framing of international conventions,<sup>38</sup> it is more usual for the organization to convene a special conference for the purpose, which, except for the fact that the organization provides the secretariat and makes the administrative arrangements, and that the cost is borne on the budget of the organization, is to all intents and purposes like an ordinary diplomatic conference. Such conferences are frequently not held at the seat of the organization, and are sometimes attended by States not members of it, if there has been a decision to that effect.<sup>39</sup>

### Paragraph 2

(2) This paragraph deals with authority to *negotiate*, not authority to sign. The two are quite distinct, and the question of authority to sign is dealt with by article 15. While authority to sign (if possessed by the representative at the stage of negotiation) might be held to imply authority to negotiate, the reverse is certainly not the case, and, as a general rule,<sup>40</sup> a further and specific authority to sign will be required before signature can be affixed. On the other hand, as the second sentence of the paragraph makes clear, authority to sign need not be in the possession of the representative at the negotiating stage. For that, it will suffice if he possesses an authority to negotiate or to act as representative.

(3) The first sentence of the paragraph states the normal rule without qualification. However, what it really means is that States can, in a negotiation, refuse to deal with unaccredited representatives of other States; and that at an international conference they can refuse to allow them to participate, except on a provisional basis pending arrival or production of the necessary authorization. It goes without saying that if the other negotiating States choose to negotiate with, or allow the participation of an unaccredited "representative" they can do so, and this sometimes occurs. In that case, unless the necessary authorizations are eventually forthcoming, the representative will only be able to initial the text, or sign it *ad referendum*, as described in the commentary to article 10 below; and these acts will require to be followed up in due course by an authorized signature, or by confirmation, as the case may be and as specified in paragraphs 2 and 3 of that article.

### Paragraph 3

(4) A general exception to the necessity for authority to negotiate, duly referred to in paragraph 2 of the present article, is specified in paragraph 3. Authority

to negotiate (and, as will be seen later, authority to sign) is inherent in the office and function of such persons as Heads of States and Governments, and Foreign Ministers—and also, in the special circumstances stated in the second sentence of paragraph 3, ambassadors or other heads of diplomatic missions, as regards authority to *negotiate*.<sup>41</sup> In the case of Foreign Ministers, the principle involved can be illustrated from the pronouncement of the Permanent Court of International Justice, already referred to (see footnote 26 above), in the Eastern Greenland dispute, in which the Court said<sup>42</sup> (in relation to a case in which a Foreign Minister had given an *oral* undertaking, but without producing any express authority to do so) that it considered it to be "...beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, *in regard to a question falling within his province*, is binding upon the country to which the Minister belongs".<sup>43</sup>

(5) As regards the case of an ambassador or other head of diplomatic mission negotiating on behalf of his State with the State to which he is accredited, the Commission draws attention to article 3, sub-head (c) of its draft on diplomatic intercourse and immunities,<sup>44</sup> where it is stated: "The functions of a diplomatic mission consist *inter alia* in... negotiating with the Government of the receiving State..." In the commentary to this article, it was explained that this sub-head described one of the "classic functions of the mission, viz... negotiating with the Government of the receiving State..." Clearly, no special authority is necessary for this: it would be part of the inherent functions of the head of the mission.

### Paragraph 4

(6) This paragraph deals in effect with the voting rule by which the *text* of the treaty is adopted. Neither the term "adopted" nor the expression "The adoption of the text..." denotes, or in any way implies, consent of any kind to be bound by this text, or to carry out its provisions. These terms relate solely to the framing of the text; but this text will eventually become binding on the parties as a *treaty* only if and when, by signature, ratification, or otherwise, they take the necessary steps to that end. The mere adoption of the text, and even a vote cast in favour of it for that purpose, involves no assurance whatever that these further steps will be taken.

(7) In practice, the question of the voting rule arises mainly in connexion with the adoption of the texts of multilateral treaties and conventions. It is obvious that the text of a bilateral treaty can only be adopted by the mutual consent of the two States concerned, and that the rule of unanimity must also apply in the case of treaties negotiated between a small number or a

<sup>37</sup> Drawn up in the Sixth Committee of the General Assembly at its third session, Paris, 1948.

<sup>38</sup> As for instance the International Labour Organisation.

<sup>39</sup> Both points are exemplified by the Law of the Sea Conference, convened by the General Assembly and held at Geneva in 1958, to which a number of States not members of the United Nations were invited.

<sup>40</sup> That is, apart from the special case mentioned in article 15, paragraph 1 (a).

<sup>41</sup> They would, however, still require specific full powers to *sign* any resulting treaty.

<sup>42</sup> Series A/B, No. 53, p. 71.

<sup>43</sup> Italics added by the Commission.

<sup>44</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, p. 12; see also *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No.: 58. V. 1, vol. II), p. 90.

restricted group of States for some specific common purpose, unless (though equally by unanimity) they decide on a different procedure. Hence sub-paragraphs (a) and (b) of the paragraph.

(8) As regards general multilateral treaties, there seems to be little doubt that, historically, and up to the First World War, the unanimity rule prevailed at most international conferences. Some members of the Commission felt that this was still the basic rule, unless a contrary decision should be taken; and that such a contrary decision itself required, strictly, to be taken unanimously, or at any rate without active dissent. It was pointed out that at conferences, the rules of procedure, including the voting rule, were frequently adopted without a vote, or subject only to abstentions; so that at least the appearance of unanimity was preserved. It was further pointed out that, even where a conference adopted its voting rule only by a majority vote (i.e., in the face of actual contrary votes), the element of unanimity still existed in the sense that the States which had voted against this rule had the choice either of not participating further, and of leaving the conference, or else of submitting to the rule adopted. If, as would usually be the case, they remained, and took part in the work of the conference on the basis of this rule, they tacitly assented to it.

(9) At the same time, the general feeling in the Commission was that in recent times the practice at international conferences of adopting texts by some kind of majority vote had become so invariable that it would now be unrealistic to postulate any other system. A conference could of course *decide* to proceed by unanimity, but in the absence of any such decision it must be assumed that it would proceed on the basis of a majority rule. The only questions were *what* majority, and how was the conference to decide on that majority—i.e., did this initial decision itself require to be taken by unanimity, or could it equally be taken by a majority vote, and if so what majority?

(10) In relation to these questions, four distinct points of view were put forward in the Commission.

(a) According to one view, the Commission should not deal with the matter at all, because it was not really a part of the law of treaties, but belonged to the subject of the law and procedure of international conferences. Against this view, it was urged that the treaty-making *process* was essentially a part of the law of treaties,<sup>45</sup> and that the adoption of the text was an essential part of that process. Without it there could be no treaty, and it was therefore necessary to have rules to govern the question of the adoption of the text.

(b) According to a second view, a code on the law of treaties should not only deal with the matter, but should actually specify the majority by which an international conference should adopt its texts. In this con-

nexion, it was pointed out that although most conferences had adopted their texts by a simple majority vote, there was a growing tendency to regard a two-thirds rule as preferable. A simple majority rule certainly facilitated the work of the conference; but it often led to the adoption of texts that did not command any really wide measure of support, and which consequently tended to remain unratified. Some members of the Commission considered that a code on treaty law should prescribe a two-thirds rule for the adoption of texts.

(c) According to a third view, the code should make no attempt to prescribe any particular voting rule, but should simply state that the matter was one for decision by the conference. Furthermore, according to this view, no attempt should be made to prescribe *how* the conference would reach a decision concerning its substantive voting rule. That too should be left to the conference. In reply to objections that this might theoretically prevent the conference from ever starting, it was pointed out that, by one means or another, conferences always did manage to adopt their rule of procedure, including a voting rule.

(d) The supporters of the fourth view, which eventually prevailed, while agreeing with the supporters of the third view that the code should not prescribe the voting rule, but should leave this to the decision of the conference, considered it essential at least to prescribe by what means the conference would reach that decision. It might be true that a conference would usually reach it somehow, but perhaps only after long procedural debates, delaying the start of the substantive work of the conference. Once this view had been adopted by the Commission, there was general agreement that the rule of the simple majority as the basis of the adoption by the conference of its rules of procedure, including its *substantive* voting rule, was the only practicable one. The conference's substantive voting rule—i.e., for the adoption of texts, and for taking any other non-procedural<sup>46</sup> decisions—would then be such as the conference, by a simple majority, decided upon. This substantive voting rule might itself be a simple majority rule, or it might be two-thirds, or even, theoretically, unanimity.

(11) Sub-paragraph (c) of paragraph 4, in which the result just discussed is embodied, is, however, expressed to be "subject to sub-paragraph (d) below". The latter sub-paragraph deals with the special case of treaties drawn up in an international organization, or at conferences convened by it, where (which is not always the case) either the constitution of the organization already prescribes a voting rule for the adoption of the texts of such treaties, or there has been a decision by some organ of the organization, competent to give it, as to what the voting rule shall be. The constitutions of some organizations such as the International Labour Organization prescribe in detail the method by which treaties concluded under their auspices shall be drawn up. Others do not. However, the appropriate organ of the organization, if it is constitutionally empowered to do so, may, in deciding to hold or convene a conference,

<sup>45</sup> It can of course be argued that the law of treaties presupposes the existence of a treaty, and must therefore take its point of departure from the completed treaty actually in force. This would however exclude such matters as signature and its effects, ratification, accession, reservations, entry into force, and other matters, all of them traditionally regarded as part of the law of treaties.

<sup>46</sup> The rule of the simple majority vote for *procedural* decisions is universally admitted; but the discussion here relates to substantive decisions—in particular those leading to the adoption of texts.

prescribe the voting rule in advance as one of the conditions of holding or convening the conference. At the same time, it was pointed out by the Secretary of the Commission that, when the General Assembly of the United Nations convened a conference, what normally occurred was that the Secretariat, after consultation with the groups and interests mainly concerned, drew up provisional or draft rules of procedure, including a suggested voting rule, for adoption by the conference itself. But it was left to the conference to adopt the suggested rule on a definitive basis, or else to substitute another for it, if it pleased.

#### Article 7

##### *Elements of the text*

1. It is not a juridical requirement of the text of a treaty that it should contain any particular rubric, such as a preamble or conclusion, or other special clause.

2. However, in addition to a statement of its purpose and an indication of the parties, provisions normally found in the text of a treaty are those concerning the date and method of the entry into force of the treaty, the manner of participation of the parties, the period of its duration, and other formal and procedural matters.

3. In those cases where a treaty provides expressly that it shall remain open for signature, or provides for ratification, accession, acceptance, coming into force, termination or denunciation, or any other matter affecting the operation of the treaty, it should indicate the manner in which these processes are to be carried out and the requisite communications to the interested States which are to be made.

##### *Commentary*

(1) As the opening words of paragraph 2 of this article imply, the only essential elements that must be found in the text of a treaty for it to exist as such are a statement of its purpose (i.e., its *substantive* content) and an indication in some form of who are the parties to it. Other clauses may be, and indeed, in general are, usual and often desirable. But their absence would not affect the legal validity of the treaty which, theoretically, could consist merely of several lines written on a sheet of paper, provided it was clear that this represented or embodied an agreement between the parties to it. Thus, while there is a good deal to be found in juridical literature, and elsewhere, about the various parts of a treaty, formal clauses, *clauses de style*, etc., and while there is a great deal of law regarding these clauses and their effects, assuming they are present in any given case, their presence is not itself an actual legal necessity. It may at first sight seem strange that clauses which figure so prominently in many treaty instruments should not do so in any way as a legal necessity. But if the question be asked whether their absence can render the treaty actually invalid, the answer must clearly be in the negative. The treaty would still be a treaty without them, if what it did contain had been duly consented to by the parties.

(2) Such is the legal position intended to be reflected by paragraph 1 of article 7. But this paragraph is not of course intended to imply that a preamble, a formal conclusion, and other special clauses, should not figure in treaties, or that they will not produce their due

legal effect whenever they are present. What the paragraph implies is that it is for the parties to decide whether to include these elements or not, but that failure to do so will not affect the validity of the treaty as such. As to the legal effects of such parts or provision of a treaty, this is a matter of the rules of treaty interpretation, and of other rules contained in later parts of the Code.

(3) On the other hand, if not a legal necessity, it is certainly preferable that treaties should contain formal clauses, or at least indications, on a number of matters affecting the mechanics of the treaty, such as the necessity or otherwise of ratification, the method of entry into force, the duration of the treaty (if not intended to be of indefinite duration), the method of its termination, etc. This is true not merely of treaties *stricto sensu*, but also of less formal instruments, even if to a somewhat diminished extent,<sup>47</sup> and on the basis of a rather different method of indication.<sup>48</sup> The absence of such provisions, or indications, will not invalidate the treaty, but it may lead to mechanical difficulties, to difficulties in the application of the treaty, and to disputes between the parties that can perhaps only be resolved by reference to an international tribunal. Accordingly, paragraph 2 of the article, by stating that provision for such matters is usual, is also intended to suggest that it is desirable.

(4) The final paragraph is consequential, but relates mainly to the case of the plurilateral or multilateral treaty. The operation of such treaties is greatly facilitated if they contain (though this could of course equally well be done by some ancillary protocol) a provision naming the Government of one of the parties, or the secretariat of some international organization, as constituting the treaty's "headquarters", at the seat of which it will remain open for signature; with whom other notifications—such as notices of denunciation—may be sent; and by whom the receipt of such instruments and notifications, and any other relevant information, will be communicated to the other parties or interested States.

#### Article 8

##### *Legal consequences of drawing up the text*

1. Participation in a negotiation or an international conference, even where texts have been adopted by unanimity, does not involve any obligation to accept the text or to carry out its provisions.

2. This does not, however, affect such obligations as any participant in the negotiation may have according to general principles of international law to refrain for the time being from taking any action that might frustrate or adversely affect the purpose of the negotiation, or prevent the treaty producing its intended effect if and when it comes into force.

<sup>47</sup> It is less important only because, in the case of these instruments, it is easier to infer with reasonable certainty what the intention is. Thus it is fairly clear that unless something different is indicated, an exchange of notes takes effect on the date of exchange, whether this is stated or not.

<sup>48</sup> That is to say, less use is made of formal clauses specifically devoted to providing for ratification, entry into force, duration, etc., and more is left to the play of inference or indirect indication.

*Commentary*

(1) The title of this article may be slightly elliptical, because the main legal consequence involved is that there are no *direct* or positive legal consequences of merely drawing up the text of a treaty—and it is of importance to the success of the negotiating process that this should be clearly understood. Even the unanimous adoption of a text—provided it is not adopted as anything more than a simple text—involves no obligation to become finally bound by the text as a treaty; still less (at that stage) to carry out its provisions. The same applies where, at an international conference, texts are adopted by a majority vote. The States of the majority are no more bound than are those whose delegations voted against. Both classes are equally entitled to accept (i.e., become bound by) the treaty eventually; but neither is obliged to do so, or, in the meantime, to carry out its provisions. There is a clear distinction between a text that exists *only as a text*, which the negotiating States may or may not proceed to sign, ratify or otherwise become bound by, and a text which, through these processes, becomes an international agreement. Further observations on this matter are contained in paragraph (1) of the commentary to article 5 above and in paragraph (6) of the commentary to article 6.

(2) So much for the direct legal consequences—or rather, the lack of them—with reference to the drawing up of the text. Many members of the Commission, however, felt that it might be misleading to imply that there were no legal consequences at all. For instance, States which have participated in a negotiation at which the text of a treaty has been drawn up certainly have a right to sign the treaty, although this right does not necessarily or always derive from the participation as such. But the question of the right to sign is dealt with in a separate article (see article 17 and commentary thereto). Furthermore, a number of the members of the Commission considered that, while participation in a negotiation, and in the drawing up of a text, did not involve any positive obligations for the States concerned, it did, or might, involve a *negative* obligation of a different kind; namely, for the time being, and pending eventual signature, etc.—or for a reasonable time within which the further steps which would bring the treaty into force could be taken, if the parties decided to do so—to refrain from any action that might frustrate the whole negotiation by imperilling the objects of the treaty. An example which was given, and which, if not very likely to occur in practice, nevertheless aptly illustrates the point involved, was the possibility that, a treaty having been drawn up between two States for the cession by one to the other of certain territory (in return for a specified compensation), the ceding State might, before any further step could be taken, destroy installations and other objects of value in the territory—yet claim that, as the territory itself could, as such, still be transferred, the purpose of the negotiation remained intact.

(3) Some members of the Commission felt that, while a certain obligation to refrain from this type of behaviour might result from actual *signature* of a treaty, it could not result from merely drawing up the text. A

State's freedom of action could not, as a matter of law, be affected or limited simply by participation in a negotiation. Even if the State had given some assent, it would only have assented to the text *as a text*, and not in any way (even provisionally) as a *treaty*. In such circumstances, the suggested behaviour could not be illegal, though it might be lacking in morality or political good sense. The members of the Commission who took this view also felt the case lacked reality. In the face of such behaviour, the treaty would evidently not be signed, or would not be ratified. Still, the other party would be no worse off than if the negotiation had not taken place at all. Since no State having participated in the drawing up of a text was, on that account, bound to sign it, the suggested behaviour would simply be the equivalent (or evidence) of a decision not to sign.

(4) These views were not shared by certain other members of the Commission who felt that, particularly in the case of general multilateral conventions left open for signature for a period of months, some kind of obligation did rest on the negotiating States, particularly those which had voted in favour of the text as a text, to refrain from action which would alter the *status quo* in such a way that States eventually signing would find themselves obliged to do so against the background of a different situation of fact from that which existed when the treaty was first opened for signature. It was immaterial whether this obligation sprang from the general principle of good faith, the doctrine of abuse of rights, or from a rule implied by the general international law of treaties—as to which, opinions differed somewhat amongst the members of the Commission holding this basic view.

(5) In these circumstances, the Commission eventually decided on the course reflected in paragraph 2 of article 8. This paragraph is intended to leave the question entirely open. Admittedly it implies that an obligation of the kind specified may exist. It does not denote that it does exist. This is left to be determined on the basis of general principles of international law, and without prejudice to what the result of such a determination might be.

(6) Supposing, however, that such an obligation exists (though, as just stated, this point remains quite open), then the words “for the time being” would indicate that it is not of indefinite duration. How long it would last would depend on the circumstances of the particular case and could hardly be specified precisely. But the obligation could clearly not last beyond such time as was reasonably necessary in order to enable the negotiating States to decide on their attitude in relation to the treaty.

*Article 9*

*Authentication of the text*

1. Unless other means are prescribed in the text itself or specially agreed upon by the negotiating States, the text of a treaty as finally drawn up may be authenticated in any of the following ways:

- (a) Initialling of the text on behalf of the negotiating States;
- (b) Incorporation of the text in the Final Act of the conference at which it was drawn up;

(c) Incorporation of the text in a resolution of an organ of an international organization, or such other means as may be provided for by the Constitution of that organization.

2. In addition, signature of the text on behalf of the negotiating States (whether full signature or signature *ad referendum*), apart from such effects as it may produce by virtue of articles . . . of the present code,<sup>49</sup> also authenticates the text in all cases in which this has not already been carried out in one of the ways referred to in paragraph 1.

3. Once authenticated as provided for in paragraphs 1 and 2 of the present article, the text is final.

### Commentary

(1) What is meant by the authentication of the text? And why is "authentication" necessary? It will be simplest to begin with the second of these two questions. In answering it, an answer will automatically be given to the first. Authentication is necessary in order that, before the negotiating States are called upon to decide whether they will become parties to the treaty or not—or in some cases before they are called upon to decide whether they will even sign it, as an act of provisional consent to the treaty—they may know once and for all, finally and definitively, what is the text of the treaty which, if they take these decisions, they will be signing or becoming parties to. It is clear that such steps as signature, ratification, accession, bringing into force, etc., can only take place on the basis of a text the terms of which have been settled, and are not open to change. There must come a point, therefore, at which the process of negotiation or discussion is halted, and the text which the parties have, as a text, agreed (or, at an international conference adopted by a majority vote) is *established* as being the text of the proposed treaty. Whether the States concerned will eventually become bound by this treaty is of course another matter, and remains quite open. None are committed at that stage. But if they are eventually to become bound, they must have, as the basis of any further action, a final text not susceptible of alteration.

(2) It is accordingly necessary to have some means whereby the text, when ultimately settled, can be registered and recorded in such a manner that its status as being the finally agreed text (i.e., as being what has been agreed on as a text) is not open to question or challenge. This process is known as authentication, and authentication therefore consists in some act or procedure which as it were certifies and establishes that "this text is the correct (and the only correct) and authentic text".

(3) It may be asked, is it then impossible to change an established text, should the parties have further thoughts, so long at any rate as it has not been signed? The answer is that it is not impossible, but that once a recognized procedure of authentication has been carried out in relation to a text, any subsequent alteration of it results not merely in an amended text, but in a *new* text, which will then itself require authentication or reauthentication in some way. This can best be illustrated in

<sup>49</sup> The numbering is left blank as the Commission has not yet considered all the articles involved.

relation to those cases where signature is itself the method of authentication—i.e., where the text has not already been authenticated in any other way (until fairly recently signature was indeed the normal method of authentication though it no longer always is so<sup>50</sup>). In such a case, changes effected after signature would require the text to be re-signed or re-initialled, or a new text to be drawn up and signed; or alternatively a separate protocol registering and authenticating the changes would have to be drawn up and signed. In general, no changes could be made to the original signed text or signature copy itself, for then the parties would be on record as having signed a text different from the one which, at the actual date of signature, they did sign. If changes *are* made on the original signed text or signature copy, they would themselves require to be signed or initialled, and *dated*. The document as a whole would then stand authenticated as the actual text of the treaty. But final establishment of the text at some point there must be, and, in order to register and stabilize this text as the basis for ratification (where necessary) and entry into force, there must be an eventual authentication of it in its final form by some recognized method.

(4) The same considerations apply, *mutatis mutandis*, and perhaps even more obviously, where authentication of the original text has taken place, not by signature but, for example, by embodiment of the text in the final act of a conference, or in a resolution of an organ of an international organization.<sup>51</sup> Any subsequent alteration of it would result in a new text, itself requiring authentication by the same or some other recognized means.

(5) It has now been stated what authentication is, and why it is necessary. It next becomes pertinent to ask why the concept of authentication has until recently remained largely unrecognized as a definite, separate, and necessary part of the treaty-making process. The explanation lies in the fact that in the past, and apart from the possibility of initialling and signature *ad referendum*, signature was the normal method of authenticating a text, but that signature invariably had and has a further and much more important aspect. It not only establishes what the text is (assuming that this has not already been done in some other way, as indicated in paragraph 1 of article 9), but also operates as a provisional consent to be bound by this text as an international agreement—or even (in those cases—e.g., of exchanges of notes—where no ratification is necessary)

<sup>50</sup> See the text of article 9, and see further below, where it is explained that the other aspects and effects of signature have tended to mask its authenticating aspect.

<sup>51</sup> The practice of the United Nations for purposes of authentication is to use the latter two methods specified in paragraph 1 of article 9, rather than the first alternative of initialling. The custom of initialling has never been used in the United Nations for the purposes of authenticating the text of a multilateral convention. Initialling for the purposes of authentication has been supplanted, in the more institutionalized treaty-making processes of the United Nations, by such standard machinery as the recorded vote on a resolution embodying or incorporating the text, or by incorporation into a final act. As stated in paragraph (4) of the above commentary, any subsequent alteration of a text authenticated by these means would be, in effect, the drawing up of a new text, itself requiring authentication by the same or other recognized means.

as a final consent. The authenticating aspect of signature is consequently masked, because it merges in or becomes absorbed by its consent aspect. The two are, in such cases, indistinguishable, except conceptually. But even in the past, the distinction existed, and could clearly be seen where, for example, the text was merely initialled (a purely authenticating act), signature taking place later. It was for this reason that Professor Brierly, in his first report,<sup>52</sup> in explanation of why previous drafts and codes on the law of treaties did not "provide in terms for . . . authentication", said that this was

" . . . because the process of authentication is commonly part of that of negotiation or conclusion, the same act serving more than one purpose. Thus when a treaty is signed by the negotiators subject to ratification the signatures affixed to its text serve both for the purpose of authenticating the latter as a correct record of the terms the several parties are willing to consider accepting as binding, and also as part of the process whereby the parties do in fact become bound by those terms. Likewise, in the case of a treaty binding on signature, its signature on the part of any party constitutes both an act of authentication of its terms and an act of final acceptance of these terms."

Continuing, Professor Brierly said that in recent years:

" . . . methods of authentication of the texts of treaties, other than that of signature on behalf of all or most of the negotiating parties have been devised. Thus the incorporation of unsigned texts of projected treaties in signed Final Acts of diplomatic conferences which may have negotiated more than one such text has been resorted to. [See the *Harvard Draft Convention*, Comment, pp. 734-735.] And a special procedure, namely, signature by the President of the International Labour Conference and Director or Director-General of the International Labour Office alone, has been applied for the authentication of (draft) international labour conventions since the first establishment of the International Labour Organisation. [See The Treaty of Versailles, article 405.] Treaties which have not been signed at all, all parties resorting instead to a process of accession, have not been unknown. [See General Act of 1928 (article 43), Hudson, *International Legislation*, vol. IV, p. 3207; the Revised General Act of 1949, *Official Records of third session of the General Assembly, Part II*, Resolutions, p. 11; the General Convention on the Privileges and Immunities of the United Nations, 1946, *United Nations Treaty Series*, vol. 1, p. 15; the Convention on the Privileges and Immunities of the Specialized Agencies, *Official Records of the second session of the General Assembly*, Resolutions, p. 114.] The authentication of the texts of these agreements was effected by their incorporation in a resolution of the League Assembly or, as the case may be, of the General Assembly of the United Nations."

In conclusion, Professor Brierly accordingly said that

"In the light of the developments referred to, it is thought useful to emphasize in the present draft the

distinction between signature of the texts of treaties as a means of mere authentication and signature as the process, or part of the process, whereby a State or international organization accepts a treaty as obligatory; considered as a means of authentication, signature of negotiators is but one such means, though of course still that which is most common."

(6) In the light of the foregoing explanations and examples, it is not necessary to say much more by way of comment on paragraph 1 of the present article 9, while paragraph 3 has equally been fully covered. In this last paragraph, the word "final" is used in the sense that any change subsequent to authentication results in a new text, itself requiring authentication. With regard to paragraph 2, the reasons why signature has not been specified amongst the methods of authentication listed in paragraph 1 are first, that these latter acts are always (or almost always<sup>53</sup>) acts of authentication, whereas, as already explained, signature may or may not be; and secondly, that these acts are (in this immediate context) acts *only* of authentication; whereas signature, even where it authenticates, has a further and more important aspect (to use Professor Brierly's phrase) as being at least "part of the process whereby a State . . . accepts a treaty as obligatory . . ." For these reasons it seemed desirable to separate signature from the other acts concerned, and to deal with it in a different paragraph.

(7) The present special rapporteur had also included in his corresponding article a provision to the effect that sealing—a practice commonly resorted to in the past, whereby delegates affixed their seals, as well as their signatures, to the treaty—was not necessary to its authentication or formal validity, even if the treaty contained the common-form recital ". . . have signed the present treaty and have affixed thereto their seals". The Commission thought it would suffice to mention this matter in the commentary.

#### Article 10

##### *Initialing and signature ad referendum, as acts authenticating the text*

1. The text of a treaty may be signed or initialled. If signed, the signature may be outright (full signature), or *ad referendum* to the Government concerned, by the addition of those words, or an equivalent formula, to the signature. The incidents and legal effects of full signature are set out in articles . . .<sup>54</sup> of the present Code.

2. Initialling, except where it is carried out by Heads of State or of Government or by Ministers of Foreign Affairs with the intention that it shall operate as a signature, can only have effect as an authentication of the text. If initialling is to be followed by signature, this must be carried out as a separate act, the legal effects of which will date only from the day of such signature.

3. Signature *ad referendum* may be converted into a full signature by a subsequent confirmation on the part of the Government concerned. In that case the confirmation operates retroactively to convert the signature *ad referendum* into a full signature with effect as from the date of affixation.

<sup>52</sup> *Yearbook of the International Law Commission, 1950*, vol. II (United Nations publication, Sales No.: 1957. V. 3, vol. II), pp. 233-234.

<sup>53</sup> Theoretically, a treaty might only, *after* authentication by signature, be embodied in a resolution of an international organization and be recommended for accession by members not having signed it. Professor Brierly mentions such a possibility.

<sup>54</sup> See footnote 49.

### Commentary

(1) As stated in paragraph 1 of this article, a treaty may be signed or initialled; and if signed, may be signed unconditionally or only *ad referendum*. The latter is not of course a full signature, although it will rank as one if subsequently confirmed by the Government on whose behalf it was made.

(2) As indicated in the opening phrase of paragraph 2 of the article, initialling is capable of being the equivalent of a full signature if two conditions are fulfilled—namely, first, that it is carried out by certain persons having inherent authority, arising out of their office, to bind the State; and secondly, that it is done with the intention that it shall operate as a signature.<sup>55</sup> In all other cases, initialling is an act only of authentication of the text. Except in the case just mentioned, it can never, in itself, be more. It can never be converted into a signature, though it can be followed up by one.

(3) Accordingly, the principal differences between initialling and signature *ad referendum* are: (a) that initialling is and remains basically an authenticating act only, whereas signature *ad referendum* is, originally, both an authenticating act (where the text has not otherwise been authenticated already) and a provisional signature; (b) that initialling is never anything more, whereas signature *ad referendum* is capable of being transformed into full signature by subsequent confirmation; and (c) that such a confirmation has retroactive effect, causing the signature *ad referendum* to rank as a full signature from the date of its original affixation, which then becomes the date of signature for the State concerned; whereas if initialling is followed up by signature, the latter has no retroactive effect, and signature dates only from the later, not the earlier act.

(4) There may also be a certain difference in the occasions on which these two procedures are employed. Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned. It may also be employed by a representative who has authority to negotiate, but is not in possession of (and is not at the moment able to obtain) an actual authority to sign.<sup>56</sup> Sometimes it may be resorted to by a representative who, for whatever reasons is acting on his own initiative and without instructions, but who nevertheless considers that he should carry out some sort of act in relation to the text. Signature *ad referendum* may also be resorted to in some of these cases, but at the present time is probably employed mainly on actual governmental instructions in cases where the Government wishes to perform some act in relation to the text, but is unwilling to be committed to giving it even the provisional consent that a full signature would imply.

<sup>55</sup> Such cases are infrequent but have occurred. The intention may be inferred from the instrument as a whole or from the surrounding circumstances.

<sup>56</sup> At present, when a telegraphic authority, pending the arrival of written full powers, would usually be accepted (see article 15 below, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.

### SECTION B. CONCLUSION OF AND PARTICIPATION IN THE TREATY AND ITS ENTRY INTO FORCE

*Note.* The following articles would be preceded by certain articles not yet taken up by the Commission (see para. 17 of the present report).

#### Article 14

##### Function of signature

In addition to authenticating the text where this has not been done in some other way, as provided in article 9, signature operates as a provisional consent to the text, as constituting an international agreement, in those cases where it is subject to ratification; and as a final consent in those cases where the treaty comes into force on signature, as provided in article . . .<sup>57</sup>

#### Article 15

##### Authority to sign

1. Signature can only be effected:

(a) By a person having capacity *ex officio* to bind the State by virtue of his position or office as Head of State or Government, or Minister of Foreign Affairs;

(b) Under a full-power issued to the representative concerned.

2. Full-powers must be in appropriate form, and must emanate from the competent authority in the State concerned. In cases where transmission of full-powers is delayed, a telegraphic authority, or a letter from the head of the diplomatic mission of the country concerned in the country of negotiation may be accepted, subject to eventual production of the full-powers.

### Commentary

#### Article 14

(1) No special commentary is necessary on article 14, since the points involved have already been fully covered in connexion with material contained in earlier articles (see in particular paragraph (1) of the commentary to articles 5 and 8 respectively). Signature as an act that, *per se*, brings the treaty into force, is dealt with in article . . . below,<sup>57</sup> and the commentary thereto.

#### Article 15

(2) It has already been noticed in paragraph (2) of the commentary to article 6, that authority to negotiate does not of itself imply authority to sign, and that, for the latter, a separate authority is required. It would perhaps be more accurate to say that authority to sign must *exist*, and that it is not entailed by authority to negotiate. This way of putting it would be more accurate because it is not the case that a *specific* full-power to sign the particular treaty must always be produced. In the first place, as indicated by paragraph 1 (a) of article 15 (a similar situation in connexion with authority to negotiate has already been noticed; see above, article 6, paragraph 3 and commentary thereto) certain persons have, by virtue of their office, an inherent authority to sign a treaty on behalf of the State, without being in possession of any specific full-power to do so.

(3) Secondly, while in other cases a specific full-power to sign the particular treaty must be produced,

<sup>57</sup> See footnote 49.

the Commission believes that in some countries there may be a practice of issuing to certain Ministers, as part of their commissions so to speak, a general or standing full-power which, without mentioning any particular treaty, authorizes the Minister to sign treaties generally on behalf of the State. The Commission would be glad eventually to hear from Governments what are their respective practices in this respect. In principle, the Commission can see no reason why the production of a full-power in these terms should not suffice, particularly in the case of Ministers who by virtue of their office would normally have authority to sign even without a full-power. To take account of this possibility, sub-head (b), as at present drafted, speaks simply of a full-power "issued to the representative concerned", without specifying that it must name of refer to the particular treaty to be signed.

4) With regard to the question of whether full-powers are necessary not merely for outright signature but even for the purpose of affixing a signature *ad referendum*, opinion in the Commission was divided. It was felt that this matter depended partly on the practice actually followed by Governments, as to which the Commission did not feel itself to be fully informed at present, and partly on the exact legal effect to be attributed to a signature *ad referendum*, as to which conflicting views were expressed. In these circumstances the Commission decided to postpone further consideration of the matter until it next takes up the subject of treaties.

(5) While certain forms of full-powers are traditional, and, with sundry variations, in common and general use, the form of the full-powers is strictly a matter for each country to determine for itself—subject to certain essential requirements. These are: (a) that the full-power should emanate from whatever authority (and of course there may be more than one<sup>58</sup>) is competent to issue it under the constitution of the particular State; (b) that it should clearly express or convey the necessary authority to sign; and (c) that it should, either by name or in some other definite manner,<sup>59</sup> indicate the person to whom it is issued and on whose part signature is authorized. Requirement (a) is specified in paragraph 2 of article 15. The Commission thought that requirements (b) and (c) were sufficiently covered by the words "Full-powers must be in appropriate form..." These words would also cover the question of whether the full-powers must be in "Heads of States", or "Governmental" form—a matter which must depend on the form of the treaty itself, and on the constitutional practice of the State concerned.

(6) The second sentence of paragraph 2 recognizes a practice of fairly recent development and of considerable utility. It should render initialling and signature *ad referendum* unnecessary, save in exceptional circumstances or as deliberate acts (see para. (4) of the commentary to article 10). It goes without saying that if the promised full-powers do not in due course arrive,

<sup>58</sup> For instance Heads of States, Heads of Governments, and Foreign Ministers would normally be competent authorities.

<sup>59</sup> For instance by his office—e.g., "Our Ambassador at . . . for the time being".

the signature admitted on the basis of the telegraphic authority has no effect, and must be considered null and void.

(7) Most formal treaty instruments contain recitals, which may take various forms, indicating that the persons signing it are authorized to do so. Thus, at the end of the preamble it may be stated that certain (named) persons have been appointed as the plenipotentiaries of the parties and that these persons "having exchanged [or "exhibited"] their full powers found in good and due form,<sup>60</sup> have agreed as follows:" (or some such formula). Alternatively (or sometimes in addition), there may be a phrase at the end of the treaty which runs "In witness whereof, the undersigned, being duly authorized to that effect, have signed the present treaty." A variant of this is "In witness whereof the undersigned Plenipotentiaries have signed, etc." Here, the term "Plenipotentiaries", and the use of the capital "P", has been considered as acknowledging the existence of the necessary authority to sign—otherwise those concerned would not be "Plenipotentiaries", which translated means, precisely, "fully empowered persons".

(8) Nevertheless, however desirable it may be, and is, that treaty instruments purporting to be of a formal character should contain recitals of this kind, and however customary they may be in the case of such instruments, it cannot be contended that they are in any way essential. So long as the necessary full-powers exist, and are on record, the signature will be valid, whether or not these recitals appear in the treaty.

#### Article 16

##### *Time and place of signature*

Signature takes place on the occasion of the conclusion of the negotiation or of the meeting or conference at which the text has been drawn up. It may, however, be provided, either in the treaty itself or by some other agreement between the parties, that signature shall take place on a subsequent occasion, or that the treaty will remain open for signature at some specified place, either indefinitely or until a certain date.

##### *Commentary*

(1) The antitheses in this article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a restricted number or group of States, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, States intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, e.g.,

<sup>60</sup> In bilateral or other restricted negotiations, the full powers will normally be examined by the protocol or treaty departments or sections of the respective foreign ministries or embassies. In the case of international conferences, a credentials committee will be set up, or else the examination will be entrusted to the secretariat or bureau of the conference.

accession (as to which see later articles of the Code <sup>61</sup>).

(2) In the case of general multilateral treaties, or conventions negotiated at international conferences, there has for some time been a growing tendency to include a clause leaving them open for signature until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record: <sup>62</sup> however, the utility and practicability of that must depend on the character of the particular treaty. The practice of leaving multilateral treaties open for signature has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the Governments at home are not in possession of the final text, which may only have been completed at the last moment. For that reason, many of the representatives are not in possession of authority to sign the treaty in its final form. Yet even in those cases where it is possible to become a party to a treaty by accession, many Governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that Governments which are not sure of being able eventually to ratify (or accede), may nevertheless wish for an opportunity of giving that provisional measure of assent to the treaty which signature implies. These preoccupations can most easily be met by leaving the treaty open for signature at the seat of the "headquarters" Government or international organization. It can then be signed by any person producing a valid full-power to do so, such as the diplomatic or permanent representative of the signing State at the seat in question, or by a Foreign Minister or other authorized person present there, or having gone specially for the purpose.

#### Article 17

##### *The right to sign*

1. In the case of bilateral treaties, and of plurilateral treaties negotiated between a regional or other restricted number or group of States, the right to sign is necessarily restricted to the negotiating States, and to such other States as, by the terms of the treaty or otherwise, they may admit to signature.

2. In the case of general multilateral treaties, the right to sign is governed by the following rules:

<sup>61</sup> The Commission had not reached this part of the work at the end of the present session.

<sup>62</sup> Article 14 of the Convention on the Pan-American Union, adopted at Havana on 18 February 1928, provides as follows: "The present Convention shall be ratified by the signatory States and shall remain open for signature and for ratification by the States represented at the Conference and which have not been able to sign it." The Convention on Treaties, adopted 20 February 1928; the Convention on the Condition of Aliens, adopted 20 February 1928; the Convention on Diplomatic Agents, adopted 20 February 1928; the Convention on Consular Agents, adopted 20 February 1928; the Convention on Maritime Neutrality, adopted 20 February 1928; the Convention relating to Asylum, adopted 20 February 1928; the Convention on the Rights and Duties of States in the Event of Civil War, adopted 20 February 1928, all contain a slightly different final clause which merely states that after signature it shall be subject to ratification by the signatory States. There is no time limit specifically imposed on signature. All the above-mentioned Conventions were adopted at the Sixth Pan-American Convention held at Havana.

(a) Subject to sub-paragraph (b), every State invited to participate in the negotiation or attend the conference at which the treaty is drawn up has the right to sign the treaty;

(b) Where the treaty specifies the States or categories of States which are entitled to sign it, only those States or categories of States can sign;

(c) Where the treaty does not contain any provision on the matter, and is still open for signature, then signature by States other than those referred to in sub-paragraph (a) above can take place with the consent of two-thirds of the parties to it if the treaty is in force, or, if the treaty is not in force, by consent of two-thirds of the negotiating States.

#### *Commentary*

(1) This article was the occasion of a discussion in the Commission as to the existence or otherwise of any basic general right to participate in treaties. This of course is quite a different question from that of treaty-making *capacity*. The issue it involves is whether a State can have a right to insist on becoming a party to a particular treaty. It arises with special reference to the question of participation in multilateral treaties or conventions of general interest, or which create norms of general international law. Some members of the Commission felt that the Code should contain a provision which, without going into the particular methods by which participation might take place, would state the general principles governing the question of participation in multilateral treaties of a general character, and of what rights, if any, in that connexion, might exist. The special rapporteur, on the other hand, pointed out that the scheme of his draft in this respect was based on the fact that any right of participation that might exist must always, in order to be effective, be exercised through some concrete means or method. Only where some means or method of participation existed could it take place. States might, according to the circumstances, have a right to participate. Still, they must do so by the prescribed method, or forgo the right. In general, participation could only take place in certain ways—i.e., by signature alone in some cases, by signature followed by ratification in others, and by accession in yet others. If therefore the matter was dealt with under the respective heads of the right to sign, the right to ratify and the right to accede, the subject would automatically be exhausted. Moreover, as these various methods were all different, and allowed of participation in certain events and in certain events only (for instance participation by ratification could take place only if there had been a previous signature) it would in any case be necessary to deal with the matter under these separate heads, even if, additionally, there was a general provision on participation as such.

(2) The special rapporteur also drew attention to the distinction between the abstract right to participate where this existed, and the concrete *possibility* of doing so in any given case. For instance, if a treaty did not provide for accession, States could not become parties to it by that means. If therefore there was some State which had failed to sign it—and hence could not ratify it—that State could not become a party *in concreto*, however much it might *in abstracto* belong to the category of States that were, in principle, entitled to participate. In the same way, if an international agreement

took effect on signature, and contained no accession clause, a State which failed to sign it on the occasion of the signature, or within such period as it remained open for signature, could not become a party at all, even though it had originally had a right to sign.

(3) What would have happened in all cases of this kind was that a State, having originally had the right to participate, would not have exercised it by the prescribed method, or by one of the prescribed methods. It would simply have failed to exercise its right in due time, and thereby would have waived it. The existence of a right of this kind, where it existed, did not imply an ancillary right to have the possibility of exercising the principal right kept open indefinitely. Of course in all such cases the parties to the treaty, or perhaps in some cases the signatory States, could, by such means as a separate protocol, institute some special procedure for admitting States originally entitled to participate but which had failed to exercise their right within the necessary time limits or by the prescribed method. But that would be a separate procedure, not taking place under the original treaty.

(4) It being admitted, however, that the right to participate, where it existed, must, in principle, be conditioned by the possibility of exercising it in the actual circumstances, it appeared to the Commission that three problems still remained. First, was there any abstract *right* of participation at all, and if so in what cases? Secondly, should the matter be dealt with on a general basis, or in relation to the separate questions of the right to sign, to ratify and to accede? Thirdly, what was to be done about new States which might want to become parties to treaties concluded before the emergence of the new State in those cases in which the treaties, according to their terms, were no longer open to signature or accession?

(5) The decision taken by the Commission on the second of these questions (see para. (9) below), made a decision on the first strictly unnecessary at the present stage; nor was one taken. Nevertheless some account of the views put forward on the first question is desirable. It was generally agreed that no problem could arise with reference to bilateral treaties, or treaties (e.g., of a regional character) negotiated between a restricted number or group of States. Participation in all such treaties was necessarily limited in principle to the States immediately concerned. No other State could claim a right of participation, or in fact participate without the consent of these States. The problem was therefore confined to general multilateral treaties or conventions, and, even so, not necessarily all of them, for it was only in relation to such as could be said to be of "general interest to *all* States", or intended to create norms of general international law, that it was suggested that international law did, or should, postulate an inherent right of participation for every State. Some members of the Commission considered that in relation to these kinds of multilateral treaties such a right should be postulated—on the ground that it was for the general good that all States should become parties to such treaties, and further that in a world community of States, no State should be excluded from participation in treaties of this character.

(6) Other members of the Commission, who did not

share this view, pointed out that, even if it were to be admitted in principle, great practical difficulties would arise in putting it into effect. Either a treaty of this kind made provision for the States or category of States to be admitted to participation, or it did not. If it did not—i.e., if it did not either expressly or by implication exclude any State—then there was no problem. Any State could participate by taking the prescribed steps. If on the other hand the treaty contained some limitation, then it was virtually impossible to admit that a State not covered could, by pleading an alleged inherent right, insist on participation, thus overriding the wishes and intentions of the framers of the treaty, as expressed in it.

(7) It was pointed out that the real problem arose at the antecedent stage of who were to be the "framers of the treaty"—in short, who was to be invited to the conference at which the treaty was drawn up? But as a rule, participation in the conference (or the right to participate, whether exercised or not) normally determined the right of participation in the treaty. If the eventual treaty did no limit the class of participants, then again there was no problem. If, however, it did, it would usually be found that the designated class was the same as that invited to the conference. In so far as there was a problem, therefore, it could only be dealt with at the pre-invitation stage. It could not be met by overriding the express provisions of the treaty about participation, which indeed would not be juridically possible.

(8) A further point which was made was that any inherent right of participation, if admitted, would give rise to serious difficulties in relation to the recognition or non-recognition of States or Governments. Even though the mere fact that a State was a party to a multilateral treaty did not of itself involve recognition of that State or its Government by other parties, nevertheless serious political and other problems would arise if parties to a treaty found themselves obliged to admit as a party States or Governments which they might perhaps have expressly intended to exclude by the wording of the participation clause.

(9) However, as stated above, the Commission did not take a final decision on the subject because, in relation to the second of the main questions mentioned in paragraph (4), it decided, in view of the complexities of the matter, to defer consideration of a general article about participation until after articles on the right to sign, to accede, etc., had been drafted, and then to consider whether any general article about participation was necessary or desirable, and if so what its contents should be. It thus decided to confine the present article 17 to the right to sign; but the questions discussed in paragraphs (5) to (8) above may of course come up later in connexion with accession.

(10) The same decision equally disposed, for the time being, of the third main question mentioned in paragraph (4) above; namely, the case of the new State which wants to become a party to an old treaty. The Commission thought that, although this matter was important and must be dealt with, it was mainly a question of accession and belonged more particularly there. It was pointed out that the dimensions of the problem were in practice slight. Most general treaties of the kind

involved had accession clauses. The problem arises only in the case of the older treaties which are no longer open for signature and which either do not expressly provide for accession or which, like The Hague Conventions of 1899 and 1907 concerning the Pacific Settlements of International Disputes or the Barcelona Conventions of 1921, contain an accession clause limiting the right of accession to certain States (but see para. (12) below).

(11) In the light of the foregoing observations, the actual terms of article 17 need little more by way of comment. Paragraph 1 is completely covered by what has been said, and so is paragraph 2 (b). With reference to paragraph 2 (a), the Commission felt that where a State had been *invited* to attend a general international negotiation or conference, the mere fact that, possibly for good reason, it had not accepted, or had failed to attend, should not prevent it from signing, if, on studying the results of the negotiation or conference, it felt disposed to do so.

(12) With reference to paragraph 2 (c), it is clear that where the treaty is not left open for signature, States which did not sign on the occasion of the signature cannot do so afterwards (see paras. (2) and (3) above). Where, however, the treaty remains open for signature, the question might arise of signature by a State not included amongst the sub-paragraph (a) category of States—i.e., those invited to participate in the negotiation or conference. In principle, such a State could not sign. But in view of the possibility that a new State wanting to sign might have attained independence after the close of the negotiation or conference, but while the treaty was still open for signature, the Commission thought that the possibility of enabling it to sign should be specially provided for, and signature should be admitted if two-thirds of the States entitled to a voice in the matter consented. As to who these States were or should be, two possibilities existed. The treaty might be in force even though still open for signature (e.g., if open for signature indefinitely). In that case, it would seem that the right to admit signature by a State not having an original right to sign should be confined to actual parties to the treaty: but this is not quite certain because they might at the given moment be very few. The other case is where the treaty is not yet in force. In that event, it would seem that the right should extend to all the negotiating (and not merely to the signatory) States, but not to States invited to the negotiation or conference but which did not attend. Here again (in those cases where the treaty remains open for signature indefinitely) there is room for doubt as regards the position of negotiating States which have delayed signature for so long that it is a reasonable inference that they do not intend ever to become signatories. Their right to a voice in the matter would then become questionable. To meet these uncertainties, however, a considerable elaboration of the article would be necessary, and the Commission did not think it necessary to undertake this at the present stage.

[*Note.* In order to complete the topic of signature, before proceeding to that of ratification, the Commission will have to consider articles 29 and 30 in the special rapporteur's text, which it has not yet reached (see para. 17 of the present report).]

## CHAPTER III

### CONSULAR INTERCOURSE AND IMMUNITIES

#### I. Introduction

21. 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.<sup>63</sup>

22. At its seventh session, in 1955, the Commission decided to begin the study of this topic and appointed Mr. Jaroslav Zourek as special rapporteur.<sup>64</sup>

23. 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.

24. 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.<sup>65</sup>

25. The topic was retained on the agenda for the Commission's fifth 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.<sup>66</sup>

26. 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.<sup>67</sup>

27. 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.<sup>68</sup> It had 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 those comments until its thirteenth session

<sup>63</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20.

<sup>64</sup> *Ibid.*, *Tenth Session, Supplement No. 9 (A/2934)*, para. 34.

<sup>65</sup> *Ibid.*, *Eleventh Session, Supplement No. 9 (A/3159)*, para. 36.

<sup>66</sup> *Ibid.*, *Twelfth Session, Supplement No. 9 (A/3623)*, para. 20.

<sup>67</sup> *Ibid.*, *Thirteenth Session, Supplement No. 9 (A/3859)*, para. 56.

<sup>68</sup> *Ibid.*, para. 57.

(1961), and would proceed with other subjects at its twelfth session (1960).

28. 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.<sup>69</sup> 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.<sup>69</sup>

29. For the reasons given in paragraph 7 of this report (chap. I), the Commission was unable to adhere to the time-table decided upon and had to begin the present session by an examination of the "Law of treaties". It was unable to start work on the draft article on consular intercourse and immunities prepared by the special rapporteur until the fifth week and later on had to interrupt that work for a few days. It examined articles 1 to 17 of the draft at its 496th to 499th, 505th to 511th, 513th, 514th, 516th to 518th and 523rd to 525th meetings.

30. As stated in paragraph 7 of this report, at its next session in 1960 the Commission will give first priority to "Consular intercourse and immunities" in order to be able to complete the first draft on this topic and submit it to Governments for comments. The Commission intends to resume consideration of the draft, in the light of those comments, at its thirteenth session in 1961, so that the final draft will still be ready by the same date as had been fixed by the Commission at its tenth session. By thus shortening the interval between the completion of the first draft and the preparation of the final draft, the Commission will make good the delay incurred in preparing the first draft.

31. Articles 1 to 19 contained in this report are submitted to the General Assembly and to the Governments of Member States for information.

## II. General considerations

32. Consular intercourse and immunities are governed partly by municipal law and partly by international law. Very often municipal law regulations deal with matters governed by international law, whether customary or conventional. 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,<sup>70</sup> 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.

33. The codification of the international law on consular intercourse and immunities involves another spe-

cial 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.

34. A 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, and which, if incorporated in a codification, may be expected to obtain the support of many States.

35. 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.

36. 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 the codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."<sup>71</sup>

37. 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 first draft.

38. In his draft articles on consular intercourse and immunities, the special rapporteur dealt first with consular intercourse (chap. I), next with the privileges

<sup>69</sup> *Ibid.*, para. 64.

<sup>70</sup> *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957. V. 5, vol. II), p. 80, para. 80.

<sup>71</sup> *Ibid.*, para. 84.

and immunities of career consuls (chap. II), then with the privileges and immunities of honorary consuls and similar officers (chap. III), and lastly with general provisions (chap. IV), among which he included a clause preserving bilateral conventions in force between States that become parties to the multilateral convention (if the draft is finally accepted by States in the form of a convention). This arrangement is followed herein. The Commission will decide on the final arrangement of its draft when it has finished its examination of all the articles.

39. Since the Commission had at its tenth session in 1958 adopted the draft articles on diplomatic intercourse and immunities which, in several respects regulate similar or analogous situations, it is desirable that the two drafts should, whenever this is justified, be brought into concordance as regards both substance and structure. The special rapporteur's draft was prepared before the Commission's draft on diplomatic intercourse and immunities had been adopted on its first reading. The special rapporteur has submitted at the present session three more draft articles, and has informed the Commission that he proposes to submit in this second report a number of additional articles on matters not dealt with in the first.

40. The order of the articles has been slightly rearranged, chiefly because new ones have been added. Drafting amendments have been made in some articles in accordance with suggestions submitted by the special rapporteur to meet views expressed during the discussion.

41. The commentary contains only material necessary to an understanding of the text of the articles. The Commission intends to submit a more detailed commentary at its next session when the whole draft is finished.

42. The text of draft articles 1 to 19 and the commentary as adopted by the Commission are reproduced below.

### III. Text of draft articles 1-19 and commentary

#### 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 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 5, 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 article 10 or 11 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.

#### 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." The article was adopted on a provisional basis; when, at the next session, the Commission concludes its examination of all the articles of the draft, it will re-examine the article in the light of the texts adopted, and will decide whether the list of definitions should be simplified or, on the other hand, be augmented by yet further definitions.

## CHAPTER I. CONSULAR INTERCOURSE

### 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 by reason of the fact that consular functions are exercised by authorities of the one State on the territory of the other. In 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 until it should have finished its examination of article 25 dealing with consular functions. It has not had time to revert to this matter at its present session, and will have to take a decision at its twelfth session.

(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, nor 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 this 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 16, which deals with the occasional performance of diplomatic acts by a consul, and article 17, 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 whose territory 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**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 breaking off 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 5**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 5 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 5. 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, relating 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 the United Kingdom and France). 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 only deals 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 6

*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 5, 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 which the Commission is now drafting 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 7

*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 of consuls-general is involved, or else that of consuls, 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 exercise of 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. 10), there shall be a provisional recognition (art. 11). Internal law therefore governs the other relevant matters dealt with by the present article.

(4) Subject to article 5, 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 8 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 8

*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 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 9

##### *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 "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 9 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, 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 notification of the consul's posting. It was therefore thought necessary to allow for this practice in article 9, paragraph 3.

(7) For the presentation of the consular commission, the diplomatic channel is prescribed by a large number of national legislations 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 10

##### *The exequatur*

Without prejudice to the provisions of articles 11 and 13, 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 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 7, 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 7, 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 the following.

Exequaturs may be 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 (Consular Convention of 12 January 1948, between the United States and Costa Rica, 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 11), or may be allowed to act as temporary head of post in the cases referred to in article 13, 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 an exequatur. 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 11

##### *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 a verbal 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 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 12

*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 13

*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 the particular consulate, or to 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 14, paragraph 5, of this draft.

## Article 14

*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 places, 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 will be dealt with in chapter III of the special rapporteur's draft, but the Commission will be unable to arrive at a final decision until it receives full information on state practice in the matter.

(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 15

##### 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.<sup>72</sup> 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 Arabic 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 the Governments for comment when the Commission has 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,<sup>73</sup> Mr. Pal<sup>74</sup> and Mr. Padilla Nervo,<sup>75</sup> to the Drafting Committee, which, on the basis of a revised proposal prepared by the special rapporteur, drafted a definition<sup>76</sup> 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.

<sup>72</sup> *Yearbook of the International Law Commission*, vol. II United Nations publication, Sales No. : 1957. V. 5, vol. II), p. 91.

<sup>73</sup> A/CN.4/SR.513, para. 54; A/CN.4/SR.514, para. 25.

<sup>74</sup> A/CN.4/SR.513, para. 62.

<sup>75</sup> A/CN.4/SR.517, para. 2.

<sup>76</sup> See A/CN.4/L.84, art. 13.

(6) Some members objected to the word "protect", although it appears in the Draft Articles on Diplomatic Intercourse and Immunities, and would have preferred to use the word "defend".

(7) Some members found the word "interests" inadequate and would have preferred the term "rights and interests". The word "interests" must, however, be taken to include rights.

(8) The word "nationals" applies 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 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. This matter is dealt with in article 24 of the special rapporteur's draft and the Commission will consider it later.

(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 has 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 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:*

##### *1. 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 the trusteeship 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 the 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 provision proposed 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 to 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 are 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 like documents ;
- (g) Transmitting to the entitled persons any benefits, pensions or compensation due to them in accordance with their national laws or with international conventions, in particular under social welfare legislation ;
- (h) 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, and, under the laws of certain countries, also between the 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, 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 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 deeds-poll 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).<sup>77</sup>

13. *To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to the consuls 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.

#### C. 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 it 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 the sending 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.

#### Article 16

##### *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.

<sup>77</sup> *Yearbook of the International Law Commission, 1957, vol. II (United Nations publication, Sales No.: 1957. V. 5, vol. II), document A/CN.4/108.*

#### 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 17, 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 17

##### *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 performance not merely of occasional diplomatic acts, as provided for in article 16, 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 functions 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 17, and article 16 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 18

##### *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.

#### 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 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 19

##### 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 only procure premises in the manner laid down by the internal law of the receiving State. The 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.

(3) This article, which would normally be placed earlier in the present chapter, is placed here because the Commission may, as in the case of the Draft Articles on Diplomatic Intercourse and Immunities, decide to place it in the chapter on privileges and immunities.

## CHAPTER IV

### OTHER DECISIONS OF THE COMMISSION

#### I. Planning of future work of the Commission

43. Reference is made in chapter I of this report (see para. 7 above) to the decision of the Commission to include the item of consular intercourse and immunities on the provisional agenda for the next session and to give to it first priority. The Commission also decided to place on the provisional agenda the subjects of state responsibility, law of treaties, and *ad hoc* diplomacy. The special rapporteurs were requested to continue with their work. The order of the last three items does not, however, necessarily indicate that the Commission will discuss them in that order.

44. The Commission would hope, therefore, that at its next session, in addition to completing the first draft on consular intercourse and immunities, it would hold some discussion of State responsibility and also continue with the section of the law of treaties dealing with the conclusion of treaties. With respect to the item on *ad hoc* diplomacy, it will be recalled that at its last session the Commission decided that this subject should be studied, since it constituted one form of diplomatic relations between States, and the Commission had limited its Draft Articles on Diplomatic Intercourse and Immunities, submitted to the General Assembly in the report covering its tenth session, to permanent diplomatic missions. Accordingly, the special rapporteur on diplomatic intercourse and immunities, Mr. A. E. F. Sandström, was requested to make a study of this subject and submit a

report at a future session.<sup>78</sup> At the present session the special rapporteur announced his intention of submitting his report on this subject to the Commission prior to the next session, so that the Commission would be in a position to take up this subject at that session, if this were desirable. The desirability of considering this subject at the next session may, however, be affected by the General Assembly's decision at its fourteenth session on the measures to be taken with regard to the Draft Articles on Diplomatic Intercourse and Immunities.

## II. Co-operation with other bodies

45. At its previous session the Commission adopted a resolution which, *inter alia*, requested the Secretary-General to authorize the Secretary of the International Law Commission to attend, in the capacity of an observer for the Commission, the fourth meeting of the Inter-American Council of Jurists to be held in 1959 at Santiago, Chile.<sup>79</sup> The Commission took note of the statement of the Secretary that this meeting would take place from 24 August to 12 September 1959, that an official invitation from the host Government, Chile, had been received and that the Secretary-General had authorized the Secretary to attend the meeting, in accordance with the request of the Commission.

46. The Commission also had before it a letter received from the Secretary of the Asian-African Legal Consultative Committee, enclosing a copy of the summary report of the Committee's second session, held at Cairo in October 1958, and inviting the Commission to send an observer to the third session to be held at Colombo from 5 to 19 November 1959. The Commission authorized the Secretary to inform the Asian-African Legal Consultative Committee that the question

of diplomatic intercourse and immunities would be before the General Assembly at its fourteenth session and the Committee's report might be useful to the delegations there represented, but that it was too late for the Commission to request the necessary arrangements to be made in order to send an observer to the Committee's third session.

## III. Control and limitation of documentation

47. Resolution 1272 (XIII) of the General Assembly, dated 14 November 1958, concerning this question had been placed on the agenda of the Commission for the present session and was duly brought to the attention of the Commission. The Commission took note of the resolution.

## IV. Relations between States and inter-governmental organizations

48. Resolution 1289 (XIII) of the General Assembly, dated 5 December 1958, on relations between States and inter-governmental organizations, which was adopted in connexion with the General Assembly's consideration of the Draft Articles on Diplomatic Intercourse and Immunities, had been placed on the agenda of the Commission for the present session. The Commission took note of the resolution and resolved that in due course consideration would be given to the matter.

## V. Date and place of the next session

49. The Commission decided to hold its twelfth session in Geneva from 25 April to 1 July 1960.

## VI. Representation at the fourteenth session of the General Assembly

50. The Commission decided that it should be represented at the next (fourteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Sir Gerald Fitzmaurice.

<sup>78</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859)*, para. 51.

<sup>79</sup> *Ibid.*, para. 71.